The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

JUDICIARY
Senator Diaz de la Portilla, Chair
Senator Ring, Vice Chair

MEETING DATE: Tuesday, March 31, 2015
TIME: 4:00 —6:00 p.m.
PLACE: *Toni Jennings Committee Room,* 110 Senate Office Building

MEMBERS: Senator Diaz de la Portilla, Chair; Senator Ring, Vice Chair; Senators Bean, Benacquisto, Brandes, Joyner, Simmons, Simpson, Soto, and Stargel

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	**SB 44** Grimsley (Identical H 3505)	Relief of the Estate of Lazaro Rodriguez by the City of Hialeah; Providing for the relief of the Estate of Lazaro Rodriguez and his legal survivors by the City of Hialeah; providing an appropriation to compensate the Estate and Lazaro Rodriguez's legal survivors for injuries sustained as a result of the negligence of the City of Hialeah; providing a limitation on the payment of fees and costs; providing that the appropriation settles all present and future claims related to the wrongful death of Lazaro Rodriguez, etc. SM 03/27/2015 Recommendation: Favorable JU 03/31/2015 Favorable CA FP	Favorable Yeas 8 Nays 1
2	**SB 78** Flores (Identical H 3557)	Relief of Maricelly Lopez by the City of North Miami; Providing for the relief of Maricelly Lopez by the City of North Miami; providing for an appropriation to compensate Maricelly Lopez, individually and as personal representative of the Estate of Omar Mieles, for the wrongful death of her son, Omar Mieles, which was due to the negligence of a police officer of the City of North Miami; providing a limitation on the payment of fees and costs; providing that the appropriation settles all present and future claims related to the death of Omar Mieles, etc. SM 03/27/2015 Recommendation: Favorable JU 03/31/2015 Fav/CS CA FP	Fav/CS Yeas 9 Nays 0
3	**CS/CS/SB 222** Communications, Energy, and Public Utilities / Commerce and Tourism / Hukill (Similar CS/CS/CS/H 175)	Electronic Commerce; Creating the "Computer Abuse and Data Recovery Act"; prohibiting a person from intentionally committing specified acts without authorization with respect to a protected computer; specifying remedies for civil actions brought by persons affected by a violation; providing that the act does not prohibit specified activity by certain state, federal, and foreign law enforcement agencies, regulatory agencies, and political subdivisions, etc. CM 02/16/2015 Fav/CS CU 03/10/2015 Fav/CS JU 03/31/2015 Fav/CS	Fav/CS Yeas 9 Nays 0

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
4	**CS/SB 252** Banking and Insurance / Smith (Compare CS/H 233)	Insurance; Providing that the absence of a countersignature does not affect the validity of a policy or contract of insurance; requiring the statement of diligent effort from a retail or producing agent be in a specified form; deleting provisions that require surplus lines agents to file a quarterly affidavit with the Florida Surplus Lines Office, etc. BI 03/04/2015 Fav/CS JU 03/31/2015 Fav/CS RC	Fav/CS Yeas 9 Nays 0
5	**CS/SB 568** Banking and Insurance / Richter (Similar CS/H 825)	Family Trust Companies; Revising the purposes of the Family Trust Company Act; specifying the applicability of other chapters of the financial institutions codes to family trust companies; revising the requirements for investigations of license applicants by the Office of Financial Regulation; deleting a provision that authorizes the office to immediately revoke the license of a licensed family trust company under certain circumstances; authorizing a family trust company to have its terminated registration or revoked license reinstated under certain circumstances, etc. BI 03/04/2015 Fav/CS JU 03/31/2015 Favorable FP	Favorable Yeas 9 Nays 0
6	**SB 982** Thompson (Identical H 625)	Florida Civil Rights Act; Prohibiting discrimination on the basis of pregnancy in public lodging and food service establishments and in places of public accommodation; prohibiting employment discrimination on the basis of pregnancy; prohibiting discrimination on the basis of pregnancy by labor organizations, joint labor-management committees, employment agencies, and in occupational licensing, certification, and membership organizations, etc. CM 03/23/2015 Favorable JU 03/31/2015 Favorable RC	Favorable Yeas 9 Nays 0
7	**SB 1078** Sobel (Identical H 4049, Compare H 4045)	Lewd and Lascivious Behavior; Repealing provisions relating to a prohibition on lewd and lascivious behavior, including a prohibition on lewd and lascivious association and cohabitation together by a man and woman who are not married to each other, etc. CJ 03/16/2015 Favorable JU 03/31/2015 Favorable RC	Favorable Yeas 8 Nays 0

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
8	**SB 1242** Hays (Identical H 931)	Interstate Compacts; Adopting and entering the state into an interstate Compact for a Balanced Budget; exempting the compact from the Article V Constitutional Convention Act; providing for proposal by the compact's member states of an amendment to the United States Constitution requiring the Federal Government to maintain a balanced budget with certain exceptions; providing that the balanced budget amendment is not considered ratified until ratified by a specified number of states; authorizing severability of the compact under certain circumstances, etc. JU 03/31/2015 Favorable FT AP	Favorable Yeas 8 Nays 1
9	**CS/SB 1314** Banking and Insurance / Bradley (Similar CS/H 961)	Electronic Noticing of Trust Accounts; Authorizing a sender to post a document to a secure electronic account or website upon the authorization of a recipient; requiring a sender to provide notice of the beginning of a limitations period and authority of a recipient to amend or revoke authorization for electronic posting; establishing burdens of proof for purposes of determining whether proper notifications were provided, etc. BI 03/23/2015 Fav/CS JU 03/31/2015 Favorable RC	Favorable Yeas 9 Nays 0
10	**SB 30** Montford (Identical H 3535)	Relief of Jennifer Wohlgemuth by the Pasco County Sheriff's Office; Providing for the relief of Jennifer Wohlgemuth by the Pasco County Sheriff's Office; providing for an appropriation to compensate her for injuries and damages sustained as a result of the negligence of an employee of the Pasco County Sheriff's Office; etc. SM 03/27/2015 Recommendation: Fav/1 Amendment JU 03/31/2015 Favorable CA FP	Favorable Yeas 8 Nays 1

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
11	**SB 62** Montford (Similar H 3501)	Relief of Shuler Limited Partnership by the Florida Forest Service; Providing for an appropriation to compensate Shuler Limited Partnership for damages sustained to 835 acres of its timber as a result of the negligence, negligence per se, and gross negligence of employees of the Florida Forest Service and their violation of s. 590.13, Florida Statutes; providing a limitation on the payment of fees and costs, etc. SM 03/27/2015 Recommendation: Unfavorable JU 03/31/2015 Temporarily Postponed AGG AP	Temporarily Postponed
12	**SB 1084** Brandes (Similar CS/H 1103)	Patent Infringement; Creating provisions entitled the "Patent Troll Prevention Act"; prohibiting bad faith assertions of patent infringement from being made; authorizing a court to require a patent infringement plaintiff to post a bond under certain circumstances; authorizing private rights of action for violations of this part; requiring a bad faith assertion of patent infringement to be treated as an unfair or deceptive trade practice, etc. JU 03/31/2015 Fav/CS ACJ AP	Fav/CS Yeas 9 Nays 0
13	**CS/SB 542** Criminal Justice / Benacquisto / Simpson (Compare H 7001, S 218)	Interception of Wire, Oral, or Electronic Communication; Authorizing a child younger than 18 years of age to intercept and record an oral communication if the child is a party to the communication and certain conditions are met, etc. CJ 03/02/2015 Fav/CS JU 03/31/2015 Favorable RC	Favorable Yeas 9 Nays 0
14	**SB 932** Stargel (Similar CS/CS/H 453)	Timeshares; Revising provisions pertaining to multisite timeshare plans and clarifying single-site timeshare plan developer liability for nonmaterial errors or omissions; providing that leasehold accommodations or facilities may be added to a timeshare trust; providing for extension or termination of timeshare plans; providing for the transfer of reservation system data upon termination of managing entity; clarifying the annual fees due from managing entities of all timeshare plans, etc. RI 03/11/2015 Favorable JU 03/31/2015 Favorable FP	Favorable Yeas 8 Nays 1

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
15	**SB 1224** Joyner (Similar CS/CS/H 889)	Health Care Representatives; Providing an exception for a patient who has designated a surrogate to make health care decisions and receive health information without a determination of incapacity being required; revising provisions relating to the designation of health care surrogates; providing for the designation of health care surrogates for minors, etc. JU 03/31/2015 Fav/CS HP RC	Fav/CS Yeas 9 Nays 0
16	**SB 1298** Simmons (Compare H 757)	Insurance for Short-term Rental and Transportation Network Companies; Establishing insurance requirements for short-term rental and transportation network companies and participating drivers during certain timeframes; prohibiting the personal insurance policy of a participating lessor of a short-term rental property from providing specified coverage during certain timeframes except under specified circumstances; prohibiting the personal motor vehicle insurance policy of a participating driver from providing specified coverage during certain timeframes except under specified circumstances, etc. BI 03/23/2015 Favorable JU 03/31/2015 Favorable AP	Favorable Yeas 9 Nays 0
17	**SB 28** Diaz de la Portilla (Identical H 3529)	Relief of Charles Pandrea by the North Broward Hospital District; Providing for the relief of Charles Pandrea by the North Broward Hospital District; providing for an appropriation to compensate Charles Pandrea, husband of Janet Pandrea, for the death of Janet Pandrea as a result of the negligence of the North Broward Hospital District; providing a limitation on the payment of fees and costs, etc. SM 03/27/2015 Recommendation: Unfavorable JU 03/31/2015 Favorable AHS AP	Favorable Yeas 6 Nays 3
18	**SB 794** Ring (Similar H 941)	Prejudgment Interest; Requiring a court to include prejudgment interest on the amount of money damages awarded to a plaintiff in a final judgment; providing for retroactive application, etc. JU 03/10/2015 Temporarily Postponed JU 03/17/2015 JU 03/24/2015 Temporarily Postponed JU 03/31/2015 Temporarily Postponed ACJ AP	Temporarily Postponed

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
19	**CS/SB 1212** Commerce and Tourism / Ring (Similar H 659)	Contracts for Goods and Services; Prohibiting contracts for the sale or lease of consumer goods or services from waiving the right of the consumer to make certain statements; providing civil penalties; providing construction and applicability, etc. CM 03/23/2015 Fav/CS JU 03/31/2015 Favorable FP	Favorable Yeas 9 Nays 0
20	**SB 1452** Detert (Compare CS/H 1069, H 7113, S 1170, S 1338, CS/S 1462, S 7070)	Mental Health Services in the Criminal Justice System; Authorizing the creation of treatment-based mental health court programs; authorizing a county court to order the conditional release of a defendant only for the provision of outpatient care and treatment; creating the Forensic Hospital Diversion Pilot Program; requiring the Department of Children and Families to implement a Forensic Hospital Diversion Pilot Program in three specified judicial circuits; authorizing a court to impose certain conditions on certain probationers or community controllees, etc. JU 03/31/2015 Favorable AHS AP	Favorable Yeas 9 Nays 0
21	**SB 1226** Detert (Similar CS/H 1225)	Guardianship; Revising the responsibilities of the executive director for the Office of Public and Professional Guardians; requiring the Office of Public and Professional Guardians to adopt rules; requiring that a professional guardian appointed by a court to represent an allegedly incapacitated person be selected from a registry of professional guardians, etc. CF 03/12/2015 Favorable JU 03/31/2015 Favorable FP	Favorable Yeas 9 Nays 0
	Other Related Meeting Documents		

THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
302 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
12/23/14	SM	Favorable
3/31/15	JU	Favorable
	CA	
	FP	

December 23, 2014

The Honorable Andy Gardiner
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 44** – Senator Grimsley
HB 3505 – Representative Steube
Relief of Estate of Lazaro Rodriguez by the City of Hialeah

SPECIAL MASTER'S FINAL REPORT

THIS IS AN UNCONTESTED CLAIM FOR $485,000 BASED ON A SETTLEMENT AGREEMENT WITH THE CITY OF HIALEAH FOR THE DEATH OF LAZARO RODRIGUEZ DUE TO THE NEGLIGENT OPERATION OF A PATROL VEHICLE BY ONE OF ITS POLICE OFFICERS.

FINDINGS OF FACT:

At about 10:15 p.m. on July 30, 2000, 29 year old Lazaro Rodriguez was on his way home from work when his Ford Explorer was struck on the left front side by a City of Hialeah police cruiser driven by Officer Jorge Rodriguez. Lazaro Rodriguez was driving west on East 32nd Street and Officer Rodriguez was driving north on Palm Avenue when the accident occurred in the intersection of the two roads. The collision caused Lazaro Rodriguez' vehicle to run into the curb, where it tipped and struck a large concrete pole on the roadside. The impact with the pole crushed the roof above the driver, but the vehicle righted itself and continued moving before striking a third vehicle. Lazaro Rodriguez died at the scene as a result of blunt trauma injuries. He was not wearing his seat belt, but the use of a seat belt would not have prevented his death.

Just prior to the accident, Officer Rodriguez and another police officer had concluded working a domestic violence incident. The other officer was dispatched to a separate incident and Officer Rodriguez chose to respond as well. Both officers proceeded north on Palm Avenue with lights and sirens activated. The traffic light was red as they approached the intersection with East 32nd Street. The other officer, who was in the right northbound lane and slightly ahead of Officer Rodriguez, stopped at the light and made a right turn onto East 32nd Street. Officer Rodriguez, who was in the left northbound lane, slowed at the intersection. Perceiving that his path was clear, he accelerated straight through the light. His police car struck Lazaro Rodriguez' vehicle in the westbound through lane of East 32d Street as it moved from Officer Rodriguez' right. There is no indication that either vehicle took evasive maneuvers, and Officer Rodriguez stated that he did not see Lazaro Rodriguez' vehicle until immediately before the impact.

Two vehicles were stopped in the left turn lane of eastbound 32nd Avenue East and may have obscured each driver's view of the other vehicle. In addition, there was a concrete sign, foliage, and a chain link fence on the corner that may also have obscured the drivers' views.

Officer Rodriguez was traveling at 20-24 miles per hour when the collision occurred, having accelerated after slowing down to ascertain whether the intersection was clear. Lazaro Rodriquez was traveling 35-45 miles per hour at the time of impact, equal to or in excess of the 35 mile per hour speed limit on 32nd Avenue East.

Section 316.072(5)(b)2., F.S., authorizes the operator of an emergency vehicle to proceed past a red stop signal when responding to an emergency call. However, the driver may do so only after slowing down as may be necessary for safe operation and is not relieved from the duty to drive with due regard for the safety of all persons. A City of Hialeah Police Department administrative order imposes an additional requirement that the driver of a police car come to a complete stop before proceeding through an intersection against a stop signal. Officer Rodriguez slowed down, but did not stop, before proceeding into the intersection. He was issued traffic citations for violation of s. 316.075, F.S.

(Running a Red Light) and s. 316.1925 (Careless Driving), but the disposition of the traffic violations is not known.

With regard to Lazaro Rodriquez' actions, s. 316.126(1), F.S., provides: "Upon the immediate approach of an authorized emergency vehicle, while en route to meet an existing emergency, the driver of every other vehicle shall, when such emergency vehicle is giving audible signals by siren, exhaust whistle, or other adequate device, or visible signals by the use of displayed blue or red lights, yield the right-of-way to the emergency vehicle and shall immediately proceed to a position parallel to, and as close as reasonable to the closest edge of the curb of the roadway, clear of any intersection and shall stop and remain in position until the authorized emergency vehicle has passed, unless otherwise directed by a law enforcement officer." Lazaro Rodriguez did not stop, and there was no evidence that he slowed down or swerved prior to the collision.

Tests of blood samples taken from Officer Rodriguez and from Lazaro Rodriguez' body detected no alcohol or drugs in either driver's system.

Lazaro Rodriguez was a native of Cuba who entered the United States in March 1995 by way of an airline flight from Spain. At the time of his entry, immigration officials detected that he presented another man's Spanish passport as his own. He was detained and his legitimate Cuban passport was found on his person. He was paroled (allowed to remain in the United States) pending an exclusion hearing before an immigration judge. On April 22, 1997, Lazaro Rodriguez was ordered excluded and deported from the United States. However, he was allowed to remain in the United States while he pursued legal avenues, including requesting asylum due to persecution by the Cuban government and requesting waiver of inadmissibility due to extreme hardship. His extreme hardship waiver request was denied months before his death because his U.S. citizen daughter (Kathryn) was not a qualifying relative for purposes of waiver and he was not yet married to Beatrice Luquez, who is a permanent resident alien. Subsequent to that denial, he applied for adjustment of status as a NACARA applicant. Also, he and Beatrice Luquez were married in April 2000 and she petitioned for him to receive an immigrant visa as the spouse of a permanent resident alien. These petitions were pending

at the time of Lazaro Rodriguez' death. Lazaro Rodriguez had no criminal record, and he worked and paid federal income taxes throughout his five-year stay in the United States.

Lazaro Rodriguez is survived by his wife, Beatriz Luquez, with whom he lived for five years before getting married shortly before his death. He is also survived by his 22 year old son, Lazaro, Jr., and his 17 year old daughter, Katherine. Katherine will turn 18 on March 5, 2015. Lazaro is the child of Lazaro Rodriguez and his first wife. Katherine is the child of Lazaro Rodriguez and Beatriz Luquez.

In 2001, the claimants filed a wrongful death claim against the City of Hialeah and Hialeah, Inc. Hialeah, Inc. was owner of the land at the corner of the intersection and was alleged to be responsible for the obscured view.[1] The City settled in 2011, after nearly ten years of pre-trial discovery and motions, for $685,000 plus $25,000 in costs. The City has paid the statutory sovereign immunity limit of $200,000 and the costs, and has budgeted the amount of each additional payment from July 2012 through July 2016.

CONCLUSIONS OF LAW:

The claim bill hearing was a *de novo* proceeding to determine whether the City is liable in negligence for damages suffered by the Claimants and, if so, whether the amount of the claim is reasonable. This report is based on the evidence presented to the Special Master prior to and during the hearing.

Officer Rodriguez had a duty to exercise reasonable care in operating his police cruiser. Although he was authorized by s. 316.072(5)(b)2., F.S., to proceed through the red stop signal because he was responding to an emergency call, he was permitted to do so "only after slowing down as may be necessary for safe operation." His department had imposed a more restrictive requirement to come to a complete stop before proceeding through a stop signal. Although he slowed down and was driving under the speed limit, the fact that his vehicle collided with Lazaro Rodriguez' vehicle indicates that he did not proceed appropriately under the circumstances. Although Lazaro Rodriguez may have been speeding as much as ten miles per hour over the speed limit, his speed

[1] Hialeah, Inc., which owns and operates Hialeah Park Racing & Casino, settled with claimants for $60,000.

was not so excessive as to completely relieve Officer Rodriguez of responsibility. Therefore, the qualified immunity provided by section 316.072(5)(b)2., F.S., is inapplicable.

Officer Rodriguez was acting within the course and scope of his employment at the time of the crash. Therefore, his negligence is attributable to the City of Hialeah.

Lazaro Rodriguez also had a duty to exercise reasonable care in operating his motor vehicle. Although there is insufficient evidence to conclude that he was speeding, s. 316.126(1), F.S., required him to stop his vehicle clear of the intersection until the Officer Rodriguez' police car had passed. It is possible that Lazaro Rodriguez saw the first police car turning from Palm Avenue and did not perceive that there was a second police car continuing through the intersection. Nevertheless, he was negligent in failing to stop until Officer Rodriguez' vehicle had cleared the intersection.

After considering all of the factors in this case, I conclude that the amount of this claims bill is appropriate.

ATTORNEYS FEES:

From the $225,000 already paid by the City ($200,000 of the settlement amount plus $25,000 in costs), trial and appellate counsel received $67,500 in attorney fees and the client was charged $44,243.29 for costs and expenses. A total of $87,908.04 has been paid by claimants for costs and expenses.

Information provided by claimants' counsel indicates that the claimants have entered into attorney fee agreements for payment of a total of 37%, plus costs, for trial counsel (25%), appellate counsel (5%), and claims bill counsel (7%). However, the bill provides that the total amount paid for attorney fees, lobbying fees, costs, and other similar expenses relating to the claim may not exceed 25 percent of the total amount awarded under the act. The Florida Supreme Court has held that the Legislature has the authority to limit attorney fees in a claim bill even if the attorney has contracted for a higher amount. *Gamble v. Wells*, 450 So.2d 850 (Fla. 1984).

RECOMMENDATIONS: For the reasons set forth above, I recommend that Senate Bill 44 (2015) be reported FAVORABLY.

Respectfully submitted,

Scott E. Clodfelter
Senate Special Master

cc: Debbie Brown, Secretary of the Senate

By Senator Grimsley

21-00013-15 201544__

A bill to be entitled

An act for the relief of the Estate of Lazaro Rodriguez and his legal survivors by the City of Hialeah; providing an appropriation to compensate the Estate and Lazaro Rodriguez's legal survivors for injuries sustained as a result of the negligence of the City of Hialeah; providing a limitation on the payment of fees and costs; providing that the appropriation settles all present and future claims related to the wrongful death of Lazaro Rodriguez; providing an effective date.

WHEREAS, on July 30, 2000, at approximately 10:14 p.m., 29-year-old Lazaro Rodriguez was lawfully and properly operating his 1997 Ford Explorer in the westbound lanes of East 32nd Street in the City of Hialeah, and

WHEREAS, at the same time, Officer Jorge Rodriguez, a City of Hialeah road patrolman, was on duty and overheard a radio summons of another unit and, despite the fact that he was not dispatched to the call, decided to respond, and

WHEREAS, in responding to the call, Officer Rodriguez was traveling northbound on Palm Avenue in the City of Hialeah while Lazaro Rodriguez was traveling westbound on East 32nd Street, and

WHEREAS, Officer Rodriguez ran the red light at the intersection of Palm Avenue and East 32nd Street, crashing his police cruiser into the driver side of the vehicle driven by Lazaro Rodriguez, and

WHEREAS, the severe impact of the collision forced Lazaro

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21-00013-15 201544__

Rodriguez's vehicle into a concrete utility pole at the northwest corner of the intersection and then into another vehicle, and

WHEREAS, the force of the crash was so great that it caused massive and fatal blunt trauma injuries to Lazaro Rodriguez, and he was pronounced dead at the scene, and

WHEREAS, at the conclusion of the traffic homicide investigation concerning the death of Lazaro Rodriguez, the City of Hialeah Police Department found that Officer Rodriguez had violated Florida traffic statutes by unlawfully running the red light at the intersection of Palm Avenue and East 32nd Street and operating his motor vehicle in a careless manner, and that these violations were the legal cause of the traffic collision and the death of Lazaro Rodriguez, and

WHEREAS, Lazaro Rodriguez left a widow, Beatriz Luquez, and children, Lazaro, Jr., and Katherine, all of whom were dependent upon him financially and emotionally and loved him dearly, and

WHEREAS, in 2001, Ms. Luquez, individually and as the personal representative of the Estate of Lazaro Rodriguez, filed a wrongful death lawsuit in the 11th Judicial Circuit Court in and for Miami-Dade County, styled *Beatriz Luquez, individually and as Personal Representative of the Estate of Lazaro Rodriguez v. City of Hialeah*, Case No. 01-3691 CA 08, and

WHEREAS, the parties to the lawsuit entered into a formal settlement agreement following mediation and a unanimous vote by the Hialeah City Council, and

WHEREAS, the terms of the settlement agreement required the claimants to dismiss their case with prejudice and provide a full release of liability to the city and its employees, which

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

the claimants have done, in exchange for payments by the City of Hialeah totaling $685,000, plus $25,000 for costs, to be paid over 5 years if the Legislature approves the unpaid amounts, and

WHEREAS, pursuant to the settlement agreement, the City of Hialeah has paid $200,000 to the claimants, plus $25,000 for costs, leaving an unpaid balance of $485,000, and

WHEREAS, as part of the terms of the settlement agreement and general release, the City of Hialeah has agreed to support the passage of a claim bill and to pay the remaining balance of $485,000 in installments, with the last payment to be made on July 1, 2016, NOW, THEREFORE,

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

Section 1. The facts stated in the preamble to this act are found and declared to be true.

Section 2. The City of Hialeah is authorized and directed to appropriate from funds of the city not otherwise appropriated and to draw warrants totaling the amount of $485,000, payable to Beatriz Luquez, individually and as personal representative of the Estate of Lazaro Rodriguez, and to Lazaro Rodriguez, Jr., and Katherine Rodriguez, as compensation for injuries and damages sustained by the claimants as a result of the death of Lazaro Rodriguez. The amount of $385,000 shall be paid on July 1, 2015, and $100,000 shall be paid on July 1, 2016.

Section 3. The total amount paid for attorney fees, lobbying fees, costs, and other similar expenses relating to this claim may not exceed 25 percent of the total amount awarded under this act.

Section 4. The amounts awarded pursuant to the waiver of sovereign immunity under s. 768.28, Florida Statutes, and under this act are intended to provide the sole compensation for all present and future claims arising out of the factual situation described in the preamble to this act which resulted in the death of Lazaro Rodriguez.

Section 5. This act shall take effect upon becoming a law.

The Florida Senate

COMMITTEE VOTE RECORD

COMMITTEE: Judiciary
ITEM: SB 44
FINAL ACTION: Favorable
MEETING DATE: Tuesday, March 31, 2015
TIME: 4:00 —6:00 p.m.
PLACE: 110 Senate Office Building

FINAL VOTE								
Yea	**Nay**	**SENATORS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
X		Bean						
X		Benacquisto						
X		Brandes						
X		Joyner						
X		Simmons						
X		Simpson						
X		Soto						
	X	Stargel						
		Ring, VICE CHAIR						
X		Diaz de la Portilla, CHAIR						
8	1	**TOTALS**						
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting) SB 44

Meeting Date — *Bill Number (if applicable)*

Topic Rodriguez Claim Bill — *Amendment Barcode (if applicable)*

Name Lance Block

Job Title attorney - lobbyist

Address *Street* — Phone 599-1980

City Tallahassee *State* 32309 *Zip* — Email

Speaking: ☑ For ☐ Against ☐ Information — Waive Speaking: ☐ In Support ☐ Against

(The Chair will read this information into the record.)

Representing Family + Estate of Rodriguez

Appearing at request of Chair: ☐ Yes ☐ No — Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:
Communications, Energy, and Public Utilities, *Chair*
Agriculture
Appropriations
Appropriations Subcommittee on Health and Human Services
Health Policy
Transportation

JOINT COMMITTEES:
Joint Administrative Procedures Committee
Joint Legislative Budget Commission

SENATOR DENISE GRIMSLEY
Deputy Majority Leader
21st District

March 30th, 2015

The Honorable Miguel Diaz de la Portilla, Chair
Senate Committee on Judiciary
Room 515 Knott Building
404 S. Monroe Street
Tallahassee, FL 32399-1300

Dear Chair Diaz de la Portilla:

I have a bill on your agenda tomorrow, Senate Bill 44, Relief of the Estate of Lazaro Rodriguez by the City of Hialeah. I've asked a member of my staff to present this proposed legislation. I will be Chairing the Communications, Energy and Public Utilities meeting at this time. Staff presenting will be Anne K. Bell.

Thank you for hearing my bill.

Sincerely,

Denise Grimsley
Senator, District 21

DG/ab

REPLY TO:
- 205 South Commerce Avenue, Suite A, Sebring, Florida 33870 (863) 386-6016
- 212 East Stuart Avenue, Lake Wales, Florida 33853 (863) 679-4847
- 306 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5021

Senate's Website: *www.flsenate.gov*

ANDY GARDINER
President of the Senate

GARRETT RICHTER
President Pro Tempore

THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
302 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
12/31/14	SM	Favorable
3/31/15	JU	Fav/CS
	CA	
	FP	

December 31, 2014

The Honorable Andy Gardiner
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **CS/SB 78** – Judiciary Committee and Senator Flores
Relief of Maricelly Lopez, as Personal Representative of the Estate of Omar Mieles

SPECIAL MASTER'S FINAL REPORT

THIS IS A CONTESTED CLAIM FOR $1,611,237 BASED ON A JURY VERDICT AGAINST THE CITY OF NORTH MIAMI, IN WHICH THE JURY DETERMINED THAT THE CITY OF NORTH MIAMI WAS 50 PERCENT RESPONSIBLE FOR THE DEATH OF OMAR MIELES DUE TO THE NEGLIGENT OPERATION OF A PATROL VEHICLE BY ONE OF ITS OFFICERS.

CONCLUSIONS AND RECOMMENDATIONS:

On February 11, 2011, an administrative law judge from the Division of Administrative Hearings, serving as a Senate Special Master, held a de novo hearing on a previous version of this bill, SB 342 (2011), filed on January 3, 2011. After the hearing, the judge issued a report containing findings of fact and conclusions of law and recommended that the bill be reported favorably with one amendment. That bill was never heard in committee. The bill was subsequently filed in the next legislative session – SB 58 (2012) – and Special Master Bauer updated his report. That report is attached as an addendum to this report. The bill has been filed subsequently in each successive legislative session - SB 36 (2013), SB 40 (2014), and SB 78 (2015).

Due to the passage of time since the hearing, the Senate President reassigned the claim to me. My responsibilities were to review the records relating to the claim bill, be available for questions from the members, and determine whether any changes have occurred since the hearing, which if known at the hearing, might have significantly altered the findings or recommendation in the previous report.

The prior claim bill upon which a Special Master's Report was conducted, SB 58 (2012), is substantially similar to the claim bill filed for the 2015 Legislative Session.

According to counsel for Ms. Lopez, no changes have occurred since the hearing that might have altered the findings and recommendations in the report. Counsel for the City of Miami raise several issues:

1. The Plaintiff failed to exhaust all remedies pursuant to Senate Rule 4.81(6) because plaintiff did not appeal the final judgment.
2. The Plaintiff's claim is time barred by operation of section 11.065, Florida Statutes.
3. The bill fails to accurately reflect the driver of the vehicle in which Omar Mieles was a passenger caused the accident.
4. The bill fails to accurately reflect that Omar Mieles was not wearing his seatbelt, thus contributing to his injuries.
5. The passage of the bill would create a financial strain on the City's general revenue fund that would "significantly hurt the critical municipal services that the City provides to its residents" as well as "negatively impact both the city's internal functions but also the residents it serves."

Addressing each point in turn, I find the City's contentions to be insufficient to justify disturbing the original findings and recommendations contained in Senate Special Master's Report.

Senate Rule 4.81 provides "[t]he hearing and consideration of a claim bill shall be held in abeyance until all available administrative and judicial remedies have been exhausted." The plaintiff's failure to appeal a judgment with which they were apparently content is not the failure to exhaust administrative and judicial remedies. There is nothing in the

rule that requires a claimant to resort to appeals that may be deemed unnecessary or undesirable if they are content with their judgment. The essence of the rule is that all relevant proceedings be final, not that each party be required to pursue litigation to the highest permissible point of the administrative and judicial processes. The underlying case became final for judicial relief when the time for appeal passed. As such, the case is ripe for relief within the parameters of Senate Rule 4.81.

Likewise, the claim that the bill is now time barred from consideration by the legislature is without merit. While it is an open question whether section 11.065(1), Florida Statutes, could prevent a future legislature from taking up a bill that presents a claim outside the limitation period, one need not decide that question at this time. As noted in the introduction, the initial bill was presented and filed in the Legislature on January 3, 2011- within four years of both the accident that occurred on November 11, 2007, and the final judgment entered on April 21, 2010. Moreover, the bill has been presented for consideration in every subsequent legislative session. Claimants have plainly presented their claims in a timely manner that is entirely consistent with section 11.065, Florida Statutes.

As to the third and fourth points, the bill adequately describes relevant facts reflected in both the jury's verdict and the Special Master's Report, and plaintiffs' arguments are merely attempts to re-litigate those conclusions. The introductory clauses clearly set forth "the jury apportioned 50 percent of the responsibility for the death of Omar Mieles to the City of North Miami, and 50 percent to the driver of the vehicle in which Omar Mieles was traveling as a passenger." The claim bill is not made against the driver, but against the City of Miami whose officer was traveling at 60 mph in a nonemergency situation – twice the posted legal limit. The fault of the driver as well as Mr. Mieles' failure to wear his seatbelt are simply attempts to question the findings of both the jury and the Special Master which apportioned fault and re-litigate those conclusions. The City presented no new evidence to support their position. As such, I find no compelling reason to set aside or overturn the reasonable findings and recommendations of either the jury or Special Master Bauer.

Finally, the City argues the financial hardship to the general revenue fund that will result if SB 78 passes. The original Special Master's Report noted that the City had "$252,000 available in a claims payment account, as well as $538,000 in a risk management reserve account" as of February 2011 for payment of the claim. The City did not provide any additional information concerning either of these accounts or the general revenue fund or evidence of any kind in support of its claim for financial hardship. Accordingly, I am unable to assess the merits of the City's claim. Additionally, no alternative proposal or solution was suggested by the City in the event the claim bill was passed by the Legislature and they become obligated to pay the judgment. In any event, such a question does not go to the merits of the claim and is best left to the discretion of legislators deciding whether to bestow legislative grace through the passage of legislation.

Accordingly, the findings of the original Senate Special Master are adopted by the undersigned.

Respectfully submitted,

George Levesque
Senate Special Master

cc: Debbie Brown, Secretary of the Senate

CS by Judiciary on March 31, 2015:
The committee substitute reduces the appropriation in the bill to $200,000. This amount is intended to reflect a recent settlement between the claimant and the City of North Miami.

THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
302 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
12/2/11	SM	Favorable

December 2, 2011

The Honorable Mike Haridopoulos
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 58 (2012)** – Senator Anitere Flores
Relief of Maricelly Lopez, as Personal Representative of the Estate of Omar Mieles

SPECIAL MASTER'S FINAL REPORT

THIS IS A CONTESTED CLAIM FOR $1,611,237 BASED ON A JURY VERDICT AGAINST THE CITY OF NORTH MIAMI, IN WHICH THE JURY DETERMINED THAT THE CITY OF NORTH MIAMI WAS 50 PERCENT RESPONSIBLE FOR THE DEATH OF OMAR MIELES DUE TO THE NEGLIGENT OPERATION OF A PATROL VEHICLE BY ONE OF ITS OFFICERS.

FINDINGS OF FACT:

The instant claim arises out of a traffic accident that occurred in Miami on November 11, 2007, at the intersection of Northwest 7th Avenue and Northwest 46th Street. Northwest 46th Street runs from east to west, and intersects Northwest 7th Avenue (which runs from north to south) at a right angle. At the time of the accident, the intersection was controlled by four traffic signals: two blinking red lights that directed vehicles traveling east and west on Northwest 46th Street to stop, and two blinking yellow lights for vehicles proceeding north and south on Northwest 7th Avenue.

At approximately 4:10 a.m., 19-year-old Omar Mieles was traveling east on Northwest 46th Street in a 2005 Ford Focus, which was being driven by Madelayne Ibarra. The vehicle was owned by Ms. Ibarra's mother, who was not present. Mr. Mieles' girlfriend, Raiza Areas, was positioned in the front passenger's seat. Although Ms. Ibarra and Ms. Areas were both wearing seatbelts, Mr. Mieles was lying down unrestrained on the back seat, with his head behind the front passenger's seat. Mr. Mieles, Ms. Areas, and Ms. Ibarra had spent the evening eating dinner in Coconut Grove and socializing with friends in South Beach.

Although Ms. Ibarra was not under the influence of alcohol or controlled substances, she was unfamiliar with the area and fatigued due to the late hour. As a consequence, Ms. Ibarra failed to come to a complete stop at the red traffic signal prior to entering the Northwest 7th Avenue intersection. At the same time, a City of North Miami police cruiser traveling north on Northwest 7th Avenue entered the intersection through the yellow caution light. The police vehicle, which was on routine patrol and not operating in emergency mode (i.e., the siren and emergency lights were not activated), was substantially exceeding the 30 MPH limit.

Tragically, the police cruiser, which was being operated by Officer James Thompson, struck the right rear passenger door of Ms. Ibarra's Ford Focus. Mr. Mieles, who was ejected through a rear window due to the force and location of the impact, landed approximately 35 feet from the final resting position of Ms. Ibarra's vehicle. Although Mr. Mieles sustained catastrophic head injuries as a result of the accident, neither Ms. Ibarra nor Ms. Areas was seriously injured.

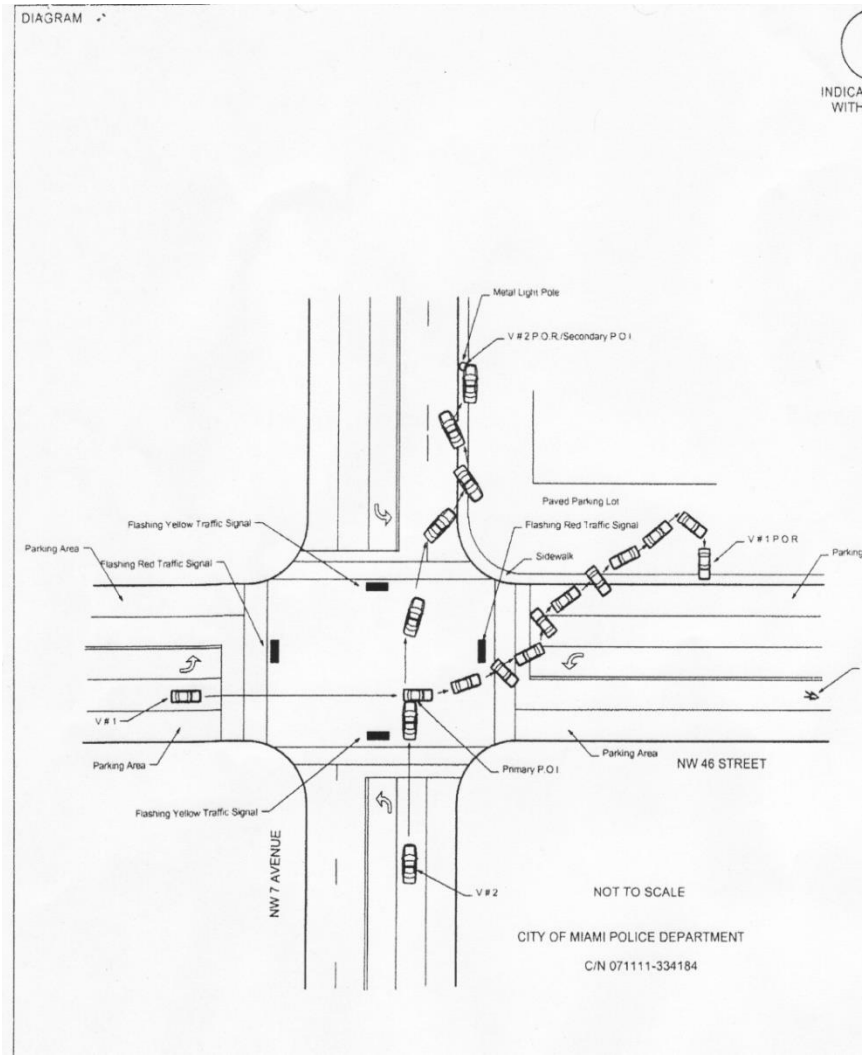
Officer Thompson, who likewise was not significantly injured in the collision, immediately radioed for emergency assistance. Paramedics responded to the scene minutes later and transported Mr. Mieles to Jackson Memorial Hospital. Soon after his arrival at the hospital, Mr. Mieles was pronounced brain dead. On November 14, 2007, with the consent of Maricelly Lopez (Mr. Mieles' mother and the Claimant in this proceeding), hospital staff harvested Mr. Mieles' heart, liver, and kidneys for donation, and he expired.

Approximately 90 minutes after the collision, K. Andrews, a detective employed with the City of Miami Police Department, arrived at the scene of the crash and initiated an accident investigation. During the investigation, Officer Thompson advised Detective Andrews that Ms. Ibarra had failed to stop at the red light and that he was unable to avoid the accident. However, Officer Thompson failed to mention that he was needlessly exceeding the speed limit at the time of the crash. Based upon the incomplete information in her possession, Detective Andrews concluded that Ms. Ibarra was solely at fault in the accident and issued her a citation for running a red light.

During the ensuing litigation between Mr. Mieles' estate and the City of North Miami, it was determined (based upon data from the patrol vehicle's "black box") that one second prior to the crash, Officer Thompson was traveling 61 MPH. As noted above, the speed limit on Northwest 7th Street at the accident location was 30 MPH.

At the time of his death, Mr. Mieles had recently graduated from high school and was working two jobs. In addition, he had been accepted to Valencia Community College and was scheduled to begin classes in January 2008. Mr. Mieles, who is survived by his mother, stepfather, and two siblings, was by all accounts a hard-working and well-liked young man.

DIAGRAM:



LITIGATION HISTORY:

On June 23, 2008, Maricelly Lopez, in her individual capacity and as the personal representative of the estate of Omar Mieles, filed a complaint for damages in Miami-Dade County circuit court against the City of North Miami. The complaint alleged that Officer Thompson's operation of his police vehicle on November 11, 2007, was negligent, and that such negligence was the direct and proximate cause of Mr. Mieles' death. In addition, the complaint alleged that Mr. Mieles' estate sustained various damages, which included medical and funeral expenses, as well as lost earnings. The complaint further asserted that Ms. Lopez sustained damages in her individual capacity, such as the loss of past and future support

and services, past and future mental pain and suffering, and loss of companionship.

The matter subsequently proceeded to a jury trial, during which the parties presented conflicting theories regarding the cause of the accident. Specifically, the plaintiff contended that Ms. Ibarra had properly stopped at the intersection and that Officer Thompson was solely responsible for the collision, while the City of North Miami argued that Ms. Ibarra had run the red light and was entirely at fault. In addition, both sides presented conflicting expert testimony regarding whether Mr. Mieles would have sustained fatal injuries had been wearing a seatbelt. In particular, the plaintiff's expert opined that due to the location of the collision (the right rear passenger's door of the Ford Focus) and its force, Mr. Mieles would have been killed even if he had been properly restrained. In contrast, the City of Miami presented expert testimony indicating that the use of a seatbelt would have saved Mr. Mieles' life.

On March 19, 2010, the jury returned a verdict, in which it determined that the City of North Miami and Ms. Ibarra were negligent, and that each was 50 percent responsible for Mr. Mieles' death. The jury apportioned no fault to Mr. Mieles. The jury further concluded that Mr. Mieles' estate and Ms. Lopez sustained the following damages:

<u>Damages to the Estate</u>

- $163,950.15 for medical expenses.
- $1,630 for funeral expenses.

<u>Damages to Maricelly Lopez</u>

- $2,000 for loss of past support.
- $40,000 for loss of future support.
- $1,750,000 for past pain and suffering.
- $1,750,000 for future pain and suffering.

Based on the jury's finding that the City of North Miami was 50 percent responsible, final judgment was entered against it in the amount of $1,719,808.63 (this figure is comprised of $1,688,195.10, which represents fifty percent of the total damages outlined above, minus various setoffs, plus costs of $31,613.53).

No appeal of the final judgment was taken to the Third District Court of Appeal.

The City of North Miami has tendered $108,571.30 against the final judgment, leaving $1,611,237.33 unpaid.

CLAIMANT'S POSITION: The City of North Miami is vicariously liable for the negligence of Officer Thompson, which was the direct and proximate cause of Omar Mieles' death. The Claimant further argues that Mr. Miles did nothing to contribute to his death.

RESPONDENT'S POSITION: The City of North Miami objects to any payment to the Claimant through a claim bill. The City of Miami also contends that Mr. Mieles' catastrophic head injuries would have been avoided had he been properly restrained by a seat belt, and that the jury should not have apportioned any fault to Officer Thompson.

CONCLUSIONS OF LAW: Like any motorist, Officer Thompson had a duty to operate his patrol vehicle with consideration for the safety of other drivers. Pedigo v. Smith, 395 So. 2d 615, 616 (Fla. 5th DCA 1981). Specifically, Officer Thompson owed a duty to observe the 30 MPH posted speed limit and to use caution (as directed by the yellow flashing light) as he entered the intersection. See § 316.076(1)(b), Fla. Stat. (2007) ("When a yellow lens is illuminated with rapid intermittent flashes, drivers of vehicles may proceed through the intersection or past such signal only with caution."); § 316.183(2), Fla. Stat. (2007) ("On all streets or highways, the maximum speed limits for all vehicles must be 30 miles per hour in business . . . districts"). By entering the intersection at 61 MPH, Officer Thompson breached his duty of care, which was a direct and proximate cause of Mr. Mieles' death.

The City of North Miami, as Officer Thompson's employer, is liable for his negligent act. Mercury Motors Express v. Smith, 393 So. 2d 545, 549 (Fla. 1981) (holding that an employer is vicariously liable for compensatory damages resulting from the negligent acts of employees committed within the scope of their employment); see also Aurbach v. Gallina, 753 So. 2d 60, 62 (Fla. 2000) (holding that the dangerous instrumentality doctrine "imposes strict vicarious liability upon the owner of a motor vehicle who voluntarily entrusts that motor vehicle to an individual whose negligent operation causes damage to another").

As discussed above, the jury determined that Officer Thompson and Ms. Ibarra, based upon the negligent operation of their respective vehicles, were equally at fault in this tragic event. Further, in apportioning no fault to Mr. Mieles, the jury presumably found that Mr. Mieles would have been killed in the collision even if he had been properly restrained. These conclusions are reasonable and will not be disturbed by the undersigned. The undersigned also concludes that the damages awarded by the jury were appropriate.

LEGISLATIVE HISTORY: This is the second year that a bill has been filed on the Claimant's behalf. During the 2011 session, the bill (SB 342) died in Committee.

ATTORNEYS FEES: The Claimant's attorneys have agreed to limit their fees to 25 percent of any amount awarded by the Legislature in compliance with section 768.28(8), Florida Statutes. Lobbyist's fees are included with the attorney's fees.

FISCAL IMPACT: As the City of North Miami is self-insured, its general funds would be used to satisfy the instant claim bill. In February 2011, the City of North Miami reported that it had $252,000 available in a claims payment account, as well as $538,000 in a risk management reserve account.

COLLATERAL SOURCES: Prior to the litigation against the City of North Miami, the Claimant recovered the bodily injury limits from Ms. Ibarra's GEICO policy in the amount of $10,000, as well as $10,000 from the Claimant's underinsured motorist coverage.

RECOMMENDATIONS: For the reasons set forth above, the undersigned recommends that Senate Bill 58 (2012) be reported FAVORABLY.

Respectfully submitted,

Edward T. Bauer
Senate Special Master

cc: Senator Anitere Flores
Debbie Brown, Interim Secretary of the Senate
Counsel of Record

742054

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
04/01/2015	.	
	.	
	.	
	.	

The Committee on Judiciary (Soto) recommended the following:

Senate Amendment (with title amendment)

Delete line 70
and insert:
$200,000.00, payable to Maricelly Lopez, individually and as

================ T I T L E A M E N D M E N T ================
And the title is amended as follows:
Delete lines 59 - 61
and insert:

742054

WHEREAS, on March 24, 2015, the City of North Miami passed a resolution unanimously authorizing the settlement of the claim for $200,000, and supporting the passage of a claim bill in that amount for Maricelly Lopez, individually and as personal representative of Omar Mieles, and

WHEREAS, the City of North Miami and Maricelly Lopez have agreed to settle the claim for $200,000, NOW, THEREFORE,

By Senator Flores

37-00070-15 201578__

A bill to be entitled

An act for the relief of Maricelly Lopez by the City of North Miami; providing for an appropriation to compensate Maricelly Lopez, individually and as personal representative of the Estate of Omar Mieles, for the wrongful death of her son, Omar Mieles, which was due to the negligence of a police officer of the City of North Miami; providing a limitation on the payment of fees and costs; providing that the appropriation settles all present and future claims related to the death of Omar Mieles; providing an effective date.

WHEREAS, on November 11, 2007, 18-year-old Omar Mieles was a passenger in the back seat of a vehicle traveling eastbound on NW 46th Street in North Miami, Florida, and

WHEREAS, at that time and place, Officer James Ray Thompson, a police officer employed by the City of North Miami Police Department, while in the course and scope of his duties as a police officer, negligently drove a police department vehicle at a high rate of speed and collided with the vehicle in which Omar Mieles was a passenger, and

WHEREAS, as a direct result of the collision caused by Officer Thompson's negligence, Omar Mieles was thrown from the rear window of the vehicle in which he was traveling, landed 35 feet from the vehicle, and died shortly thereafter from the injuries he sustained, and

WHERAS, the mother of Omar Mieles, Maricelly Lopez, has endured continuous mental pain and suffering since the date of

37-00070-15 201578__

her son's death and seeks to recover damages, individually, for loss of support, services, and companionship due to the death of her son, and

WHEREAS, the Estate of Omar Mieles seeks to recover damages for medical expenses, funeral expenses, loss of earnings, and net accumulation of earnings, and

WHEREAS, on June 23, 2008, Maricelly Lopez, as personal representative of the Estate of Omar Mieles and in her individual capacity as mother of Omar Mieles, filed an action against the City of North Miami in the Miami-Dade County Circuit Court, styled *Maricelly Lopez, Plaintiff, v. City of North Miami, Defendants*, Case No. 13-2008-CA-035955-0000-01, to recover damages for the wrongful death of Omar Mieles as a result of the negligence of a police officer of the City of North Miami, and

WHEREAS, on March 19, 2010, the case was tried before a jury that returned a verdict for damages against the City of North Miami and in favor of Maricelly Lopez, as personal representative of the Estate of Omar Mieles and in her individual capacity as mother of Omar Mieles, in the amount of $3,542,000, and

WHEREAS, the jury apportioned 50 percent of the responsibility for the death of Omar Mieles to the City of North Miami, and 50 percent to the driver of the vehicle in which Omar Mieles was traveling as a passenger, and

WHEREAS, on April 21, 2010, a final judgment was entered against the City of North Miami for $1,719,808.63, of which the city has paid $108,571.30 pursuant to the statutory limits of liability set forth in s. 768.28, Florida Statutes, and

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

WHEREAS, the remainder of the judgment is sought through the submission of a claim bill to the Legislature, NOW, THEREFORE,

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

Section 1. The facts stated in the preamble to this act are found and declared to be true.

Section 2. The City of North Miami is authorized and directed to appropriate from funds of the city not otherwise appropriated and to draw a warrant in the amount of $1,611,237.33, payable to Maricelly Lopez, individually and as personal representative of the Estate of Omar Mieles, as compensation for the death of her son due to the negligence of a police officer of the City of North Miami.

Section 3. The total amount paid for attorney fees, lobbying fees, costs, and other similar expenses relating to this claim may not exceed 25 percent of the amount awarded under this act.

Section 4. The amount paid by the City of North Miami pursuant to s. 768.28, Florida Statutes, and the amount awarded under this act are intended to provide the sole compensation for all present and future claims arising out of the factual situation described in this act which resulted in the death of Omar Mieles.

Section 5. This act shall take effect upon becoming a law.

The Florida Senate

COMMITTEE VOTE RECORD

COMMITTEE: Judiciary
ITEM: SB 78
FINAL ACTION: Favorable with Committee Substitute
MEETING DATE: Tuesday, March 31, 2015
TIME: 4:00 —6:00 p.m.
PLACE: 110 Senate Office Building

FINAL VOTE			3/31/2015 1 Amendment 742054 Soto		3/31/2015 2 Motion to vote "YEA" after Roll Call Simmons			
Yea	**Nay**	**SENATORS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
X		Bean						
X		Benacquisto						
X		Brandes						
X		Joyner						
VA		Simmons						
X		Simpson						
X		Soto						
X		Stargel						
		Ring, VICE CHAIR						
X		Diaz de la Portilla, CHAIR						
9	0	**TOTALS**	RCS	-	FAV	-		
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3.31
Meeting Date

78
Bill Number (if applicable)

Topic Relief of Maricelly Lopez

Amendment Barcode (if applicable)

Name Sarah Carrell

Job Title

Address 123 S. Adams
Street

Phone 671.4401

Tallahassee FL 32301
City *State* *Zip*

Email

Speaking: ☒ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against
(The Chair will read this information into the record.)

Representing [redacted] Maricelly Lopez

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/15
Meeting Date

78
Bill Number (if applicable)

742054
Amendment Barcode (if applicable)

Topic Lopez / Claims

Name Kelly Mallette

Job Title

Address 104 West Jefferson Street
Street

Tallahassee, FL 32301
City *State* *Zip*

Phone (850) 224-3427

Email kelly@rlbookpa.com

Speaking: ☒ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against
(The Chair will read this information into the record.)

Representing City of North Miami

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/15
Meeting Date

78
Bill Number (if applicable)

Topic Lopez/Claims

Amendment Barcode (if applicable)

Name Kelly Mallette

Job Title

Address 104 west Jefferson St.
Street
Tallahassee, FL 32301
City *State* *Zip*

Phone (850) 224-3427

Email kelly@rlbodepa.com

Speaking: ☒ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing City of North Miami

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	CS/CS/CS/SB 222
INTRODUCER:	Judiciary Committee; Communications, Energy and Public Utilities Committee; Commerce and Tourism Committee; and Senator Hukill
SUBJECT:	Electronic Commerce
DATE:	April 2, 2015 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harmsen	McKay	CM	**Fav/CS**
2.	Clift/Wiehle	Caldwell	CU	**Fav/CS**
3.	Procaccini	Cibula	JU	**Fav/CS**

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/CS/SB 222 creates the Computer Abuse and Data Recovery Act (CADRA), which establishes a civil cause of action for harm or loss caused by the unauthorized access or hacking of a protected computer owned by a for-profit or not-for-profit business. The bill provides a definition for "authorized user," to be a director, officer, third-party agent, contractor, consultant, or employee, who is granted, otherwise blocked, access by the owner, operator, lessee of the protected computer, or the owner of the protected information stored in the computer. Remedies created by the bill include the recovery of actual damages, lost profits, economic damages, and injunctive or other equitable relief.

II. Present Situation:

"Hacking" is the unauthorized access of a computer or its related technologies, usually with intent to cause harm.[1] Currently, hackers are subject to criminal and limited civil penalties under the Florida Computer Crimes Act (CCA) and the federal Computer Fraud and Abuse Act (CFAA).

[1] Eric J. Sinrod, William P. Reilly, *Cyber-Crimes: A Practical Approach to the Application of Federal Computer Crime Laws*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 177 (2000).

Hacking by insiders or employees poses a significant threat to businesses because employees have ready access to valuable or significant information,[2] but challenges to the prosecution of hacking by employees exist. For example, the CCA exempts employees acting within the scope of their lawful employment from prosecution for criminal actions.[3] Civil actions brought under the CFAA must have damages of $5,000 or more, or must be based on other specific harm.[4] Additionally, federal appellate circuit courts are split on the application of the CFAA to employee hackers.[5, 6]

Computer Fraud and Abuse Act

The CFAA[7] provides criminal penalties for individuals who either without authorization, or in excess of authorized access:

- Obtain national security information;
- Access a computer and obtain confidential information;
- Trespass in a government computer;
- Access a computer to commit a fraud;
- Damage a computer;
- Traffic in computer passwords; or
- Make threats involving computers.

The CFAA also provides civil remedies if damages exceed $5,000, hamper medical care, physically harm a person, or threaten national security, public safety, or health.[8]

The CFAA does not define "without authorization," but does define to "exceed authorized access" as "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter.[9]"

Florida Computer Crimes Act

In 1978, the Legislature created the CCA[10] to address the problem of computer-related crime in government and the private sector.[11] The CCA criminalizes certain offenses against intellectual

[2] U.S. Department of Homeland Security, *Increase in Insider Threat Cases Highlight Significant Risks to Business Networks and Proprietary Information*, (September 23, 2014) https://www.ic3.gov/media/2014/140923.aspx; *see also*, s. 815.02, F.S.
[3] Section 815.06(7)(b), F.S. (2014).
[4] 18 U.S.C. §1030(c)(4)(A)(i)(I)-(V).
[5] U.S. Department of Justice, *Prosecuting Computer Crimes,* (Office of Legal Education 2009) from http://www.justice.gov/criminal/cybercrime/docs/ccmanual.pdf.
[6] *Compare United States v. Nosal*, 676 F. 3d 854 (9th Cir. 2012) (Finding that an employee hacker can only exceed authorization by accessing files outside the scope of her use-authorization (e.g., stealing a co-workers password to access information)) with *United States v. Rodriguez*, 628 F. 3d 1258 (11th Cir. 2010) (Finding that an employee hacker who uses information obtained within the scope of her normal use authorization exceeds authorization by using the information in a manner contrary to the business' interests or use agreement).
[7] 18 U.S.C. §1030.
[8] 18 U.S.C. §1030(g).
[9] 18 U.S.C. §1030(e)(6).
[10] Sections 815.01-815.06, F.S.
[11] Chapter 78-92, Laws of Fla.; s. 815.01-02, F.S.

property and offenses against users of computers, computer systems, computer networks, and electronic devices.

Offenses against Intellectual Property

A person commits an offense against intellectual property under the CCA when he or she willfully, knowingly, and without authorization:

- Introduces a contaminant into a computer or its related technologies;
- Modifies, renders unavailable, or destroys data, programs, or supporting documentation in a computer or its related technologies; or
- Discloses or takes data, programs, or supporting documentation which is a trade secret or is confidential that is in a computer or its related technologies.

Offenses against Computer Users

A person commits an offense against computer users under the CCA when he or she willfully, knowingly, and without authorization:

- Accesses, destroys, injures, or damages any computer or its related technologies;
- Disrupts the ability to transmit data to or from an authorized user of a computer or its related technologies;
- Destroys, takes, injures, modifies, or damages equipment or supplies used or intended to be used in a computer or its related technologies;
- Introduces any computer contaminant into any computer or its related technologies; or
- Engages in audio or video surveillance of an individual by accessing any inherent feature or component of a computer or its related technologies, including accessing the data or information thereof that is stored by a third party.

The CCA does not provide a civil remedy for offenses against intellectual property, but it does enable an owner or lessee of an affected computer or its related technologies to bring a civil action[12] for compensatory damages against any person convicted of an offense against computer users under s. 815.06, F.S.[13] Employees acting under the scope of their authorization are specifically exempted from this civil cause of action under the CCA.[14]

The civil action provided for in s. 815.04, F.S., is generally disfavored as a more costly and time-consuming option than necessary because it must be preceded by a criminal conviction under the CCA.[15] As an alternative, litigants generally proceed under a federal CFAA claim.[16]

[12] Section 815.06(4), F.S.
[13] Section 815.06(5)(a), F.S.
[14] Section 815.06(7)(b), F.S.
[15] Robert Kain, *Federal Computer Fraud and Abuse Act: Employee Hacking Legal in California and Virginia, But Illegal in Miami, Dallas, Chicago, and Boston*, 87 FLA. BAR. J., (January, 2013) http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/8c9f13012b96736985256aa900624829/83a2364f8efc84e385257ae200647255!OpenDocument
[16] *Id*.

III. Effect of Proposed Changes:

The bill creates the "Computer Abuse and Data Recovery Act" (CADRA) in ch. 668, F.S. It directs that CADRA be liberally construed to protect owners, operators, and lessees of a protected computer from harm or losses caused by the unauthorized access to the protected computer.

The bill creates a civil action available to those injured by an individual who knowingly and with intent to cause harm or loss:

- Obtains information from a protected computer without authorization, and as a result, causes a harm or loss;
- Causes the transmission of a program, code, or command from a protected computer without authorization, and as a result, causes a harm or loss; or
- Traffics in any technological access barrier (e.g., password) through which access to a protected computer may be obtained without authorization.

In the civil action, the injured party has the following civil remedies available:

- Recovery of actual damages;
- Recovery of the violator's profits that are not included in the plaintiff's damages;
- Injunctive or other equitable relief to prevent a future violation; and
- Return of the misappropriated information, program, or code, and all copies.

The bill also directs courts to award attorney's fees to the prevailing party.

An injured party victim must commence a civil action within 3 years after the violation or 3 years after the violation was discovered, or should have been discovered with due diligence. This statute of limitations is shorter than Florida's 4-year default statute of limitations,[17] but longer than the 2-year statute of limitations provided for in the federal CFAA.[18]

Relief provided under this bill is available as a supplement to other remedies under state and federal law. If a criminal proceeding brought under the CCA results in a final judgment or decree in favor of the state, the defendant is estopped from denying or disputing the same matters in any subsequent civil action brought under CADRA.

The bill excludes from its provisions:

- Any lawfully authorized investigative, protective, or intelligence activity of any law enforcement agency, regulatory agency, or political subdivision of Florida, any other state, the United States, or any foreign country, and
- Any provider of an interactive computer service, of an information service, or of a communications service, if the provider provides the transmission, storage, or caching of electronic communications or messages of a person other than the provider, related telecommunications or commercial mobile radio services, or content provided by a person other than the provider.

[17] Section 95.11(3)(f), F.S.
[18] 18 U.S.C. §1030(g

The bill provides definitions, including for the term "without authorization." This definition states that the term "does not include circumventing a technological measure that does not effectively control access to the protected computer or the information stored in the protected computer." This wording imposes a responsibility on businesses to establish and maintain effective technological measures such as passwords, because hackers who "circumvent a technological measure that does not effectively control access to the protected computer" act outside the scope of liability created by this bill.

The definitions do not resolve uncertainties about application of the liability provisions to an employee who is permitted access to the relevant information as part of their duties, but acts outside those duties with resulting harm or loss to the employer. However, permission to access a business' private computer is terminated upon cessation of the third-party agent, contractor, consultant, or employee's employment.

The phrase "owner of information" appears to be limited to the owner of information stored in the protected computer who uses the information in connection with the operation of a business as that is the terminology used in creating the liability. As such, the bill does not create a cause of action for an individual whose personal information: is stored on a business computer, is accessed by a hacker, and is fraudulently used to the individual's harm or loss. It would, however, protect the owner of that business computer (assuming adequate technological measures).

The bill takes effect October 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill provides an alternate civil remedy for businesses affected by specific hacking acts.

C. Government Sector Impact:

According to the Office of the Florida State Courts Administrator, the creation of a new civil cause of action is expected to result in an additional court workload. However, the office was unable to determine the fiscal impact of the bill due to the lack of data needed to determine the expected increase in judicial workload.[19]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates the following sections of the Florida Statutes: 668.801, 668.802, 668.803, 668.804, and 668.805.

IX. Additional Information:

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

CS by Judiciary on March 31, 2015:
Expands the definition for "authorized user" to include currently employed directors, officers, and employees who are granted access to a protected computer.

CS by Communications, Energy, and Public Utilities on March 10, 2015:
Revises the definition for "authorized user" and expands the definition of the term "without authorization" to further clarify the circumstances under which the owner of a protected computer is eligible to seek judicial relief under the "Computer Abuse and Data Recovery Act;" provides an exclusion from liability for certain internet access service providers and on-line storage providers; and makes a technical change.

CS by Commerce and Tourism on February 16, 2015:
Clarifies that a victim may seek the return of misappropriated programs, misappropriated codes, and misappropriated information under s. 668.804, F.S.

[19] Office of the State Courts Administrator, *2015 Judicial Impact Statement for CS/SB 222*, (March 9, 2015).

B. Amendments:

None.

872716

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
04/02/2015	.	
	.	
	.	
	.	

The Committee on Judiciary (Bean) recommended the following:

Senate Amendment

Delete lines 43 - 67
and insert:
(1) "Authorized user" means, with respect to a protected computer: a director, officer, employee, third-party agent, contractor, or consultant of the owner, operator, or lessee of the computer or the owner of information stored in the protected computer if the director, officer, employee, third-party agent, contractor, or consultant is granted access to the protected computer by the owner, operator, or lessee of the protected

872716

computer or by the owner of information stored in such protected computer through a technological access barrier.

If the owner, operator, or lessee of the protected computer or the owner of information stored in the protected computer provides a director, officer, employee, third-party agent, contractor, or consultant with a technological access barrier within the scope of his or her employment, the owner, operator, or lessee of the computer or the owner of information stored in the protected computer gives explicit permission to the director, officer, employee, third-party agent, contractor, or consultant to use the technological access barrier and establishes the director, officer, employee, third-party agent, contractor, or consultant as an authorized user. Such permission, however, is terminated upon cessation of his or her employment.

By the Committees on Communications, Energy, and Public Utilities; and Commerce and Tourism; and Senator Hukill

579-02142-15 2015222c2

A bill to be entitled

An act relating to electronic commerce; providing a directive to the Division of Law Revision and Information; creating the "Computer Abuse and Data Recovery Act"; creating s. 668.801, F.S.; providing a statement of purpose; creating s. 668.802, F.S.; defining terms; creating s. 668.803, F.S.; prohibiting a person from intentionally committing specified acts without authorization with respect to a protected computer; providing penalties for a violation; creating s. 668.804, F.S.; specifying remedies for civil actions brought by persons affected by a violation; providing that specified criminal judgments or decrees against a defendant act as estoppel as to certain matters in specified civil actions; providing that specified civil actions must be filed within certain periods of time; creating s. 668.805, F.S.; providing that the act does not prohibit specified activity by certain state, federal, and foreign law enforcement agencies, regulatory agencies, and political subdivisions; providing that the act does not impose liability on specified providers in certain circumstances; providing an effective date.

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

Section 1. The Division of Law Revision and Information is directed to create part V of chapter 668, Florida Statutes, consisting of ss. 668.801-668.805, Florida Statutes, to be

579-02142-15 2015222c2

entitled the "Computer Abuse and Data Recovery Act."

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

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

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

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

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

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

(1) "Authorized user" means, with respect to a protected computer:

(a) A director, officer, or employee of the owner, operator, or lessee of the computer or the owner of information stored in the protected computer.

(b) A third-party agent, contractor, consultant, or employee of the owner, operator, or lessee of the computer or the owner of information stored in the protected computer if the third-party agent, contractor, consultant, or employee is granted access to the protected computer by the owner, operator, or lessee of the protected computer or by the owner of information stored in such protected computer in the form of a technological access barrier.

If the owner, operator, or lessee of the computer or the owner of information stored in the protected computer provides a

third-party agent, contractor, consultant, or employee with a technological access barrier within the scope of his or her employment, the owner, operator, or lessee of the computer or the owner of information stored in the protected computer gives explicit permission to the third-party agent, contractor, consultant, or employee to use the technological access barrier and establishes the third-party agent, contractor, consultant, or employee as an authorized user. Such permission, however, is terminated upon cessation of his or her employment.

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

(3) "Computer" means an electronic, magnetic, optical, electrochemical, or other high-speed data processing device that performs logical, arithmetic, or storage functions and includes any data storage facility, data storage device, or communications facility directly related to, or operating in conjunction with, the device.

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

(5) "Loss" means any of the following:

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

(b) Economic damages.

(c) Lost profits.

(d) Consequential damages, including the interruption of service.

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

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

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

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

(9) "Without authorization" means access to a protected computer by a person who:

(a) Is not an authorized user;

(b) Has stolen a technological access barrier of an authorized user; or

(c) Circumvents a technological access barrier on a protected computer without the express or implied permission of the owner, operator, or lessee of the computer or the express or implied permission of the owner of information stored in the protected computer. The term does not include circumventing a technological measure that does not effectively control access to the protected computer or the information stored in the protected computer.

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

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

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

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

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

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

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

668.804 Remedies.—

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

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

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

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

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

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

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

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

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

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

668.805 Exclusions.—This part does not prohibit any lawfully authorized investigative, protective, or intelligence activity of any law enforcement agency, regulatory agency, or political subdivision of this state, any other state, the United States, or any foreign country. This part may not be construed to impose liability on any provider of an interactive computer service as defined in 47 U.S.C. 230(f), of an information service as defined in 47 U.S.C. 153, or of a communications service as defined in s. 202.11, if the provider provides the transmission, storage, or caching of electronic communications or messages of a person other than the provider, related telecommunications or commercial mobile radio services, or

content provided by a person other than the provider.

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

The Florida Senate

COMMITTEE VOTE RECORD

COMMITTEE: Judiciary
ITEM: CS/CS/SB 222
FINAL ACTION: Favorable with Committee Substitute
MEETING DATE: Tuesday, March 31, 2015
TIME: 4:00 —6:00 p.m.
PLACE: 110 Senate Office Building

FINAL VOTE			3/31/2015 1 Amendment 872716 Bean		3/31/2015 2 Motion to vote "YEA" after Roll Call Bean		3/31/2015 3 Motion to vote "YEA" after Roll Call Soto	
Yea	**Nay**	**SENATORS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
VA		Bean						
X		Benacquisto						
X		Brandes						
X		Joyner						
X		Simmons						
X		Simpson						
VA		Soto						
X		Stargel						
		Ring, VICE CHAIR						
X		Diaz de la Portilla, CHAIR						
9	0	**TOTALS**	RCS	-	FAV	-	FAV	-
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3 / 31 /2015
Meeting Date

Topic _____ Bill Number 222 *(if applicable)*

Name BRIAN PITTS Amendment Barcode _____ *(if applicable)*

Job Title TRUSTEE

Address 1119 NEWTON AVNUE SOUTH Phone 727-897-9291
Street

SAINT PETERSBURG FLORIDA 33705 E-mail JUSTICE2JESUS@YAHOO.COM
City *State* *Zip*

Speaking: ☐ For ☐ Against ☑ Information

Representing JUSTICE-2-JESUS

Appearing at request of Chair: ☐ Yes ☑ No Lobbyist registered with Legislature: ☐ Yes ☑ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/20/11)

THE FLORIDA SENATE

APPEARANCE RECORD

3/31/2015 (Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)
Meeting Date

222
Bill Number (if applicable)

Topic ELECTRONIC COMMERCE

Amendment Barcode (if applicable)

Name GAIL MARIE PERRY

Job Title CHAIR

Address PO BOX 1766 (*Street*)
POMPANO BEACH FL 33061 (*City* / *State* / *Zip*)

Phone 954 850-4255

Email workingfolk@hotmail.com

Speaking: ☐ For ☒ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing COMMUNICATIONS WORKERS of AMERICA

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/15
Meeting Date

222
Bill Number (if applicable)

Topic Electronic Commerce/Computer Abuse and Data Recovery Act

Amendment Barcode (if applicable)

Name Greg Black

Job Title Attorney

Address 215 S. Monroe Street, Suite 505
Street

Phone 205-9000

Tallahassee FL 32301
City *State* *Zip*

Email greg.black@metzlaw.com

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Business Law Section of the Florida Bar

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	CS/CS/SB 252
INTRODUCER:	Judiciary Committee; Banking and Insurance Committee; and Senator Smith
SUBJECT:	Insurance Countersignature Requirements
DATE:	April 1, 2015
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Billmeier	Knudson	BI	**Fav/CS**
2.	Davis	Cibula	JU	**Fav/CS**
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 252 provides that the absence of a countersignature does not affect the validity of a property, casualty, or surety insurance policy or contract. This could reduce the risk that an insured loses coverage due to events the insured cannot control. Current law provides that no property, casualty, or surety insurer shall assume direct liability unless the policy or contract of insurance is countersigned by a licensed agent.

The bill amends the definition of financial guaranty insurance to provide that financial guaranty insurance does not include guarantees of higher education loans unless they are written by a financial guaranty insurance corporation.

This bill eliminates the requirement that each surplus lines agent, on or before the 45th day following each calendar quarter, file with the Florida Surplus Lines Service Office (FSLSO) an affidavit stating that all surplus lines insurance he or she transacted during that calendar year has been submitted to the FSLSO. The requirement is no longer needed because the FSLSO has implemented auditing procedures to confirm the information.

II. Present Situation:

Section 624.425(1), F.S., requires all property, casualty, and surety insurance policies or contracts to be issued and countersigned by an agent. The agent must be regularly commissioned,

currently licensed, and appointed as an agent for the insurer.[1] The purpose of the countersignature requirement is "to protect the public … by requiring such policies to be issued by resident, licensed agents over whom the state can exercise control and thus prevent abuses."[2] The absence of a countersignature does not necessarily invalidate the insurance policy. The insurer may waive the countersignature requirement.[3] If the countersignature requirement is not waived, a policy is not enforceable against the insurer, as a court will not consider the policy properly executed.[4] In the absence of a countersignature, whether a policy is waived is a factual matter determined on a case-by-case basis.[5] In at least one recent case, a defendant argued that the lack of a countersignature constituted a defense in a breach of contract action.[6]

Section 624.426, F.S., excludes some policies from the countersignature requirement. These are:

- Contracts of reinsurance;
- Policies of insurance on the rolling stock of railroad companies doing a general freight and passenger business;
- United States Custom surety bonds issued by a corporate surety approved by the United States Department of Treasury;
- Policies of insurance issued by insurers whose agents represent one company or a group of companies under common ownership if a company within one group is transferring policies to another company within the same group and the agent of record remains the same; and
- Policies of property, casualty, and surety insurance issued by insurers whose agents represent one company or a group of companies under common ownership and for which the application is lawfully submitted to the insurer.[7]

Surplus Lines Agent Affidavit

Surplus lines insurance refers to a category of insurance for which there is no market available through standard insurance carriers in the admitted market (insurance companies licensed to transact insurance in Florida). Surplus lines insurance is sold by surplus lines insurance agents.[8] Section 626.916, F.S., requires the insurance agent to make a diligent effort[9] to procure the desired coverage from admitted insurers before the agent can place insurance in the surplus lines market. Surplus lines insurance agents must report surplus lines insurance transactions to the Florida Surplus Lines Service Office (FSLSO or Office) within 30 days after the effective date of

[1] An earlier version of s. 624.425, F.S., required a countersignature by a licensed agent who was a Florida resident. The residency requirement was held invalid in *Council of Insurance Agents and Brokers v. Gallagher*, 287 F.Supp.2d 1302 (N.D. Fla. 2003).
[2] *Wolfe v. Aetna Insurance Company*, 436 So.2d 997, 999 (Fla. 5th DCA 1983)
[3] *See Meltsner v. Aetna Casualty and Surety Company of Hartford, Conn.*, 233 So.2d 849, 850 (Fla. 3rd DCA 1969) (holding under the facts of that case that the countersignature requirement was waived).
[4] 43 AM.JUR.2D *Insurance* s. 225.
[5] *See Meltsner*, 233 So. 2d at 850 (finding a waiver of the countersignature requirement); Wolfe, 436 So.2d at 999 (finding a waiver of the countersignature requirement); *CNA Intern. Reinsurance Co. Ltd. v. Phoenix*, 678 So.2d 378 (Fla. 1st DCA 1996) (noting that the countersignature requirement may be waived).
[6] *See FCCI Insurance Company v. Gulfwind Companies, LLC*, 2013 CC 003056 NC (Fla. Sarasota County Court).
[7] *See* s. 624.426, F.S.
[8] *See* s. 626.915(3), F.S.
[9] Section 626.914, F.S., defines a diligent effort as seeking and being denied coverage from at least three authorized insurers in the admitted market unless the cost to replace the property insured is $1 million or more. In that case, diligent effort is seeking and being denied coverage from at least one authorized insurer in the admitted market.

the transaction.[10] They must also transmit service fees to the Office each month and must transmit assessment and tax payments to the Office quarterly.[11] Current law also requires a surplus lines agent to file a quarterly affidavit with the FSLSO to document all surplus lines insurance transacted in the quarter it was submitted to the FSLSO.[12] The affidavit also documents the efforts the agent made to place coverage with authorized insurers and the results of the efforts.[13] The FSLSO audits agents on a tri-annual basis to verify accuracy of submitted data with original source documents.[14]

III. Effect of Proposed Changes:

Countersignatures

This bill provides that the absence of a countersignature does not affect the validity of a policy or contract of insurance. This bill does not repeal the countersignature requirement; it provides that the failure to obtain a countersignature does not invalidate the policy or contract.

Surplus Lines

This bill repeals s. 626.931(1) and s. 626.931(2), F.S., requiring a surplus lines agent to file quarterly reports stating that all surplus lines transactions have been submitted to the FSLSO and requiring that such reports include an affidavit of diligent effort. The FSLSO reports that the provisions are no longer necessary. The FSLSO receives the information relating to the surplus lines transactions from the agents and the insurers and has implemented audit procedures to verify the information. The diligent effort affidavit is required under s. 626.916(1), F.S.

Existing law requires that before issuing surplus lines coverage, a surplus lines agent must verify that a diligent effort has been made by the producing agent to obtain coverage. As part of the verification process, the surplus lines agent must obtain a properly documented statement of diligent effort from the producing agent. Before the surplus lines agent may rely on the statement of diligent effort, the surplus lines agent must find the producing agent's efforts to be reasonable. Under existing s. 926.916(1)(a), F.S., reasonableness will "be assessed by taking into account factors which include, but are not limited to, a regularly conducted program of verification of the information provided by the retail or producing agent." This bill removes the statutory definition of reasonableness. Reasonableness will now be determined on a case by case basis.

Financial Guaranty Insurance

Existing s. 627.971(1)(a), F.S., defines financial guaranty insurance. It means a surety bond, insurance policy, an indemnity contract that is issued by an insurer, or any similar guaranty, under which a loss is payable upon proof of the occurrence of financial loss to an insured, obligee, or indemnitee as a result of certain enumerated events. Existing s. 627.971(1)(b), F.S.,

[10] *See* s. 626.921, F.S. (requiring reports of transactions as required by the FSLSO Plan of Operation); Florida Surplus Lines Office, *Agent's Procedures Manual*, (Jan. 2015) http://www.fslso.com/publications/manuals/Agents.Procedures.Manual.pdf (requiring reports within 30 days).
[11] *See* ss. 626.932, 626.9325, F.S.
[12] *See* s. 626.931(1), F.S.
[13] *See* s. 626.932(2), F.S.
[14] E-mail from the FSLSO (on file with the Committee on Banking and Insurance).

however, lists 13 categories of what financial guaranty insurance does *not* include. The bill amends that section to provide that financial guaranty insurance does not include guarantees of higher education loans, unless written by a financial guaranty insurance corporation. This language conforms the current definition to the model Financial Guaranty Insurance Guideline of the National Association of Insurance Commissioners.

This bill makes conforming changes to ss. 626.932, 626.935, and 626.936, F.S.

This bill takes effect July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may reduce costs to surplus lines agents by eliminating the requirement to file a quarterly report.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 624.425, 626.916, 626.931, 626.932, 626.935, and 626.936.

IX. Additional Information:

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

CS by Judiciary Committee on March 31, 2015:
The committee substitute:

- Deletes the statutory definition of what constitutes "reasonableness" in a surplus lines agent's reliance on a producing agent's efforts to find coverage before seeking surplus lines coverage;
- Deletes language from the bill about the specifications for a statement of diligent effort form that was to be prescribed by rule by the Department of Financial Services. Accordingly, DFS is not required to develop a form or engage in rulemaking.
- Provides that "financial guaranty insurance" does not include guarantees of higher education loans unless they are written by a financial guaranty insurance corporation.

CS by Banking and Insurance on March 4, 2015:
The committee substitute removes a provision of the bill providing that the bill was retroactive until 1959. It also repeals s. 626.931(1) and s. 626.931(2), F.S., requiring a surplus lines agent to file quarterly reports stating that all surplus lines transactions have been submitted to the FSLSO and requiring that such reports include an affidavit of diligent effort.

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
04/01/2015	.	
	.	
	.	
	.	

The Committee on Judiciary (Soto) recommended the following:

Senate Amendment (with title amendment)

Delete lines 37 - 50

and insert:

statement of diligent effort from the retail or producing agent. However, to be in compliance with the diligent effort requirement, the surplus lines agent's reliance must be reasonable under the particular circumstances surrounding the export of that particular risk. ~~Reasonableness shall be assessed by taking into account factors which include, but are not limited to, a regularly conducted program of verification of the~~

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~~information provided by the retail or producing agent.~~
Declinations must be documented on a risk-by-risk basis. If it is not possible to obtain the full amount of insurance required by layering the risk, it is permissible to export the full amount.

Section 3. Paragraph (b) of subsection (1) of section 627.971, Florida Statutes, is amended to read

627.971 Definitions.—As used in this part:

(1)

(b) However, "financial guaranty insurance" does not include:

1. Insurance of a loss resulting from an event described in paragraph (a), if the loss is payable only upon the occurrence of any of the following, as specified in a surety bond, insurance policy, or indemnity contract:

a. A fortuitous physical event;

b. A failure of or deficiency in the operation of equipment; or

c. An inability to extract or recover a natural resource;

2. An individual or schedule public official bond;

3. A court bond required in connection with judicial, probate, bankruptcy, or equity proceedings, including a waiver, probate, open estate, or life tenant bond;

4. A bond running to a federal, state, county, municipal government, or other political subdivision, as a condition precedent to the granting of a license to engage in a particular business or of a permit to exercise a particular privilege;

5. A loss security bond or utility payment indemnity bond running to a governmental unit, railroad, or charitable

organization;

6. A lease, purchase and sale, or concessionaire surety bond;

7. Credit unemployment insurance on a debtor in connection with a specific loan or other credit transaction, to provide payments to a creditor in the event of unemployment of the debtor for the installments or other periodic payments becoming due while a debtor is unemployed;

8. Credit insurance indemnifying a manufacturer, merchant, or educational institution which extends credit against loss or damage resulting from nonpayment of debts owed to her or him for goods or services provided in the normal course of her or his business;

9. Guaranteed investment contracts that are issued by life insurance companies and that provide that the life insurer will make specified payments in exchange for specific premiums or contributions;

10. Mortgage guaranty insurance as defined in s. 635.011(1) or s. 635.021;

11. Indemnity contracts or similar guaranties, to the extent that they are not otherwise limited or proscribed by this part, in which a life insurer guarantees:

a. Its obligations or indebtedness or the obligations or indebtedness of a subsidiary of which it owns more than 50 percent, other than a financial guaranty insurance corporation, if:

(I) For any such obligations or indebtedness that are backed by specific assets, such assets are at all times owned by the insurer or the subsidiary; and

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(II) For the obligations or indebtedness of the subsidiary that are not backed by specific assets of the life insurer, the guaranty terminates once the subsidiary ceases to be a subsidiary; or

b. The obligations or indebtedness, including the obligation to substitute assets where appropriate, with respect to specific assets acquired by a life insurer in the course of normal investment activities and not for the purpose of resale with credit enhancement, or guarantees obligations or indebtedness acquired by its subsidiary, provided that the assets so acquired have been:

(I) Acquired by a special purpose entity where the sole purpose is to acquire specific assets of the life insurer or the subsidiary and issue securities or participation certificates backed by such assets; or

(II) Sold to an independent third party; or

c. The obligations or indebtedness of an employee or agent of the life insurer;

12. Any form of surety insurance as defined in s. 624.606;

13. Guarantees of higher education loans, unless written by a financial guaranty insurance corporation; or

14.~~13.~~ Any other form of insurance covering risks which the office determines to be substantially similar to any of the foregoing.

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

And the title is amended as follows:

Delete lines 5 - 7

and insert:

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of insurance; amending s. 626.916, F.S.; revising the required conditions for the export of insurance coverage to delete a provision specifying how reasonableness shall be assessed under certain circumstances; amending s. 627.971, F.S.; providing that the term "financial guaranty insurance" does not include guarantees of higher education loans unless written by a financial guaranty insurance corporation; amending s.

By the Committee on Banking and Insurance; and Senator Smith

597-01934-15 2015252c1

A bill to be entitled

An act relating to insurance; amending s. 624.425, F.S.; providing that the absence of a countersignature does not affect the validity of a policy or contract of insurance; amending s. 626.916, F.S.; requiring the statement of diligent effort from a retail or producing agent be in a specified form; amending s. 626.931, F.S.; deleting provisions that require surplus lines agents to file a quarterly affidavit with the Florida Surplus Lines Office; amending ss. 626.932, 626.935, and 626.936, F.S.; conforming provisions to changes made by act; providing an effective date.

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

Section 1. Subsection (6) is added to section 624.425, Florida Statutes, to read:

624.425 Agent countersignature required, property, casualty, surety insurance.—

(6) The absence of a countersignature required under this section does not affect the validity of a policy or contract of insurance.

Section 2. Paragraph (a) of subsection (1) of section 626.916, Florida Statutes, is amended to read:

626.916 Eligibility for export.—

(1) No insurance coverage shall be eligible for export unless it meets all of the following conditions:

(a) The full amount of insurance required must not be

597-01934-15 2015252c1

procurable, after a diligent effort has been made by the producing agent to do so, from among the insurers authorized to transact and actually writing that kind and class of insurance in this state, and the amount of insurance exported shall be only the excess over the amount so procurable from authorized insurers. Surplus lines agents must verify that a diligent effort has been made by requiring a properly documented statement of diligent effort, which must be in the form prescribed by department rule or, if a form is not prescribed by rule, in the form of an affidavit, from the retail or producing agent. However, to be in compliance with the diligent effort requirement, the surplus lines agent's reliance must be reasonable under the particular circumstances surrounding the export of that particular risk. Reasonableness shall be assessed by taking into account factors which include, but are not limited to, a regularly conducted program of verification of the information provided by the retail or producing agent. Declinations must be documented on a risk-by-risk basis. If it is not possible to obtain the full amount of insurance required by layering the risk, it is permissible to export the full amount.

Section 3. Section 626.931, Florida Statutes, is amended to read:

626.931 ~~Agent affidavit and~~ Insurer reporting requirements.—

~~(1) Each surplus lines agent shall on or before the 45th day following each calendar quarter file with the Florida Surplus Lines Service Office an affidavit, on forms as prescribed and furnished by the Florida Surplus Lines Service~~

~~Office, stating that all surplus lines insurance transacted by him or her during such calendar quarter has been submitted to the Florida Surplus Lines Service Office as required.~~

~~(2) The affidavit of the surplus lines agent shall include efforts made to place coverages with authorized insurers and the results thereof.~~

(1) ~~(3)~~ Each foreign insurer accepting premiums shall, on or before the end of the month following each calendar quarter, file with the Florida Surplus Lines Service Office a verified report of all surplus lines insurance transacted by such insurer for insurance risks located in this state during such calendar quarter.

(2) ~~(4)~~ Each alien insurer accepting premiums shall, on or before June 30 of each year, file with the Florida Surplus Lines Service Office a verified report of all surplus lines insurance transacted by such insurer for insurance risks located in this state during the preceding calendar year.

(3) ~~(5)~~ The department may waive the filing requirements described in subsections (1) and (2) ~~(3) and (4)~~.

(4) ~~(6)~~ Each insurer's report and supporting information shall be in a computer-readable format as determined by the Florida Surplus Lines Service Office or shall be submitted on forms prescribed by the Florida Surplus Lines Service Office and shall show for each applicable agent:

(a) A listing of all policies, certificates, cover notes, or other forms of confirmation of insurance coverage or any substitutions thereof or endorsements thereto and the identifying number; and

(b) Any additional information required by the department

or Florida Surplus Lines Service Office.

Section 4. Paragraph (a) of subsection (2) of section 626.932, Florida Statutes, is amended to read:

626.932 Surplus lines tax.—

(2)(a) The surplus lines agent shall make payable to the department the tax related to each calendar quarter's business as reported to the Florida Surplus Lines Service Office, and remit the tax to the Florida Surplus Lines Service Office on or before the 45th day following each calendar quarter ~~at the same time as provided for the filing of the quarterly affidavit, under s. 626.931~~. The Florida Surplus Lines Service Office shall forward to the department the taxes and any interest collected pursuant to paragraph (b), within 10 days of receipt.

Section 5. Paragraph (d) of subsection (1) of section 626.935, Florida Statutes, is amended to read:

626.935 Suspension, revocation, or refusal of surplus lines agent's license.—

(1) The department shall deny an application for, suspend, revoke, or refuse to renew the appointment of a surplus lines agent and all other licenses and appointments held by the licensee under this code, on any of the following grounds:

~~(d) Failure to make and file his or her affidavit or reports when due as required by s. 626.931.~~

Section 6. Subsection (1) of section 626.936, Florida Statutes, is amended to read:

626.936 Failure to file reports or pay tax or service fee; administrative penalty.—

(1) Any licensed surplus lines agent who neglects to file a report ~~or an affidavit~~ in the form and within the time required

or provided for in the Surplus Lines Law may be fined up to $50 per day for each day the neglect continues, beginning the day after the report ~~or affidavit~~ was due until the date the report ~~or affidavit~~ is received. All sums collected under this section shall be deposited into the Insurance Regulatory Trust Fund.

Section 7. This act shall take effect July 1, 2015.

The Florida Senate

COMMITTEE VOTE RECORD

COMMITTEE: Judiciary
ITEM: CS/SB 252
FINAL ACTION: Favorable with Committee Substitute
MEETING DATE: Tuesday, March 31, 2015
TIME: 4:00 —6:00 p.m.
PLACE: 110 Senate Office Building

FINAL VOTE			3/31/2015 1 Amendment 924126 Soto					
Yea	**Nay**	**SENATORS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
X		Bean						
X		Benacquisto						
X		Brandes						
X		Joyner						
X		Simmons						
X		Simpson						
X		Soto						
X		Stargel						
		Ring, VICE CHAIR						
X		Diaz de la Portilla, CHAIR						
9	0	**TOTALS**	RCS	-				
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

The Florida Senate

Committee Agenda Request

To: Senator Miguel Diaz de la Portilla, Chair
Committee on Judiciary

Subject: Committee Agenda Request

Date: March 17, 2015

I respectfully request that **Senate Bill #252**, relating to Insurance Countersignature, be placed on the:

☒ committee agenda at your earliest possible convenience.

☐ next committee agenda.

Senator Christopher L. Smith
Florida Senate, District 31

File signed original with committee office

S-020 (03/2004)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31
Meeting Date

CS/SB 252
Bill Number (if applicable)

924126
Amendment Barcode (if applicable)

Topic INSURANCE

Name DOUG MANG

Job Title

Address 1424 PIEDMONT DR
Street
TALLY FL 32308
City *State* *Zip*

Phone 509-2511

Email DMANG@MANGLAW.COM

Speaking: [X] For [ ] Against [ ] Information

Waive Speaking: [ ] In Support [ ] Against
(The Chair will read this information into the record.)

Representing FLA SURPLUS LINES ASSOC

Appearing at request of Chair: [ ] Yes [X] No

Lobbyist registered with Legislature: [X] Yes [ ] No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	CS/SB 568
INTRODUCER:	Banking and Insurance Committee and Senator Richter
SUBJECT:	Family Trust Companies
DATE:	March 30, 2015
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Billmeier	Knudson	BI	**Fav/CS**
2.	Davis	Cibula	JU	**Favorable**
3.			FP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 568 amends the Florida Family Trust Company Act. Chapter 662, F.S., was created in 2014 to allow families to form and operate private or family trust companies that provide trust services similar to those that can be provided by an individual trustee or a financial institution. Family trust companies are owned exclusively by family members and may not provide fiduciary services to the public. These private, family trust companies are generally formed to manage the wealth of high net-worth families in lieu of traditional individual or institutional trustee arrangements for a variety of personal, investment, regulatory, and tax reasons.

Chapter 662, F.S., authorized the creation of three types of family trust companies: licensed family trust companies, foreign family trust companies, and unlicensed family trust companies. This bill amends ch. 662, F.S., to:

- Provide that the office must conduct an examination of a licensed family trust company every 36 months instead of the current 18 months. The bill does not allow an audit to substitute for an examination conducted by the office;
- Remove the requirement that the office conduct examinations of unlicensed family trust companies;
- Require that a court determine there has been a breach of fiduciary duty or trust before the Office of Financial Regulation ("OFR" or "the office") may enter a cease and desist order;
- Require all family trust companies in operation on October 1, 2015, to apply for licensure as a licensed family trust company, register as a family trust company, register as a foreign licensed family trust company, or cease doing business in this state by December 30, 2015.

- Make legislative findings that clarify that the OFR is responsible for the regulation, supervision, and examinations of licensed family trust companies, but that for unlicensed or foreign family trust companies the role of the OFR is limited to ensuring that services provided by such companies are provided only to family members and not to the general public;
- Require the management of a licensed family trust company to have at least three directors or managers and require that at least one of those directors or managers be a Florida resident;
- Provide that a family trust company registration application must state that trust operations will comply with statutory provisions relating to requirements in organizational documents and relating to minimum capital requirements;
- Provide that the designated relatives in a licensed family trust company may not have a common ancestor within three generations instead of the current five generations;
- Require that a registration application for a foreign licensed family trust company must provide proof that the company is in compliance with the family trust company laws and regulations of its principal jurisdiction;
- Require that amendments to certificates of formation or certificates of organization be submitted to the OFR for review at least 30 days before it is filed or effective;
- Create a mechanism for the automatic reinstatement of lapsed licenses and registrations by payment of appropriate fees and any fines imposed by the OFR; and
- Allow family trust companies, licensed family trust companies, and foreign licensed family trust companies to file annual renewal applications within 45 days after the end of each calendar year.

II. Present Situation:

The Family Trust Company

A family trust company provides trust services to a group of related people but is prohibited from providing services to the general public. This includes serving as a trustee of trusts held for the benefit of the family members, as well as providing other fiduciary, investment advisory, wealth management, and administrative services to the family. A family might wish to form a family trust company in order to keep family matters more private than they would be if turned over to an independent trustee, to gain liability protection, to establish its own trust fee structure, and to obtain tax advantages. Traditional trust companies require regulatory oversight, licensing of investment personnel, public disclosure and capitalization requirements considered by practitioners to be overbroad and intrusive for the family trust.

In 2014, the Legislature authorized the creation of family trust companies in Florida.[1] The legislation takes effect on October 1, 2015.[2] At least 14 other states currently have statutes governing the organization and operation of family trust companies.

[1] Chapter 2014-97, Laws of Fla.
[2] *Id*.

Types of Family Trust Companies

Chapter 662, F.S., creates three types of family trust companies: family trust companies, licensed family trust companies, and foreign licensed family trust companies.[3]

A "family trust company" is a corporation or limited liability company (LLC) that is exclusively owned by one or more family members, is organized or qualified to do business in Florida, acts or proposes to act as a fiduciary to serve one or more family members, and does not serve as a fiduciary for a person, entity, trust, or estate that is not a family member, except that it may serve as a fiduciary for up to 35 individuals who are not family members if the individuals are current or former employees of the family trust company or one or more trusts, companies, or other entities that are family members.[4]

A "licensed family trust company" means a family trust company that operates in accordance with ch. 662. F.S., and has been issued a license that has not been revoked or suspended by the OFR.[5]

A "foreign licensed family trust company" means a family trust company that is licensed by a state other than Florida, has its principal place of business in a jurisdiction in the United States other than Florida, is operated in accordance with family or private trust company laws of a jurisdiction other than Florida, and is subject to statutory or regulatory mandated supervision by the jurisdiction in which the principal place of business is located.[6]

Powers of a Family Trust Company

Section 662.130, F.S., provides that a family trust company and a licensed family trust company may, for its eligible members and individuals:

- Act as a sole or copersonal representative, executor, or curator for probate estates being administered in a state or jurisdiction other than Florida.
- Act as an attorney-in-fact or agent under a power of attorney, other than a power of attorney governed by ch. 709, F.S.
- Act within or outside of Florida as sole fiduciary or cofiduciary and possess, purchase, sell, invest, reinvest, safekeep, or otherwise manage or administer the real or personal property of eligible individuals and members.
- Exercise the powers of a corporation or LLC incorporated or organized under Florida law, or qualified to transact business as a foreign corporation or LLC under Florida law, which are reasonably necessary to enable it to fully exercise, in accordance with commonly accepted customs and usages, a power conferred by the Florida Family Trust Company Act.
- Delegate duties and powers, including investment functions under s. 518.112, F.S., in accordance with the powers granted to a trustee under ch. 736, F.S., or other applicable law, and retain agents, attorneys, accountants, investment advisers, or other individuals or entities to advise or assist the family trust company, licensed family trust company, or foreign licensed family trust company in the exercise of its powers and duties.

[3] Chapter 662, F.S., was created by 2014-97, L.O.F.
[4] *See* s. 662.111(12), F.S.
[5] *See* s. 662.111(16), F.S.
[6] *See* s. 662.111(15), F.S.

- Perform all acts necessary for exercising these powers.

Capital Requirements

Section 662.124, F.S., provides minimum capital requirements. A family trust company or a licensed family trust company that has one designated relative may not be organized or operated with an owner's capital account of less than $250,000.

Licensed Family Trust Companies

Section 662.121, F.S., requires a company seeking to be licensed as a licensed family trust company to file an application with the OFR. When a company files an application for licensure as a licensed family trust company, s. 662.1215, F.S., requires the OFR to conduct an investigation to confirm that persons who will serve as directors or officers of the corporation or, if the applicant is a LLC, managers or members acting in a managerial capacity, have not:

- Been convicted of, or entered a plea of nolo contendere to, a crime involving fraud, misrepresentation, or moral turpitude;
- Been convicted of, or pled nolo contendere to, a violation of the financial institutions codes or similar state or federal laws;
- Been directors or executive officers of a financial institution licensed or chartered under the financial institutions codes or by the Federal Government or any other state, the District of Columbia, a territory of the United States, or a foreign country, whose license or charter was suspended or revoked within the 10 years preceding the date of the application;
- Had a professional license suspended or revoked within 10 years preceding the application; or
- Made a false statement of material fact on the application.

The OFR must also confirm that the name of the proposed company complies with naming requirements, that capital accounts of the proposed company conform to relevant law, that the fidelity bonds and errors and omissions insurance coverage required are issued and effective, and that the articles of incorporation or articles of organization conform to applicable law. If the OFR determines the application does not meet statutory criteria, it must issue a notice of intent to deny the application and offer the applicant an opportunity for an administrative hearing.[7]

Management of Family Trust Companies

Section 662.125, F.S., provides that exclusive authority to manage a licensed family trust company is vested in a board of directors, if a corporation, or a board of directors or managers, if a limited liability company. A licensed family trust company must have at least three directors or managers and at least one director or manager of the company must be a resident of this state.

[7] *See* s. 662.1215(4), F.S.

Renewal of Licensure or Registration

Section 662.128, F.S., requires family trust companies, licensed family trust companies, and foreign licensed family trust companies to file renewal applications with the OFR within 30 days after the end of each calendar year.

Examinations and Investigations by the OFR

Section 662.141, F.S., provides that the office may conduct an examination or investigation of a family trust company, licensed family trust company, or foreign licensed family trust company at any time it deems necessary to determine whether a family trust company, licensed family trust company, or foreign licensed family trust company has violated or is about to violate any provision of ch. 662, F.S., any relevant administrative rules, or any applicable provision of the financial institution codes. Section 662.141(1), F.S., requires the office to conduct an examination of a licensed family trust company, family trust company, and foreign licensed family trust company at least once every 18 months. The office may accept an audit in lieu of conducting an entire examination in certain circumstances.[8]

There is concern among practitioners that the current regulatory scheme in ch. 662, F.S., does not allow licensed family trust companies to qualify for the "bank exemption" with the federal Securities and Exchange Commission.[9] If these companies do not qualify for the "bank exemption," they will be required to register as investment advisers with the federal regulator.[10]

Cease and Desist Authority

Section 662.143, F.S., gives the OFR the power to order a family trust company, licensed family trust company, or foreign licensed family trust company to cease and desist from engaging in specified activities or practices. If the OFR believes there could be a violation, it must give the entity notice of the violation and an opportunity for an administrative hearing.[11] One of the specific practices that the OFR can take action against is if it has reason to believe that a family trust company, licensed family trust company, or foreign licensed family trust company is engaging in or has engaged in an act of commission or omission or a practice that is a breach of trust or of fiduciary duty.

III. Effect of Proposed Changes:

Section 1 of this bill amends the findings of the Family Trust Company Act to clarify that the OFR is responsible for the regulation, supervision, and examinations of licensed family trust companies, but that the office's role is limited to ensuring that services provided by unlicensed or foreign family trust companies are provided to family members and not to the general public.

[8] *See* s. 662.141(2), F.S.
[9] Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper on Proposed Changes to the Florida Family Trust Company Act, Florida Statutes Chapter 662* (2015) (on file with the Senate Committee on Judiciary).
[10] *Id*.
[11] *See* s. 662.143(2), F.S.

Changes to Licensed Family Trust Companies

Section 5 of the bill amends s. 662.1215, F.S., to include within the OFR initial licensure investigation of an applicant seeking to be recognized as a licensed family trust company, verification that the management of a licensed family trust company complies with s. 662.125, F.S. That statute requires a family trust company or licensed family trust company to have at least three directors or managers and requires that at least one of those directors or managers be a Florida resident.

Section 11 of this bill amends s. 662.141, F.S., to provide that the office must conduct an examination of a licensed family trust company every 36 months instead of the current 18 months. The bill does not allow an audit to substitute for an examination conducted by the office.

Section 12 of this bill amends s. 662.142, F.S., to clarify that a licensed family trust company is entitled to an administrative hearing pursuant to ch. 120, F.S., to contest a license revocation.

Changes to Unlicensed Family Trust Companies

Section 6 of this bill provides that a family trust company registration application must state that its operations will comply with s. 662.123(1), F.S., relating to requirements in organizational documents, and s. 662.124, F.S., relating to minimum capital requirements.

Section 11 of this bill removes the requirement that the office conduct examinations of unlicensed family trust companies. The OFR may conduct examinations of such entities at any time it deems necessary to determine whether the entities have engaged in activities prohibited by statute.

Other Provisions of the Bill

Section 2 makes a technical change to the definition of "officer."

Section 3 provides that the financial institutions codes do not apply to family trust companies, licensed family trust companies, or foreign family trust companies unless specifically made applicable by ch. 662, F.S., in order to make ch. 662 a stand-alone statute for family trust companies. It further provides that this does not limit the office's power to investigate any entity to determine compliance with ch. 662 or applicable provisions of the financial institutions codes.

Section 4 of this bill provides that the designated relatives in licensed family trust company may not have a common ancestor within three generations instead of the current five generations.[12]

Section 6 of this bill requires that a registration application for a foreign licensed family trust company must provide proof that the company is in compliance with the family trust company laws and regulations of its principal jurisdiction.

[12] "Designated relative" means a common ancestor of a family, who may be a living or deceased person, and who is so designated in the application for a license.

Section 7 of this bill requires a foreign licensed family trust company to be in compliance with the laws of its principal jurisdiction in order to operate in Florida. The bill requires all family trust companies in operation on October 1, 2015, to either apply for licensure as a licensed family trust company, register as a family trust company, register as a foreign licensed family trust company, or cease doing business in this state. The application or registration must be filed by December 30, 2015.

Section 8 of this bill requires amendments to certificates of formation or certificates of organization to be submitted to the OFR at least 30 days before it is filed or effective. It removes the requirement that bylaws or articles of organization be submitted to this OFR.

Section 9 of the bill allows family trust companies, licensed family trust companies, and foreign licensed family trust companies to file annual renewal applications within 45 days after the end of each calendar year. Current law allows 30 days. This bill also requires a family trust company registration renewal application to certify compliance with capital requirements and statutes relating to organizational documents.

Section 10 of the bill removes references to the term "affiliate" and replaces it with "parent" or "subsidiary company" in s. 662.132, F.S., to prevent confusion with the term "family affiliate" defined in s. 662.111, F.S. It also provides that a family trust company or licensed family trust company may purchase bonds and securities directly from broker-dealers when acting as a fiduciary.

Section 13 of this bill allows the OFR to serve a complaint against a family trust company, licensed family trust company, or foreign licensed family trust company if a court has determined that there has been a breach of trust or fiduciary duty.

Section 14 of this bill provides a mechanism to reinstate the license or registration of a family trust company, licensed family trust company, or foreign licensed family trust company that was terminated for failure to timely file an annual renewal. The bill provides that a family trust company may have its license or registration automatically reinstated by submitting the renewal application, renewal fee, a $500 late fee, and any fine imposed by the OFR. Fees and fines collected pursuant to this section will be deposited into the Financial Institutions' Regulatory Trust Fund to administer the chapter.

Sections 15 and 16 of this bill make technical changes.

Section 17 of this bill repeals s. 662.151(3), F.S., relating to licensure and registration. The bill transfers this provision of law to s. 662.1225, F.S.

Section 18 of this bill provides an effective date of October 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Proponents of the bill expect that, as a result of this legislation, high net worth families who are not located in Florida may select Florida as the jurisdiction to establish FTCs, which may benefit the investment, accounting, legal, and advisory support service professions.[13]

C. Government Sector Impact:

The OFR does not anticipate a fiscal impact on state government.[14]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 662.102, 662.111, 662.120, 662.1215, 662.122, 662.1225, 662.123, 662.128, 662.132, 662.141, 662.142, 662.143, 662.145, 662.150, and 662.151.

This bill creates section 662.113 of the Florida Statutes.

[13] Real Property, Probate, and Trust Law Section of the Florida Bar, *supra* note 9.
[14] Office of Financial Regulation, *Senate Bill 568 Fiscal Analysis* (Feb. 27, 2015) (on file with the Senate Committee on Judiciary).

IX. Additional Information:

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

CS by Banking and Insurance on March 4, 2015:
The committee substitute clarifies that the OFR may investigate any entity to determine compliance with ch. 662, F.S. The CS provides that family trust companies operating on October 1, 2015, must apply for licensure or registration by December 30, 2015. It allows a family trust company or licensed family trust company to make purchases as a fiduciary directly from broker-dealers. The CS also expands the scope of examinations of licensed family trust companies and provides procedures for reinstatements of licenses or registrations.

B. Amendments:

None.

By the Committee on Banking and Insurance; and Senator Richter

597-01933-15 2015568c1

A bill to be entitled

An act relating to family trust companies; amending s. 662.102, F.S.; revising the purposes of the Family Trust Company Act; providing legislative findings; amending s. 662.111, F.S.; redefining the term "officer"; creating s. 662.113, F.S.; specifying the applicability of other chapters of the financial institutions codes to family trust companies; providing that the section does not limit the authority of the Office of Financial Regulation to investigate any entity to ensure that it is not in violation of ch. 662, F.S., or applicable provisions of the financial institutions codes; amending s. 662.120, F.S.; revising the ancestry requirements for designated relatives of a licensed family trust company; amending s. 662.1215, F.S.; revising the requirements for investigations of license applicants by the Office of Financial Regulation; amending s. 662.122, F.S.; revising the requirements for registration of a family trust company and a foreign licensed family trust company; amending s. 662.1225, F.S.; requiring a foreign licensed family trust company to be in compliance with the family trust laws and regulations in its jurisdiction; specifying the date upon which family trust companies must be registered or licensed or, if not registered or licensed, cease doing business in this state; amending s. 662.123, F.S.; revising the types of amendments to organizational documents which must have prior

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

597-01933-15 2015568c1

approval by the office; amending s. 662.128, F.S.; extending the deadline for the filing of, and revising the requirements for, specified license and registration renewal applications; amending s. 662.132, F.S.; revising the authority of specified family trust companies while acting as fiduciaries to purchase certain bonds and securities; revising the prohibition against the purchase of certain bonds or securities by specified family trust companies; amending s. 662.141, F.S.; revising the purposes for which the office may examine or investigate a family trust company that is not licensed and a foreign licensed family trust company; deleting the requirement that the office examine a family trust company that is not licensed and a foreign licensed family trust company; providing that the office may rely upon specified documentation that identifies the qualifications of beneficiaries as permissible recipients of family trust company services; deleting a provision that authorizes the office to accept an audit by a certified public accountant in lieu of an examination by the office; authorizing the Financial Services Commission to adopt rules establishing specified requirements for family trust companies; amending s. 662.142, F.S.; deleting a provision that authorizes the office to immediately revoke the license of a licensed family trust company under certain circumstances; revising the circumstances under which the office may enter an order revoking the

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

license of a licensed family trust company; amending s. 662.143, F.S.; revising the acts that may result in the entry of a cease and desist order against specified family trust companies and affiliated parties; amending s. 662.144, F.S.; authorizing a family trust company to have its terminated registration or revoked license reinstated under certain circumstances; revising the timeframe for a family trust company to wind up its affairs under certain circumstances; requiring the deposit of certain fees and fines in the Financial Institutions' Regulatory Trust Fund; amending s. 662.145, F.S.; revising the office's authority to suspend a family trust company-affiliated party who is charged with a specified felony or to restrict or prohibit the participation of such party in certain financial institutions; s. 662.150, F.S.; making a technical change; amending s. 662.151, F.S.; conforming a provision to changes made by the act; providing an effective date.

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

Section 1. Section 662.102, Florida Statutes, is amended to read:

662.102 Purposes; findings ~~Purpose~~.—The purposes ~~purpose~~ of the Family Trust Company Act are ~~is~~ to establish requirements for licensing family trust companies, to regulate ~~provide regulation of those~~ persons who provide fiduciary services to

family members of no more than two families and their related interests as a family trust company, and to establish the degree of regulatory oversight required of the Office of Financial Regulation over such companies. The ~~Unlike trust companies formed under chapter 658, there is no~~ public interest ~~to be~~ served by this chapter is to ensure ~~outside of ensuring~~ that fiduciary activities performed by a family trust company are restricted to family members and their related interests and as otherwise provided ~~for~~ in this chapter. Therefore, the Legislature finds that:

(1) A family trust company is ~~companies are~~ not a financial institution ~~institutions~~ within the meaning of the financial institutions codes~~., and~~ Licensure of such a company ~~these companies~~ pursuant to chapters 658 and 660 is ~~should~~ not ~~be~~ required as it would not promote the purposes of the codes specified ~~as set forth~~ in s. 655.001.

(2) A family trust company may elect to be a licensed family trust company under this chapter if the company desires to be subject to the regulatory oversight of the office, as provided in this chapter, notwithstanding that the company restricts its services to family members.

(3) With respect to: ~~Consequently, the office~~

(a) A licensed ~~of Financial Regulation is not responsible for regulating~~ family trust company, the office is responsible for regulating, supervising, and examining the company as provided under this chapter.

(b) A family trust company that does not elect to be licensed and a foreign licensed family trust company, ~~companies to ensure their safety and soundness, and the responsibility of~~

the office's role ~~office~~ is limited to ensuring that fiduciary services provided by the company ~~such companies~~ are restricted to family members and authorized related interests and not to the general public. The office is not responsible for examining a family trust company or a foreign licensed family trust company regarding the safety or soundness of its operations.

Section 2. Subsection (19) of section 662.111, Florida Statutes, is amended to read:

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

(19) "Officer" of a family trust company means an individual, regardless of whether the individual has an official title or receives a salary or other compensation, who may participate in the major policymaking functions of a family trust company, other than as a director. The term does not include an individual who may have an official title and exercise discretion in the performance of duties and functions, but who does not participate in determining the major policies of the family trust company and whose decisions are limited by policy standards established by other officers, regardless of whether the policy standards have been adopted by the board of directors. The chair of the board of directors, the president, the chief officer, the chief financial officer, the senior trust officer, and all executive vice presidents of a family trust company, and all managers if organized as a limited liability company, are presumed to be ~~executive~~ officers unless such officer is excluded~~,~~ by resolution of the board of directors or members or by the bylaws or operating agreement of the family trust company, other than in the capacity of a director, from participating in major policymaking functions of the family

trust company, and such excluded officer does not actually participate therein.

Section 3. Section 662.113, Florida Statutes, is created to read:

662.113 Applicability of other chapters of the financial institutions codes.—If a family trust company, licensed family trust company, or foreign licensed family trust company limits its activities to the activities authorized under this chapter, the provisions of other chapters of the financial institutions codes do not apply to the trust company unless otherwise expressly provided in this chapter. This section does not limit the office's authority to investigate any entity to ensure that it is not in violation of this chapter or applicable provisions of the financial institutions codes.

Section 4. Subsection (2) of section 662.120, Florida Statutes, is amended to read:

662.120 Maximum number of designated relatives.—

(2) A licensed family trust company may ~~not~~ have up to ~~more than~~ two designated relatives.~~, and~~ The designated relatives may not have a common ancestor within three ~~five~~ generations.

Section 5. Paragraph (e) is added to subsection (2) of section 662.1215, Florida Statutes, to read:

662.1215 Investigation of license applicants.—

(2) Upon filing an application for a license to operate as a licensed family trust company, the office shall conduct an investigation to confirm:

(e) That the management structure of the proposed company complies with s. 662.125.

Section 6. Paragraph (b) of subsection (1) and paragraphs

(a) and (c) of subsection (2) of section 662.122, Florida Statutes, are amended to read:

662.122 Registration of a family trust company or a foreign licensed family trust company.—

(1) A family trust company that is not applying under s. 662.121 to become a licensed family trust company must register with the office before beginning operations in this state. The registration application must:

(b) State that the family trust company is a family trust company as defined under this chapter and that its operations will comply with ss. 662.1225, 662.123(1), 662.124, 662.125, 662.127, 662.131, and 662.134.

(2) A foreign licensed family trust company must register with the office before beginning operations in this state.

(a) The registration application must state that its operations will comply with ss. 662.1225, 662.125, 662.127, 662.131, and 662.134 and that it is currently in compliance with the family trust company laws and regulations of its principal jurisdiction.

(c) The registration must include a certified copy of a certificate of good standing, or an equivalent document, authenticated by the official having custody of records in the jurisdiction where the foreign licensed family trust company is organized, along with satisfactory proof, as determined by the office, that the company is organized in a manner similar to a family trust company as defined under this chapter and is in compliance with the family trust company laws and regulations of its principal jurisdiction.

Section 7. Subsection (2) of section 662.1225, Florida

Statutes, is amended, and subsection (3) is added to that section, to read:

662.1225 Requirements for a family trust company, licensed family trust company, and foreign licensed family trust company.—

(2) In order to operate in this state, a foreign licensed family trust company must be in good standing in its principal jurisdiction, must be in compliance with the family trust company laws and regulations of its principal jurisdiction, and must maintain:

(a) An office physically located in this state where original or true copies of all records and accounts of the foreign licensed family trust company pertaining to its operations in this state may be accessed and made readily available for examination by the office in accordance with this chapter.

(b) A registered agent who has an office in this state at the street address of the registered agent.

(c) All applicable state and local business licenses, charters, and permits.

(d) A deposit account with a state-chartered or national financial institution that has a principal or branch office in this state.

(3) A company in operation as of October 1, 2015, which meets the definition of a family trust company, must, on or before December 30, 2015, apply for licensure as a licensed family trust company, register as a family trust company or foreign licensed family trust company, or cease doing business in this state.

Section 8. Subsection (2) of section 662.123, Florida Statutes, is amended to read:

662.123 Organizational documents; use of term "family trust" in name.—

(2) A proposed amendment to the articles of incorporation, articles of organization, certificate of formation, or certificate of organization~~, bylaws, or articles of organization~~ of a ~~limited liability company,~~ family trust company~~,~~ or licensed family trust company must be submitted to the office for review at least 30 days before it is filed or effective. An amendment is not considered filed or effective if the office issues a notice of disapproval with respect to the proposed amendment.

Section 9. Subsections (1) through (4) of section 662.128, Florida Statutes, are amended to read:

662.128 Annual renewal.—

(1) Within 45 ~~30~~ days after the end of each calendar year, a family trust company ~~companies~~, licensed family trust company ~~companies~~, or ~~and~~ foreign licensed family trust company ~~companies~~ shall file its ~~their~~ annual renewal application with the office.

(2) The license renewal application filed by a licensed family trust company must include a verified statement by an authorized representative of the trust company that:

(a) The licensed family trust company operated in full compliance with this chapter, chapter 896, or similar state or federal law, or any related rule or regulation. The application must include proof acceptable to the office that the company is a family trust company as defined under this chapter.

(b) Describes any material changes to its operations, principal place of business, directors, officers, managers, members acting in a managerial capacity, and designated relatives since the end of the preceding calendar year.

(3) The registration renewal application filed by a family trust company must include:

(a) A verified statement by an authorized representative ~~officer~~ of the trust company that it is a family trust company as defined under this chapter and that its operations are in compliance with ss. 662.1225, 662.123(1), 662.124, 662.125, 662.127, 662.131, and 662.134~~,~~ chapter 896~~,~~ or similar state or federal law~~,~~ or ~~any~~ related rule or regulation.

(b) ~~, and include~~ The name of the company's ~~its~~ designated relative or relatives, if applicable, and the street address for its principal place of business.

(4) The registration renewal application filed by a foreign licensed family trust company must include a verified statement by an authorized representative of the trust company that its operations are in compliance with ss. 662.1225, 662.125, 662.131, and 662.134 and in compliance with the family trust company laws and regulations of its principal jurisdiction. It must also provide:

(a) The current telephone number and street address of the physical location of its principal place of business in its principal jurisdiction.

(b) The current telephone number and street address of the physical location in this state of its principal place of operations where its books and records pertaining to its operations in this state are maintained.

(c) The current telephone number and address of the physical location of any other offices located in this state.

(d) The name and current street address in this state of its registered agent.

(e) Documentation satisfactory to the office that the foreign licensed family trust company is in compliance with the family trust company laws and regulations of its principal jurisdiction.

Section 10. Subsections (4) and (7) of section 662.132, Florida Statutes, are amended to read:

662.132 Investments.—

(4) Notwithstanding any other law, a family trust company or licensed family trust company may, while acting as a fiduciary, purchase directly from underwriters or broker-dealers ~~distributors~~ or in the secondary market:

(a) Bonds or other securities underwritten or brokered ~~distributed~~ by:

1. The family trust company or licensed family trust company;

2. A family affiliate; or

3. A syndicate, including the family trust company, licensed family trust company, or family affiliate.

(b) Securities of an investment company, including a mutual fund, closed-end fund, or unit investment trust, as defined under the federal Investment Company Act of 1940, for which the family trust company or licensed family trust company acts as an advisor, custodian, distributor, manager, registrar, shareholder servicing agent, sponsor, or transfer agent.

(7) Notwithstanding subsections (1)-(6), a family trust

company or licensed family trust company may not, while acting as a fiduciary, purchase a bond or security issued by the company or its parent, or a subsidiary company ~~an affiliate~~ thereof or its parent, unless:

(a) The family trust company or licensed family trust company is expressly authorized to do so by:

1. The terms of the instrument creating the trust;

2. A court order;

3. The written consent of the settlor of the trust for which the family trust company or licensed family trust company is serving as trustee; or

4. The written consent of every adult qualified beneficiary of the trust who, at the time of such purchase, is entitled to receive income under the trust or who would be entitled to receive a distribution of principal if the trust were terminated; and

(b) The purchase of the security is at a fair price and complies with:

1. The prudent investor rule in s. 518.11~~,~~ or other prudent investor or similar rule under other applicable law, unless ~~such~~ compliance is waived in accordance with s. 518.11 or other applicable law.

2. The terms of the instrument, judgment, decree, or order establishing the fiduciary relationship.

Section 11. Section 662.141, Florida Statutes, is amended to read:

662.141 Examination, investigations, and fees.—The office may conduct an examination or investigation of a ~~family trust company,~~ licensed family trust company~~, or foreign licensed~~

~~family trust company~~ at any time it deems necessary to determine whether the ~~a family trust company,~~ licensed family trust company~~, foreign licensed family trust company,~~ or licensed family trust company-affiliated party thereof ~~person~~ has violated or is about to violate any provision of this chapter, ~~or rules adopted by the commission pursuant to this chapter, or~~ any applicable provision of the financial institution codes, or any rule ~~rules~~ adopted by the commission pursuant to this chapter or the ~~such~~ codes. The office may conduct an examination or investigation of a family trust company or foreign licensed family trust company at any time it deems necessary to determine whether the family trust company or foreign licensed family trust company has engaged in any act prohibited under s. 662.131 or s. 662.134 and, if a family trust company or a foreign licensed family trust company has engaged in such act, to determine whether any applicable provision of the financial institution codes has been violated.

(1) The office may rely upon a certificate of trust, trust summary, or written statement from the trust company which identifies the qualified beneficiaries of any trust or estate for which a family trust company, licensed family trust company, or foreign licensed family trust company serves as a fiduciary and the qualifications of such beneficiaries as permissible recipients of company services.

(2) The office shall conduct an examination of a licensed family trust company~~, family trust company, and foreign licensed family trust company~~ at least once every 36 ~~18~~ months.

~~(2) In lieu of an examination by the office, the office may accept an audit of a family trust company, licensed family trust company, or foreign licensed family trust company by a certified public accountant licensed to practice in this state who is independent of the company, or other person or entity acceptable to the office. If the office accepts an audit pursuant to this subsection, the office shall conduct the next required examination.~~

~~(3)~~ The office shall examine the books and records of a ~~family trust company or~~ licensed family trust company as necessary to determine whether it is a ~~family trust company or~~ licensed family trust company as defined in this chapter~~,~~ and is operating in compliance with this chapter ~~ss. 662.1225, 662.125, 662.126, 662.131, and 662.134, as applicable~~. ~~The office may rely upon a certificate of trust, trust summary, or written statement from the trust company identifying the qualified beneficiaries of any trust or estate for which the family trust company serves as a fiduciary and the qualification of the qualified beneficiaries as permissible recipients of company services. The commission may establish by rule the records to be maintained or requirements necessary to demonstrate conformity with this chapter as a family trust company or licensed family trust company.~~

(3)~~(4)~~ The office shall examine the books and records of a foreign licensed family trust company as necessary to determine if it is a foreign licensed trust company as defined in this chapter and is in compliance with ss. 662.1225, 662.125, 662.130(2), 662.131, and 662.134. In connection with an examination of the books and records of the company, the office may rely upon the most recent examination report or review or certification letters or similar documentation issued by the

regulatory agency to which the foreign licensed family trust company is subject to supervision. ~~The commission may establish by rule the records to be maintained or requirements necessary to demonstrate conformity with this chapter as a foreign licensed family trust company.~~ The office's examination of the books and records of a foreign licensed family trust company is, to the extent practicable, limited to books and records of the operations in this state.

(4)~~(5)~~ For each examination of the books and records of a family trust company, licensed family trust company, or foreign licensed family trust company as authorized under this chapter, the trust company shall pay a fee for the costs of the examination by the office. As used in this section, the term "costs" means the salary and travel expenses of field staff which are directly attributable to the examination of the trust company and the travel expenses of any supervisory and ~~or~~ support staff required as a result of examination findings. The mailing of payment for costs incurred must be postmarked within 30 days after the receipt of a notice stating that the ~~such~~ costs are due. The office may levy a late payment of up to $100 per day or part thereof that a payment is overdue~~,~~ unless waived for good cause. However, if the late payment of costs is intentional, the office may levy an administrative fine of up to $1,000 per day for each day the payment is overdue.

(5)~~(6)~~ All fees collected under this section must be deposited into the Financial Institutions' Regulatory Trust Fund pursuant to s. 655.049 for the purpose of administering this chapter.

(6) The commission may establish by rule the records to be

maintained or requirements necessary to demonstrate conformity with this chapter as a family trust company, licensed family trust company, or foreign licensed family trust company.

Section 12. Section 662.142, Florida Statutes, is amended to read:

662.142 Revocation of license.—

(1) Any of the following acts constitute ~~or conduct constitutes~~ grounds for the revocation by the office of the license of a licensed family trust company:

(a) The company is not a family trust company as defined in this chapter.~~;~~

(b) A violation of s. 662.1225, s. 662.123(1)(a), s. 662.125(2), s. 662.126, s. 662.127, s. 662.128, s. 662.130, s. 662.131, s. 662.134, or s. 662.144.~~;~~

(c) A violation of chapter 896, relating to financial transactions offenses, or a ~~any~~ similar state or federal law or ~~any~~ related rule or regulation.~~;~~

(d) A violation of any rule of the commission.~~;~~

(e) A violation of any order of the office.~~;~~

(f) A breach of any written agreement with the office.~~;~~

(g) A prohibited act or practice under s. 662.131.~~;~~

(h) A failure to provide information or documents to the office upon written request.~~; or~~

(i) An act of commission or omission which ~~that~~ is judicially determined by a court of competent jurisdiction to be a breach of trust or ~~of~~ fiduciary duty ~~pursuant to a court of competent jurisdiction~~.

(2) If the office finds ~~Upon a finding~~ that a licensed family trust company has committed any of the acts specified ~~set~~

~~forth~~ in subsection (1) ~~paragraphs (1)(a) - (h)~~, the office may enter an order suspending the company's license and provide notice of its intention to revoke the license and of the opportunity for a hearing pursuant to ss. 120.569 and 120.57.

(3) If a hearing is not timely requested pursuant to ss. 120.569 and 120.57 or if a hearing is held and it has been determined that the licensed family trust company has committed any of the acts specified in subsection (1) ~~there has been a commission or omission under paragraph (1)(i)~~, the office may ~~immediately~~ enter an order revoking the company's license. A ~~The~~ licensed family trust company has ~~shall have~~ 90 days to wind up its affairs after license revocation. If after 90 days the company is still in operation, the office may seek an order from the circuit court for the annulment or dissolution of the company.

Section 13. Subsection (1) of section 662.143, Florida Statutes, is amended to read:

662.143 Cease and desist authority.—

(1) The office may issue and serve upon a family trust company, licensed family trust company, ~~or~~ foreign licensed family trust company, or ~~upon a~~ family trust company-affiliated party~~,~~ a complaint stating charges if the office has reason to believe that such company, family trust company-affiliated party, or individual named therein is engaging in or has engaged in any of the following acts ~~conduct that~~:

(a) ~~Indicates that~~ The company is not a family trust company or foreign licensed family trust company as defined in this chapter.~~;~~

(b) ~~Is~~ A violation of s. 662.1225, s. 662.123(1)(a), s.

662.125(2), s. 662.126, s. 662.127, s. 662.128, s. 662.130, or s. 662.134.~~;~~

(c) ~~Is~~ A violation of any rule of the commission.~~;~~

(d) ~~Is~~ A violation of any order of the office.~~;~~

(e) ~~Is~~ A breach of any written agreement with the office.~~;~~

(f) ~~Is~~ A prohibited act or practice pursuant to s. 662.131.~~;~~

(g) ~~Is~~ A willful failure to provide information or documents to the office upon written request.~~;~~

(h) ~~Is~~ An act of commission or omission that is judicially determined by ~~or~~ a court of competent jurisdiction ~~practice that the office has reason~~ to be ~~believe is~~ a breach of trust or ~~of~~ fiduciary duty.~~; or~~

(i) ~~Is~~ A violation of chapter 896 or similar state or federal law or any related rule or regulation.

Section 14. Section 662.144, Florida Statutes, is amended to read:

662.144 Failure to submit required report; fines.—If a family trust company, licensed family trust company, or foreign licensed family trust company fails to submit within the prescribed period its annual renewal or any other report required by this chapter or any rule, the office may impose a fine of up to $100 for each day that the annual renewal or report is overdue. Failure to provide the annual renewal within 60 days after the end of the calendar year shall automatically result in termination of the registration of a family trust company or foreign licensed family trust company or revocation of the license of a licensed family trust company. A family trust company may have its registration or license automatically

reinstated by submitting to the office, on or before August 31 of the calendar year in which the renewal application is due, the company's annual renewal application and fee required under s. 662.128, a $500 late fee, and the amount of any fine imposed by the office under this section. A family ~~The~~ trust company that fails to renew or reinstate its registration or license must ~~shall thereafter have 90 days to~~ wind up its affairs on or before November 30 of the calendar year in which such failure occurs. Fees and fines collected under this section shall be deposited into the Financial Institutions' Regulatory Trust Fund pursuant to s. 655.049 for the purpose of administering this chapter.

Section 15. Paragraph (a) of subsection (6) of section 662.145, Florida Statutes, is amended to read:

662.145 Grounds for removal.—

(6) The chief executive officer, or the person holding the equivalent office, of a family trust company or licensed family trust company shall promptly notify the office if he or she has actual knowledge that a family trust company-affiliated party is charged with a felony in a state or federal court.

(a) If a family trust company-affiliated party is charged with a felony in a state or federal court, or is charged with an offense in a court ~~the courts~~ of a foreign country with which the United States maintains diplomatic relations which involves a violation of law relating to fraud, currency transaction reporting, money laundering, theft, or moral turpitude and the charge is equivalent to a felony charge under state or federal law, the office may enter an emergency order suspending the family trust company-affiliated party or restricting or

prohibiting participation by such ~~company-affiliated~~ party in the affairs of that particular family trust company or licensed family trust company or any state financial institution, subsidiary, or service corporation, upon service of the order upon the company and ~~the~~ family trust company-affiliated party ~~so~~ charged.

Section 16. Paragraph (b) of subsection (1) of section 662.150, Florida Statutes, is amended to read:

662.150 Domestication of a foreign family trust company.—

(1) A foreign family trust company lawfully organized and currently in good standing with the state regulatory agency in the jurisdiction where it is organized may become domesticated in this state by:

(b) Filing an application for a license to begin operations as a licensed family trust company in accordance with s. 662.121, which must first be approved by the office, or by filing the prescribed form with the office to register as a family trust company to begin operations in accordance with s. 662.122.

Section 17. Subsection (3) of section 662.151, Florida Statutes, is amended to read:

662.151 Registration of a foreign licensed family trust company to operate in this state.—A foreign licensed family trust company lawfully organized and currently in good standing with the state regulatory agency in the jurisdiction under the law of which it is organized may qualify to begin operations in this state by:

~~(3) A company in operation as of the effective date of this act that meets the definition of a family trust company shall~~

~~have 90 days from the effective date of this act to apply for licensure as a licensed family trust company, register as a family trust company or foreign licensed family trust company, or cease doing business in this state.~~

Section 18. This act shall take effect October 1, 2015.

The Florida Senate

COMMITTEE VOTE RECORD

COMMITTEE: Judiciary
ITEM: CS/SB 568
FINAL ACTION: Favorable
MEETING DATE: Tuesday, March 31, 2015
TIME: 4:00 —6:00 p.m.
PLACE: 110 Senate Office Building

FINAL VOTE								
Yea	**Nay**	**SENATORS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
X		Bean						
X		Benacquisto						
X		Brandes						
X		Joyner						
X		Simmons						
X		Simpson						
X		Soto						
X		Stargel						
		Ring, VICE CHAIR						
X		Diaz de la Portilla, CHAIR						
9	0	**TOTALS**						
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

The Florida Senate

Committee Agenda Request

To: Senator Miguel Diaz de la Portilla, Chair
Committee on Judiciary

Subject: Committee Agenda Request

Date: March 5, 2015

I respectfully request that **Senate Bill #568**, relating to Family Trust Companies, be placed on the:

☒ committee agenda at your earliest possible convenience.

☐ next committee agenda.

Senator Garrett Richter
Florida Senate, District 23

File signed original with committee office

S-020 (03/2004)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3-31-15
Meeting Date

568
Bill Number (if applicable)

Topic _____

Amendment Barcode (if applicable)

Name Pete Dunbar

Job Title _____

Address 215 S. Monroe Ste 815
Street

Tallahassee FL 32301
City *State* *Zip*

Phone 999-4100

Email pdunbar@dunnead.com

Speaking: [X] For [ ] Against [ ] Information

Waive Speaking: [X] In Support [ ] Against
(The Chair will read this information into the record.)

Representing Real Property, Probate & Trust Law Section - Fla Bar

Appearing at request of Chair: [ ] Yes [ ] No

Lobbyist registered with Legislature: [X] Yes [ ] No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/2015
Meeting Date

Topic _____ Bill Number 568 *(if applicable)*

Name BRIAN PITTS Amendment Barcode _____ *(if applicable)*

Job Title TRUSTEE

Address 1119 NEWTON AVNUE SOUTH Phone 727-897-9291
Street

SAINT PETERSBURG FLORIDA 33705 E-mail JUSTICE2JESUS@YAHOO.COM
City *State* *Zip*

Speaking: ☐ For ☐ Against ☑ Information

Representing JUSTICE-2-JESUS

Appearing at request of Chair: ☐ Yes ☑ No Lobbyist registered with Legislature: ☐ Yes ☑ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/20/11)

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:
Ethics and Elections, *Chair*
Banking and Insurance, *Vice Chair*
Appropriations
Appropriations Subcommittee on Health and Human Services
Commerce and Tourism
Regulated Industries
Rules

SENATOR GARRETT RICHTER
President Pro Tempore
23rd District

March 30, 2015

The Honorable Miguel Diaz de la Portilla, Chair
The Committee on Judiciary
515 Knott Building
404 S. Monroe Street
Tallahassee, Florida 32399-1100

Dear Chair Diaz de la Portilla,

Committee Substitute for Senate Bill 568 relating to Family Trust Companies is scheduled to be heard in the Committee on Judiciary Tuesday, March 31st at 4 p.m. Due to conflicts in my schedule, I will be sending my Legislative Assistant, Michael Nachef, as a representative to present the bill for your committee's consideration.

Thank you in advance for your consideration.

Sincerely,

Garrett Richter

cc: Tom Cibula, Staff Director
Shirley Proctor, Committee Administrative Assistant

REPLY TO:
❒ 3299 E. Tamiami Trail, Suite 203, Naples, Florida 34112-4961 (239) 417-6205
❒ 404 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5023
❒ 25 Homestead Road North, Suite 42 B, Lehigh Acres, Florida 33936 (239) 338-2777

Senate's Website: *www.flsenate.gov*

ANDY GARDINER
President of the Senate

GARRETT RICHTER
President Pro Tempore

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 982
INTRODUCER:	Senators Thompson and Smith
SUBJECT:	Florida Civil Rights Act
DATE:	March 30, 2015
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Siples	McKay	CM	**Favorable**
2.	Brown	Cibula	JU	**Favorable**
3.			RC	

I. Summary:

SB 982 amends the Florida Civil Rights Act (FCRA) by expressly prohibiting discrimination because of pregnancy. The FCRA currently prohibits discrimination based on race, creed, color, sex, physical disability, or national origin in the areas of education, employment, housing, and public accommodation. However, the decisions of the district courts of appeal were in conflict as to whether discrimination based on sex includes discrimination based on pregnancy. The conflict among the appellate courts was resolved by the Florida Supreme Court in a 2014 case ruling that discrimination based on pregnancy is subsumed within the prohibition in the FCRA against sex discrimination. This bill effectively codifies that decision.

Although pregnancy discrimination is prohibited under federal law, by specifically permitting a state cause of action for pregnancy discrimination, plaintiffs will have more time to file suit than is available under federal law. After the federal Equal Employment Opportunity Commission concludes an investigation of a complaint and issues a "right-to-sue" letter, the plaintiff has 90 days to file an action in federal court. Plaintiffs bringing pregnancy discrimination cases in state court will have up to 1 year to file after a determination of reasonable cause by the Florida Commission on Human Relations (FCHR). Also, plaintiffs filing a lawsuit against a small-sized employer may be able to recoup greater punitive damages in state court due to the difference in caps on punitive damages in state and federal court.

II. Present Situation:

Title VII of the Civil Rights Act of 1964[1]

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination based on race, color, religion, national origin, or sex. Title VII applies to employers having 15 or more employees and

[1] 42 U.S.C. 2000e et. seq.

outlines a number of unlawful employment practices. Title VII makes it unlawful for employers to refuse to hire, discharge, or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, based on race, color, religion, national origin, or sex.[2]

Pregnancy Discrimination Act[3]

In 1976, the United States Supreme Court ruled in *General Electric Co. v. Gilbert* that Title VII did not provide protection based on pregnancy discrimination.[4] In response, in 1978, Congress passed the Pregnancy Discrimination Act (PDA). The PDA amended Title VII to expressly provide that discrimination because of sex includes discrimination against a woman due to pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.[5]

Americans with Disabilities Act[6]

The Americans with Disabilities Act (ADA) prohibits discrimination based on disability in employment, public accommodation, and telecommunications. The ADA defines disability as a "physical or mental impairment that substantially limits one or more major life activities …; a record of such an impairment; or … being regarded as having such an impairment."[7] Although pregnancy is not generally considered a disability, pregnancy-related impairments may be protected under the ADA if they substantially limit one or more major life activities, such as walking or lifting.[8]

Family and Medical Leave Act[9]

The Family and Medical Leave Act (FMLA) provides that employees of certain covered employers are entitled to take up to 12 weeks of unpaid leave a year for a serious illness, injury, or other health condition that involves continuing treatment by a health care provider. The FMLA also guarantees that employees can return to the same or an equivalent position. To apply, the FMLA sets certain threshold requirements regarding a minimum number of employees and time worked in that position.[10] In addition to providing coverage for birth or adoption, the FMLA authorizes leave for prenatal care, incapacity related to pregnancy, and any serious health condition following childbirth.[11]

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[2] 42 U.S.C. 2000e-2.
[3] Pub. L. No. 95-555, 92 Stat. 2076.
[4] 429 U.S. 125, 145-146 (1976).
[5] The PDA provides that individuals qualifying for protection on the basis of pregnancy must be treated the same for employment purposes, including the receipt of benefits, as any other person who does not have that condition but is similarly able or unable to work.
[6] 42 U.S.C. s. 101.
[7] 42 U.S.C. s. 12102.
[8] Equal Employment Opportunity Commission, *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues* (July 14, 2014), *available at* http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#dissta.
[9] 29 U.S.C. s. 2611 (11)(1993).
[10] The FMLA applies to private employers with at least 50 employees and all public employers. To be eligible for FMLA leave, an individual must have worked for the employer for at least 12 months and must have worked at least 1,250 hours during the 12 months prior to the leave.
[11] For more information, see U.S. Dept. of Labor, Wage and Hour Division, *Family and Medical Leave Act*, http://www.dol.gov/whd/fmla/.

Florida Civil Rights Act

The 1992 Florida Legislature enacted the Florida Civil Rights Act to protect persons from discrimination in education, employment, housing, and public accommodations. In addition to the classes of race, color, religion, sex, and national origin protected in federal law, the FCRA includes age, handicap, and marital status as protected classes.[12]

Similar to Title VII, the FCRA specifically provides a number of actions that, if undertaken by an employer, are considered unlawful employment practices.[13] Unlike Title VII, the FCRA has not been amended to expressly prohibit pregnancy discrimination.

Courts interpreting the FCRA typically follow federal precedent because the FCRA is generally patterned after Title VII. Still, differences between state and federal law persist. As noted above, the FCRA includes age, handicap, and marital status as protected categories. Although Title VII does not include these statuses, other federal laws address age and disability, albeit in a different manner.[14]

Pregnancy Discrimination in Florida

Although Title VII expressly includes pregnancy status as a form of sex discrimination, the FCRA does not. The fact that the FCRA is modeled after Title VII but failed to include this provision caused divisions among federal and state courts as to whether the Legislature intended to provide protection on the basis of pregnancy status. Thus, the ability to bring a claim based on pregnancy discrimination varied among jurisdictions until recently when the Florida Supreme Court ruled that by prohibiting discrimination based on sex, the FCRA also prohibits discrimination based on pregnancy.

The case of O'Loughlin v. Pinchback was the first time that a Florida district court of appeal reviewed a claim of pregnancy discrimination in the context of the FCRA (then known as the Florida Human Rights Act).[15] In this case, the plaintiff alleged that her employer unlawfully terminated her from her position as a correctional officer based on her pregnancy. The First District Court of Appeal indicated as an initial matter that Florida styled its anti-discrimination law on the federal model.[16] Although the Legislature did not amend Florida law to conform to Title VII as amended by the Pregnancy Discrimination Act, the court held that both federal and state law should be read in concert to provide the maximum protection against discrimination. Therefore, Title VII as amended by the PDA preempts Florida law "to the extent that Florida's law offers less protection to its citizens than does the corresponding federal law."[17] Therefore, the O'Loughlin court found that pregnancy discrimination is prohibited by state law.

[12] Section 760.10(1)(a), F.S.
[13] Section 760.10(2) through (8), F.S.
[14] Kendra D. Presswood, *Interpreting the Florida Civil Rights Act of 1992*, 87 FLA. B.J. 36, 36 (Dec. 2013).
[15] 579 So.2d 788 (Fla. 1st DCA 1991). This case was brought under the Florida Human Rights Act of 1977, which was the predecessor to the Florida Civil Rights Act of 1992, and was also patterned after Title VII.
[16] *Id*. at 791.
[17] *Id*. at 792.

Other courts interpreted the issue of pregnancy discrimination in state law differently. In Carsillo v. City of Lake Worth, the Fourth District Court of Appeal opined that the FCRA includes pregnancy because Congress originally intended Title VII to include pregnancy, and the PDA merely clarified that intent.[18] The court concluded it was unnecessary for Florida to amend its statute in light of this interpretation. The Florida Supreme Court declined to hear the appeal.[19]

However, the Third District Court of Appeal court reached an opposite finding. In Delva v. Continental Group, Inc., the court, by looking at the plain language of the FCRA, found that no remedy exists for a pregnancy claim in state court under Florida law.[20] The court certified the conflict with Carsillo to the Florida Supreme Court.

In 2014, the Florida Supreme Court reviewed the Delva case, quashed the appellate decision, and remanded the case back to the trial court.21 The Court ruled that "discrimination based on pregnancy is subsumed within the prohibition in the FCRA against discrimination based on an individual's sex."[22] The Court considered this interpretation consistent with legislative intent, as expressly provided in the FCRA itself, that the FCRA be liberally construed in favor of ensuring freedom from discrimination based on sex.[23]

The decision only addressed pregnancy discrimination claims under the FCRA, but did not speak to s. 509.092, F.S., which addresses discrimination in public lodging and public food establishments.

Procedure for Filing Claims of Discrimination

A Florida employee may file a charge of an unlawful employment practice with either the federal Equal Employment Opportunities Commission (EEOC) or the Florida Commission on Human Relations (FCHR).

For a charge filed with the EEOC, the EEOC must investigate and make a reasonable cause determination within 120 days after the date of the filing.[24] If the EEOC finds an absence of reasonable cause, the EEOC will dismiss the charge. If the EEOC finds reasonable cause, the EEOC must engage in informal conferencing, conciliation, and persuasion to remedy the unlawful employment practice.[25]

After the EEOC concludes its investigation and issues a "right-to-sue" letter to the plaintiff, the plaintiff must file a claim in federal court under Title VII within 90 days of receipt of the letter.[26]

[18] *Carsillo v. City of Lake Worth*, 995 So.2d 1118, 1121 (Fla. 4th DCA 2008).
[19] 20 So.3d 848 (Fla. 2009).
[20] *Delva v. Continental Group, Inc.*, 96 So.3d 956, 958 (Fla. 3d DCA 2012), *reh'g denied*.
[21] *Delva v. Continental Group, Inc.*, 137 So.3d 371 (Fla. 2014).
[22] *Id.* at 375.
[23] *Id.*
[24] 42 U.S.C. s. 2000e-5(b).
[25] *Id*.
[26] 42 U.S.C. s. 2000e-5(f)(1).

For a charge filed with the FCHR, the FCHR must make a reasonable cause determination within 180 days after the filing of the complaint.[27] If the FCHR finds reasonable cause, the plaintiff may bring either a civil action or request an administrative hearing.[28]

A plaintiff is required to file a state claim in civil court under the Florida Civil Rights Act within 1 year of the determination of reasonable cause by the FCHR.[29]

Remedies

Both state and federal law authorize awards of back pay, compensatory damages, and punitive damages.[30]

In federal court, punitive damages vary depending on the size of the employer. In cases that qualify for punitive damages, the sum of both compensatory and punitive damages is capped at:
- $50,000 for an employer that has 15 to 100 employees for at least 20 calendar weeks in the current or preceding calendar year;
- $100,000 for an employer that has between 101 and 200 employees;
- $200,000 for an employer that has between 201 and 500 employees; and
- $300,000 for an employer that has more than 500 employees.31

In state court, punitive damages are capped at $100,000 regardless of the size of the employer.[32]

III. Effect of Proposed Changes:

SB 982 adds the condition of pregnancy as a protected class under the Florida Civil Rights Act of 1992 (FCRA).

Pregnancy is afforded the same protection as other statuses or classes identified in the FCRA. A woman affected by pregnancy may not be discriminated against:
- By public lodging and food service establishments;
- With respect to education, housing, or public accommodation; or
- With respect to employment, provided that any discriminatory act constitutes an unlawful employment practice.[33]

By specifically permitting a state cause of action for pregnancy discrimination claims, plaintiffs will have more time to file suit. As described in the Present Situation, after receiving a "right-to-sue" letter from the EEOC, a plaintiff must file a case in federal court within 90 days. A plaintiff

[27] Section 760.11(3), F.S.
[28] Section 760.11(4), F.S.
[29] Section 760.11(5), F.S.
[30] 42 U.S.C. s. 2000e-5(g)(1) and s. 1981a.
[31] 42 U.S.C. s. 1981a(b)(3).
[32] Section 760.11(5), F.S.
[33] Unlawful employment practices include discharging or failing to or refusing to hire a person, or discriminating in compensation, benefits, terms, conditions, or privileges of employment; and limiting or classifying an employee or applicant in such a way as to deprive the person of employment opportunities The prohibition on unlawful employment practices applies also to employment agencies and labor organizations. *See* s. 760.10, F.S.

has up to 1 year to file a civil action in state court after the FCHR issues its reasonable cause determination.

Additionally, a state cause of action in some cases will allow for greater remedies than the remedies authorized by federal law. Under federal law, the sum of compensatory and punitive damages against an employer having between 15 and 100 employees may not exceed $50,000. Under a state claim, punitive damages may reach $100,000, regardless of the size of the employer. However, federal law authorizes the sum of compensatory and punitive damages of up to $300,000 for discrimination by larger employers.

The bill applies to all private and public employers at the state and local level. In the public sector, the bill will apply to state agencies, counties, municipalities, political subdivisions, school districts, community colleges, and state universities.[34]

The bill takes effect July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

By codifying an interpretation of the FCRA by the Supreme Court, businesses and individuals will have clearer notice of their rights and obligations under the FCRA.

C. Government Sector Impact:

State and local governments are currently required to comply with Title VII as amended by the Pregnancy Discrimination Act of 1978 (PDA). The PDA has been interpreted by the state and local governments as prohibiting discrimination on the basis of pregnancy,

[34] Department of Management Services, *2015 Legislative Bill Analysis* (July 1, 2015).

childbirth, or related medical conditions. Therefore, complying with this bill will not impose any additional burden on state or local government.

The FCHR manages complaints of discrimination brought under Title VII in Florida. According to the analysis conducted by the FCHR, passage of this bill will not result in any additional fiscal or workload burden on the agency.[35]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 509.092, 760.01, 760.05, 760.07, 760.08, and 760.10.

This bill reenacts section 760.11, Florida Statutes.

IX. Additional Information:

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

None.

B. Amendments:

None.

[35] Florida Commission on Human Relations, *2015 Legislative Bill Analysis* (Feb. 19, 2015) (on file with the Senate Committee on Judiciary).

By Senator Thompson

12-00862-15 2015982__

A bill to be entitled

An act relating to the Florida Civil Rights Act; amending s. 509.092, F.S.; prohibiting discrimination on the basis of pregnancy in public lodging and food service establishments; amending s. 760.01, F.S.; revising the general purpose of the Florida Civil Rights Act of 1992; amending s. 760.05, F.S.; revising the function of the Florida Commission on Human Relations; amending s. 760.07, F.S.; providing civil and administrative remedies for discrimination on the basis of pregnancy; amending s. 760.08, F.S.; prohibiting discrimination on the basis of pregnancy in places of public accommodation; amending s. 760.10, F.S.; prohibiting employment discrimination on the basis of pregnancy; prohibiting discrimination on the basis of pregnancy by labor organizations, joint labor-management committees, and employment agencies; prohibiting discrimination on the basis of pregnancy in occupational licensing, certification, and membership organizations; providing an exception to unlawful employment practices based on pregnancy; reenacting s. 760.11(1), F.S., relating to administrative and civil remedies for violations of the Florida Civil Rights Act of 1992, to incorporate the amendments made to s. 760.10(5), F.S., in a reference thereto; providing an effective date.

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

12-00862-15 2015982__

Section 1. Section 509.092, Florida Statutes, is amended to read:

509.092 Public lodging establishments and public food service establishments; rights as private enterprises.—Public lodging establishments and public food service establishments are private enterprises, and the operator has the right to refuse accommodations or service to any person who is objectionable or undesirable to the operator, but such refusal may not be based upon race, creed, color, sex, pregnancy, physical disability, or national origin. A person aggrieved by a violation of this section or a violation of a rule adopted under this section has a right of action pursuant to s. 760.11.

Section 2. Subsection (2) of section 760.01, Florida Statutes, is amended to read:

760.01 Purposes; construction; title.—

(2) The general purposes of the Florida Civil Rights Act of 1992 are to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights, and privileges of individuals within the state.

Section 3. Section 760.05, Florida Statutes, is amended to read:

760.05 Functions of the commission.—The commission shall promote and encourage fair treatment and equal opportunity for

all persons regardless of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status and mutual understanding and respect among all members of all economic, social, racial, religious, and ethnic groups; and shall endeavor to eliminate discrimination against, and antagonism between, religious, racial, and ethnic groups and their members.

Section 4. Section 760.07, Florida Statutes, is amended to read:

760.07 Remedies for unlawful discrimination.—Any violation of any Florida statute making unlawful discrimination because of race, color, religion, gender, pregnancy, national origin, age, handicap, or marital status in the areas of education, employment, housing, or public accommodations gives rise to a cause of action for all relief and damages described in s. 760.11(5), unless greater damages are expressly provided for. If the statute prohibiting unlawful discrimination provides an administrative remedy, the action for equitable relief and damages provided for in this section may be initiated only after the plaintiff has exhausted his or her administrative remedy. The term "public accommodations" does not include lodge halls or other similar facilities of private organizations which are made available for public use occasionally or periodically. The right to trial by jury is preserved in any case in which the plaintiff is seeking actual or punitive damages.

Section 5. Section 760.08, Florida Statutes, is amended to read:

760.08 Discrimination in places of public accommodation.—All persons are ~~shall be~~ entitled to the full and equal enjoyment of the goods, services, facilities, privileges,

advantages, and accommodations of any place of public accommodation~~, as defined in this chapter,~~ without discrimination or segregation on the ground of race, color, national origin, sex, pregnancy, handicap, familial status, or religion.

Section 6. Subsections (1) and (2), paragraphs (a) and (b) of subsection (3), subsections (4) through (6), and paragraph (a) of subsection (8) of section 760.10, Florida Statutes, are amended to read:

760.10 Unlawful employment practices.—

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

(a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

(b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

(2) It is an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status or to classify or refer for employment any individual on the basis of race, color, religion, sex,

pregnancy, national origin, age, handicap, or marital status.

(3) It is an unlawful employment practice for a labor organization:

(a) To exclude or to expel from its membership, or otherwise to discriminate against, any individual because of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

(b) To limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way that ~~which~~ would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

(4) It is an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual because of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status in admission to, or employment in, any program established to provide apprenticeship or other training.

(5) Whenever, in order to engage in a profession, occupation, or trade, it is required that a person receive a license, certification, or other credential, become a member or an associate of any club, association, or other organization, or pass any examination, it is an unlawful employment practice for any person to discriminate against any other person seeking such

license, certification, or other credential, seeking to become a member or associate of such club, association, or other organization, or seeking to take or pass such examination, because of such other person's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

(6) It is an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee to print, or cause to be printed or published, any notice or advertisement relating to employment, membership, classification, referral for employment, or apprenticeship or other training, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, pregnancy, national origin, age, absence of handicap, or marital status.

(8) Notwithstanding any other provision of this section, it is not an unlawful employment practice under ss. 760.01-760.10 for an employer, employment agency, labor organization, or joint labor-management committee to:

(a) Take or fail to take any action on the basis of religion, sex, pregnancy, national origin, age, handicap, or marital status in those certain instances in which religion, sex, condition of pregnancy, national origin, age, absence of a particular handicap, or marital status is a bona fide occupational qualification reasonably necessary for the performance of the particular employment to which such action or inaction is related.

Section 7. For the purpose of incorporating the amendment made by this act to section 760.10(5), Florida Statutes, in a reference thereto, subsection (1) of section 760.11, Florida

Statutes, is reenacted to read:

760.11 Administrative and civil remedies; construction.—

(1) Any person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the commission within 365 days of the alleged violation, naming the employer, employment agency, labor organization, or joint labor-management committee, or, in the case of an alleged violation of s. 760.10(5), the person responsible for the violation and describing the violation. Any person aggrieved by a violation of s. 509.092 may file a complaint with the commission within 365 days of the alleged violation naming the person responsible for the violation and describing the violation. The commission, a commissioner, or the Attorney General may in like manner file such a complaint. On the same day the complaint is filed with the commission, the commission shall clearly stamp on the face of the complaint the date the complaint was filed with the commission. In lieu of filing the complaint with the commission, a complaint under this section may be filed with the federal Equal Employment Opportunity Commission or with any unit of government of the state which is a fair-employment-practice agency under 29 C.F.R. ss. 1601.70-1601.80. If the date the complaint is filed is clearly stamped on the face of the complaint, that date is the date of filing. The date the complaint is filed with the commission for purposes of this section is the earliest date of filing with the Equal Employment Opportunity Commission, the fair-employment-practice agency, or the commission. The complaint shall contain a short and plain statement of the facts describing the violation and the relief sought. The commission may require additional information to be

in the complaint. The commission, within 5 days of the complaint being filed, shall by registered mail send a copy of the complaint to the person who allegedly committed the violation. The person who allegedly committed the violation may file an answer to the complaint within 25 days of the date the complaint was filed with the commission. Any answer filed shall be mailed to the aggrieved person by the person filing the answer. Both the complaint and the answer shall be verified.

Section 8. This act shall take effect July 1, 2015.

The Florida Senate

COMMITTEE VOTE RECORD

COMMITTEE: Judiciary
ITEM: SB 982
FINAL ACTION: Favorable
MEETING DATE: Tuesday, March 31, 2015
TIME: 4:00 —6:00 p.m.
PLACE: 110 Senate Office Building

FINAL VOTE								
Yea	**Nay**	**SENATORS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
X		Bean						
X		Benacquisto						
X		Brandes						
X		Joyner						
X		Simmons						
X		Simpson						
X		Soto						
X		Stargel						
		Ring, VICE CHAIR						
X		Diaz de la Portilla, CHAIR						
9	0	**TOTALS**						
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
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THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/2015
Meeting Date

Topic _____ Bill Number 982 *(if applicable)*

Name BRIAN PITTS Amendment Barcode _____ *(if applicable)*

Job Title TRUSTEE

Address 1119 NEWTON AVNUE SOUTH Phone 727-897-9291
Street

SAINT PETERSBURG FLORIDA 33705 E-mail JUSTICE2JESUS@YAHOO.COM
City *State* *Zip*

Speaking: ☑ For ☐ Against ☑ Information

Representing JUSTICE-2-JESUS

Appearing at request of Chair: ☐ Yes ☑ No Lobbyist registered with Legislature: ☐ Yes ☑ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/20/11)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/15
Meeting Date

SB 982
Bill Number (if applicable)

Amendment Barcode (if applicable)

Topic FL Civil Rights Act

Name DEBRA GRECO

Job Title BUSINESS REP

Address 2153 W. OAKRIDGE Rd
Street
ORLANDO FL 32809
City *State* *Zip*

Phone 305-360-5333

Email dgreco@dc78.org

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against
(The Chair will read this information into the record.)

Representing

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

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S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

31MAR2015 — *Meeting Date*

SB-982 — *Bill Number (if applicable)*

Amendment Barcode (if applicable)

Topic Civil Rights/ Discrimination

Name Kevin Earl Wood

Job Title Citize/SCLC Member

Address 6925 Wood Place — *Street*

Panama City, FL 32404 — *City* *State* *Zip*

Phone 850-785-3763

Email allunited@bellsouth.net

Speaking: For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against

(The Chair will read this information into the record.)

Representing SELF/SCLC(Southern Leadership Conference Christian

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

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S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/15
Meeting Date

Bill Number (if applicable)
982

Topic Protection of Pregnant Women From Discrimination
Amendment Barcode (if applicable)

Name Vinny DelGoverico

Job Title

Address 1174 Walden Rd
Street

Phone

Tall FL 32317
City *State* *Zip*

Email

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Self

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

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S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

98 2

Meeting Date

Bill Number (if applicable)

Amendment Barcode (if applicable)

Topic Civil rights Act

Name Cynthia RichBERG

Job Title Postal Clerk

Address 1418 California ST

Street

Tall FL 32304

City *State* *Zip*

Phone (850) 222-8459

Email CynthiaRichberg@Gmail.com

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against

(The Chair will read this information into the record.)

Representing Self

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

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S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/15
Meeting Date

SB 982
Bill Number (if applicable)

Topic FL CIVIL RIGHTS ACT / JUDICIARY

Amendment Barcode (if applicable)

Name PAUL Ucci

Job Title BUS DRIVER

Address 4256 Houston LANE
Street

Phone

WESTLAKE Port FL 33987
City *State* *Zip*

Email

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing [redacted] SELF

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

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S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3-31-15
Meeting Date

SB 982
Bill Number (if applicable)

Topic FL. CIVIL RIGHTS ACT

Amendment Barcode (if applicable)

Name RONALD CLARKE

Job Title UAW RETIREE

Address 29900 COCOA WAY
Street

Phone 352 357 9662

FRUITLAND FL 32736
City *State* *Zip*

Email

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against
(The Chair will read this information into the record.)

Representing SELF

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

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S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3-31-15
Meeting Date

SB 982
Bill Number (if applicable)

Topic FL Civil Rights Act / Judiciary

Amendment Barcode (if applicable)

Name Amy Datz

Job Title Mother

Address 1130 Crestview Ave.
Street

Tallahassee FL. 32303
City *State* *Zip*

Phone 850 322-7599

Email amaliedatz@mac.com

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Mothers who have been discriminated during Pregnancy

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

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S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3-31-15
Meeting Date

SB 0982
Bill Number (if applicable)

Topic FLORIDA CIVIL RIGHTS ACT

Amendment Barcode (if applicable)

Name ALICE-MARIE TUCKER

Job Title

Address 6075 WATERCOO AVE
Street

PORT ST JOHN FL 32927
City *State* *Zip*

Phone 321 508 1976

Email amKjtucker@msn.com

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against
(The Chair will read this information into the record.)

Representing WORKING FAMILY LOBBY CORP AFL-CIO

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

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S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/15
Meeting Date

982
Bill Number (if applicable)

Amendment Barcode (if applicable)

Topic Pregnancy Discrimination

Name Barbara J. DeVane

Job Title MS

Address 1625 E. Brevard St
Street

Tallahassee FL 32308
City *State* *Zip*

Phone 850-222-3969

Email barbaradevane1@yahoo.com

Speaking: ☑ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing FL NOW

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

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S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3-31-15
Meeting Date

SB 982
Bill Number (if applicable)

Topic Pregnancy – Civil Rights Act

Amendment Barcode (if applicable)

Name Stephanie Kinkel

Job Title

Address 1143 Albritton DR
Street

Phone 850-320-4208

Tallahassee FL 32301
City *State* *Zip*

Email Stef.Kinkel@gmail.com

Speaking: ☒ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Florida Federation of Business and Professional Women

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

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S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/2015
Meeting Date

982
Bill Number (if applicable)

Amendment Barcode (if applicable)

Topic CIVIL RIGHTS

Name GAIL MARIE PERRY

Job Title CHAIR

Address PO BOX 1766
Street
POMPANO BCH, FLA 33061
City *State* *Zip*

Phone 954 850 4055

Email workingfolks@hotmail.com

Speaking: [X] For [ ] Against [ ] Information

Waive Speaking: [ ] In Support [ ] Against
(The Chair will read this information into the record.)

Representing

Appearing at request of Chair: [ ] Yes [X] No

Lobbyist registered with Legislature: [ ] Yes [X] No

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S-001 (10/14/14)

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:
Community Affairs
Appropriations Subcommittee on Transportation, Tourism, and Economic Development
Commerce and Tourism- Vice Chair
Transportation
Ethics and Elections

JOINT COMMITTEE:
Joint Administrative Procedures Committee

SENATOR GERALDINE F. THOMPSON
12th District

March 31, 2015

The Honorable Migeul Diaz de la Portialla, Chair
The Committee on Judiciary
515 Knott Building
404 S. Monroe Street
Tallahassee, Florida 32399-1100

Dear Chair Diaz de la Portialla,

Committee Substitute for Senate Bill 0982 relating to the Florida Civil Rights Act is scheduled to be heard in the Committee on Judiciary Tuesday, March 31st at 4 p.m. Due to conflicts in my schedule, I will be sending my Legislative Assistant, Clifton Addison, as a representative to present the bill for your committee's consideration.

Thank you in advance for your consideration.

Sincerely,

Geraldine F. Thompson

Geraldine F. Thompson

REPLY TO:

☐ 511 W. South Street, Suite 204, Orlando, Florida 32805 (407) 245-1511 FAX: (407) 245-1513
☐ 210 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5012

Senate's Website: *www.flsenate.gov*

ANDY GARDINER
President of the Senate

GARRETT RICHTER
President Pro Tempore

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 1078
INTRODUCER:	Senator Sobel
SUBJECT:	Lewd and Lascivious Behavior
DATE:	March 30, 2015 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sumner	Cannon	CJ	**Favorable**
2.	Brown	Cibula	JU	**Favorable**
3.			RC	

I. Summary:

SB 1078 repeals s. 798.02, F.S., which makes it a second degree misdemeanor for:

- An unmarried man and a woman to lewdly and lasciviously associate and cohabit together, or
- Any man or woman, married or unmarried to engage in open and gross lewdness and lascivious behavior.

By repealing s. 798.02, F.S., the bill removes cross-references that would have potentially disqualified from visitation a parent, caretaker, or grandparent of a child under the jurisdiction of the Department of Children and Families or disqualified from employment an applicant or employee criminally charged with a violation of the statute.

II. Present Situation:

Cohabitation Law in Florida

Florida law makes it a second degree misdemeanor[1] for any unmarried man and woman to lewdly and lasciviously associate and cohabit together, or if married or unmarried engage in open and gross lewdness and lascivious behavior.[2] This law, originally enacted in 1868, made the crime of cohabitation punishable by up to 2 years in prison, up to 1 year in the county jail, or up to a $300 fine.[3] Somewhat similarly, s. 800.02, F.S., makes it a second degree misdemeanor for a person to engage in any unnatural and lascivious act with another person.

Section 798.02, F.S., is cross-referenced in three other statutes.

[1] Second degree misdemeanors are punishable by up to 60 days in jail and up to a $500 fine. Sections 775.082(4)(b) and 775.083(1)(e), F.S.
[2] Section 798.02, F.S.
[3] Chapter 71-136 s. 773, L.O.F.

Section 39.0139, F.S., addresses visitation with children who are under the jurisdiction of the Department of Children and Families. A rebuttable presumption of detriment applies to a parent or caregiver who has been found guilty or who has entered a plea to certain crimes including cohabitation.[4]

Section 39.509, F.S., provides visitation rights to grandparents who qualify. In determining whether grandparent visitation is in the best interest of the child, the court may consider if a grandparent has been found guilty or who has entered a plea to certain crimes including cohabitation.[5]

Screening of employees for criminal backgrounds is provided in ch, 435, F.S. Screenings for Level 2 background checks screen for certain crimes including cohabitation.[6]

Cohabitation Law in other States

According to the National Conference of State Legislatures only three states, Florida, Michigan, and Mississippi, make cohabitation illegal. Eight states that once made cohabitation illegal have repealed those statutes, one as recently as 2013.[7]

States with Cohabitation Laws other than Florida

State	Statute	Language
Michigan	MCLA § 750.335	Any man or woman, not being married to each other, who shall lewdly and lasciviously associate and cohabit together, and any man or woman, married or unmarried, who shall be guilty of open and gross lewdness and lascivious behavior, shall be guilty of a misdemeanor, punishable by imprisonment in the county jail not more than 1 year, or by fine of not more than $1,000.00. No prosecution shall be commenced under this section after 1 year from the time of committing the offense.
Mississippi	97-29-1	If any man and woman shall unlawfully cohabit, whether in adultery or fornication, they shall be fined in any sum not more than five hundred dollars each, and imprisoned in the county jail not more than six months; and it shall not be necessary, to constitute the offense, that the parties shall dwell together publicly as husband and wife, but it may be proved by circumstances which show habitual sexual intercourse.

The following states have repealed laws which made cohabitation illegal: Arizona, Idaho, Maine, New Mexico, North Carolina, North Dakota, Virginia, and West Virginia.

[4] Section 39.0139(3)(a)2., F.S.
[5] Section 39.509(6)(a), F.S.
[6] Section 435.04(2)(w), F.S.
[7] E-mail from staff of the National Conference of State Legislatures (Mar. 11, 2015) (on file with the Senate Committee on Judiciary).

III. Effect of Proposed Changes:

The bill repeals the law that made it a second degree misdemeanor for an unmarried man and woman to lewdly and lasciviously associate and cohabit together, or if any man or woman, married or unmarried, engage in open and gross lewdness and lascivious behavior.

The bill repeals a statute that prohibits:

- A man and a woman who are not married to each other from lewdly and lasciviously associating and cohabiting together; or
- A man and a woman, regardless of marital status, from engaging in open and gross lewdness and lascivious behavior.

Under existing law, a person who violates one of the prohibitions above is subject to the penalties for a second degree misdemeanor.

By repealing the prohibition on cohabitation and open lewd and lascivious behavior, the bill removes cross-references that would have potentially disqualified from visitation a parent, caretaker, or grandparent of a child under the jurisdiction of the Department of Children and Families or disqualified from employment an applicant or employee criminally charged with a violation of the cohabitation law.

The bill takes effect July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 39.0139, 39.509, and 435.04.

This bill repeals section 798.02, Florida Statutes.

IX. Additional Information:

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

None.

B. Amendments:

None.

By Senator Sobel

33-01255-15 20151078__

A bill to be entitled

An act relating to lewd and lascivious behavior; repealing s. 798.02, F.S., relating to a prohibition on lewd and lascivious behavior, including a prohibition on lewd and lascivious association and cohabitation together by a man and woman who are not married to each other; amending ss. 39.0139, 39.509, and 435.04, F.S.; conforming provisions to changes made by the act; providing an effective date.

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

Section 1. Section 798.02, Florida Statutes, is repealed.

Section 2. Paragraph (a) of subsection (3) of section 39.0139, Florida Statutes, is amended to read:

39.0139 Visitation or other contact; restrictions.—

(3) PRESUMPTION OF DETRIMENT.—

(a) A rebuttable presumption of detriment to a child is created when:

1. A court of competent jurisdiction has found probable cause exists that a parent or caregiver has sexually abused a child as defined in s. 39.01;

2. A parent or caregiver has been found guilty of, regardless of adjudication, or has entered a plea of guilty or nolo contendere to, charges under the following statutes or substantially similar statutes of other jurisdictions:

a. Section 787.04, relating to removing minors from the state or concealing minors contrary to court order;

b. Section 794.011, relating to sexual battery;

33-01255-15 20151078__

~~c. Section 798.02, relating to lewd and lascivious behavior;~~

c.~~d.~~ Chapter 800, relating to lewdness and indecent exposure;

d.~~e.~~ Section 826.04, relating to incest; or

e.~~f.~~ Chapter 827, relating to the abuse of children; or

3. A court of competent jurisdiction has determined a parent or caregiver to be a sexual predator as defined in s. 775.21 or a parent or caregiver has received a substantially similar designation under laws of another jurisdiction.

Section 3. Paragraph (a) of subsection (6) of section 39.509, Florida Statutes, is amended to read:

39.509 Grandparents rights.—Notwithstanding any other provision of law, a maternal or paternal grandparent as well as a stepgrandparent is entitled to reasonable visitation with his or her grandchild who has been adjudicated a dependent child and taken from the physical custody of the parent unless the court finds that such visitation is not in the best interest of the child or that such visitation would interfere with the goals of the case plan. Reasonable visitation may be unsupervised and, where appropriate and feasible, may be frequent and continuing. Any order for visitation or other contact must conform to the provisions of s. 39.0139.

(6) In determining whether grandparental visitation is not in the child's best interest, consideration may be given to the following:

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

s. 787.04, relating to removing minors from the state or concealing minors contrary to court order; s. 794.011, relating to sexual battery; ~~s. 798.02, relating to lewd and lascivious behavior;~~ chapter 800, relating to lewdness and indecent exposure; s. 826.04, relating to incest; or chapter 827, relating to the abuse of children.

Section 4. Present paragraphs (x) through (zz) of subsection (2) of section 435.04, Florida Statutes, are redesignated as paragraphs (w) through (yy), respectively, and paragraph (w) of subsection (2) of that section, is amended to read:

435.04 Level 2 screening standards.—

(2) The security background investigations under this section must ensure that no persons subject to the provisions of this section have been arrested for and are awaiting final disposition of, have been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, or have been adjudicated delinquent and the record has not been sealed or expunged for, any offense prohibited under any of the following provisions of state law or similar law of another jurisdiction:

~~(w) Section 798.02, relating to lewd and lascivious behavior.~~

Section 5. This act shall take effect July 1, 2015.

The Florida Senate

COMMITTEE VOTE RECORD

COMMITTEE: Judiciary
ITEM: SB 1078
FINAL ACTION: Favorable
MEETING DATE: Tuesday, March 31, 2015
TIME: 4:00 —6:00 p.m.
PLACE: 110 Senate Office Building

FINAL VOTE								
Yea	**Nay**	**SENATORS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
X		Bean						
X		Benacquisto						
X		Brandes						
X		Joyner						
X		Simmons						
X		Simpson						
X		Soto						
		Stargel						
		Ring, VICE CHAIR						
X		Diaz de la Portilla, CHAIR						
8	0	**TOTALS**						
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:
Children, Families, and Elder Affairs, *Chair*
Health Policy, *Vice Chair*
Agriculture
Education Pre-K-12
Appropriations Subcommittee on Health and Human Services

SENATOR ELEANOR SOBEL
33rd District

March 18, 2015

Senator Miguel Diaz de la Portilla
Chair of the Committee on Judiciary
406 Senate Office Building
404 South Monroe Street
Tallahassee, Florida 32399

Dear Chair Diaz de la Portilla,

This letter is to request that **SB 1078** relating to **the repeal of cohabitation laws** be placed on the agenda of the next scheduled meeting of the Committee on Judiciary. It unanimously passed the Committee on Criminal Justice.

Thank you for your consideration of this request.

Respectfully,

Eleanor Sobel

Eleanor Sobel
State Senator, 33rd District

Cc: Tom Cibula *Staff Director*, Shirley Proctor *Committee Administrative Assistant*

REPLY TO:
☐ The "Old" Library, First Floor, 2600 Hollywood Blvd., Hollywood, Florida 33020 (954) 924-3693 FAX: (954) 924-3695
☐ 410 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5033

Senate's Website: *www.flsenate.gov*

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3-31-15
Meeting Date

1078
Bill Number (if applicable)

Topic Families

Amendment Barcode (if applicable)

Name Greg Bond

Job Title Building Families

Address 9166 Sunrise Dr.
Street

Phone

Largo FL 33773
City *State* *Zip*

Email

Speaking: ☐ For ☐ Against ☒ Information

Waive Speaking: ☐ In Support ☒ Against
(The Chair will read this information into the record.)

Representing

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/2015
Meeting Date

Topic _____ Bill Number 1078 *(if applicable)*

Name BRIAN PITTS Amendment Barcode _____ *(if applicable)*

Job Title TRUSTEE

Address 1119 NEWTON AVNUE SOUTH Phone 727-897-9291
Street

SAINT PETERSBURG FLORIDA 33705 E-mail JUSTICE2JESUS@YAHOO.COM
City *State* *Zip*

Speaking: ☐ For ☐ Against ☑ Information

Representing JUSTICE-2-JESUS

Appearing at request of Chair: ☐ Yes ☑ No Lobbyist registered with Legislature: ☐ Yes ☑ No

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S-001 (10/20/11)

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 1242
INTRODUCER:	Senator Hays
SUBJECT:	Interstate Compacts
DATE:	March 30, 2015
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Cibula	JU	**Favorable**
2.			FT	
3.			AP	

I. Summary:

SB 1242 proposes the Compact for a Balanced Budget. It is an interstate compact that binds member states together in calling for an Article V Constitutional Convention for the purpose of adopting a federal balanced budget amendment. Upon passage of the bill, a state enters into the Compact with other states and agrees to observe the provisions of the compact which govern its rules and procedures.

The Compact contains the specific language of the balanced budget amendment that limits the borrowing capacity of the federal government. The amendment requires the supermajority approval of Congress for any new or increased income or sales taxes while keeping the current simple majority rule for eliminating or reducing tax exemptions, credits, and deductions, replacing the income tax with a consumption tax, and altering new or increased tariffs or fees. The amendment contains two so-called "release valves." One is a referendum initiated by Congress requesting a simple majority of state legislatures to approve a proposed increase in the debt limit within 60 days. The second is an impoundment process that requires the President to designate necessary spending delays and reprioritizations when a "red zone" or 98 percent of borrowing capacity is reached, subject so simple majority override by Congress.

The Compact also contains the application for calling an Article V convention for proposing amendments, a pre-commitment to ratifying the amendment, the method for designating and instructing each state's delegates to the convention, convention rules, and a commission to oversee the process. Because the Compact contains conditional enactments, the amendment process is not initiated until 38 states join the Compact. However, the Compact's commission was authorized to begin oversight operations when two states joined the Compact. Because two states have already joined, the commission is already operational.

II. Present Situation:

Methods of Amending the U.S. Constitution

Article V of the United States Constitution provides two methods for proposing amendments to the Constitution. The first method authorizes Congress to propose amendments to the states which are approved by a two-thirds vote of both Houses of Congress.[1] Amendments approved in this manner do not require the President's signature and are transmitted to each state for ratification.[2] Starting with the Bill of Rights in 1789, Congress used this method to submit 33 amendments to the states. Of those 33 proposals, 27 amendments to the Constitution were approved by the states.[3]

The second method, which has never been used, requires Congress to call a convention for proposing amendments when two-thirds of the state legislatures apply to Congress to call an amendments convention.[4] Currently, 34 states would need to make applications to meet the two-thirds requirement to call an Article V Convention. Because an Article V amendments convention has never been conducted, what might actually occur procedurally or substantively is unclear.

Article V further provides that the amendments shall become a part of the Constitution when ratified by the Legislatures of three-fourths of the states or by conventions in three-fourths of the states. This would require ratification by 38 states. Because Article V provides that the amendments become valid when ratified by three-fourths of the legislatures or conventions "as the one or the other Mode of Ratification may be proposed by the Congress," Congress may choose the method of ratification. With the exception of the 21st Amendment, which repealed the 18th Amendment and prohibition, Congress has sent all proposed amendments to the legislatures for ratification.[5, 6]

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[1] U.S. CONST. Article V.

[2] U.S. National Archives and Records Administration, *The Constitutional Amendment Process*, http://www.archives.gov/federal-register/constitution (last visited February 4, 2014).

[3] Thomas H. Neale, Congressional Research Service, *The Article V Convention: Contemporary Issues for Congress* (July 9, 2012), http://www.fas.org/sgp/crs/misc/R42589.pdf.

[4] U.S. CONST. Article V.

[5] Neale, *supra*, note 3, at 22.

[6] With respect to ratification, it has become accepted procedure, although not stated in the Constitution, that Congress may set time limits on the ratification process and specify when an amendment must be ratified by the requisite number of states to become valid. With several amendments, Congress stated that ratification must occur within 7 years after their proposal to become effective. (See footnote 2 above.) The U.S. Supreme Court, in *Dillon v. Gloss*, 256 U.S. 368 (1921), concluded that Congress does have the authority to determine what a reasonable time frame for ratification is, even though the Constitution is silent on the matter.

Although no attempts to call an Article V Convention have ever been successful, two relatively recent attempts approached the requisite number of 34 applications to Congress. In 1969, a total of 33 states submitted applications for a convention to address U.S. Supreme Court decisions that dealt with voting districts and the apportionment of votes. The effort fell short of the total number required by one application. Several states later rescinded their applications and the call for a convention dissipated. James Kenneth Rogers, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 Harv.J.L. & Pub. Pol'Y 1005, 1009-1010 (2007). In the second instance, and similar to this proposal, state legislatures made application to Congress to call an Article V Convention requesting a balanced budget amendment. In 1975, North Dakota was the first state to make application, followed by a succession of 30 other states over the years, ending with Missouri's application in 1983 as the 32nd application. The effort fell short of the 34 applications to Congress by two states and again, interest in calling for a convention declined. (Rogers at 1010)

Florida's Article V Constitution Act

The Legislature passed the Article V Constitutional Convention Act in 2014 to establish the framework for selecting, appointing, and restricting Florida delegates if an Article V Constitutional Convention is called. The bill also established an advisory group to provide guidance to the delegates in carrying out their responsibilities.[7]

Federal and State Balanced Budget Requirements

There is no requirement in the U.S. Constitution that the federal government operate under a balanced federal budget. Florida, in contrast, is required to have a balanced budget and those provisions are set forth in both the State Constitution and statute. Article VII, section 1 states that "Provision shall be made by law for raising sufficient revenue to defray the expenses of the state for each fiscal period." Similarly, s. 216.221(1), F.S., provides that "All appropriations shall be maximum appropriations, based upon the collection of sufficient revenues to meet and provide for such appropriations." The subsection also provides that it is the Governor's duty to ensure that "revenues collected will be sufficient to meet the appropriations and that no deficit occurs in any state fund."

According to the National Conference of State Legislatures, as of 2014, 45 states had some kind of a constitutional requirement for a balanced budget. In four states it is only a statutory requirement, while Vermont is the only state without any requirement for a balanced budget.[8]

Interstate Compacts

The Compact Clause of the United States Constitution provides that "No state shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State …."[9] This provision is the only section of the Constitution that addresses formal agreements between and among the various states. The Constitution does not place "limits on what might be done through an interstate compact other than the requirement of congressional consent."[10] Congress expresses its consent in the form of a joint resolution or act of Congress that specifies its approval of the text of the compact and adds any conditions or provisions that it determines are necessary, with the text of the compact contained in the document.[11]

[7] Chapter 2014-52, Laws of Fla.
[8] E-mail from Todd Haggerty, NCSL Fiscal Affairs Program (February 3, 2014) (on file with the Senate Committee on Judiciary).
[9] U.S. CONST. Article I, s. 10, cl. 3.
[10] Thomas Neale, Congressional Research Service, *The Article V Convention: Contemporary Issues for Congress* (April 11, 2014).
[11] *Id*. 14-15. Authorities disagree as to whether a joint resolution, such as this proposal, must be signed by the President before becoming law. Thomas Neale, with the Congressional Research Service, states that this proposal could be challenged as unconstitutional without presentment to the President. In contrast, supporters of this proposal state that it would not need presidential approval because no other application calling for a Constitutional Convention has required a presidential signature to become effective.

Compact for a Balanced Budget – Enactments

The Compact for a Balanced Budget proposed by this bill and discussed below has been adopted by Georgia, Alaska, Mississippi, and North Dakota and is pending before several other state legislatures.[12] House Congressional Resolution 26, which effectuates the Compact for a Balanced Budget, was filed in Congress on March 19, 2015. The resolution calls for an Article V Convention for a balanced budget amendment as contemplated in the Compact for a Balanced Budget. The congressional resolution will not take effect until Congress receives a sufficient number of certified conforming copies evidencing that at least three-fourths of the states are Member States of the compact and have made application for a convention.[13]

III. Effect of Proposed Changes:

The bill creates s. 11.95, F.S., which provides, through a series of Articles, that the state agrees to enter and be bound by a compact (Compact) with other states for the purpose of calling a constitutional convention pursuant to Article V of the United State Constitution for the purpose of a Balanced Budget Amendment.

The text of the constitutional amendment is provided in Article II of the Compact as follows:

"SECTION 1. Total outlays of the government of the United States shall not exceed total receipts of the government of the United States at any point in time unless the excess of outlays over receipts is financed exclusively by debt issued in strict conformity with this article.

"SECTION 2. Outstanding debt shall not exceed authorized debt, which initially shall be an amount equal to 105 percent of the outstanding debt on the effective date of this article. Authorized debt shall not be increased above its aforesaid initial amount unless such increase is first approved by the legislatures of the several states as provided in Section 3.

"SECTION 3. From time to time, Congress may increase authorized debt to an amount in excess of its initial amount set by Section 2 only if it first publicly refers to the legislatures of the several states an unconditional, single subject measure proposing the amount of such increase, in such form as provided by law, and the measure is thereafter publicly and unconditionally approved by a simple majority of the legislatures of the several states, in such form as provided respectively by state law; provided that no inducement requiring an expenditure or tax levy shall be demanded, offered, or accepted as a quid pro quo for such approval. If such approval is not obtained within 60 calendar days after referral, then the measure shall be deemed disapproved and the authorized debt shall thereby remain unchanged.

"SECTION 4. Whenever the outstanding debt exceeds 98 percent of the debt limit set by Section 2, the President shall enforce said limit by publicly designating specific expenditures for impoundment in an amount sufficient to ensure outstanding debt shall not exceed the authorized debt. Said impoundment shall become effective 30 days thereafter, unless Congress first designates an alternate impoundment of the same or greater amount by concurrent resolution, which shall become immediately effective. The failure of the President to designate or enforce the required impoundment is an impeachable misdemeanor. Any purported issuance or incurrence of any debt in excess of the debt limit set by Section 2 is void.

[12] Telephone interview with Nick Drania, Compact for America Educational Foundation, Inc., (March 29, 2015).
[13] H.R. Con. Res. 26, 114th Cong. (2015).

"SECTION 5. No bill that provides for a new or increased general revenue tax shall become law unless approved by a two-thirds roll call vote of the whole number of each House of Congress. However, this requirement shall not apply to any bill that provides for a new end user sales tax which would completely replace every existing income tax levied by the government of the United States; or for the reduction or elimination of an exemption, deduction, or credit allowed under an existing general revenue tax.

"SECTION 6. For purposes of this article, "debt" means any obligation backed by the full faith and credit of the government of the United States; "outstanding debt" means all debt held in any account and by any entity at a given point in time; "authorized debt" means the maximum total amount of debt that may be lawfully issued and outstanding at any single point in time under this article; "total outlays of the government of the United States" means all expenditures of the government of the United States from any source; "total receipts of the government of the United States" means all tax receipts and other income of the government of the United States, excluding proceeds from its issuance or incurrence of debt or any type of liability; "impoundment" means a proposal not to spend all or part of a sum of money appropriated by Congress; and "general revenue tax" means any income tax, sales tax, or value-added tax levied by the government of the United States excluding imposts and duties.

"SECTION 7. This article is immediately operative upon ratification, self-enforcing, and Congress may enact conforming legislation to facilitate enforcement."

Compact Membership and Withdrawal

Article III of the Compact establishes membership and withdrawal requirements. It provides that the Compact governs each Member State[14] to the fullest extent permitted by its respective constitution and supersedes and repeals any conflicting law. Additionally, each Member State is contractually bound to other Member states and promises and agrees to comply with the terms and conditions of the Compact.

When fewer than three-fourths, or 38, of the states are Member States, any Member State may withdraw from this Compact. However, once at least three-fourths of the states are Member States, then no Member State may withdraw from the Compact prior to its termination absent unanimous consent of all Member States.

Compact Commission and Compact Administrators

Article IV of the Compact establishes the Compact Commission and the Compact Administrator. The Compact Commission will appoint and oversee a Compact Administrator, promote the Compact, coordinate the performance of obligations under the Compact, and defend and enforce the Compact in legal proceedings, among other things.

The Compact Administrator will notify the states of the date, time, and location of the convention; organize the convention, maintain a list of all Member States and their appointed delegates; and maintain all official records relating to the Compact. The Compact Administrator will also notify Member States of key events.

[14] A "Member State" is defined as "a State that has enacted, adopted, and agreed to be bound to this Compact."

Resolution Applying for a Convention

Article V of the Compact provides that the states are applying for a convention but the application will only have legal effect, due to a conditional enactment provision, when 38 states join the compact.

Appointment of Delegates, Limitations, and Instructions

Article VI of the Compact regulates the appointment and authority of delegates who will attend a convention pursuant to the Compact. The President of the Senate, or his or her designee, and the Speaker of the House of Representatives, or his or her designee, will represent Florida as its sole and exclusive delegates. A delegate may be replaced or recalled by the Legislature at any time for good cause, such as criminal misconduct or the violation of the Compact. Each delegate must take an oath to "act strictly in accordance with the terms and conditions of the Compact for a Balanced Budget, the Constitution of the state I represent, and the Constitution of the United States."

A delegate's authority is limited to introducing, debating, voting upon, proposing, and enforcing the convention rules specified in the Compact, and to introducing, debating, voting on, and rejecting or proposing for ratification the Balanced Budget Amendment. Any actions taken by any delegate beyond this limited authority are void ab initio.[15] Additionally, a delegate may not introduce, debate, vote upon, reject, or propose for ratification any constitutional amendment at the convention other than the constitutional amendment the Balanced Budget Amendment.

If any Member State or delegate violates any provision of the Compact, then every delegate of that Member State immediately forfeits his or her appointment, and must immediately cease participation at the convention, vacate the convention, and return to his or her respective state's capitol.[16]

Convention Rules

Article VII of the Compact details the convention agenda and rules. The agenda of the Convention will be exclusively limited to introducing, debating, voting on, and rejecting or proposing for ratification the Balanced Budget Amendment. The convention will not consider any matter outside of this agenda. The convention has a limited time-frame in which it must act. It must permanently adjourn either 24 hours after commencing consideration of the Balanced Budget Amendment or the completion of the business on its agenda, whichever occurs first.

Regardless of whether a state is a member to the compact, each state may have no more than three delegates at the convention. However, each state will only have one vote.

The convention will be chaired by the delegate representing the first state to have become a Member State. Any vote, including the rejection or proposal of any constitutional amendment, requires a quorum to be present and a majority affirmative vote of those states constituting the

[15] "Void ab initio" means void from the beginning.

[16] Given the very brief nature of the convention provided by the Compact, it appears that expulsion of a state's delegates would effectively bar a state from having any delegates at the convention. *See* Article VII, Convention Rules below.

quorum. In adopting rules of parliamentary procedure, the convention must exclusively adopt or adapt provisions from Robert's Rules of Order and the American Institute of Parliamentarians Standard Code of Parliamentary Procedure.

Unless otherwise specified by Congress in its call, the convention will be held in Dallas, Texas, on the sixth Wednesday after the latter of the date on which three-fourths of the states become Member States or the enactment date of the Congressional resolution calling the convention.[17] In the event that the chair declares an emergency due to disorder or an imminent threat to public health and safety, and a majority of the States present do not object, convention proceedings may be temporarily suspended and the Commission will relocate or reschedule the convention.

Prohibition on Ultra Vires[18] Convention

Article VIII of the Compact prohibits Member States from participating in any convention organized pursuant to the Compact other than one called pursuant to and in accordance with the rules provided in the Compact. Additionally, Member states are prohibited from ratifying any proposed amendment to the Constitution of the United States, which originates from the convention, other than the Balanced Budget Amendment.

Resolution Prospectively Ratifying the Balanced Budget Amendment

Article IX of the Compact provides that upon becoming a Member State, the Legislature prospectively adopts and ratifies the Balanced Budget Amendment. However, this Article does not take effect until Congress refers the Balanced Budget Amendment to the states for ratification by three-fourths of the Legislatures of the states.

Construction, Enforcement, and Termination of the Compact

Article X of the Compact regulates the construction of the Compact as well as providing for its legal enforcement and termination. To the extent that the effectiveness of the Compact requires the alteration of legislative rules to be effective, legislation agreeing to be bound by the Compact is deemed to waive, repeal, supersede, or amend all such rules to allow for the effectiveness of the Compact to the fullest extent permitted by the constitution of the Member State.

The Compact provides that the chief law enforcement officer of each Member State may defend the Compact from any legal challenge, as well as seek civil mandatory and prohibitory injunctive relief to enforce the Compact. The exclusive venue for all actions arising under the Compact will be in the United States District Court for the Northern District of Texas or the courts of the State of Texas within the jurisdictional boundaries of the district court. Each Member State is required to submit to the jurisdiction of those courts with respect to all actions arising under the Compact. However, the Compact Commission may waive this provision.

The severability clause of the Compact provides that any provision of the Compact except Article VIII related to ultra vires conventions may be severable. If a court finds that the Compact

[17] The time and date of the convention is provided in Article X of the Compact.
[18] "Ultra vires" means "[u]nauthorized; beyond the scope of power allowed or granted by a corporate charter or by law." Black's Law Dictionary (10th ed. 2014).

is entirely contrary to the state constitution of a Member State or otherwise entirely invalid, that Member State is withdrawn from the Compact, and the Compact will remain in full force and effect as to any remaining Member State. Moreover, if a court finds the Compact to be wholly or substantially in violation of Article I, Section 10, of the United State Constitution, then it will be construed and enforced solely as reciprocal legislation enacted by the affected Member States.

The termination clause provides that the Compact will terminate when it is fully performed and the Constitution of the United States is amended by the Balanced Budget Amendment. However, in the event such amendment does not occur within 7 years after the date the first state passed legislation agreeing to be bound to the Compact, the Compact terminates and the Commission dissolves 90 days after that 7-year date.

The bill provides that it takes effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not appear to have an impact on cities or counties and as such, does not appear to be a mandate for constitutional purposes.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates s. 11.95, Florida Statutes:

IX. Additional Information:

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

None.

B. Amendments:

None.

By Senator Hays

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A bill to be entitled

An act relating to interstate compacts; creating s. 11.95, F.S.; adopting and entering the state into an interstate Compact for a Balanced Budget; exempting the compact from the Article V Constitutional Convention Act; providing the policy, purpose, and intent of the compact; defining terms; providing for proposal by the compact's member states of an amendment to the United States Constitution requiring the Federal Government to maintain a balanced budget with certain exceptions; requiring member states to strictly comply with the terms of the compact; describing circumstances under which the compact becomes contractually binding on a member state; establishing a Compact Commission and specifying the commission's membership and duties; providing for appointment of a Compact Administrator and specifying the administrator's duties; providing for funding of the Compact Commission and Compact Administrator; providing for the member states to apply to the United States Congress for a convention under Article V of the United States Constitution to propose the balanced budget amendment; requiring cooperation among the commission, the member states, and the Compact Administrator; providing for the appointment, terms, duties, and authority of convention delegates; requiring an oath to be taken by delegates; specifying rules to govern procedures at the convention; specifying actions that are considered ultra vires;

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providing that the balanced budget amendment is not considered ratified until ratified by a specified number of states; providing for construction and enforcement of the compact; providing an effective date for the compact; authorizing severability of the compact under certain circumstances; providing for termination of the compact under certain conditions; providing an effective date.

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

Section 1. Section 11.95, Florida Statutes, is created to read:

11.95 Compact for a balanced budget.—Notwithstanding the Article V Constitutional Convention Act, ss. 11.93-11.9352, the State of Florida enacts, adopts, and agrees to be bound by the following compact:

ARTICLE I

DECLARATION OF POLICY, PURPOSE, AND INTENT

WHEREAS, every State enacting, adopting, and agreeing to be bound by this Compact intends to ensure that their respective Legislature's use of the power to originate a Balanced Budget Amendment under Article V of the Constitution of the United States will be exercised conveniently and with reasonable certainty as to the consequences thereof.

NOW, THEREFORE, in consideration of their expressed mutual promises and obligations, be it enacted by every State enacting, adopting, and agreeing to be bound by this Compact, and resolved by each of their respective Legislatures, as the case may be, to

exercise herewith all of their respective powers as set forth herein, notwithstanding any law to the contrary.

ARTICLE II

DEFINITIONS

As used in this Compact, the term:

Section 1. "Compact" means this "Compact for a Balanced Budget."

Section 2. "Convention" means the convention for proposing amendments organized by this Compact under Article V of the Constitution of the United States and, where contextually appropriate to ensure the terms of this Compact are not evaded, any other similar gathering or body, which might be organized as a consequence of Congress receiving the application set out in this Compact and claim authority to propose or effectuate any amendment, alteration, or revision to the Constitution of the United States. This term does not encompass a convention for proposing amendments under Article V of the Constitution of the United States that is organized independently of this Compact based on the separate and distinct application of any State.

Section 3. "State" means one of the several States of the United States. Where contextually appropriate, the term "State" shall be construed to include all of its branches, departments, agencies, political subdivisions, and officers and representatives acting in their official capacity.

Section 4. "Member State" means a State that has enacted, adopted, and agreed to be bound to this Compact. For any State to qualify as a Member State with respect to any other State under this Compact, each such State must have enacted, adopted, and agreed to be bound by substantively identical compact

legislation.

Section 5. "Compact Notice Recipients" means the Archivist of the United States, the President of the United States, the President of the United States Senate, the Office of the Secretary of the United States Senate, the Speaker of the United States House of Representatives, the Office of the Clerk of the United States House of Representatives, the chief executive officer of each State, and the presiding officer(s) of each house of the Legislatures of the several States.

Section 6. Notice. All notices required by this Compact shall be by United States Certified Mail, return receipt requested, or an equivalent or superior form of notice, such as personal delivery documented by evidence of actual receipt.

Section 7. "Balanced Budget Amendment" means the following:

"ARTICLE ____

"SECTION 1. Total outlays of the government of the United States shall not exceed total receipts of the government of the United States at any point in time unless the excess of outlays over receipts is financed exclusively by debt issued in strict conformity with this article.

"SECTION 2. Outstanding debt shall not exceed authorized debt, which initially shall be an amount equal to 105 percent of the outstanding debt on the effective date of this article. Authorized debt shall not be increased above its aforesaid initial amount unless such increase is first approved by the legislatures of the several states as provided in Section 3.

"SECTION 3. From time to time, Congress may increase authorized debt to an amount in excess of its initial amount set by Section 2 only if it first publicly refers to the

legislatures of the several states an unconditional, single subject measure proposing the amount of such increase, in such form as provided by law, and the measure is thereafter publicly and unconditionally approved by a simple majority of the legislatures of the several states, in such form as provided respectively by state law; provided that no inducement requiring an expenditure or tax levy shall be demanded, offered, or accepted as a quid pro quo for such approval. If such approval is not obtained within 60 calendar days after referral, then the measure shall be deemed disapproved and the authorized debt shall thereby remain unchanged.

"SECTION 4. Whenever the outstanding debt exceeds 98 percent of the debt limit set by Section 2, the President shall enforce said limit by publicly designating specific expenditures for impoundment in an amount sufficient to ensure outstanding debt shall not exceed the authorized debt. Said impoundment shall become effective 30 days thereafter, unless Congress first designates an alternate impoundment of the same or greater amount by concurrent resolution, which shall become immediately effective. The failure of the President to designate or enforce the required impoundment is an impeachable misdemeanor. Any purported issuance or incurrence of any debt in excess of the debt limit set by Section 2 is void.

"SECTION 5. No bill that provides for a new or increased general revenue tax shall become law unless approved by a two-thirds roll call vote of the whole number of each House of Congress. However, this requirement shall not apply to any bill that provides for a new end user sales tax which would completely replace every existing income tax levied by the

government of the United States; or for the reduction or elimination of an exemption, deduction, or credit allowed under an existing general revenue tax.

"SECTION 6. For purposes of this article, "debt" means any obligation backed by the full faith and credit of the government of the United States; "outstanding debt" means all debt held in any account and by any entity at a given point in time; "authorized debt" means the maximum total amount of debt that may be lawfully issued and outstanding at any single point in time under this article; "total outlays of the government of the United States" means all expenditures of the government of the United States from any source; "total receipts of the government of the United States" means all tax receipts and other income of the government of the United States, excluding proceeds from its issuance or incurrence of debt or any type of liability; "impoundment" means a proposal not to spend all or part of a sum of money appropriated by Congress; and "general revenue tax" means any income tax, sales tax, or value-added tax levied by the government of the United States excluding imposts and duties.

"SECTION 7. This article is immediately operative upon ratification, self-enforcing, and Congress may enact conforming legislation to facilitate enforcement."

ARTICLE III

COMPACT MEMBERSHIP AND WITHDRAWAL

Section 1. This Compact governs each Member State to the fullest extent permitted by its respective constitution, superseding and repealing any conflicting or contrary law.

Section 2. By becoming a Member State, each such State

offers, promises, and agrees to perform and comply strictly in accordance with the terms and conditions of this Compact, and has made such offer, promise, and agreement in anticipation and consideration of, and in substantial reliance upon, such mutual and reciprocal performance and compliance by each other current and future Member State, if any. Accordingly, in addition to having the force of law in each Member State upon its respective effective date, this Compact and each of its Articles shall also be construed as contractually binding each Member State when:

(a) At least one other State has likewise become a Member State by enacting substantively identical legislation adopting and agreeing to be bound by this Compact; and

(b) Notice of such State's Member State status is or has been seasonably received by the Compact Administrator, if any, or otherwise by the chief executive officer of each other Member State.

Section 3. For purposes of determining Member State status under this Compact, as long as all other provisions of the Compact remain identical and operative on the same terms, legislation enacting, adopting, and agreeing to be bound by this Compact shall be deemed and regarded as "substantively identical" with respect to such other legislation enacted by another State, notwithstanding:

(a) Any difference in Section 2 of Article IV with specific regard to the respectively enacting State's own method of appointing its member to the Commission;

(b) Any difference in Section 5 of Article IV with specific regard to the respectively enacting State's own obligation to fund the Commission;

(c) Any difference in Sections 1 and 2 of Article VI with specific regard to the number and identity of each delegate respectively appointed on behalf of the enacting State, provided that no more than three delegates may attend and participate in the Convention on behalf of any State; or

(d) Any difference in Section 7 of Article X with specific regard to the respectively enacting State as to whether Section 1 of Article V of this Compact shall survive termination of the Compact, and thereafter become a continuing resolution of the Legislature of such State applying to Congress for the calling of a Convention of the States under Article V of the Constitution of the United States, under such terms and limitations as may be specified by such State.

Section 4. When fewer than three-fourths of the States are Member States, any Member State may withdraw from this Compact by enacting appropriate legislation, as determined by state law, and giving notice of such withdrawal to the Compact Administrator, if any, or otherwise to the chief executive officer of each other Member State. A withdrawal shall not affect the validity or applicability of the Compact with respect to remaining Member States, provided that there remain at least two such States. However, once at least three-fourths of the States are Member States, then no Member State may withdraw from the Compact prior to its termination absent unanimous consent of all Member States.

ARTICLE IV

COMPACT COMMISSION AND COMPACT ADMINISTRATOR

Section 1. Nature of the Compact Commission.—The Compact Commission ("Commission") is hereby established. It has the

power and duty:

(a) To appoint and oversee a Compact Administrator;

(b) To encourage States to join the Compact and Congress to call the Convention in accordance with this Compact;

(c) To coordinate the performance of obligations under the Compact;

(d) To oversee the Convention's logistical operations as appropriate to ensure this Compact governs its proceedings;

(e) To oversee the defense and enforcement of the Compact in appropriate legal venues;

(f) To request funds and to disburse those funds to support the operations of the Commission, Compact Administrator, and Convention; and

(g) To cooperate with any entity that shares a common interest with the Commission and engages in policy research, public interest litigation, or lobbying in support of the purposes of the Compact.

The Commission shall only have such implied powers as are essential to carrying out these express powers and duties. It shall take no action that contravenes or is inconsistent with this Compact or any law of any State that is not superseded by this Compact. It may adopt and publish corresponding bylaws and policies.

Section 2. Commission Membership.—The Commission initially consists of three unpaid members. Each Member State may appoint one member to the Commission through an appointment process to be determined by its respective chief executive officer until all positions on the Commission are filled. Positions shall be

assigned to appointees in the order in which their respective appointing States became Member States. The bylaws of the Commission may expand its membership to include representatives of additional Member States and to allow for modest salaries and reimbursement of expenses if adequate funding exists.

Section 3. Commission Action.—Each Commission member is entitled to one vote. The Commission shall not act unless a majority of its appointed membership is present, and no action shall be binding unless approved by a majority of the Commission's appointed membership. The Commission shall meet at least once a year, and may meet more frequently.

Section 4. First Order of Business.—The Commission shall at the earliest possible time elect from among its membership a Chair, determine a primary place of doing business, and appoint a Compact Administrator.

Section 5. Funding.—The Commission and the Compact Administrator's activities shall be funded exclusively by each Member State, as determined by its respective state law, or by voluntary donations.

Section 6. Compact Administrator.—The Compact Administrator has the power and duty:

(a) To timely notify the States of the date, time, and location of the Convention;

(b) To organize and direct the logistical operations of the Convention;

(c) To maintain an accurate list of all Member States and their appointed delegates, including contact information; and

(d) To formulate, transmit, and maintain all official notices, records, and communications relating to this Compact.

The Compact Administrator shall only have such implied powers as are essential to carrying out these express powers and duties and shall take no action that contravenes or is inconsistent with this Compact or any law of any State that is not superseded by this Compact. The Compact Administrator serves at the pleasure of the Commission and must keep the Commission seasonably apprised of the performance or nonperformance of the terms and conditions of this Compact. Any notice sent by a Member State to the Compact Administrator concerning this Compact shall be adequate notice to each other Member State provided that a copy of said notice is seasonably delivered by the Compact Administrator to each other Member State's respective chief executive officer.

Section 7. Notice of Key Events.—Upon the occurrence of each of the following described events, or otherwise as soon as possible, the Compact Administrator shall immediately send the following notices to all Compact Notice Recipients, together with certified conforming copies of the chaptered version of this Compact as maintained in the statutes of each Member State:

(a) Whenever any State becomes a Member State, notice of that fact shall be given;

(b) Once at least three-fourths of the States are Member States, notice of that fact shall be given together with a statement declaring that the Legislatures of at least two-thirds of the several States have applied for a Convention for proposing amendments under Article V of the Constitution of the United States, petitioning Congress to call the Convention contemplated by this Compact, and further requesting cooperation

in organizing the same in accordance with this Compact;

(c) Once Congress has called the Convention contemplated by this Compact, and whenever the date, time, and location of the Convention has been determined, notice of that fact shall be given together with the date, time, and location of the Convention and other essential logistical matters;

(d) Upon approval of the Balanced Budget Amendment by the Convention, notice of that fact shall be given together with the transmission of certified copies of such approved proposed amendment and a statement requesting Congress to refer the same for ratification by three-fourths of the Legislatures of the several States under Article V of the Constitution of the United States; however, in no event shall any proposed amendment other than the Balanced Budget Amendment be transmitted; and

(e) When any Article of this Compact prospectively ratifying the Balanced Budget Amendment becomes effective in any Member State, notice of the same shall be given together with a statement declaring such ratification and further requesting cooperation in ensuring that the official record confirms and reflects the effective corresponding amendment to the Constitution of the United States.

However, whenever any Member State enacts appropriate legislation, as determined by the laws of the respective state, withdrawing from this Compact, the Compact Administrator shall immediately send certified conforming copies of the chaptered version of such withdrawal legislation as maintained in the statutes of each such withdrawing Member State, solely to each chief executive officer of each remaining Member State, giving

notice of such withdrawal.

Section 8. Cooperation.—The Commission, Member States, and Compact Administrator shall cooperate with each other and give each other mutual assistance in enforcing this Compact and shall give the chief law enforcement officer of each other Member State any information or documents that are reasonably necessary to facilitate the enforcement of this Compact.

Section 9. Effective Date of Article.—This Article does not take effect until there are at least two Member States.

ARTICLE V

RESOLUTION APPLYING FOR CONVENTION

Section 1. Be it resolved, as provided for in Article V of the Constitution of the United States, the Legislature of each Member State herewith applies to Congress for the calling of a convention for proposing amendments limited to the subject matter of proposing for ratification the Balanced Budget Amendment.

Section 2. Congress is further petitioned to refer the Balanced Budget Amendment to the States for ratification by three-fourths of their respective Legislatures.

Section 3. This Article does not take effect until at least three-fourths of the several States are Member States.

ARTICLE VI

DELEGATE APPOINTMENT, LIMITATIONS, AND INSTRUCTIONS

Section 1. Number of Delegates.—Each Member State shall be entitled to delegates as the sole and exclusive representatives at the Convention as set forth in this Article.

Section 2. Identity of Delegates.—The then serving President of the Senate, or his or her designee, and the then

serving Speaker of the House of Representatives, or his or her designee, are appointed to represent Florida as its sole and exclusive delegates.

Section 3. Replacement or Recall of Delegates.—A delegate appointed hereunder may be replaced or recalled by the Legislature of his or her respective State at any time for good cause, such as criminal misconduct or the violation of this Compact. If replaced or recalled, any delegate previously appointed hereunder must immediately vacate the Convention and return to his or her respective State's capitol.

Section 4. Oath.—The power and authority of a delegate under this Article may only be exercised after the Convention is first called by Congress in accordance with this Compact and such appointment is duly accepted by such appointee publicly taking the following oath or affirmation: "I do solemnly swear (or affirm) that I accept this appointment and will act strictly in accordance with the terms and conditions of the Compact for a Balanced Budget, the Constitution of the State I represent, and the Constitution of the United States. I understand that violating this oath (or affirmation) forfeits my appointment and may subject me to other penalties as provided by law."

Section 5. Term.—The term of a delegate then serving as the President of the Senate or the Speaker of the House of Representatives, or their designees, commences upon acceptance of appointment and terminates upon the permanent adjournment of the Convention, unless shortened by recall, replacement, or forfeiture under this Article. Upon expiration of such term, any person formerly serving as a delegate must immediately withdraw from and cease participation at the Convention, if any is

proceeding.

Section 6. Delegate Authority.—The power and authority of any delegate appointed hereunder is strictly limited:

(a) To introducing, debating, voting upon, proposing, and enforcing the Convention Rules specified in this Compact, as needed to ensure those rules govern the Convention; and

(b) To introducing, debating, voting upon, and rejecting or proposing for ratification the Balanced Budget Amendment.

All actions taken by any delegate in violation of this section are void ab initio.

Section 7. Delegate Authority.—No delegate of any Member State may introduce, debate, vote upon, reject, or propose for ratification any constitutional amendment at the Convention unless:

(a) The Convention Rules specified in this Compact govern the Convention and its actions; and

(b) The constitutional amendment is the Balanced Budget Amendment.

Section 8. Delegate Authority.—The power and authority of any delegate at the Convention does not include any power or authority associated with any other public office held by the delegate. Any person appointed to serve as a delegate shall take a temporary leave of absence, or otherwise shall be deemed temporarily disabled, from any other public office held by the delegate while attending the Convention, and may not exercise any power or authority associated with any other public office held by the delegate, while attending the Convention. All actions taken by any delegate in violation of this section are

void ab initio.

Section 9. Order of Business.—Before introducing, debating, voting upon, rejecting, or proposing for ratification any constitutional amendment at the Convention, each delegate of every Member State must first ensure the Convention Rules in this Compact govern the Convention and its actions. Every delegate and each Member State must immediately vacate the Convention and notify the Compact Administrator by the most effective and expeditious means if the Convention Rules in this Compact are not adopted to govern the Convention and its actions.

Section 10. Forfeiture of Appointment.—If any Member State or delegate violates any provision of this Compact, then every delegate of that Member State immediately forfeits his or her appointment, and shall immediately cease participation at the Convention, vacate the Convention, and return to his or her respective State's capitol.

Section 11. Expenses.—A delegate appointed hereunder is entitled to reimbursement of reasonable expenses for attending the Convention from his or her respective Member State. No delegate may accept any other form of remuneration or compensation for service under this Compact.

ARTICLE VII

CONVENTION RULES

Section 1. Nature of the Convention.—The Convention shall be organized, construed, and conducted as a body exclusively representing and constituted by the several States.

Section 2. Agenda of the Convention.—The agenda of the Convention shall be entirely focused upon and exclusively

limited to introducing, debating, voting upon, and rejecting or proposing for ratification the Balanced Budget Amendment under the Convention Rules specified in this Article and in accordance with the Compact. It shall not be in order for the Convention to consider any matter that is outside the scope of this agenda.

Section 3. Delegate Identity and Procedure.—States shall be represented at the Convention through duly appointed delegates. The number, identity, and authority of delegates assigned to each State shall be determined by this Compact in the case of Member States or, in the case of States that are not Member States, by their respective state laws. However, to prevent disruption of proceedings, no more than three delegates may attend and participate in the Convention on behalf of any State. A certified chaptered conforming copy of this Compact, together with government-issued photographic proof of identification, shall suffice as credentials for delegates of Member States. Any commission for delegates of States that are not Member States shall be based on its respective state laws, but it shall furnish credentials that are at least as reliable as those required of Member States.

Section 4. Voting.—Each State represented at the Convention shall have one vote, exercised by the vote of that State's delegate in the case of States represented by one delegate, or, in the case of any State that is represented by more than one delegate, by the majority vote of that State's respective delegates.

Section 5. Quorum.—A majority of the several States of the United States, each present through its respective delegate in the case of any State that is represented by one delegate, or

through a majority of its respective delegates, in the case of any State that is represented by more than one delegate, shall constitute a quorum for the transaction of any business on behalf of the Convention.

Section 6. Action by the Convention.—The Convention shall only act as a committee of the whole, chaired by the delegate representing the first State to have become a Member State, if that State is represented by one delegate, or otherwise by the delegate chosen by the majority vote of that State's respective delegates. The transaction of any business on behalf of the Convention, including the designation of a Secretary, the adoption of parliamentary procedures, and the rejection or proposal of any constitutional amendment, requires a quorum to be present and a majority affirmative vote of those States constituting the quorum.

Section 7. Emergency Suspension and Relocation of the Convention.—In the event that the Chair of the Convention declares an emergency due to disorder or an imminent threat to public health and safety prior to the completion of the business on the Agenda, and a majority of the States present at the Convention do not object to such declaration, further Convention proceedings shall be temporarily suspended and the Commission shall subsequently relocate or reschedule the Convention to resume proceedings in an orderly fashion in accordance with the terms and conditions of this Compact with prior notice given to the Compact Notice Recipients.

Section 8. Parliamentary Procedure.—In adopting, applying, and formulating parliamentary procedure, the Convention shall exclusively adopt, apply, or appropriately adapt provisions of

the most recent editions of Robert's Rules of Order and the American Institute of Parliamentarians Standard Code of Parliamentary Procedure. In adopting, applying, or adapting parliamentary procedure, the Convention shall exclusively consider analogous precedent arising within the jurisdiction of the United States. Parliamentary procedures adopted, applied, or adapted pursuant to this section shall not obstruct, override, or otherwise conflict with this Compact.

Section 9. Transmittal.—Upon approval of the Balanced Budget Amendment by the Convention to propose for ratification, the Chair of the Convention shall immediately transmit certified copies of such approved proposed amendment to the Compact Administrator and all Compact Notice Recipients, notifying them respectively of such approval and requesting Congress to refer the same for ratification by the States under Article V of the Constitution of the United States. However, in no event shall any proposed amendment other than the Balanced Budget Amendment be transmitted as aforesaid.

Section 10. Transparency.—Records of the Convention, including the identities of all attendees and detailed minutes of all proceedings, shall be kept by the Chair of the Convention or Secretary designated by the Convention. All proceedings and records of the Convention shall be open to the public upon request subject to reasonable regulations adopted by the Convention that are closely tailored to preventing disruption of proceedings under this Article.

Section 11. Adjournment of the Convention.—The Convention shall permanently adjourn upon the earlier of twenty-four (24) hours after commencing proceedings under this Article or the

completion of the business on its Agenda.

ARTICLE VIII

PROHIBITION ON ULTRA VIRES CONVENTION

Section 1. Member States shall not participate in the Convention unless:

(a) Congress first calls the Convention in accordance with this Compact; and

(b) The Convention Rules of this Compact are adopted by the Convention as its first order of business.

Section 2. Any proposal or action of the Convention is void ab initio and issued by a body that is conducting itself in an unlawful and ultra vires fashion if that proposal or action:

(a) Violates or was approved in violation of the Convention Rules or the delegate instructions and limitations on delegate authority specified in this Compact;

(b) Purports to propose or effectuate a mode of ratification that is not specified in Article V of the Constitution of the United States; or

(c) Purports to propose or effectuate the formation of a new government.

All Member States are prohibited from advancing or assisting in the advancement of any such proposal or action.

Section 3. Member States shall not ratify or otherwise approve any proposed amendment, alteration, or revision to the Constitution of the United States, which originates from the Convention, other than the Balanced Budget Amendment.

ARTICLE IX

RESOLUTION PROSPECTIVELY RATIFYING THE BALANCED BUDGET AMENDMENT

Section 1. Each Member State, by and through its respective Legislature, hereby adopts and ratifies the Balanced Budget Amendment.

Section 2. This Article does not take effect until Congress effectively refers the Balanced Budget Amendment to the States for ratification by three-fourths of the Legislatures of the several States under Article V of the Constitution of the United States.

ARTICLE X

CONSTRUCTION, ENFORCEMENT, VENUE, AND SEVERABILITY

Section 1. Construction of Compact.—To the extent that the effectiveness of this Compact or any of its Articles or provisions requires the alteration of local legislative rules, drafting policies, or procedures to be effective, the enactment of legislation enacting, adopting, and agreeing to be bound by this Compact shall be deemed to waive, repeal, supersede, or otherwise amend and conform all such rules, policies, or procedures to allow for the effectiveness of this Compact to the fullest extent permitted by the constitution of any affected Member State.

Section 2. Date and Location of the Convention.—Unless otherwise specified by Congress in its call, the Convention shall be held in Dallas, Texas, and commence proceedings at 9 a.m. Central Standard Time on the sixth Wednesday after the latter of the effective date of Article V of this Compact or the enactment date of the Congressional resolution calling the Convention.

Section 3. Defense of the Compact.—In addition to all other powers and duties conferred by state law which are consistent

with the terms and conditions of this Compact, the chief law enforcement officer of each Member State is empowered to defend the Compact from any legal challenge, as well as to seek civil mandatory and prohibitory injunctive relief to enforce this Compact, and shall take such action whenever the Compact is challenged or violated.

Section 4. Venue.—The exclusive venue for all actions in any way arising under this Compact shall be in the United States District Court for the Northern District of Texas or the courts of the State of Texas within the jurisdictional boundaries of the foregoing district court. Each Member State shall submit to the jurisdiction of said courts with respect to such actions. However, upon written request by the chief law enforcement officer of any Member State, the Commission may elect to waive this provision for the purpose of ensuring an action proceeds in the venue that allows for the most convenient and effective enforcement or defense of this Compact. Any such waiver shall be limited to the particular action to which it is applied and not construed or relied upon as a general waiver of this provision. The waiver decisions of the Commission under this provision shall be final and binding on each Member State.

Section 5. Effective Date.—The effective date of this Compact and any of its Articles is the latter of:

(a) The date of any event rendering the same effective according to its respective terms and conditions; or

(b) The earliest date otherwise permitted by law.

Section 6. Severability and Invalidity.—Article VIII of this Compact is hereby deemed nonseverable prior to termination of the Compact. However, if any other phrase, clause, sentence,

or provision of this Compact, or the applicability of any other phrase, clause, sentence, or provision of this Compact to any government, agency, person, or circumstance, is declared in a final judgment to be contrary to the Constitution of the United States, contrary to the state constitution of any Member State, or is otherwise held invalid by a court of competent jurisdiction, such phrase, clause, sentence, or provision shall be severed and held for naught, and the validity of the remainder of this Compact and the applicability of the remainder of this Compact to any government, agency, person, or circumstance shall not be affected. Furthermore, if this Compact is declared in a final judgment by a court of competent jurisdiction to be entirely contrary to the state constitution of any Member State or otherwise entirely invalid as to any Member State, such Member State shall be deemed to have withdrawn from the Compact, and the Compact shall remain in full force and effect as to any remaining Member State. Finally, if this Compact is declared in a final judgment by a court of competent jurisdiction to be wholly or substantially in violation of Article I, Section 10, of the Constitution of the United States, then it shall be construed and enforced solely as reciprocal legislation enacted by the affected Member State(s).

Section 7. Termination.—This Compact shall terminate and be held for naught when the Compact is fully performed and the Constitution of the United States is amended by the Balanced Budget Amendment. However, notwithstanding anything to the contrary set forth in this Compact, in the event such amendment does not occur within 7 years after the first State passes legislation enacting, adopting, and agreeing to be bound to this

Compact, the Compact shall terminate as follows:

(a) The Commission shall dissolve and wind up its operations within 90 days thereafter, with the Compact Administrator giving notice of such dissolution and the operative effect of this section to the Compact Notice Recipients; and

(b) Upon the completed dissolution of the Commission, this Compact shall be deemed terminated, repealed, void ab initio, and held for naught.

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

The Florida Senate

COMMITTEE VOTE RECORD

COMMITTEE: Judiciary
ITEM: SB 1242
FINAL ACTION: Favorable
MEETING DATE: Tuesday, March 31, 2015
TIME: 4:00 —6:00 p.m.
PLACE: 110 Senate Office Building

FINAL VOTE								
Yea	**Nay**	**SENATORS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
X		Bean						
X		Benacquisto						
X		Brandes						
	X	Joyner						
X		Simmons						
X		Simpson						
X		Soto						
X		Stargel						
		Ring, VICE CHAIR						
X		Diaz de la Portilla, CHAIR						
8	1	**TOTALS**						
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

SENATOR ALAN HAYS
11th District

COMMITTEES:
Appropriations Subcommittee on General Government, *Chair*
Governmental Oversight and Accountability, *Vice Chair*
Appropriations
Environmental Preservation and Conservation
Ethics and Elections
Fiscal Policy

JOINT COMMITTEE:
Joint Select Committee on Collective Bargaining, *Alternating Chair*

MEMORANDUM

To: Senator Miguel Diaz de la Portilla, Chair
Judiciary Committee
CC: Tom Cibula, Staff Director
Shirley Proctor, Committee Administrative Assistant

From: Senator D. Alan Hays

Subject: Request to agenda SB 1242 – Interstate Compacts

Date: March 2, 2015

I respectfully request that you agenda the above referenced bill at your earliest convenience. If you have any questions regarding this legislation, I welcome the opportunity to meet with you one-on-one to discuss it in further detail. Thank you so much for your consideration of this request.

Sincerely,

D. Alan Hays, DMD
State Senator, District 11

REPLY TO:
- ☐ 871 South Central Avenue, Umatilla, Florida 32784-9290 (352) 742-6441
- ☐ 320 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5011
- ☐ 1104 Main Street, The Villages, Florida 32159 (352) 360-6739 FAX: (352) 360-6748
- ☐ 685 West Montrose Street, Suite 210, Clermont, Florida 34711 (352) 241-9344 FAX: (888) 263-3677

Senate's Website: *www.flsenate.gov*

ANDY GARDINER
President of the Senate

GARRETT RICHTER
President Pro Tempore

Delegations
Escambia County Delegation, Member
Santa Rosa County Delegation, Member

Committee Assignments
Civil Justice Subcommittee, Vice Chair
Finance & Tax Committee
Rules, Calendar & Ethics Committee
Energy & Utilities Subcommittee

Florida House of Representatives

Representative Mike Hill
District 2

March 17, 2015

The Honorable Miguel Diaz de la Portilla
Chair-Judiciary Committee
406 Senate Office Building
402 South Monroe Street
Tallahassee, Florida 32399

Dear Chair Diaz de la Portilla,

HB 931, companion to SB 1242, has just passed through the House Civil Justice Subcommittee and is now in the Local & Federal Affairs Committee. I respectfully request that you schedule SB 1242- Interstate Compacts, on the Judiciary Committee agenda at your earliest convenience.

The intent of the bill is to show that Florida is asking the Federal Government to balance the Federal Budget and if there is a need to call a Constitutional Convention, under Article V of the United States Constitution, Florida has designated specific delegates to participate in the Convention.

I look forward to discussing this bill with you and your committee. Your favorable consideration is greatly appreciated.

I am, respectfully,

State Representative Mike Hill
District 2

WBH/BH

CC: Tom Cibula, Staff Director
Shirley Proctor, Committee Administrative Assistant

District Office:
Box#2, 418 West Garden Street, Suite 403
Pensacola, Florida 32502
(850) 595-5550 (850) 595-5552 (fax)
E-mail: Mike.Hill@myfloridahouse.gov
Sandra Livingston, Executive District Assistant

Tallahassee Office:
405 House Office Building
402 South Monroe Street
Tallahassee, Florida 32399
(850) 717-5002
Brittany Hamel, Legislative Assistant

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/2015
Meeting Date

Senate Judiciary Committee

SB 1242
Bill Number (if applicable)

Topic Compact for a Balanced Budget

Amendment Barcode (if applicable)

Name Chip DeMoss

Job Title Compact Administrator

Address 2323 Clear Lake City Blvd
Street

Houston, TX 77062
City *State* *Zip*

Phone 281-235-8311

Email chip.demoss@compactforamerica.org

Speaking: ☒ For ☐ Against ☐ Information

Will Waive Speaking: ☒ In Support ☐ Against
(The Chair will read this information into the record.)

If there are no technical questions

Representing Compact Commission - here to answer any technical questions

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/2015
Meeting Date

Senate Judiciary Committee

SB 1242
Bill Number (if applicable)

Topic Compact for a Balanced Budget

Amendment Barcode (if applicable)

Name Paulette Rakestraw

Job Title Compact Commissioner from the state of Georgia

Address 2323 Clear Lake City Blvd
Street

Houston, TX 77062
City *State* *Zip*

Phone (770) 294-1039

Email paulette.rakestraw@compactforamerica.org

Speaking: ☒ For ☐ Against ☐ Information

Will Waive Speaking: ☒ In Support ☐ Against
(The Chair will read this information into the record.)
If there are no technical questions

Representing Compact Commission - here to answer any technical questions

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/2015
Meeting Date

Topic _____ Bill Number 1242 *(if applicable)*

Name BRIAN PITTS Amendment Barcode _____ *(if applicable)*

Job Title TRUSTEE

Address 1119 NEWTON AVNUE SOUTH Phone 727-897-9291
Street

SAINT PETERSBURG FLORIDA 33705 E-mail JUSTICE2JESUS@YAHOO.COM
City *State* *Zip*

Speaking: ☐ For ☐ Against ☑ Information

Representing JUSTICE-2-JESUS

Appearing at request of Chair: ☐ Yes ☑ No Lobbyist registered with Legislature: ☐ Yes ☑ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/20/11)

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	CS/SB 1314
INTRODUCER:	Banking and Insurance Committee and Senator Bradley
SUBJECT:	Electronic Noticing of Trust Accounts
DATE:	March 30, 2015 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Billmeier	Knudson	BI	**Fav/CS**
2.	Davis	Cibula	JU	**Favorable**
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1314 provides a mechanism for trustees to provide electronic notices relating to trust accounts. A trustee has a duty to keep beneficiaries of an irrevocable trust reasonably informed of the trust and its administration. Specifically, the trustee must provide beneficiaries with an accounting of the trust at specified periods, disclosure of documents related to the trust, and notice of specific events related to the administration of the trust.

The Florida Trust Code currently provides that the only permissible methods of sending notice or a document to such persons are by first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, or a properly directed facsimile or other electronic message. However, for many reasons, some beneficiaries prefer to receive, store, and access correspondence and documents through secured websites and accounts. Trustees also prefer to provide sensitive financial information through secured web accounts rather than through electronic messages that carry greater security risks. Although financial institutions commonly use secure websites for providing statements and other disclosures related to bank or credit accounts, such methods are rarely used for trust accounts due to a perceived lack of authorization within current law.

The bill authorizes a trustee to post required documents to a secure website or account if a beneficiary opts in to receiving electronic documents through a secure website or account. The bill also specifies when notice or the delivery of a document by electronic message or posting is

complete and presumed received by the intended recipient for purposes of commencing a limitations period for breach of trust claims.

II. Present Situation:

"A trust is a fiduciary relationship[1] with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it."[2] A trust involves three interest holders: the settlor[3] who establishes the trust; the trustee[4] who holds legal title to the property held for the benefit of the beneficiary; and lastly, the beneficiary[5] who has an equitable interest in property held subject to the trust.

The Florida Trust Code[6] (the "code") requires a trustee to administer the trust "in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with [the] code,"[7] and also imposes a duty of loyalty upon the trustee.[8] The violation by a trustee of a duty owed to a beneficiary is a breach of trust.[9]

Disclosure and Notice of Trust Administration

To be able to enforce the trustee's duties, the beneficiary of a trust must know of the existence of the trust and be informed about the administration of the trust:

> If there were no duty to inform and report to the beneficiary, the beneficiary might never become aware of breaches of trust or might be unaware of breaches until it is too late to obtain relief. In addition, providing information to the beneficiary protects the trustee from claims being brought long after events that allegedly constituted a breach, because the statute of limitations or the doctrine of laches will prevent the beneficiary from pursuing stale claims. As a result, the duty to inform and report to the beneficiary is fundamental to the trust relationship.[10]

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[1] *Brundage v. Bank of America*, 996 So.2d 877, 882 (Fla. 4th DCA 2008) (trustee owes a fiduciary duty to settlor/beneficiary).
[2] 55A FLA.JUR.2D *Trusts* ch. 1.
[3] "Settlor" means a person, including a testator, who creates or contributes property to a trust. Section 736.0103(18), F.S.
[4] "Trustee" means the original trustee and includes any additional trustee, any successor trustee, and any cotrustee. Section 736.0103(23), F.S.
[5] "Beneficiary" means a person who has a present or future beneficial interest in a trust, vested or contingent, or who holds a power of appointment over trust property in a capacity other than that of trustee. Section 736.0103(4), F.S.
[6] Chapter 736, F.S.
[7] Section 736.0801, F.S.
[8] Section 736.0802(1), F.S.
[9] Section 736.1001(1), F.S.
[10] Kevin D. Millard, *The Trustee's Duty to Inform and Report Under the Uniform Trust Code*, 40 REAL PROPERTY, PROBATE AND TRUST J. 373, 375, (summer 2005) http://www.americanbar.org/content/dam/aba/publications/real_property_trust_and_estate_law_journal/V40/02/2005_aba_rpte_journal_v40_no2_summer_master.pdf, (last visited Mar. 9, 2015).

Accordingly, s. 736.0813, F.S., imposes a duty on a Florida trustee to keep the qualified beneficiaries[11] (hereinafter "beneficiaries") of an irrevocable trust reasonably informed of the trust and its administration. The duty includes, but is not limited to: [12]

- Notice of the existence of the irrevocable trust, the identity of the settlor or settlors, the right to request a copy of the trust instrument, the right to accountings, and applicability of the fiduciary lawyer-client privilege.
- Notice of the acceptance of the trust, the full name and address of the trustee, and the applicability of the fiduciary lawyer-client privilege.
- Disclosure of a copy of the trust instrument upon reasonable request.
- An annual accounting of the trust to each beneficiary and an accounting on termination of the trust or on change of the trustee. The accounting must address the cash and property transactions in the accounting period and what trust assets are currently on hand.[13]
- Disclosure of relevant information about the assets and liabilities of the trust and the particulars relating to administration upon reasonable request.
- Such additional notices and disclosure requirements related to the trust administration as required by the Florida Trust Code.[14]

A beneficiary must bring an action for breach of trust as to any matter adequately disclosed within an accounting or any other written report of the trustee, also known as trust disclosure documents,[15] within 6 months after *receiving* the trust disclosure document or a limitation *notice*[16] from the trustee that applies to that trust disclosure document, whichever occurs later.[17] A limitation notice informs the beneficiary that an action against the trustee for breach of trust based on any matter adequately disclosed in the trust disclosure document may be barred unless the action is commenced within 6 months.

The code prescribes the permissible methods of sending a document or notice for receipt by a beneficiary.

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[11] The term "qualified beneficiary" encompasses only a limited subset of all trust beneficiaries. The class is limited to living persons who are current beneficiaries, intermediate beneficiaries, and first-line remainder beneficiaries, whether vested or contingent. Section 736.0103(16), F.S.

[12] Section 736.0813, F.S.

[13] Sections 736.0813 and 736.08135, F.S.

[14] *See, e.g.* Section 736.0108(6), F.S. (notice of a proposed transfer of a trust's principal place of administration); Section 736.04117(4), F.S. (notice of the trustee's exercise of the power to invade the principal of the trust); Section 736.0414(1), F.S. (notice of terminating certain minimally funded trusts); Section 736.0417(1), F.S. (notice prior to combining or dividing trusts); Section 736.0705 (notice of resignation of trustee); Section 736.0802, F.S. (disclose and provide notice of investments in funds owned or controlled by trustee; the identity of the investment instruments, and the identity and relationship to the trustee to any affiliate that owns or controls the investment instruments; and notice to beneficiaries whose share of the trust may be affected by certain legal claims); and Section 736.0902(5), F.S., (notice of the non- application of the prudent investor rule to certain transactions).

[15] "Trust disclosure document" means a trust accounting or any other written report of the trustee. A trust disclosure document adequately discloses a matter if the document provides sufficient information so that a beneficiary knows of a claim or reasonably should have inquired into the existence of a claim with respect to that matter. Section 736.1008(4)(a), F.S.

[16] "Limitation notice" means a written statement of the trustee that an action by a beneficiary against the trustee for breach of trust based on any matter adequately disclosed in a trust disclosure document may be barred unless the action is commenced within 6 months after receipt of the trust disclosure document or receipt of a limitation notice that applies to that trust disclosure document, whichever is later.

[17] Section 736.1008(2), F.S.

Methods of Disclosure or Notice

Current law requires that notice or sending a document to a person under the code must be accomplished "in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document."[18] However, s. 736.0109, F.S., specifies that the only permissible manners of providing notice, except notice of a judicial proceeding, or sending a document to a person under the code are:

- First-class mail;
- Personal delivery;
- Delivery to the person's last known place of residence or place of business; or
- A properly directed facsimile or other electronic message.

Notice of a judicial proceeding must be given as provided in the Florida Rules of Civil Procedure.[19]

The current methods of permissible notice or service of documents under the code restrict the ability of trustees to meet increasing beneficiary demands to receive information electronically. Trustees have expressed concern regarding protecting confidential information and the privacy hazards inherent in the delivery of financial information via email.[20] Some trustees, sensitive to these privacy concerns, deliver required documents, such as a trust account statement, to beneficiaries by emailing notice that a trust statement is available to be viewed and downloaded on a secured website or account and providing a password for the beneficiary to access the account.[21] However, it is not clear that by using this method, although more secure than email, the trustee technically complies with the duty to provide a trust accounting under s. 736.0813, F.S., because the document itself is not delivered by email but rather delivers information on how to access the document through a secured website. The failure to provide a trust accounting may be actionable as a breach of trust under the code if a beneficiary denies receipt of statements provided by this method. Further, it is not clear that trust documents posted on a secured website have the benefit of the 6 month limitations period for matters adequately disclosed in trust disclosure documents as they are provided in a manner that may not be permissible under the code. If the limitations period does not apply, a trustee may be subject to a breach of trust claim, even if the matters were adequately disclosed in the trust document, for up to 4 years.[22]

Due to the uncertainty regarding when the limitations period runs for notice or trust disclosure documents delivered by electronic message or posted on a secured website and whether attempts to provide trust disclosure documents through a secured website or account technically comply with the statutory duty to provide certain documents to a beneficiary, trustees have little incentive to respond to beneficiary requests for electronic communications. Prudent trustees that offer electronic delivery of trust disclosure documents via email or through a secured website may find it necessary to continue providing physical documents in order to comply with notice

[18] Section 736.0109(1), F.S.
[19] Section 736.0109(4), F.S.
[20] Florida Bankers Association, *Subcommittee Report on Electronic Delivery of Trust Statements*, (2015) (on file with the Senate Committee on Judiciary).
[21] *Id.*
[22] Section 736.1008(1), F.S provides that the applicable limitations period is determined under ch. 95, F.S. That is, the normal limitations period will be the 4 year period described in s. 95.11(3), F.S.

and disclosure requirements under the code and to secure the protection of the 6 months limitations period for breach of trust claims.

III. Effect of Proposed Changes:

CS/SB 1314 authorizes a trustee to post documents that must be provided to a person under the code to a secure electronic website or account if the person provides written authorization. The website or account must allow the recipient to download or print the posted document. A document provided solely through electronic posting must be retained on the website or account for at least 4 years after the date it is received. The written authorization to provide electronic posting of documents must:

- Be limited solely to posting documents on the electronic account or website.
- Enumerate the documents that may be posted on the electronic website or account.
- Contain specific instructions for accessing the electronic website or account, including any security measures.
- Advise that a separate notice will be sent, and the manner in which it will be sent, when a document is posted to the electronic website or account.
- Advise that the authorization may be amended or revoked at any time and provide instructions to amend or revoke authorization.
- Advise that the posting of a document on the electronic account or website may commence a limitations period as short as 6 months even if the recipient never access the electronic account, website, or document.

The trustee is required to send a notice to a person receiving trust documents by electronic posting, which notice may be made by any permissible method of notice under the code except electronic posting, at the following intervals:

- Each time a document is posted and the notice must identify each document that has been posted and how the person may access the document.
- Every year (the "annual notice") to advise such persons that posting of a document commences a limitations period as short as 6 months even if the recipient never accesses the website, account, or document. The annual notice must also address the right to amend or revoke a previous authorization to post trust documents on a website or account. The bill provides the suggested form of the annual notice, which is substantially similar to the suggested form of a limitations notice provided in s. 736.1008(4)(c), F.S. The failure of a trustee to provide the annual notice within 380 days after the last notice automatically revokes the person's authorization to post trust documents on an electronic website or account.

A document delivered by electronic posting is deemed received by the recipient on the earlier of the date that notice of the document's posting is received or the date that the recipient accesses the document on the electronic account or website. The posting of a document to an electronic account or website is only effective if done in compliance with the requirements of this bill. The trustee has the burden of demonstrating compliance with such requirements. If a trustee provides notice or sends a document to a person by electronic message, notice or sending of the document is complete when sent and presumed received on the date on which it is sent unless the sender has actual knowledge the electronic message did not reach the recipient.

The bill does not preclude the sending of a document by other permissible means under the code nor does it affect or alter the duties of a trustee to keep clear, distinct, and accurate records pursuant to s. 736.0810, F.S., or the time such records must be retained.

The bill specifically delineates that notice and service of documents in a judicial proceeding related to a trust are governed by the Florida Rules of Civil Procedure rather than the code.

This bill takes effect July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Trustees may see a reduction in stationary, postage, and labor costs by providing required notices and documents electronically to qualified beneficiaries that opt in to receive electronic notices.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 736.0109 of the Florida Statutes.

IX. Additional Information:

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

CS by Banking and Insurance on March 23, 2015:
The CS clarifies that the website or account where trust documents are posted must be secure. The CS provides that the annual notice must be provided within 380 days of the last notice.

B. Amendments:

None.

By the Committee on Banking and Insurance; and Senator Bradley

597-02739-15 20151314c1

A bill to be entitled

An act relating to electronic noticing of trust accounts; amending s. 736.0109, F.S.; authorizing a sender to post a document to a secure electronic account or website upon the authorization of a recipient; providing for effective authorization for such posting; requiring a sender to provide a separate notice once a document is electronically posted; specifying when a document sent electronically is deemed received by the recipient; requiring a sender to provide notice of the beginning of a limitations period and authority of a recipient to amend or revoke authorization for electronic posting; providing a form that may be used to effectuate such notice; requiring documents posted to an electronic website to remain accessible to the recipient for a specified period; establishing burdens of proof for purposes of determining whether proper notifications were provided; specifying that electronic messages are deemed received when sent; specifying situations under which electronic messages are not deemed received; specifying that service of documents in a judicial proceeding are governed by the Florida Rules of Civil Procedure; providing an effective date.

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

Section 1. Present subsections (3) and (4) of section 736.0109, Florida Statutes, are redesignated as subsections (5)

597-02739-15 20151314c1

and (6), respectively, present subsection (4) is amended, and new subsections (3) and (4) are added to that section, to read:

736.0109 Methods and waiver of notice.—

(3) In addition to the methods listed in subsection (1) for sending a document, a sender may post a document to a secure electronic account or website where the document can be accessed.

(a) Before a document may be posted to an electronic account or website, the recipient must sign a separate written authorization solely for the purpose of authorizing the sender to post documents on the electronic account or website. The written authorization must:

1. Enumerate the documents that may be posted in this manner.

2. Contain specific instructions for accessing the electronic account or website, including the security procedures required to access the electronic account or website, such as a username and password.

3. Advise the recipient that a separate notice will be sent when a document is posted to the electronic account or website and the manner in which the separate notice will be sent.

4. Advise the recipient that the authorization to receive documents by electronic posting may be amended or revoked at any time and include specific instructions for revoking or amending the authorization, including the address designated for the purpose of receiving notice of the revocation or amendment.

5. Advise the recipient that posting a document on the electronic account or website may commence a limitations period as short as 6 months even if the recipient never actually

accesses the electronic account or website or the document.

(b) Once the recipient signs the written authorization, the sender must provide a separate notice to the recipient when a document is posted to the electronic account or website. As used in this subsection, the term "separate notice" means a notice sent to the recipient by means other than electronic posting which identifies each document posted to the electronic account or website and provides instructions for accessing the posted document. The separate notice requirement is satisfied if the recipient accesses the document on the electronic account or website.

(c) A document sent by electronic posting is deemed received by the recipient on the earlier of the date that the separate notice is received or the date that the recipient accesses the document on the electronic account or website.

(d) At least annually after a recipient signs a written authorization, a sender shall send a notice advising the recipient that posting a document on the electronic account or website may commence a limitations period as short as 6 months even if the recipient never accesses the electronic account or website or the document and that the authorization to receive documents by electronic posting may be amended or revoked at any time. This notice must be given by means other than electronic posting and may not be accompanied by any other written communication. Failure to provide such notice within 380 days after the last notice is deemed to automatically revoke the authorization to receive documents in the manner permitted under this subsection 380 days after the last notice is sent.

(e) The notice required in paragraph (d) may be in

substantially the following form: "You have authorized receipt of documents through posting to an electronic account or website where the documents can be accessed. This notice is being sent to advise you that a limitations period, which may be as short as 6 months, may be running as to matters disclosed in a trust accounting or other written report of a trustee posted to the electronic account or website even if you never actually access the electronic account or website or the documents. You may amend or revoke the authorization to receive documents by electronic posting at any time. If you have any questions, please consult your attorney."

(f) A sender may rely on the recipient's authorization until the recipient amends or revokes the authorization by sending a notice to the address designated for that purpose in the authorization. The recipient, at any time, may amend or revoke an authorization to have documents posted on the electronic account or website.

(g) A document provided to a recipient solely through electronic posting must remain accessible to the recipient on the electronic account or website for at least 4 years after the date that the document is deemed received by the recipient. The electronic account or website must allow the recipient to download or print the document. This subsection does not affect or alter the duties of a trustee to keep clear, distinct, and accurate records pursuant to s. 736.0810 or affect or alter the time periods for which the trustee must maintain those records.

(h) To be effective, the posting of a document to an electronic account or website must be done in accordance with this subsection. The sender has the burden of establishing

compliance with this subsection.

(i) This subsection does not preclude the sending of a document by other means.

(4) Notice to a person under this code, or the sending of a document to a person under this code by electronic message, is complete when the document is sent.

(a) An electronic message is presumed received on the date that the message is sent.

(b) If the sender has knowledge that an electronic message did not reach the recipient, the electronic message is deemed to have not been received. The sender has the burden to prove that another copy of the notice or document was sent by electronic message or by other means authorized under this section.

(6)~~(4)~~ Notice and service of documents in ~~of~~ a judicial proceeding are governed by ~~must be given as provided in~~ the Florida Rules of Civil Procedure.

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

The Florida Senate

COMMITTEE VOTE RECORD

COMMITTEE: Judiciary
ITEM: CS/SB 1314
FINAL ACTION: Favorable
MEETING DATE: Tuesday, March 31, 2015
TIME: 4:00 —6:00 p.m.
PLACE: 110 Senate Office Building

FINAL VOTE								
Yea	**Nay**	**SENATORS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
X		Bean						
X		Benacquisto						
X		Brandes						
X		Joyner						
X		Simmons						
X		Simpson						
X		Soto						
X		Stargel						
		Ring, VICE CHAIR						
X		Diaz de la Portilla, CHAIR						
9	0	**TOTALS**						
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

The Florida Senate

Committee Agenda Request

To: Senator Miguel Diaz de la Portilla, Chair
Committee on Judiciary

Subject: Committee Agenda Request

Date: March 26, 2015

I respectfully request that **Senate Bill # 1314**, relating to Electronic Noticing of Trust Accounts, be placed on the:

☒ committee agenda at your earliest possible convenience.

☐ next committee agenda.

Senator Rob Bradley
Florida Senate, District 7

File signed original with committee office

S-020 (03/2004)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/15
Meeting Date

1314
Bill Number (if applicable)

Topic Electronic Noticing of Trust Accounts

Amendment Barcode (if applicable)

Name Kenneth Pratt

Job Title Senior VP of Governmental Affairs

Address 1001 Thomasville Rd, Ste 200
Street

Phone 850-224-2265

Tallahassee FL 32303
City *State* *Zip*

Email kpratt@floridabankers.com

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Florida Bankers Association

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
302 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
12/9/14	SM	Fav/1 amendment
3/31/15	JU	Favorable
	CA	
	FP	

December 9, 2014

The Honorable Andy Gardiner
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 30** – Senator Montford
Relief of Jennifer Wohlgemuth

SPECIAL MASTER'S FINAL REPORT

THIS IS A CONTESTED CLAIM FOR $8,624,754.40 BASED ON A BENCH TRIAL AWARD FOR JENNIFER WOHLGEMUTH AGAINST THE PASCO COUNTY SHERIFF'S OFFICE TO COMPENSATE CLAIMANT FOR INJURIES SUSTAINED IN A MOTOR VEHICLE CRASH RESULTING FROM THE NEGLIGENT OPERATION OF A POLICE VEHICLE

CURRENT STATUS:

On February 1, 2011, an administrative law judge from the Division of Administrative Hearings, serving as a Senate special master, held a de novo hearing on a previous version of this bill, SB 50 (2012). After the hearing, the judge issued a report containing findings of fact and conclusions of law and recommended that the bill be reported favorably with one amendment. That report is attached as an addendum to this report.

Due to the passage of time since the hearing, the Senate President reassigned the claim to me, Tracy Sumner. My responsibilities were to review the records relating to the claim bill, be available for questions from the members, and determine whether any changes have occurred since the hearing, which if known at the hearing, might have

significantly altered the findings or recommendation in the previous report.

According to counsel for the parties, no changes have occurred since the hearing that might have altered the findings and recommendations in the report.

Additionally, the prior claim bill, SB 22 (2012), is effectively identical as amended by the Rules Committee to claim bill filed for the 2015 Legislative Session.

Respectfully submitted,

Tracy Jeanne Sumner
Senate Special Master

cc: Debbie Brown, Secretary of the Senate

THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
402 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
12/2/11	SM	Fav/1 amendment
2/23/12	RC	Favorable

December 2, 2011

The Honorable Mike Haridopolos
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 22 (2012)** – Senator Christopher L. Smith
Relief of Jennifer Wohlgemuth

SPECIAL MASTER'S FINAL REPORT

THIS IS A CONTESTED CLAIM FOR $8,624,754.40 BASED ON A BENCH TRIAL AWARD FOR JENNIFER WOHLGEMUTH AGAINST THE PASCO COUNTY SHERIFF'S OFFICE TO COMPENSATE CLAIMANT FOR INJURIES SUSTAINED IN A MOTOR VEHICLE CRASH RESULTING FROM THE NEGLIGENT OPERATION OF A POLICE VEHICLE.

FINDINGS OF FACT:

On January 3, 2005, at approximately 1:35 a.m., the Claimant, Jennifer Wohlgemuth, was operating her Honda Accord southbound on Regency Park Boulevard in New Port Richey, Florida. The Claimant, who was not wearing her seatbelt, was in the process of dropping off several passengers with whom she had been socializing earlier that evening.

As the Claimant headed southbound on Regency Park Boulevard, she approached the intersection of Ridge Road, which is controlled by a traffic light in all four directions.

Unbeknownst to the Claimant, a fleeing motorist, Scott Eddins, had proceeded through the intersection a short time earlier headed eastbound on Ridge Road. Closely pursuing Mr. Eddins were three police vehicles with the Port Richey and New Port Richey Police Departments. A fourth law enforcement vehicle, operated by Pasco County Sheriff's Deputy Kenneth Petrillo, was well behind the pursuit and trailed the other patrol cars by 10 to 30 seconds.

Although the traffic signal at the intersection was red for vehicles traveling eastbound on Ridge Road, Deputy Petrillo entered the intersection against the light, without slowing, at a rate of travel that substantially exceeded the 45 MPH speed limit. Although Deputy Petrillo's patrol vehicle was equipped with a siren, he neglected to activate it. Almost immediately upon entering the intersection, Deputy Petrillo struck the front right portion of the Claimant's Honda Accord, which had lawfully proceeded into the intersection several seconds earlier.

As a result of the impact, which was devastating, the Claimant's vehicle traveled approximately 15 feet across a grass shoulder and sidewalk, at which point it struck a metal railing and came to rest. The front right of the Claimant's vehicle was demolished, and the entire right side was dented with inward intrusion. In addition, the front windshield, rear windshield, and right side windows were shattered and broken away.

The Claimant exited her vehicle following the collision, but collapsed in the roadway moments later due to the serious nature of her injuries. The Claimant was subsequently transported to Bayfront Medical Center for treatment.

Shortly after the accident, Florida Highway Patrol Corporal Erik W. Bromiley initiated an investigation to determine the cause of the collision. During his investigation, Corporal Bromiley learned that three Alprazolam (an anti-depressant) tablets, totaling 1.8 grams, had been discovered in the Claimant's wallet. In addition, several witnesses advised Corporal Bromiley that the Claimant had consumed alcoholic beverages at a bar earlier in the evening. Ultimately, however, Corporal Bromiley could not conclude that the Claimant was impaired by drugs or alcohol at the time of the accident.

While Corporal Bromiley remained at the scene to question witnesses and inspect the crash site, a second trooper responded to Bayfront Medical Center and obtained blood samples from the Claimant. Testing of the blood, which was drawn approximately two and one-half hours after the accident, revealed that the Claimant's blood alcohol level was .021 and .022, which is below the legal limit of .08. In addition, cocaine metabolites and Alprazolam were detected.

Jeffrey Hayes, a toxicologist employed with the Pinellas County Forensic Laboratory, estimated that at the time of the accident, the Claimant's blood alcohol level could have ranged from .047 (a level in which the driver is presumed not to be impaired pursuant to Florida law) to .097, which would exceed the legal limit. Significantly, Mr. Hayes conceded that any conclusion that the Claimant was impaired when the collision occurred would be purely speculative.

Accident reconstruction established that Deputy Petrillo was travelling between 64 MPH (with a margin of error of plus or minus 5 MPH) in a 45 MPH zone. It was further estimated that the Claimant was travelling 34 MPH, in excess of the posted 30 MPH limit for Regency Park Boulevard. However, with the margin of error of plus or minus 5 MPH, the accident reconstruction findings do not preclude a determination that the Claimant was observing the speed limit.

Although it is clear that Deputy Petrillo's siren was not activated prior to the collision, the evidence is inconclusive regarding the use of the patrol vehicle's emergency lights.

An additional investigation of the accident was conducted by Inspector Art Fremer with the Pasco County Sheriff's Office Professional Standards Unit. The purpose of Inspector Fremer's investigation was to ascertain if Deputy Petrillo had committed any statutory violations or failed to observe the policies of the Pasco County Sheriff's Office. At the conclusion of his investigation, Investigator Fremer determined that Deputy Petrillo violated General Order 41.3 of the Pasco County Sheriff's Office in the following respects: (1) failing to activate and continuously use a siren while engaged in emergency operations; (2) entering the intersection against a red light without slowing or stopping, which was necessary for safe operation; (3) entering the

intersection at a speed greater than reasonable; and (4) failing to ensure that cross-traffic flow had yielded. In addition, Investigator Fremer concluded that Deputy Petrillo had violated s. 316.072(5), Florida Statutes, which provides that the operator of an emergency vehicle may exceed the maximum speed limit "as long as the driver does not endanger life or property." As a result of his misconduct, Deputy Petrillo was suspended for 30 days without pay.

With respect to the Claimant's driving, the undersigned credits the testimony of Amanda Dunn, an eyewitness driving three to four car lengths behind the Claimant, who noticed no unusual driving and testified that the "coast was clear" when the Claimant entered the intersection. Accordingly, the undersigned finds that she operated her vehicle in accordance with the law and did not contribute to the accident.

As a result of the collision, the Claimant suffered severe closed head trauma, which included a subdural hematoma of the right frontal lobe and a subarachnoid hemorrhage. As a result of significant swelling to her brain, a portion of the Claimant's skull was removed. The Claimant remained in a coma for approximately three weeks following the accident, and did not return home until August of 2005.

At the time of the final hearing in this matter, the Claimant continues to suffer from severe impairment to her memory, a partial loss of vision, poor balance, urinary problems, anxiety, dysarthric speech, and weight fluctuations. Further, the damage to the Claimant's frontal lobe has left her with the behavior, judgment, and impulses similar to those of a seven-year-old child. As a consequence, the Claimant requires constant supervision and is unable to hold a job, drive, or live independently.

LITIGATION HISTORY:

On March 17, 2007, the Claimant filed an Amended Complaint for Negligence and Demand for Jury Trial in the Sixth Judicial Circuit, in and for Pasco County. In her Amended Complaint, the Claimant sued Robert White, as Sheriff of Pasco County, for injuries she sustained as a result of Deputy Petrillo's negligence. On March 9-11, Circuit Judge Stanley R. Mills conducted a bench trial of the Claimant's negligence claim.

On March 12, 2009, Judge Mills rendered a verdict in favor of the Claimant and awarded:

- $299,284.32 for past medical expenses.
- $5,786,983.00 for future medical expenses.
- $1,055,000.00 for future lost earnings.
- $500,000.00 for past pain and suffering.
- $1,500,000 for future pain and suffering.

The trial judge further determined that Deputy Petrillo was 95 percent responsible for the Claimant's injuries, and that the Claimant was 5 percent responsible due to her failure to wear a seatbelt. With the allocation of 5 percent responsibility to the Claimant, the final judgment for the Claimant totaled $8,724,754.50.

The Respondent appealed the final judgment to the Second District Court of Appeal. In its initial brief, the Respondent argued that the trial court erred by: (1) failing to allocate any responsibility to the Claimant based upon her blood alcohol level; (2) awarding lost wages that were not supported by competent substantial evidence; (3) failing to allocate any responsibility to the Claimant based upon her driving in excess of the speed limit; and (4) failing to allocate any responsibility to the Scott Eddins, the fleeing motorist. Oral argument was granted, and on March 10, 2010, the Second District Court of Appeal affirmed the trial court without a written opinion.

CLAIMANT'S ARGUMENTS:

- Deputy Petrillo's negligent operation of his patrol vehicle was the proximate cause of the Claimant's injuries.
- The trial court's findings as to damages and the apportionment of liability were appropriate.

RESPONDENT'S ARGUMENTS:

- The Pasco County Sheriff's Office objects to any payment to the Claimant through a claim bill.
- At the time of the collision, the Claimant was not wearing her seat belt and was impaired by alcohol, drugs, or a combination of the two, and as such, more than 5 percent of the fault should be allocated to her.

- Some responsibility should be apportioned to Scott Eddins, who was being pursued by multiple law enforcement vehicles at the time Deputy Petrillo collided with the Claimant's vehicle.

CONCLUSIONS OF LAW:

Deputy Petrillo had a duty to operate his vehicle at all times with consideration for the safety of other drivers. See City of Pinellas Park v. Brown, 604 So. 2d 1222, 1226 (Fla. 1992) (holding officers conducting a high-speed chase of a man who ran a red light had a duty to reasonably safeguard surrounding motorists); Brown v. Miami-Dade Cnty., 837 So. 2d 414, 417 (Fla. 3d DCA 2001) ("Florida courts have found that police officers do owe a duty to exercise reasonable care to protect innocent bystanders . . . when their law enforcement activities create a foreseeable zone of risk"); Creamer v. Sampson, 700 So. 2d 711 (Fla. 2d DCA 1997) (holding police owed duty to innocent motorist during high speed pursuit of traffic offender). It was entirely foreseeable that injuries to motorists such as the Claimant could occur where Deputy Petrillo entered an intersection at a high rate of speed, without slowing, against a red light, and without his siren activated. Further, Deputy Petrillo failed to comply with s. 316.072(5), Florida Statutes, which provides that the operator of an emergency vehicle may exceed the maximum speed limit "as long as the driver does not endanger life or property." Deputy Petrillo breached his duty of care and the breach was the proximate cause of the Claimant's injuries.

The Pasco County Sheriff's Office, as Deputy Petrillo's employer, is liable for his negligent act. Mercury Motors Express v. Smith, 393 So. 2d 545, 549 (Fla. 1981) (holding that an employer is vicariously liable for compensatory damages resulting from the negligent acts of employees committed within the scope of their employment).

The circuit judge's allocation of 95 percent liability to the Pasco County Sheriff's Office is reasonable and should not be disturbed. The evidence failed to establish that the Claimant was impaired or that her operation of the vehicle contributed to the accident. Further, as Deputy Petrillo was well behind the pursuit, the zone of risk created by Scott Eddins (the fleeing motorist) had moved beyond the intersection of Regency Park Boulevard and Ridge Road at the time of the

collision. Accordingly, the trial court correctly determined that no fault should be apportioned to Mr. Eddins.

The undersigned further concludes that the damages awarded to the Claimant were appropriate. This includes the $1,055,000.00 for future lost earnings, which was based on the reasonable and conservative assumption that the Claimant did not possess a high school diploma, when in fact she had graduated from high school and planned to attend community college.

LEGISLATIVE HISTORY: This is the second year that a bill has been filed on the Claimant's behalf. During the 2011 session, the bill (SB 50) was indefinitely postponed and withdrawn from consideration on May 7, 2011.

ATTORNEYS FEES: The Claimant's attorneys have agreed to limit their fees to 25 percent of any amount awarded by the Legislature in compliance with s. 768.28(8), Florida Statutes.

FISCAL IMPACT: The Respondent has already paid the statutory maximum of $100,000.00, leaving $8,624,754.40 unpaid. Pursuant to the Sheriff's Automobile Risk Program (a self-insurance pool), an additional $332,000 is at the Respondent's disposal. The remaining balance would be paid by Pasco County funds. Respondent's General Counsel, Jeremiah Hawkes, advises that the Pasco County Sheriff's Office is in the midst of a significant budget crisis that would be exacerbated by the passage of the instant claim bill.

Notwithstanding the Respondent's budgetary woes, the undersigned concludes that the Claimant is presently entitled to the full amount sought. In the alternative, it would not be inappropriate to amend Senate Bill 22 to direct Respondent to pay the balance of $8,624,754.40 over a period of years.

COLLATERAL SOURCES: The Claimant receives $221 per month in Social Security Disability Insurance.

SPECIAL ISSUES: Senate Bill 22, as it is presently drafted, provides that Deputy Petrillo failed to activate his patrol vehicle's emergency lights. In light of the undersigned's finding that the evidenced is inconclusive regarding the use of emergency lights, Senate Bill 22 should be amended accordingly.

The Respondent introduced evidence that that the Claimant began using marijuana at the age of 16, as well as cocaine several years later. Although the Claimant sought help for her addictions, she voluntarily terminated treatment roughly two weeks prior to the collision with Deputy Petrillo's vehicle. As there was no evidence that the Claimant was impaired at the time of the accident, the undersigned concludes that the Claimant's history of drug addiction should not militate against the passage of the instant claim bill.

RECOMMENDATIONS: For the reasons set forth above, the undersigned recommends that Senate Bill 22 (2012) be reported FAVORABLY, as amended.

Respectfully submitted,

Edward T. Bauer
Senate Special Master

cc: Senator Christopher L. Smith
Debbie Brown, Interim Secretary of the Senate
Counsel of Record

By Senator Montford

3-00016-15 201530__

A bill to be entitled

An act for the relief of Jennifer Wohlgemuth by the Pasco County Sheriff's Office; providing for an appropriation to compensate her for injuries and damages sustained as a result of the negligence of an employee of the Pasco County Sheriff's Office; providing a limitation on the payment of fees and costs; providing an effective date.

WHEREAS, in the early morning of January 3, 2005, 21-year-old Jennifer Wohlgemuth was lawfully and properly operating her vehicle and traveling southbound on Regency Park Boulevard, and

WHEREAS, at the same time, Deputy Kenneth Petrillo, an officer of the Pasco County Sheriff's Office was driving one of four law enforcement vehicles engaged in a high-speed pursuit, and

WHEREAS, Deputy Petrillo's vehicle was well behind the other law enforcement vehicles, which had already cleared the intersection of Ridge Road and Regency Park Boulevard in Pasco County, and

WHEREAS, while traveling eastbound on Ridge Road, Deputy Petrillo, who did not activate his vehicle's siren or flashing lights, sped through the intersection on a red light at a speed of at least 20 miles per hour over the posted speed limit, and

WHEREAS, Deputy Petrillo's vehicle violently struck the passenger side of Jennifer Wohlgemuth's vehicle as she entered the intersection on a green light while observing the speed limit, and

WHEREAS, none of the numerous witnesses to the crash heard

3-00016-15 201530__

Deputy Petrillo's siren or saw flashing lights, and

WHEREAS, after the crash, Deputy Petrillo's siren switch was found to be in the radio mode, which indicates that the siren was not activated at the time of the crash, and

WHEREAS, an internal affairs investigation into the accident found that Deputy Petrillo violated the policies of the Pasco County Sheriff's Office, and he was suspended for 30 days without pay and subjected to other disciplinary measures, and

WHEREAS, as a result of the accident, Jennifer Wohlgemuth was in a coma for 3 weeks, was unable to speak for several months thereafter, and did not return home until August 2005, and

WHEREAS, Jennifer Wohlgemuth also suffered profound brain injuries, including a subdural hematoma of the right frontal lobe and subarachnoid hemorrhage that resulted in the removal of a portion of her skull, and

WHEREAS, due to the damage to her frontal lobe, Jennifer Wohlgemuth's behavior and impulse control are similar to those of a 7-year-old child and require that she be supervised 24 hours a day, 7 days a week, and

WHEREAS, Jennifer Wohlgemuth currently suffers from severe memory loss, partial loss of vision, lack of balance, urinary problems, anxiety, depression, dysarthric speech, acne, and weight fluctuations, and

WHEREAS, as a result of her significant memory impairment and lack of judgment, Jennifer Wohlgemuth is unable to drive, work at a job, or live independently, and

WHEREAS, a 3-day bench trial was held in the Sixth Judicial Circuit, and, on March 12, 2009, the trial court rendered a

verdict in Jennifer Wohlgemuth's favor, awarding total damages of $9,141,267.32, and

WHEREAS, the trial court found that Deputy Petrillo was 95 percent responsible for Jennifer Wohlgemuth's injuries and that Jennifer was responsible for the remaining 5 percent due to her alleged failure to wear a seat belt, and

WHEREAS, on August 4, 2009, the trial court entered its amended final judgment in the amount of $8,724,754.40, and

WHEREAS, the Pasco County Sheriff's Office appealed the amended final judgment to the Second District Court of Appeal, and the appellate court affirmed the trial court's final judgment on March 10, 2010, and

WHEREAS, according to s. 768.28, Florida Statutes, the Pasco County Sheriff's Office paid the statutory limit of $100,000, and the amount $8,624,754.40 remains unpaid, NOW, THEREFORE,

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

Section 1. The facts stated in the preamble to this act are found and declared to be true.

Section 2. The Pasco County Sheriff's Office is authorized and directed to appropriate from funds of the sheriff's office not otherwise appropriated and to draw a warrant in the amount of $8,624,754.40, payable to Jennifer Wohlgemuth, as compensation for injuries and damages sustained due to the negligence of an employee of the sheriff's office.

Section 3. The amount paid by the Pasco County Sheriff's Office pursuant to s. 768.28, Florida Statutes, and the amount

awarded under this act are intended to provide the sole compensation for all present and future claims arising out of the factual situation described in this act which resulted in the injuries to Jennifer Wohlgemuth. The total amount paid for attorney fees, lobbying fees, costs, and other similar expenses relating to this claim may not exceed 25 percent of the amount awarded under this act.

Section 4. This act shall take effect upon becoming a law.

The Florida Senate

COMMITTEE VOTE RECORD

COMMITTEE: Judiciary
ITEM: SB 30
FINAL ACTION: Favorable
MEETING DATE: Tuesday, March 31, 2015
TIME: 4:00 —6:00 p.m.
PLACE: 110 Senate Office Building

FINAL VOTE								
Yea	**Nay**	**SENATORS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
X		Bean						
X		Benacquisto						
X		Brandes						
X		Joyner						
X		Simmons						
X		Simpson						
X		Soto						
	X	Stargel						
		Ring, VICE CHAIR						
X		Diaz de la Portilla, CHAIR						
8	1	**TOTALS**						
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/15
Meeting Date

SB #30
Bill Number (if applicable)

Topic Claims bill Jennifer Wohlgemuth

Amendment Barcode (if applicable)

Name Frank Winkles

Job Title attorney

Address 1110 Flores de Avila
Street

Phone 813 390 7441

Tampa FL 33613
City *State* *Zip*

Email frank@winkleslaw.com

Speaking: ☑ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Jennifer Wohlgemuth

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☐ Yes ☑ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/2015
Meeting Date

SB 30
Bill Number (if applicable)

Topic RELIEF OF WOHLGEMUTH

Amendment Barcode (if applicable)

Name HOWARD E. "GENE" ADAMS

Job Title ATTORNEY

Address 215 SOUTH MONROE ST.
Street

TALLAHASSEE FLA. 32302-1809
City *State* *Zip*

Phone

Email

Speaking: ☐ For ☒ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing FLA. SHERIFFS RISK MANAGEMENT FUND

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
402 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
12/31/14	SM	Unfavorable
3/31/15	JU	Pre-meeting
	AGG	
	AP	

December 31, 2014

The Honorable Andy Gardiner
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 62** – Senator Bill Montford
Relief of Shuler Limited Partnership

SPECIAL MASTER'S FINAL REPORT

THIS IS A CONTESTED EXCESS JUDGMENT CLAIM FOR $670,493. THE SUIT SEEKS COMPENSATION FROM THE GENERAL REVENUE FUND FOR THE ALLEGED NEGLIGENCE OF THE DIVISION OF FORESTRY IN DESTROYING THE SHULER LIMITED PARTNERSHIP'S TIMBER AFTER CONDUCTING A PRESCRIBED BURN IN TATE'S HELL STATE FOREST.

BACKGROUND INFORMATION:

1998 Florida Wildfires

An unprecedented number of wildfires burned in Florida between May and July, 1998, destroying approximately 500,000 acres of land, 150 structures, and 86 vehicles. The economic impact of the fires was estimated to exceed $1 billion[i] and the costs of fighting the fires surpassed $130 million.[ii]

1999 Legislative Response

In response to the devastating 1998 fires, the Legislature enacted significant statutory changes in 1999 to encourage the use of prescribed burns and thereby reduce wildfires.[iii] A prescribed burn is described as the controlled application of fire under specified environmental conditions while following precautionary measures that confine the fire to a predetermined area.[iv] The burn destroys vegetation, which is

a naturally occurring fuel source, and reduces the potential and severity of wildfires. The prescription is the written plan for starting and controlling the prescribed burn.[v]

In the 1999 legislation,[vi] the Legislature found that "prescribed burning is a land management tool that benefits the safety of the public, the environment, and the economy of the state." The legislation also found that the application of periodic fire benefitted natural wildlife and when used in the state's parks and preserves, was essential to maintain the resources "for which these lands were acquired."[vii]

The Liability Standard is Changed from Negligence to Gross Negligence: To further its policy of encouraging prescribed burns, the Legislature reduced the risk of lawsuits to those conducting the burns. Specifically, the 1999 legislation, which remains current law, provides that a person who conducts a controlled burn is not liable for damages or injuries caused by smoke or fire unless the person is grossly negligent. Gross negligence means that a person's conduct is "so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct."[viii] Under the prior law, a person conducting a controlled burn could be held liable for negligence. Thus, the 1999 Legislature apparently decided that the benefits of controlled burns generally outweighed the associated risks of controlled burns.

The Two Properties Involved in the Lawsuit

Tate's Hell State Forest and Prescribed Burns: Tate's Hell State Forest is situated between the Apalachicola and Ochlockonee rivers in Franklin County. The expansive tract of land consists of more than 202,000 acres, which the state began purchasing in 1994. The forest supports a variety of ecosystems, wildlife, rare species of animals and plants, and serves to protect the Apalachicola Bay from freshwater runoff.[ix]

The Division of Forestry, as manager of Tate's Hell, endeavors to conduct prescribed burns on approximately 40,000 to 50,000 acres of the forest annually to reduce the vegetation fuels on the ground that feed forest fires. By burning this predetermined amount of acreage each year on a rotating cycle, the entire forest experiences a prescribed burn every 3 to 5 years. The prescribed burn managers and

firefighters conduct a planning meeting in advance of the next year's burns, often in October, to determine which areas will be burned and plan and schedule the burns.

Shuler Limited Partnership[x] and Shuler's Pasture: Shuler Limited Partnership owns a tract of land west of the Tate's Hell State Forest in Franklin County which consists of approximately 2,182 acres. The property is known as Shuler's Pasture and is separated from Tate's Hell by Cash Creek on its easternmost boundary. The property has been owned by the Shuler family since the 1950s and was passed down to the Shuler brothers who acquired it in 1997. Before the wildfire giving rise to this claim, Shuler's Pasture was described as being made up equally of pine flatwoods and bog or marsh.

LITIGATION HISTORY:

Litigation

On February 28, 2011, the Shuler Limited Partnership filed a Complaint in the Circuit Court of Franklin County alleging that an ember escaped from a 2008 prescribed burn conducted by the Division of Forestry in Tate's Hell State Forest and destroyed 835 acres of its timber. The Shulers' Amended Complaint named the Department of Agriculture and Consumer Services, Division of Forestry, State of Florida, and the Board of Trustees of the Internal Improvement Trust Fund, State of Florida, as Defendants. The lawsuit ultimately alleged negligence, statutory violations, negligence per se, and gross negligence.

Mediation: The parties attempted to mediate the claim in Tallahassee on September 24, 2012, 1 month in advance of the trial. After approximately 3 and one-half hours of mediation, the parties were unable to resolve the claim and the mediator declared an impasse.

Circuit Court: A 7-day jury trial was held between October 24, 2012, and November 1, 2012, at the Franklin County Courthouse in Apalachicola. The jury found in favor of the Shuler Limited Partnership on each count and rendered a verdict for $741,496 in damages and an additional $28,997 in costs. The Division of Forestry appealed.

Court of Appeal: On May 12, 2014, the First District Court of Appeal issued a succinct three paragraph, 2-1 per curiam decision upholding the lower court. Of the several arguments raised on appeal, the court addressed only the issue of

whether the evidence was insufficient to support the jury finding of gross negligence. Concluding that the jury could reasonably have found that the Division was grossly negligent and that the issue of whether negligence is ordinary or gross is a question rightfully resolved by the jury, the court affirmed the trial court. The court noted that its resolution of the negligence issue made it unnecessary to consider the other arguments on appeal.

A detailed dissenting 13-page opinion was filed by the third judge. In his dissent, the judge concluded that, due to "highly prejudicial legal errors" which were analyzed in depth in the dissent, the trial was unfair and a new trial should be held.

The Division of Forestry has stated that, while it had hoped to pursue an appeal after the Motion for Rehearing was denied, it discussed its options with the Solicitor General and concluded that the appellate rules did not provide it any basis for an appeal to the Florida Supreme Court.

Claim Bill Hearing
A day-long hearing was held on November 13, 2014, before the House and Senate special masters. Each side presented its case and was afforded the opportunity to question the opposing side's witnesses.

FINDINGS OF FACT:

The Division of Forestry conducted a certified prescribed burn on April 9 and April 10, 2008, in Tate's Hell State Forest. After the 2-day burn was complete, the Division of Forestry continued inspecting and monitoring the smoldering area to make certain that the burn was contained and that there were no spreading flames.

On May 13, 2008, a fire broke out on Shuler's Pasture. No one observed how the fire started. However, the Division stipulated that the fire probably was a spotover from the smoldering remains of a certified prescribed burn in Tate's Hell State Forest which was extinguished 33 days earlier. A spotover is a secondary fire that is ignited by an ember that is somehow lifted from the initial burn area and carried on the wind to a nearby property. For this spotover to have occurred, an ember would have apparently been picked up and carried westward by the wind over Cash Creek to the Shuler property where it ignited. Cash Creek is estimated to be between 800 and 1,300 feet wide.

The Division of Forestry personnel were the first to observe the fire. They responded to the fire and requested and received additional firefighting equipment and personnel from nearby counties to contain the fire. However, due to several complicating factors discussed later in this report, the Division was unable to contain the growing flames. Ultimately, 835 acres of the Shuler's timber was destroyed by the fire.

The Prescription or Written Prescribed Burn Plan

According to the Tallahassee District Prescribed Burn Packet that was introduced into evidence at trial, the preliminary burn plan for the prescribed burn at Tate's Hell was developed on October 19, 2007, almost 6 months in advance of the burn. Testimony elicited at trial demonstrated that approximately 10 foresters and certified prescribed burn managers were involved in developing the written plan, referred to as the prescription. According to the burn packet, the Division was approved to burn a specific tract of 3,267 acres in the High Bluff area of Tate's Hell State Forest which was previously burned in 2005.

Before initiating the burn, the Division developed a detailed burn plan prescription describing precisely the area to be burned, the dates and hours for the burn operation, the purpose and objectives of the burn, the preferred weather factors, firing techniques and ignition methods, flame length, and equipment and personnel to be used. Certified prescribed burn manager Joseph Taranto reviewed and checked boxes on the prescription form indicating that he complied with the pre-burn checklist requirements and briefed the crew members before conducting the burn. Mr. Taranto, a certified prescribed burn manager since 2004, worked with the Division since 1999 and previously conducted 71 prescribed burns in Tate's Hell State Forest. He testified at trial through a pre-recorded video deposition because he would be deployed to Afghanistan during the trial. His check marks in the necessary boxes on the prescription form indicated, that among other things, all prescription requisites were met, the necessary authorization was obtained, all equipment that was required for the burn was at the scene and fully operational, and the crew members were properly briefed and assigned their responsibilities.

Testimony at trial showed that before the burn began, the foresters and burn managers surveyed the tract of land and determined that the burn area contained adequate firebreaks around the burn area.

Conducting the Prescribed Plan

Authorization: On the morning of April 9, 2008, Mr. Taranto called the Division's dispatch office in Tallahassee to request authorization to conduct the burn. The weather forecast for this particular day provided a wind blowing from the east which would blow the smoke from the prescribed burn away from residents in Eastpoint and away from Highway 65. Upon receiving data from Mr. Taranto, which was entered into a computer program, the dispatch office determined that the weather conditions were acceptable and authorized the burn. The employees met together and Mr. Taranto briefed them on how the burn was to be conducted, weather conditions, what each person's responsibilities were, which radio channels they would operate under, and conditions for which they should be watchful.

Ignition of the Burn and the Presence of the Prescribed Burn Manager: Mr. Taranto then lit a test fire that was favorable and instructed a helicopter crew to begin laying a baseline on the westernmost boundary of the property near Cash Creek. The purpose of the baseline was to create a burn area that increased the containment line to about 30 feet and provided a larger buffer zone next to Cash Creek. This practice is known as a backing fire that has the effect of reducing the wind's ability to move a fire beyond the containment line because the fuel it would feed upon has already been consumed and because it moves against the wind, unlike a head fire that moves with the wind. If the fire had been ignited on the easternmost boundary of the property with an east wind, it would have become a wildfire blowing with the wind.

The helicopter proceeded to drop small chemical balls that ignited upon impact on the ground along a predetermined grid pattern. The small fires eventually grew into a single fire that was more manageable than igniting one extremely large fire that burns much hotter. Mr. Taranto called in his ignition reports to headquarters throughout the day letting them know what percentage of the ignition phase was complete.

The fire developed as planned throughout the day, and the fire's progress was stopped at the end of the day. When Mr. Taranto determined that no flames were spreading, the fire was no longer consuming vegetation, and remained within the containment lines, he dismissed the work crew for the day at approximately 7:00 p.m. or slightly later. According to Mr. Taranto, he was the first person on the scene that morning and the last to leave at the end of the day. No escaping fires were reported and no trees were being burned, only the undergrowth around the trees.

On April 10, the second day authorized for the prescribed burn, Mr. Taranto again called the dispatch office in Tallahassee and received the necessary authorization to conduct the burn. The same methods and procedures were followed. Once Mr. Taranto determined that the flames were stopped and not spreading, and the burn was confined within the containment lines, the crew was released. No spotovers were reported on either day of the burn.

Mopping Up: On the days following the 2-day prescribed burn, the fire continued to smolder as planned. The crews monitored the burn area and "mopped up" which means the crews worked the outer perimeter of the fire and reduced the heat along the edges by using water, shovels, and rakes to increase the buffer area and cool it. The goal is to ensure that the burn and its continued smoldering remain contained to protect nearby property from the chances of an escaped fire. Mr. Taranto established in his deposition that the fire was checked once or twice each day by one to three firefighters who rode around in trucks or fire engines until no smoke, heat, or embers were observed in the burn area.

Mr. Taranto further testified that he saw no error in how the prescribed burn plan was prepared or implemented and that he had all of the resources that he needed to conduct the prescribed burn.

Firebreaks: The four firebreaks surrounding the prescribed burn area consisted of Highway 65 on the eastern boundary, the water bodies of Cash Creek and East Bay on the northern and western boundaries, and another road that ran along the southern boundary. Additional firebreaks consisted of interior roads in Tate's Hell State Forest which previously were created by loggers or by the Division.

Mr. Taranto demonstrated that because of the large number of interior roads in the prescribed burn area, he was able to stop the fire at any point he felt necessary to prevent its spread should the weather change with a strong wind.

Personnel: Mr. Taranto established in his deposition that seven forestry personnel were present for the prescribed burn. Six of those seven were certified prescribed burn managers. He believed that he had sufficient personnel to conduct the operation and did not need to call in any additional people.

Equipment: According to Mr. Taranto's testimony, two employees were on the scene in bulldozers that were used to suppress the fire. Two employees were present in fire engines that held 350 to 500 gallons of water each. The remaining three employees served as ground patrol and used pickup trucks equipped with 50 gallons of water or more which were used for fire suppression. The employees had radios in their vehicles to communicate with each other during the prescribed burn. If additional resources were needed, the Division had access to a few tractors in nearby Carrabelle and could request assistance from the U.S. Forest Service, local fire departments, and other agencies such as the Florida Fish and Wildlife Conservation Commission, which also had fire engines. These additional resources were not needed during the 2-day prescribed burn.

Spotovers after the Controlled Burn

As mentioned earlier, a spotover is a separate fire that is ignited by an ember that is somehow lifted from the immediate burn area and carried on the wind to a nearby area outside of the initial burn area. According to testimony at trial elicited from different workers in the Division of Forestry, these occur as often as in 10 to 20 percent of fires. A spotover may occur when an area did not burn or was not consumed during the initial ignition phase because the conditions might have been too wet or the humidity was too high, but the weather conditions change, something dries out and is rekindled by a smoldering object, and an ember travels and ignites in a second location.

On April 21, 2008, 11 days after the prescribed burn was extinguished, a spotover occurred east of the prescribed burn area. The fire was referred to as the High Bluff fire. An ember

was picked up and traveled across Highway 65 and landed on state owned property. The fire was soon contained after burning approximately 10 acres of land.

Similarly, on May 6, 2008, 26 days after the prescribed burn was extinguished, a second spotover occurred east of the burn area. This fire was referred to as the High Bluff 2 fire. The ember also traveled across Highway 65 and landed on state owned property. The fire was also contained.

Difficulties of Extinguishing The Shuler Pasture Fire

The fire on Shuler's Pasture occurred 33 days after the prescribed burn was extinguished. According to trial testimony from several forestry workers, the Division had difficulty containing the fire, unlike the other spotovers, because of the conditions on the Shuler land. The firebreaks on the property were not wide enough for the Division's equipment to progress through, much of the land was boggy and would not support the large firefighting equipment, the land contained thick undergrowth that could not be traveled through, and no prescribed burns had been conducted to eliminate the inhibiting undergrowth.

CLAIMANT'S ARGUMENTS:

The Shulers alleged that the prescribed burn conducted by the Division of Forestry on April 9 and 10, 2008, which smoldered for weeks, caused the wildfire on Shuler's Pasture on May 13, 2008. The four counts alleged in the original Complaint were:

Count I – The respondents were negligent in their decision to ignite the prescribed controlled burn and negligent in the method of conducting the burn.

Count II – The prescribed burn violated section 590.13, F.S. (2007), which regulates controlled burns.

Count III – The respondents were negligent per se.

Count IV – The respondents were strictly liable.

When the jury was asked to evaluate counts II and IV, they were instructed to consider whether the Shuler fire was foreseeable by a reasonably careful person. Later, the trial court permitted the Shulers to amend Count IV to delete a

claim for strict liability and replace it with one for gross negligence.

In an effort to demonstrate the Division of Forestry's alleged negligence, the Shulers offered testimony that:

- The prescribed burn manager received a notice of violation[xi] for the manner in which the prescribed burn was conducted, thereby demonstrating negligence on his part;
- The burn was not completed in accordance with the 2-day prescription but extended for 45 days;
- Experts believed that the burn was not conducted correctly;
- The Division of Forestry personnel who fought to extinguish the fire at Shuler's Pasture were not adequately equipped to combat the fire.

RESPONDENT'S ARGUMENTS: The Division filed a Motion to Dismiss the Complaint and argued that any claim other than gross negligence was not permitted under the law as written. At trial, the Division offered testimony from the prescribed burn manager that the burn was conducted in conformance with its standard procedures and that all other needed personnel and equipment were on the scene for the prescribed burn. Forestry officials also testified that the prescribed burn was properly conducted.

Additional forestry personnel testified about the adequacy of personnel and equipment on site to extinguish the Shuler property fire, such that no negligence was committed in trying to contain and extinguish the fire.

On appeal, the Division argued that the jury trial was unfair, that the jury was misled about the proper legal standards that applied, that evidence was improperly admitted, and that conclusions were improperly drawn from that evidence. The Division also argued that it did not commit gross negligence and that the escaped ember that started the Shuler fire was not foreseeable, due to the wide expanse of the Cash Creek firebreak.

JURY VERDICT AND DAMAGES: The jury found that the Division violated the prescribed burn statute during the time between April 10 and May 23 while the burn smoldered and was, therefore, liable for negligence, a statutory violation, negligence per se, and gross negligence.

The jury awarded damages in the amount of $741,496 and costs were taxed for an additional amount of $28,997.

CONCLUSIONS OF LAW:

Summary Statement

Under section 590.125(3), F.S. (2007), the Division is legally responsible for the Shulers' damages only if the Shulers prove that the Division was grossly negligent.

The Shulers' theory of this claim is that the ember that started the fire on Shuler's Pasture was foreseeable and the Division, when conducting the prescribed burn, should have acted in such a manner as to have prevented their loss. The Shulers focus not on the 2-day prescribed burn period, but on the activities after the 2-day prescribed burn, from April 11 through May 23, when the Division was mopping up. The Shulers' theory, however, is not persuasive because it requires the Division to be responsible for weather conditions that occurred 6 weeks after the conditions under which the burn was authorized. Moreover, the manner in which the Division planned and conducted the fire and subsequently monitored the smoldering phase demonstrate that it was not grossly negligent.

The Statute and Legal Standard Involved in this Case

The primary certified prescribed burn statute in question, s. 590.125(3)(b), F.S. (2007), requires, among other things, that:

- A written prescription be prepared before authorization from the Division of Forestry is given;
- A certified prescribed burn manager be present on site with a copy of the prescription from ignition of the burn to its completion;
- An authorization to burn be obtained from the Division of Forestry before the burn is ignited; and
- Adequate firebreaks and sufficient personnel and firefighting equipment be present to control the fire.

Section 590.125(3)(c), F.S. (2007), provides that a property owner or his or her agent is not liable for damage or injury caused by the fire … for burns conducted in accordance with the subsection unless gross negligence is proven.

Gross negligence was defined as conduct that was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of

persons exposed to such conduct. Section 768.72(2)(b), F.S. (2007).

Trial Court Errors

The trial court issued several rulings that the dissenting appellate opinion characterized as "highly prejudicial legal errors in the interpretation of the open burn statute" and concluded that the jury trial in Franklin County was "unfair and a new one warranted."[xii] After reviewing the extensive trial and appellate records that exceeded 2,000 pages, the undersigned finds the dissenting opinion to be very persuasive and accurate. The errors prohibited the Division from presenting accurate testimony and evidence to the jury. As a result of these errors, the jury was misled and the Division did not receive a fair trial.

These three errors in the trial were intertwined and involved:

- The interpretation of the gross negligence standard;
- The statutory interpretation of when the controlled burn was extinguished; and
- The interpretation of "completion" as to how long the prescribed burn manager was required to be on the site of the burn.

The Gross Negligence Standard

The trial court committed error by allowing the jury to consider any standard of negligence other than gross negligence: The Shulers argued in the trial court that the Division could be held liable for negligence, statutory violations of the prescribed burn statute, and negligence per se if the burn was not conducted in accordance with the prescribed burn statute until the burn was completely extinguished 45 days later. However, this position, which the trial court accepted, is inconsistent with the prescribed burn statute, s. 590.125(3)(c), F.S. (2007), which entitles a person to damages caused by a controlled burn only if "gross negligence is proven." The position also eviscerates the legislative policy of encouraging controlled burns in s. 590.125, F.S. (2007).

Even if the statute could be read to allow causes of action other than actions for gross negligence, the evidence shows that the Division complied with the statute. The Shulers' arguments that the Division violated the statute, making the protections of gross negligence standard inapplicable, are

based on several misinterpretations of the statute. According to the dissenting judge in the appellate decision, "the cumulative effect of [these] statutory interpretation errors resulted in the Division being denied a fair opportunity to defend itself under the correct legal standards."

Specifically, the errors by the trial court prevented the Division from showing the jury that the controlled burn was extinguished, as required by the prescription, within the 2-day period of the prescription. The errors also prevented the Division from showing that the certified prescribed burn manager was present at the controlled burn as required by statute from its ignition to completion.

The fire was "extinguished" at the end of the 2-day burn period: The Shulers argued that because the Division violated the controlled burn statute, it was not protected by the gross negligence standard. Instead, according to the Shulers, the Division was responsible for the Shulers' losses because the prescribed burn was not extinguished during the 2-day period of the prescription. The Shulers' position, however, seems based on a layman's interpretation of the term "extinguished," instead of its statutory definition. Under s. 590.125(1)(d), F.S. (2007), a fire is extinguished when the visible flames, smoke, or emissions from a certified prescribed burn cease. The evidence in this matter showed that the prescribed burn was extinguished per the statutory definition by the end of the 2-day prescribed burn period. Thus, the fact that the fire continued to smolder does not show that the Division violated the statute.

Nevertheless, the Division, before it was aware of all of the facts of the case, stipulated in the trial court proceeding that the fire was not extinguished within the 2-day prescribed burn period. When the Division became aware of its mistake, it sought to amend its pleadings. The trial court denied the request on the grounds that the proposed amendment coming so close to trial was prejudicial to the Shulers.[xiii] At that same time, October 9, 2012[xiv], the trial court permitted the Shulers to amend their complaint to add a count for gross negligence. As a result, the jury was incorrectly told to believe that the Division was continuously in violation of the controlled burn statute for 45 days.[xv] Even if the trial court's decision preventing the Division from amending its stipulation was fair under the circumstances, the stipulation is not

binding in a special master proceeding. Under Senate Rule 4.81(5), a special master hearing is a *de novo* proceeding in which stipulations are not binding on the special master or the Senate. Thus, based on the evidence and the law, I find that the prescribed burn was extinguished within the 2-day prescribed burn period.

The certified prescribed burn manager was present from the ignition of the prescribed burn until its "completion:" Under s. 590.125(3)(b)1. F.S., (2007), a certified prescribed burn manager must be present at the site of a controlled burn "from ignition of the burn to its completion." The Shulers argue that the Division violated the controlled burn statute because the certified prescribed burn manager was not present at the site of the controlled burn until its completion. The Shulers' argument, however, is based on its misinterpretation of the word "completion" which the trial court accepted during a pretrial ruling.

Under the Shulers' interpretation, the statute requires a controlled burn manager be on the site of a controlled burn continuously from the ignition of the fire until it is completely extinguished. Under this interpretation, the Division should have had a certified burn manager on site 24 hours a day for 45 days.

According to the Division, the statute requires a certified burn manager to be on the site of a controlled burn from ignition until the completion of the ignition phase of the burn. Under this interpretation, the statute required that the Division's controlled burn manager be on site only during the 2-day prescribed burn period.

In resolving the dispute over the meaning of "completion," which was not defined in the statute, the trial court heard testimony during a pre-trial hearing. In support of its position, the Division offered the expert testimony of the Director of the Florida Forest Service, who among other relevant credentials such as serving as a certified prescribed burn manager for more than 25 years, helped rewrite the controlled burn statute in 1999. The Division also offered the expert testimony of a district manager of field operation of the Florida Forest Service who served as a certified prescribed burn manager for 25 years and who had supervised several hundred controlled burns each year. In support of its position,

the Shulers presented one of its partners, an attorney who was seeking more than $800,000 in the lawsuit. He opined that the statute clearly requires that a certified controlled burn manager be onsite until a controlled burn is completely extinguished.

Although the Shulers' attorney had no previous experience with the controlled burn statute, the court accepted the Shulers' interpretation of the statute and prohibited the Division from offering testimony at trial to the contrary.[xvi]

I find that the Division's interpretation of the meaning of completion is the correct interpretation for several reasons. First, the Division administers the statute and regularly conducts prescribed burns, and courts are typically deferential to a state agency's interpretation of the statutes it administers.[xvii]

Second, the Shulers' interpretation of the statute would severely limit the ability of the Division to conduct controlled burns that reduce the risk of wildfires throughout the state. The Division's personnel would be stretched too thin. Highly qualified certified controlled burn managers would be relegated to spending most of their time dealing with smoldering burns instead of the more critical tasks of planning controlled burns and managing the ignition phase of controlled burns. After the Tate's Hell prescribed burn was extinguished or completed, the burn area was checked once or twice a day by other personnel, which was reasonable, not unreasonable or grossly negligent, under the circumstances.

Third, the wording of a related statutory provision indicates that the word "completion" is synonymous with "extinguished." In other words, a certified prescribed burn manager must be on the site of a controlled burn until no spreading flames exist. Under s. 590.125(2)(a)5., F.S. (2007), when a noncertified person conducts a controlled burn, "Someone must [be] present until the fire is extinguished." If a noncertified person, who does not have the training or experience of a certified controlled burn manager, can leave the site of a controlled burn when no spreading flames exist, certainly a certified prescribed burn manager, who is in a better position to assess the risks of spreading flames, may leave a prescribed burn when it is extinguished.

The evidence in this matter showed that the Division's prescribed burn manager was on the site of the Tate's Hell prescribed burn from ignition to the completion of the ignition phase. As a result, the Division's conduct was consistent with the prescribed burn statute.

DAMAGES

Because the Division did not commit an act of gross negligence, the Division is not legally liable to the Shulers. However, even though no one observed the origin of this fire, the Division of Forestry stipulated that the Shuler fire must have been ignited by an ember from the smoldering prescribed burn conducted in Tate's Hell State Forest. Therefore, if the Legislature believes that the state is morally responsible, though not legally culpable, for this substantial property loss of 835 acres of timber, the Legislature could award some measure of compensation to the Shulers as an act of legislative grace.

Determining the Shulers' loss is not possible based upon the evidence submitted at trial or at the special master hearing.

In closing arguments to the jury, the Shulers asked the jury to award damages of $834,018, a figure calculated by the Shulers' expert, Mr. Michael Dooner. The jury, however, apparently disagreed with Mr. Dooner's estimate because it awarded $741,496, nearly $100,000 less.

The undersigned did not find the damage estimates of Mr. Dooner as persuasive as the opinions of Mr. Leonard Wood, the expert representing the Division of Forestry. Mr. Wood noted that the Shulers, in order to arrive at accurate damages, had a responsibility to salvage the damaged trees as quickly as possible before they began to degrade and lose value. This did not occur. The better practice would have been to bring in multiple buyers to move the timber to market as quickly as possible, which also did not occur. Mr. Wood also found it unacceptable that the Shuler expert did not conduct a timber cruise to assess damages until January, 2011, more than 30 months after the fire, thereby rendering his methodology questionable and statistically unsound for assessing damages.

Mr. Wood expressed no confidence in several categories of damages put forth by the Shulers' expert including value assignments of

- $334,846 for standing dead timber, a category that is affected by how quickly the trees are salvaged;
- $111,615 as an additional value of standing dead timber for non-forced sale;
- $91,644 for growth loss because no growth study was performed; and
- $85,342 for "downgrading" the marketability of timber to a lower, less desirable category due to the fire because the claim was not substantiated.

Mr. Wood also questioned assessments of:

- $60,747 for "forced sale" damages because he did not agree with Mr. Dooner's definition of "forced sale" damages;
- $5,985 for cut trees that were not actually hauled from the land because those would become the property of the logging company;
- $32,160 for a weight loss claim of 15 percent of the timber's weight due to a loss of moisture caused by the fire;
- $57,250 for reforestation for preparing and planting trees because it is a separate business decision which would be a form of giving them double damages since they were already being awarded the profits from the trees being removed and sold due to the fire;
- $30,249 for fees and commissions to Mr. Dooner which he felt should have been borne by the Shulers; and
- $24,180 for roadwork because it is a capital cost of the landowner who would enjoy the benefits of having a road after the cutting and removal of the timber.

To further complicate computing the actual loss, Mr. Wood did not offer any counter estimate at trial. He stated that it would be very difficult to accurately develop projections based upon the findings provided by Mr. Dooner because so much time had elapsed between the initial fire and Mr. Dooner's assessment of the land. When asked at the claim bill hearing if the Division of Forestry would like to offer an estimate for damages if there were an act of legislative grace,

the Division responded that "it respectfully declines to make such an offer."

In addition to the $100,000 award that was paid to the Shulers and their legal counsel, the Shulers also received $202,489 for selling timber from their land which was damaged in the fire.

ATTORNEYS FEES:

Section 768.28, F. S., limits the claimant's attorney fees to 25 percent of the claimant's total recovery by way of any judgment or settlement obtained pursuant to s. 768.28, F.S. The claimant's attorney has acknowledged this limitation and verified in writing that nothing in excess of 25 percent of the gross recovery will be withheld or paid as attorney fees.

RECOMMENDATIONS:

Based upon the foregoing, the undersigned recommends that Senate Bill 62 be reported UNFAVORABLY.

Respectfully submitted,

Eva M. Davis
Senate Special Master

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[i] U.S. FIRE ADMIN., USFA-TR-126, WILDLAND FIRES, FLORIDA - 1998 (1998). http://www.usfa.fema.gov/downloads/pdf/publications/tr-126.pdf (last visited December 19, 2014).
[ii] Fla. H.R. Comm on Agric., CS for HB 1535 (1999) Staff Analysis (June 15, 1999).
[iii] *Id*.
[iv] Section 590.026(3)(a), F.S. (1997).
[v] Rule 5I-2.003(21), F.A.C.
[vi] Chapter 99-292, s. 9, Laws of Fla.
[vii] *Id.*
[viii] Section 768.72, F.S. (2007).
[ix] Fla. Dep't of Agric. & Consumer Servs., http://www.freshfromflorida.com/Divisions-Offices/Florida-Forest-Service/Our-Forests/State-Forests/Tate-s-Hell-State-Forest/Tate-s-Hell-State-Forest (last visited December 22, 2014).
[x] The Shuler Limited Partnership consists of Michael Shuler, Gordon Shuler, and two trusts. For simplicity, this report will refer to the Claimants as either the Shuler Limited Partnership or the Shulers.
[xi] The special master did not find this testimony to be persuasive because the Division presented testimony from multiple witnesses that the notice of violation was improperly issued, the notice of violation was rescinded soon after it was issued well in advance of the filing of the lawsuit, and that other similar notices of violation were also rescinded when the general counsel pointed out that their initial interpretation of the statute for issuing notices of violation was flawed.

[xii] *Department of Agriculture and Consumer Services, Division of Forestry, State of Florida, and the Board of Trustees of the Internal Improvement Trust Fund, State of Florida v. Shuler Limited Partnership*, 139 So. 3d 914, 915 (Fla. 1st DCA 2014)(Makar, J., dissenting).
[xiii] *Id*. at 919.
[xiv] *See* Initial Brief of Defendant-Appellant, p.42.
[xv] *Department of Agriculture and Consumer Services*, *supra* note xii, at 919.
[xvi] The court's error in accepting the Shulers' interpretation, was compounded by the Shulers' closing statement to the jury. The jury was told that the Division stipulated to being in violation of the controlled burn statute for 45 days because the certified controlled burn manager was not present after the burn was extinguished.
[xvii]The dissenting opinion cited in *Department of Agriculture and Consumer Services, supra* at 927, notes that "the entire case centered on the Division's regulatory functions, requiring deference to the Division's interpretation." *See Health Options, Inc. v. Agency for Health Care Admin*., 889 So. 2d 849, 851 n. 2 (Fla. 1st DCA 2004) and *Chiles v. Dep't of State, Div. of Elec*., 711 So. 2d 151, 155 (Fla. 1st DCA 1998).

By Senator Montford

3-00075-15 201562__

A bill to be entitled

An act for the relief of Shuler Limited Partnership by the Florida Forest Service of the Department of Agriculture and Consumer Services, formerly known as the Division of Forestry, and the Board of Trustees of the Internal Improvement Trust Fund; providing for an appropriation to compensate Shuler Limited Partnership for damages sustained to 835 acres of its timber as a result of the negligence, negligence per se, and gross negligence of employees of the Florida Forest Service and their violation of s. 590.13, Florida Statutes; providing a limitation on the payment of fees and costs; providing an effective date.

WHEREAS, the Board of Trustees of the Internal Improvement Trust Fund, hereinafter referred to as the "board," is the owner of an approximately 3,267-acre property located within Tate's Hell State Forest in Franklin County, which property is hereinafter referred to as the "prescribed burn area," and

WHEREAS, pursuant to ch. 590, Florida Statutes, the Florida Forest Service of the Department of Agriculture and Consumer Services, formerly known as the Division of Forestry and hereinafter referred to as the "forest service," is responsible for managing Tate's Hell State Forest, including the prescribed burn area, for the board, and

WHEREAS, Shuler Limited Partnership is the owner of an approximately 2,182-acre property, hereinafter referred to as Shuler's Pasture, located just west of the prescribed burn area, which is separated from the prescribed burn area by Cash Creek,

3-00075-15 201562__

and

WHEREAS, on April 9, 2008, the forest service conducted a prescribed burn in the prescribed burn area, but before the fire was completely extinguished, an ember from the smoldering fire drifted onto Shuler's Pasture destroying 835 acres of trees, and

WHEREAS, Shuler Limited Partnership filed suit in the Second Judicial Circuit in and for Franklin County and a jury returned a verdict in favor of Shuler Limited Partnership, finding that the forest service was negligent, negligent per se, and grossly negligent in the conduct of the prescribed burn and that the burn was conducted in violation of s. 590.13, Florida Statutes, and

WHEREAS, the forest service and the board appealed the jury verdict and award of damages in the amount of $741,496, which was upheld by the First District Court of Appeal, and

WHEREAS, the forest service and the board have paid $100,000 to Shuler Limited Partnership pursuant to the applicable statutory limits of liability in s. 768.28, Florida Statutes, and a total of $670,493, consisting of $641,496 in damages and $28,997 in costs, remains to be paid, NOW, THEREFORE,

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

Section 1. The facts stated in the preamble to this act are found and declared to be true.

Section 2. There is appropriated from the General Revenue Fund to the Department of Agriculture and Consumer Services the sum of $670,493 for the relief of Shuler Limited Partnership for

damages caused by the negligence, negligence per se and gross negligence of employees of the Florida Forest Service and their violation of s. 590.13, Florida Statutes.

Section 3. The Chief Financial Officer is directed to draw a warrant in the sum of $670,493, payable to Shuler Limited Partnership, as compensation for the damages to Shuler Limited Partnership caused by the negligence, negligence per se and gross negligence of employees of the Florida Forest Service and their violation of s. 590.13, Florida Statutes.

Section 4. The amount paid by the Florida Forest Service of the Department of Agriculture and Consumer Services pursuant to s. 768.28, Florida Statutes, and the amount awarded under this act are intended to provide the sole compensation for all present and future claims arising out of the factual situation described in this act which resulted in damages to Shuler Limited Partnership. The total amount paid for attorney's fees, lobbying fees, costs, and similar expenses relating to this claim may not exceed 25 percent of the total amount awarded under this act.

Section 5. This act shall take effect upon becoming a law.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	CS/SB 1084
INTRODUCER:	Judiciary Committee and Senator Brandes
SUBJECT:	Patent Infringement
DATE:	April 2, 2015
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wiehle	Cibula	JU	**Fav/CS**
2.			ACJ	
3.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1084 prohibits a person from making a bad faith assertion of patent infringement. It allows a defendant in a patent infringement proceeding to move that the proceeding involves a bad faith assertion of patent infringement and request that the court issue a protective order. If, based on factors set out in the bill, the court finds that the defendant has established a reasonable likelihood that the plaintiff has made a bad faith assertion of patent infringement, the court must require the plaintiff to post a bond in an amount equal to the lesser of $250,000 or a good faith estimate of the target's expense of litigation, including an estimate of reasonable attorney fees, conditioned on payment of any amount finally determined to be due to the target. A court may waive the bond requirement for good cause shown or if it finds the plaintiff has available assets equal to the amount of the proposed bond.

A person against whom a bad faith assertion of patent infringement is made also may bring an action in a court of competent jurisdiction for relief. If successful, the court may award a plaintiff equitable relief; damages; costs and fees, including reasonable attorney fees; and punitive damages in an amount equal to $50,000 or three times the total damages, costs, and fees, whichever is greater.

A violation of the prohibition against making a bad faith assertion of patent infringement also constitutes an unfair or deceptive trade practice and the Department of Legal Affairs (department) may bring an enforcement for an injunction and to recover actual damages.

A demand letter or assertion of patent infringement that includes a claim for relief relating to patents for pharmaceutical or biological products is exempt from the bill's provisions.

II. Present Situation:

Under the U.S. Constitution,[1] patent law is generally a matter of federal law. Federal law[2] does not expressly provide for federal preemption of state laws relating to patents, but the supremacy clause functions to prohibit all conflicting state laws.[3] The states can regulate patents if their regulations do not conflict with the operation of federal patent laws.[4]

The National Conference of State Legislatures (NCSL) defines "patent trolling" as:

> "Patent trolling" is the process of filing a claim of patent infringement against an entity, despite the fact that the claimant does not manufacture or supply the product or service in question. Patent trolls often file claims in bad faith, hoping that the company being sued decides to settle in order to avoid expensive litigation costs.[5]

The patent trolling business model has been described as:

> Two key ingredients of the patent troll's business model are: 1) a litigation process that is very costly for defendants, and, 2) patents that are overly broad or vague so that they can be interpreted to cover commonly used technologies and hence snare many defendants. Given the cost, many defendants are willing to pay the troll to avoid a lawsuit even if the suit is not justified.[6]

According to NCSL, 18 states have enacted legislation on patent trolling since 2013, beginning with Vermont in May 2013.[7] These 18 states are: Alabama, Georgia, Idaho, Illinois, Louisiana, Maine, Maryland, Missouri, New Hampshire, North Carolina, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Vermont, Virginia, and Wisconsin.

The Council of State Governments developed model legislation based on the Vermont bill.[8]

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[1] U.S. CONST. art. 1, s. 8, cl. 8.
[2] 35 U.S.C. ss. 1-376.
[3] [3] U.S. CONST. art. 6.
[4] *Kewanee Oil Company v. Bicron Corporation et. al.*, 416 U.S. 470 (1974).
[5] Jonathan Griffin, *Patent Trolling Legislation*, http://www.ncsl.org/research/financial-services-and-commerce/patent-trolling-legislation.aspx (last visited Mar. 17, 2015).
[6] James Bessen, *What the Courts Did to Curb Patent Trolling—for Now*, THE ATLANTIC, (Dec. 2014) http://www.theatlantic.com/business/archive/2014/12/what-the-courts-did-to-curb-patent-trollingfor-now/383138/ (last visited Mar. 17, 2015).
[7] Jonathan Griffin, *2015 Patent Trolling Legislation*, http://www.ncsl.org/research/financial-services-and-commerce/2015-patent-trolling-legislation.aspx (last visited Mar. 17, 2015).
[8] Counsel of State Governments, *Bad Faith Assertions of Patent Infringement*, http://knowledgecenter.csg.org/kc/system/files/Bad%20Faith%20Assertions%20of%20Patent%20Infringement.pdf.

III. Effect of Proposed Changes:

The bill creates Part VII of ch. 501, F.S., consisting of ss. 501.991-501.997, F.S., and entitled it the "Patent Troll Prevention Act." It sets forth legislative intent. The bill also establishes the following definitions:

- "Demand letter" means a letter, e-mail, or other communication asserting or claiming that a person has engaged in patent infringement.
- "Institution of higher education" means an educational institution as defined in 20 U.S.C. s. 1001(a).
- "Target" means a person, including the person's customers, distributors, or agents, residing in, incorporated in, or organized under the laws of this state which:
  - Has received a demand letter or against whom an assertion or allegation of patent infringement has been made;
  - Has been threatened with litigation or against whom a lawsuit has been filed alleging patent infringement; or
  - Whose customers have received a demand letter asserting that the person's product, service, or technology has infringed upon a patent.

The bill prohibits a person from making a bad faith assertion of patent infringement. If a patent infringement proceeding is instituted, the target may move that the proceeding involves a bad faith assertion of patent infringement and request that the court issue a protective order. The bill sets out two lists of factors the court may consider as evidence, one for evidence that that a person has made a bad faith assertion of patent infringement and one for evidence that a person has *not* made a bad faith assertion of patent infringement.

If the court finds that the target has established a reasonable likelihood that the plaintiff has made a bad faith assertion of patent infringement, the court must require the plaintiff to post a bond in an amount equal to the lesser of $250,000 or a good faith estimate of the target's expense of litigation, including an estimate of reasonable attorney fees, conditioned on payment of any amount finally determined to be due to the target. A court may waive the bond requirement for good cause shown or if it finds the plaintiff has available assets equal to the amount of the proposed bond.

A person aggrieved by a violation of the prohibition making a bad faith assertion of patent infringement may bring an action in a court of competent jurisdiction, and the court may award a prevailing plaintiff the following remedies:

- Equitable relief;
- Damages;
- Costs and fees, including reasonable attorney fees; and
- Punitive damages in an amount equal to $50,000 or three times the total damages, costs, and fees, whichever is greater.

A violation also constitutes an unfair or deceptive trade practice and the department or a state attorney, as applicable,[9] may bring:

[9] The bill refers to an action brought by an "enforcing authority" as is defined in s. 501.203, F.S. That section defines the term to mean the office of the state attorney if a violation of this part occurs in or affects the judicial circuit under the office's

- An action to obtain a declaratory judgment that an act or practice constitutes a violation;
- An action to enjoin any person who has violated, is violating, or is otherwise likely to violate, the Act; or
- An action on behalf of one or more consumers or governmental entities for the actual damages caused by a violative act or practice.

The Patent Troll Prevention Act does not apply to institutions of higher education, to a technology transfer organization owned by or affiliated with an institution of higher education, or to a demand letter or an assertion of patent infringement that includes a claim for relief arising under 35 U.S.C. s. 271(e)(2) or 42 U.S.C. s. 262, which relate to protections for pharmaceuticals and biological products.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may shield some companies from costs associated with bad faith assertions of patent infringement.

C. Government Sector Impact:

None.

jurisdiction, or the Department of Legal Affairs if the violation occurs in or affects more than one judicial circuit or if the office of the state attorney defers to the department in writing, or fails to act upon a violation within 90 days after a written complaint has been filed with the state attorney.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates the following sections of the Florida Statutes: 501.991, 501.992, 501.993, 501.994, 501.995, 501.996, and 501.997.

IX. Additional Information:

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

CS by Judiciary on March 31, 2015:

- Authorizes a state attorney to bring an enforcement action for a violation of the Patent Troll Prevention Act, when appropriate; and
- Provides that the Patent Troll Prevention Act does not apply to institutions of higher education, to a technology transfer organization owned by or affiliated with an institution of higher education.

B. Amendments:

None.

183872

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
04/02/2015	.	
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	.	
	.	

The Committee on Judiciary (Brandes) recommended the following:

Senate Amendment (with title amendment)

Delete lines 183 - 190
and insert:
or deceptive trade practice in any action brought by an enforcing authority pursuant to s. 501.207. For the purposes of this section, the term "enforcing authority" has the same meaning as provided in s. 501.203.

Section 8. Section 501.997, Florida Statutes, is created to read:

501.997 Exemptions.—This part does not apply to

183872

institutions of higher education, to a technology transfer organization owned by or affiliated with an institution of higher education, or to a demand letter or an assertion of patent infringement that includes a claim for relief arising under 35 U.S.C. s. 271(e)(2) or 42 U.S.C. s. 262.

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

And the title is amended as follows:

Delete line 21

and insert:

501.997, F.S.; providing exemptions; providing an

By Senator Brandes

22-00987A-15 20151084__

A bill to be entitled

An act relating to patent infringement; creating part VII of ch. 501, F.S., entitled the "Patent Troll Prevention Act"; creating s. 501.991, F.S.; providing legislative intent; creating s. 501.992, F.S.; defining terms; creating s. 501.993, F.S.; prohibiting bad faith assertions of patent infringement from being made; providing factors that a court may consider when determining whether an allegation was or was not made in bad faith; creating s. 501.994, F.S.; authorizing a court to require a patent infringement plaintiff to post a bond under certain circumstances; limiting the bond amount; authorizing the court to waive the bond requirement in certain circumstances; creating s. 501.995, F.S.; authorizing private rights of action for violations of this part; authorizing the court to award certain relief to prevailing plaintiffs; creating s. 501.996, F.S.; requiring a bad faith assertion of patent infringement to be treated as an unfair or deceptive trade practice; creating s. 501.997, F.S.; providing an exemption; providing an effective date.

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

Section 1. Part VII of chapter 501, Florida Statutes, consisting of ss. 501.991-501.997, Florida Statutes, is created and is entitled the "Patent Troll Prevention Act."

Section 2. Section 501.991, Florida Statutes, is created to

22-00987A-15 20151084__

read:

501.991 Legislative intent.—

(1) The Legislature recognizes that it is preempted from passing any law that conflicts with federal patent law. However, the Legislature recognizes that the state is dedicated to building an entrepreneurial and business-friendly economy where businesses and consumers alike are protected from abuse and fraud. This includes protection from abusive and bad faith demands and litigation.

(2) Patents encourage research, development, and innovation. Patent holders have a legitimate right to enforce their patents. The Legislature does not wish to interfere with good faith patent litigation or the good faith enforcement of patents. However, the Legislature recognizes a growing issue: the frivolous filing of bad faith patent claims that have led to technical, complex, and especially expensive litigation.

(3) The expense of patent litigation, which may cost millions of dollars, can be a significant burden on companies and small businesses. Not only do bad faith patent infringement claims impose undue burdens on individual businesses, they undermine the state's effort to attract and nurture technological innovations. Funds spent to help avoid the threat of bad faith litigation are no longer available for serving communities through investing in producing new products, helping businesses expand, or hiring new workers. The Legislature wishes to help its businesses avoid these costs by encouraging good faith assertions of patent infringement and the expeditious and efficient resolution of patent claims.

Section 3. Section 501.992, Florida Statutes, is created to

read:

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

(1) "Demand letter" means a letter, e-mail, or other communication asserting or claiming that a person has engaged in patent infringement.

(2) "Institution of higher education" means an educational institution as defined in 20 U.S.C. s. 1001(a).

(3) "Target" means a person, including the person's customers, distributors, or agents, residing in, incorporated in, or organized under the laws of this state which:

(a) Has received a demand letter or against whom an assertion or allegation of patent infringement has been made;

(b) Has been threatened with litigation or against whom a lawsuit has been filed alleging patent infringement; or

(c) Whose customers have received a demand letter asserting that the person's product, service, or technology has infringed upon a patent.

Section 4. Section 501.993, Florida Statutes, is created to read:

501.993 Bad faith assertions of patent infringement.—A person may not make a bad faith assertion of patent infringement.

(1) A court may consider the following factors as evidence that a person has made a bad faith assertion of patent infringement:

(a) The demand letter does not contain the following information:

1. The patent number;

2. The name and address of the patent owner and assignee,

if any; and

3. Factual allegations concerning the specific areas in which the target's products, services, or technology infringe or are covered by the claims in the patent.

(b) Before sending the demand letter, the person failed to conduct an analysis comparing the claims in the patent to the target's products, services, or technology, or the analysis did not identify specific areas in which the target's products, services, and technology were covered by the claims of the patent.

(c) The demand letter lacked the information listed under paragraph (a), the target requested the information, and the person failed to provide the information within a reasonable period of time.

(d) The demand letter requested payment of a license fee or response within an unreasonable period of time.

(e) The person offered to license the patent for an amount that is not based on a reasonable estimate of the value of the license.

(f) The claim or assertion of patent infringement is unenforceable, and the person knew, or should have known, that the claim or assertion was unenforceable.

(g) The claim or assertion of patent infringement is deceptive.

(h) The person, including its subsidiaries or affiliates, has previously filed or threatened to file one or more lawsuits based on the same or a similar claim of patent infringement and:

1. The threats or lawsuits lacked the information listed under paragraph (a); or

2. The person sued to enforce the claim of patent infringement and a court found the claim to be meritless.

(i) Any other factor the court finds relevant.

(2) A court may consider the following factors as evidence that a person has not made a bad faith assertion of patent infringement:

(a) The demand letter contained the information listed under paragraph (1)(a).

(b) The demand letter did not contain the information listed under paragraph (1)(a), the target requested the information, and the person provided the information within a reasonable period of time.

(c) The person engaged in a good faith effort to establish that the target has infringed the patent and negotiated an appropriate remedy.

(d) The person made a substantial investment in the use of the patented invention or discovery or in a product or sale of a product or item covered by the patent.

(e) The person is:

1. The inventor or joint inventor of the patented invention or discovery, or in the case of a patent filed by and awarded to an assignee of the original inventor or joint inventors, is the original assignee; or

2. An institution of higher education or a technology transfer organization owned by or affiliated with an institution of higher education.

(f) The person has:

1. Demonstrated good faith business practices in previous efforts to enforce the patent, or a substantially similar

patent; or

2. Successfully enforced the patent, or a substantially similar patent, through litigation.

(g) Any other factor the court finds relevant.

Section 5. Section 501.994, Florida Statutes, is created to read:

501.994 Bond.—If a person initiates a proceeding against a target in a court of competent jurisdiction, the target may move that the proceeding involves a bad faith assertion of patent infringement in violation of this part and request that the court issue a protective order. After the motion, and if the court finds that the target has established a reasonable likelihood that the plaintiff has made a bad faith assertion of patent infringement, the court must require the plaintiff to post a bond in an amount equal to the lesser of $250,000 or a good faith estimate of the target's expense of litigation, including an estimate of reasonable attorney fees, conditioned on payment of any amount finally determined to be due to the target. The court shall hold a hearing at either party's request. A court may waive the bond requirement for good cause shown or if it finds the plaintiff has available assets equal to the amount of the proposed bond.

Section 6. Section 501.995, Florida Statutes, is created to read:

501.995 Private right of action.—A person aggrieved by a violation of this part may bring an action in a court of competent jurisdiction. A court may award the following remedies to a prevailing plaintiff in an action brought pursuant to this section:

(1) Equitable relief;

(2) Damages;

(3) Costs and fees, including reasonable attorney fees; and

(4) Punitive damages in an amount equal to $50,000 or three times the total damages, costs, and fees, whichever is greater.

Section 7. Section 501.996, Florida Statutes, is created to read:

501.996 Enforcement.—A violation of this part is an unfair or deceptive trade practice in any action brought by the department pursuant to s. 501.207.

Section 8. Section 501.997, Florida Statutes, is created to read:

501.997 Exemption.—A demand letter or assertion of patent infringement that includes a claim for relief arising under 35 U.S.C. s. 271(e)(2) or 42 U.S.C. s. 262 is not subject to this part.

Section 9. This act shall take effect upon becoming a law.

The Florida Senate

COMMITTEE VOTE RECORD

COMMITTEE: Judiciary
ITEM: SB 1084
FINAL ACTION: Favorable with Committee Substitute
MEETING DATE: Tuesday, March 31, 2015
TIME: 4:00 —6:00 p.m.
PLACE: 110 Senate Office Building

FINAL VOTE			3/31/2015 1 Amendment 183872 Brandes					
Yea	**Nay**	**SENATORS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
X		Bean						
X		Benacquisto						
X		Brandes						
X		Joyner						
X		Simmons						
X		Simpson						
X		Soto						
X		Stargel						
		Ring, VICE CHAIR						
X		Diaz de la Portilla, CHAIR						
9	0	**TOTALS**	RCS	-				
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

The Florida Senate

Committee Agenda Request

To: Senator Miguel Diaz de la Portilla, Chair
Committee on Judiciary

Subject: Committee Agenda Request

Date: February 27, 2015

I respectfully request that **Senate Bill #1084**, relating to **Patent Infringement**, be placed on the:

☒ committee agenda at your earliest possible convenience.

☐ next committee agenda.

Senator Jeff Brandes
Florida Senate, District 22

File signed original with committee office

S-020 (03/2004)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/2015
Meeting Date

Topic _____ Bill Number 1084 *(if applicable)*

Name BRIAN PITTS Amendment Barcode _____ *(if applicable)*

Job Title TRUSTEE

Address 1119 NEWTON AVNUE SOUTH Phone 727-897-9291
Street

SAINT PETERSBURG FLORIDA 33705 E-mail JUSTICE2JESUS@YAHOO.COM
City *State* *Zip*

Speaking: ☐ For ☐ Against ☑ Information

Representing JUSTICE-2-JESUS

Appearing at request of Chair: ☐ Yes ☑ No Lobbyist registered with Legislature: ☐ Yes ☑ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/20/11)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/2015
Meeting Date

1084
Bill Number (if applicable)

Topic Patent Trolling

Amendment Barcode (if applicable)

Name Kimberly Siomkos (see-OM-KŌS)

Job Title VP of Gov. Relations

Address 1001 Thomasville Road
Street

Tallahassee Florida 32303
City *State* *Zip*

Phone (561) 317-4704

Email Ksiomkos@floridabankers.com

Speaking: ☒ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Florida Bankers

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3.31.15
Meeting Date

1084
Bill Number (if applicable)

Topic PATENT INFRINGEMENT

Amendment Barcode (if applicable)

Name JARED ROSS

Job Title SVP, Governmental Affairs

Address 3692 Coolidge Ct.
Street

Tallahassee FL 32311
City *State* *Zip*

Phone (850) 322-6956

Email jared.ross@fscu.coop

Speaking: ☒ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against
(The Chair will read this information into the record.)

Representing FLORIDA CREDIT UNION ASSOCIATION

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	CS/SB 542
INTRODUCER:	Criminal Justice Committee and Senators Benacquisto and Simpson
SUBJECT:	Interception of Wire, Oral, or Electronic Communication
DATE:	March 30, 2015 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	**Fav/CS**
2.	Wiehle	Cibula	JU	**Favorable**
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 542 provides that it is lawful for a child under 18 years of age to intercept and record an oral communication if the child has reasonable grounds to believe that recording the communication will capture a statement by another party to the communication that the other party intends to commit, is committing, or has committed an unlawful sexual act or an unlawful act of physical force or violence against the child. Therefore, the bill creates an exception to the general prohibition against interceptions of oral communications. Absent this exception, the recording is proscribed and is not admissible in evidence in a criminal proceeding.

II. Present Situation:

Definitions of Relevant Terms

Section 934.02(3), F.S., defines "intercept" as the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

Section 934.02(2), F.S., defines "oral communication" as any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication.

Interception of Oral Communications

Paragraphs (1)(a) and (4)(a) of s. 934.03, F.S., make it a third degree felony[1] to intentionally intercept an oral communication. The statute provides for a number of exceptions to this general prohibition.[2] For example, it is lawful under ss. 934.03-934.09, F.S.,[3] for:

- An investigative or law enforcement officer or a person acting under the direction of an investigative or law enforcement officer to intercept an oral communication if such person is a party to the communication or one of the parties to the communication has given prior consent to the interception and the purpose of such interception is to obtain evidence of a criminal act;[4] and
- A person to intercept an oral communication when all of the parties to the communication have given prior consent to such interception.[5]

The contents of an intercepted communication and evidence derived from the contents may not be received in evidence in court proceedings and other specified proceedings if the disclosure of the information would violate ch. 934, F.S. (i.e., creating a statutory exclusionary rule):

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter. The prohibition of use as evidence provided in this section does not apply in cases of prosecution for criminal interception in violation of the provisions of this chapter.[6]

McDade v. State

In *McDade v. State*,[7] the Florida Supreme Court ("Court") held that it was an error to receive in evidence at McDade's criminal trial recordings that his stepdaughter surreptitiously made when she was 16 years-old. The recordings, which recorded conversations between McDade and his stepdaughter in McDade's bedroom, were introduced at McDade's trial for various crimes involving sexual abuse of his stepdaughter. The recorded conversations included statements by McDade that supported his stepdaughter's testimony at trail that McDade had sexually abused her. McDade had objected to their introduction.

---

[1] A third degree felony is punishable by up to 5 years in state prison, a fine of up to $5,000, or both. Sections 775.082 and 775.083, F.S. However, if total sentence points scored under the Criminal Punishment Code are 22 points or fewer, the court must impose a nonstate prison sanction, unless the court makes written findings that this sanction could present a danger to the public. Section 775.082(10), F.S.

[2] Section 934.02(2)(a)-(j), F.S.

[3] These laws respectively relate to: interception and disclosure of wire, oral, and electronic communications; manufacture of communication-intercepting devices; confiscation of those devices; authorization of an interception; authorization for disclosure and use of an intercepted communication; and the procedure for interception.

[4] Section 934.03(2)(c), F.S.

[5] Section 934.03(2)(d), F.S.

[6] Section 934.06, F.S.

[7] 2014 WL 6977944 (Fla. 2014).

The question before the Court was whether a recording of solicitation and confirmation of child sexual abuse surreptitiously made by the child victim in the accused's bedroom falls within the proscription of ch. 934, F.S. The Court determined that this was a question of statutory interpretation. The Court found that none of the exceptions in s. 934.03, F.S., to the general prohibition in that statute against interception of oral communications called "for the interception of conversations based on one's status as the victim of a crime."[8] Further, the Court determined that the facts regarding the conversations and the recording of those conversations indicated the recordings were prohibited and inadmissible under ch. 934, F.S.:

> [U]nder the definition of oral communication provided by section 934.02(2), Florida Statutes (2010), McDade's conversations with his stepdaughter in his bedroom are oral communications. The facts related to the recorded conversations support the conclusion that McDade's statements were "uttered by a person exhibiting an expectation that [his] communication [was] not subject to interception" and that McDade made those statements "under circumstances justifying" his expectation that his statements would not be recorded. § 934.02(2), Fla. Stat. (2010). The recordings were made surreptitiously. McDade did not consent to the conversations being recorded, and none of the other exceptions listed in section 934.03(2) apply. The recordings, therefore, were prohibited. Because the recordings impermissibly intercepted oral communications, the recordings are inadmissible under section 934.06, Florida Statutes (2010).[9]

At the conclusion of its analysis, the Court stated:

> It may well be that a compelling case can be made for an exception from chapter 934's statutory exclusionary rule for recordings that provide evidence of criminal activity -or at least certain types of criminal activities. But the adoption of such an exception is a matter for the Legislature. It is not within the province of the courts to create such an exception by ignoring the plain import of the statutory text.[10]

---

[8] *McDade*, 2014 WL 697794 at *4.

[9] *McDade*, 2014 WL 697794 at *5. The Court obtained jurisdiction when it agreed to consider a question (which the Court rephrased) that had been certified by the Second District Court of Appeal ("Second District") in *McDade v. State*, 114 So.2d 465 (Fla. 2d DCA 2013). In that case, the Second District rejected McDade's argument that the trial court should have suppressed the recordings under the exclusionary rule in s. 934.06, F.S. The Second District determined that the statutory proscription on recording oral communications only applied "where the person uttering the communication has a reasonable expectation of privacy under the circumstances," *McDade*, 114 So.2d at 470, and determined that McDade did not have a reasonable expectation of privacy. The Second District relied on a prior Florida Supreme Court case, *State v. Inciarrano*, 473 So.2d 1272 (Fla. 1985), which involved a victim recording. The Court rejected the Second District's application of *Inciarrano*. It found the circumstances in *Incarriano* were "starkly different" from the circumstances in the case presented. *McDade*, 2014 WL 697794 at *5. Further, *Inciarrano* was "not based on a general rule that utterances associated with criminal activity are by virtue of that association necessarily uttered in circumstances that make unjustified any expectation that the utterances will not be intercepted" and could not "be used as a basis for the decision reached by the Second District, which turns on McDade's status as a person engaged in crimes involving the sexual abuse of child." *McDade*, 2014 WL 697794 at *6.

[10] *McDade*, 2014 WL 697794 at *7.

III. Effect of Proposed Changes:

The bill addresses the decision of the Florida Supreme Court in *McDade v. State.*[11] The bill creates a new exception in s. 934.03, F.S., to the general prohibition in that statute against interception of oral communications. The bill provides that it is lawful for a child under 18 years of age to intercept and record an oral communication if the child has reasonable grounds to believe that recording the communication will capture a statement by another party to the communication that the other party intends to commit, is committing, or has committed an unlawful sexual act or an unlawful act of physical force or violence against the child.

As a result of this exception, the recording will not be proscribed and the exclusionary rule in s. 934.06, F.S., will not prohibit the recording from being received in evidence in a criminal proceeding.

The bill takes effect on July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

[11] 2014 WL 6977944 (Fla. 2014).

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 934.03 of the Florida Statutes.

IX. Additional Information:

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

CS by Criminal Justice on March 2, 2015:
Amends the description of unlawful acts against a child under 18 years of age to include an unlawful sexual act.

B. Amendments:

None.

By the Committee on Criminal Justice; and Senators Benacquisto and Simpson

591-01815-15 2015542c1

A bill to be entitled

An act relating to interception of wire, oral, or electronic communication; amending s. 934.03, F.S.; authorizing a child younger than 18 years of age to intercept and record an oral communication if the child is a party to the communication and certain conditions are met; providing an effective date.

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

Section 1. Paragraph (k) is added to subsection (2) of section 934.03, Florida Statutes, to read:

934.03 Interception and disclosure of wire, oral, or electronic communications prohibited.—

(2)

(k) It is lawful under ss. 934.03-934.09 for a child under 18 years of age to intercept and record an oral communication if the child is a party to the communication and has reasonable grounds to believe that recording the communication will capture a statement by another party to the communication that the other party intends to commit, is committing, or has committed an unlawful sexual act or an unlawful act of physical force or violence against the child.

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

The Florida Senate

COMMITTEE VOTE RECORD

COMMITTEE: Judiciary
ITEM: CS/SB 542
FINAL ACTION: Favorable
MEETING DATE: Tuesday, March 31, 2015
TIME: 4:00 —6:00 p.m.
PLACE: 110 Senate Office Building

FINAL VOTE								
Yea	**Nay**	**SENATORS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
X		Bean						
X		Benacquisto						
X		Brandes						
X		Joyner						
X		Simmons						
X		Simpson						
X		Soto						
X		Stargel						
		Ring, VICE CHAIR						
X		Diaz de la Portilla, CHAIR						
9	0	**TOTALS**						
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:
Banking and Insurance, *Chair*
Appropriations, *Vice Chair*
Appropriations Subcommittee on Health and Human Services
Education Pre-K-12
Higher Education
Judiciary
Rules

JOINT COMMITTEE:
Joint Legislative Auditing Committee
Joint Select Committee on Collective Bargaining

SENATOR LIZBETH BENACQUISTO
30th District

March 4, 2015

The Honorable Miguel Diaz de la Portilla
Senate Criminal Judiciary, Chair
406 Senate Office Building
404 South Monroe Street
Tallahassee, FL 32399

RE: SB 542- Relating to Interception of a Communication

Dear Mr. Chair:

Please allow this letter to serve as my respectful request to agenda SB 542, Relating to Interception of a Communication, for a public hearing at your earliest convenience.

Your kind consideration of this request is greatly appreciated. Please feel free to contact my office for any additional information.

Sincerely,

Lizbeth Benacquisto
Senate District 30

Cc: Tom Cibula

REPLY TO:
❒ 2310 First Street, Suite 305, Fort Myers, Florida 33901 (239) 338-2570
❒ 326 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5030

Senate's Website: *www.flsenate.gov*

AM 5110

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

March 31, 2015
Meeting Date

CS/SB 542
Bill Number (if applicable)

Topic Amendment of Florida Chapter 934 "Interception" Law

Amendment Barcode (if applicable)

Name Kevin Earl Wood

Job Title Citizen/News Reporter/Disabled Air Force Veteran

Address 6925 Wood Place
Street
Panama City, FL 32404
City *State* *Zip*

Phone 850-785-3768/cell 850-358-2200

Email allunited@bellsouth.net

Speaking: ☑ For ☑ Against ☑ Information

Purpose & ↳ Amendment Procedure

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Innocent Citizens/Child and Adult Victims of Crime/Southern Christian Leadership Conference (SCLC)

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☐ Yes ☑ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/2015
Meeting Date

Topic _____ Bill Number 542 *(if applicable)*

Name BRIAN PITTS Amendment Barcode _____ *(if applicable)*

Job Title TRUSTEE

Address 1119 NEWTON AVNUE SOUTH Phone 727-897-9291
Street

SAINT PETERSBURG FLORIDA 33705 E-mail JUSTICE2JESUS@YAHOO.COM
City *State* *Zip*

Speaking: ☑ For ☐ Against ☑ Information

Representing JUSTICE-2-JESUS

Appearing at request of Chair: ☐ Yes ☑ No Lobbyist registered with Legislature: ☐ Yes ☑ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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S-001 (10/20/11)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/15
Meeting Date

SB 542
Bill Number (if applicable)

Topic Oral Communications

Amendment Barcode (if applicable)

Name Ron Book

Job Title

Address 104 W. Jefferson
Street

TLH 32301
City *State* *Zip*

Phone 850 224-3427

Email RonW RLBookPA.com

Speaking: ☑ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Lauren's Kids

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/15
Meeting Date

SB 542
Bill Number (if applicable)

Topic RE Interception of Wire, Oral, or Electronic Communication

Amendment Barcode (if applicable)

Name Christian Minor

Job Title Director of Gov. Affairs

Address 204 S. Monroe St. Suite 201
Street

Phone

Tallahassee FL 32301
City *State* *Zip*

Email

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing The Florida Smart Justice Alliance

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/2015
Meeting Date

CS/SB 542
Bill Number (if applicable)

Topic Interception of Wire, Oral, or Electronic Communications *Amendment Barcode (if applicable)*

Name Jennifer Dritt

Job Title Executive Director

Address 1820 E. PARK AVE, STE 100 *Street*

Phone (850) 297-2000

TALLAHASSEE *City* FL *State* 32301 *Zip*

Email jdritt@fcasv.org

Speaking: ☑ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing FLORIDA COUNCIL AGAINST SEXUAL VIOLENCE

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

March 31, 2015
Meeting Date

542
Bill Number (if applicable)

Topic _____

Amendment Barcode (if applicable)

Name Matt Dunagan

Job Title Assistant Executive Director

Address 2617 Mahan Drive
Street

Phone 850-274-3599

Tallahassee FL 32308
City *State* *Zip*

Email mdunagan@flsheriffs.org

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Florida Sheriffs Association

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☑ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/15
Meeting Date

542
Bill Number (if applicable)

Amendment Barcode (if applicable)

Topic Unlawful Recording

Name Andrew Fay

Job Title Special Counsel

Address PL 01
Street

Tallahassee FL
City *State* *Zip*

Phone 245-0155

Email

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Department of Legal Affairs

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 932
INTRODUCER:	Senator Stargel
SUBJECT:	Timeshares
DATE:	March 30, 2015
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	**Favorable**
2.	Wiehle	Cibula	JU	**Favorable**
3.			FP	

I. Summary:

SB 932 relates to the Florida Vacation Plan and Timesharing Act (act), which establishes requirements for the creation, sale, exchange, promotion, and operation of timeshare plans, including requirements for full and fair disclosure to purchasers. The act is enforced by the Division of Florida Land Sales, Condominiums, and Mobile Homes (division) within the Department of Business and Professional Regulation (department). The bill:

- Provides that an ownership interest in a condominium or cooperative unit or a beneficial interest in a timeshare trust is required for such interests to qualify as timeshare estates;
- Revises the definitions for nonspecific and specific multisite timeshare plans to provide that the plans may include interests other than timeshare licenses or personal property timeshare interests;
- Revises the required disclosures for public offering statements in multisite timeshare plans;
- Revises the requirements for amendments to timeshare instruments in regards to component sites;
- Expands the limitation on liability for developers who, in good faith attempt to and substantially comply with, all the provisions of the act;
- Requires the disclosure of lease terms in timeshare trusts;
- Repeals the requirement for judicial approval of transactions involving timeshare trust property;
- Creates a procedure of the extension or termination of timeshare plans;
- Creates a procedure for the transfer of the reservation system and owner data when a managing entity is discharged;
- Provides that only one annual fee is due from a managing entity;
- Requires all multisite timeshare plans to disclose the term of each component site plan and prominently disclose the term of component sites which are shorter than the term of the plan;
- Excludes component site common expenses and ad valorem expenses from the cap on annual increases in common expense assessments;

- Allows for substitute and replacement accommodations that are better than the existing accommodations; and
- Revises the limitations on substitute accommodations.

According to the department, the bill reduces the department's revenues by $338,704 in FY 2015-16.

II. Present Situation:

Timeshares

A timeshare interest is a form of ownership of real and personal property.[1] According to a report prepared by the American Resort Development Association (ARDA), Florida had 23 percent of the estimated 1,540 timeshare resorts in the United States as of December 31, 2013.[2]

Part I of ch. 721, F.S., relates to vacation plans and timesharing. Part II of ch. 721, F.S., relates to multisite vacation and timeshare plans that are also known as vacation clubs.

In a timeshare, the real property is typically a condominium unit or a cooperative unit. A timeshare property is typically a resort in which multiple parties hold the right to use the property. Each owner of a timeshare interest is allotted a period of time (typically one week) in which he or she may use the property.

The Florida Vacation Plan and Timesharing Act, ch. 721, F.S., establishes requirements for the creation, sale, exchange, promotion, and operation of timeshare plans, including requirements for full and fair disclosure to purchasers and prospective purchasers.[3] Chapter 721, F.S., applies to all timeshare plans consisting of more than seven timeshare periods over a period of at least three years in which the accommodations and facilities are located within this state or offered within this state.[4]

A timeshare unit is an accommodation of a timeshare plan which is divided into timeshare periods or a condominium unit in which timeshare estates have been created.[5]

A timeshare plan is any arrangement, plan, scheme, or similar device whereby a purchaser gives consideration for ownership rights in, or a right to use, any accommodations, and facilities for less than a full year during any given year, but not necessarily for consecutive years.[6]

Section 721.05(34), F.S., defines a "timeshare estate" as "a right to occupy a timeshare unit, coupled with a freehold estate or an estate for years with a future interest in a timeshare property or a specified portion thereof." The term also includes an interest in a condominium unit, a

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[1] *See* s. 721.05(36), F.S.
[2] ARDA International Foundation, *Banner Year for Timeshare Industry*, a copy of the report is available at: http://www.arda.org/news-information/default.aspx (last visited March 9, 2015).
[3] Section 721.02(2) and (3), F.S.
[4] Section 721.03, F.S.
[5] *See* ss. 721.05(41) and 718.103(26), F.S.
[6] Section 721.05(39), F.S.

cooperative unit, or a trust. This definition does not specify whether the term includes both direct and indirect interests in trusts. An example of an indirect interest in a trust is a trust beneficiary's spouse or other dependent.

Section 721.05(36), F.S., provides that a "timeshare interest" means a timeshare estate, a personal property timeshare interest, or a timeshare license.

Section 721.05(37), F.S., provides that a "timeshare license" is the "right to occupy a timeshare unit, which right is not a personal property timeshare interest or a timeshare estate."

A timeshare plan under s. 721.05(39), F.S., is any "arrangement, plan, scheme, or similar device, other than an exchange program" where a purchaser, for consideration, "receives ownership rights in or a right to use accommodations, and facilities, if any, for a period of time less than a full year during any given year, but not necessarily for consecutive years." The term includes both personal property timeshare and real property timeshare plans.[7]

Section 721.52(4), F.S., defines a "multisite timeshare plan" to mean:

> any method, arrangement, or procedure with respect to which a purchaser obtains, by any means, a recurring right to use and occupy accommodations or facilities of more than one component site, only through use of a reservation system, whether or not the purchaser is able to elect to cease participating in the plan. However, the term "multisite timeshare plan" shall not include any method, arrangement, or procedure wherein:
> (a) The contractually specified maximum total financial obligation on the purchaser's part is $3,000 or less, during the entire term of the plan; or
> (b) The term is for a period of 3 years or less, regardless of the purchaser's contractually specified maximum total financial obligation, if any. For purposes of determining the term of such use and occupancy rights, the period of any optional renewals which a purchaser, in his or her sole discretion, may elect to exercise, whether or not for additional consideration, shall not be included. For purposes of determining the term of such use and occupancy rights, the period of any automatic renewals shall be included unless a purchaser has the right to terminate the membership at any time and receive a pro rata refund or the purchaser receives a notice no less than 30 days and no more than 60 days prior to the date of renewal informing the purchaser of the right to terminate at any time prior to the date of automatic renewal.
>
> Multisite timeshare plan does not mean an exchange program as defined in s. 721.05. Timeshare estates may only be offered in a multisite timeshare plan pursuant to s. 721.57.

[7] A "personal property timeshare plan," which means a timeshare plan in which the accommodations are comprised of personal property that is not permanently affixed to real property; and a "real property timeshare plan," which means a timeshare plan in which the accommodations of the timeshare plan are comprised of or permanently affixed to real property.

Section 721.52(5), F.S., defines a "nonspecific multisite timeshare plan" to mean:

> "a multisite timeshare plan *containing timeshare licenses or personal property timeshare interests*, with respect to which a purchaser receives a right to use all of the accommodations and facilities, if any, of the multisite timeshare plan through the reservation system, but no specific right to use any particular accommodations and facilities for the remaining term of the multisite timeshare plan in the event that the reservation system is terminated for any reason prior to the expiration of the term of the multisite timeshare plan." [Emphasis added.]

Section 721.52(7), F.S., defines a "specific multisite timeshare plan" to mean:

> "a multisite timeshare plan *containing timeshare licenses or personal property timeshare interests*, with respect to which a purchaser receives a specific right to use accommodations and facilities, if any, at one component site of a multisite timeshare plan, together with use rights in the other accommodations and facilities of the multisite timeshare plan created by or acquired through the reservation system." [Emphasis added.]

According to the American Resort Development Association (ARDA),[8] which represents the vacation ownership and resort development industries (timeshares), there has been a recent development in nonspecific timeshare *estate* plans in which the purchaser receives a timeshare estate in a trust and one in a specific component site and such may not be clearly consistent with definitions for specific sand nonspecific multisite timeshare plans.

A timeshare plan developer must file a public offering statement and the required exhibits with the Division of Florida Condominiums, Timeshares, and Mobile Homes (division) within the Department of Business and Professional Regulation, prior to offering the timeshare plan to the public.[9]

For each timeshare plan, the developer must provide for a managing entity, which must be the developer, a separate manager or management firm, or an owners' association.[10] The public offering statement must include an estimated operating budget for the timeshare plan, and a schedule of the purchaser's expenses to be paid to the timeshare plan and the managing entity.[11] A common expense to be paid to the managing entity is a reserve for deferred maintenance and capital expenditures.

A timeshare unit is an accommodation of a timeshare plan which is divided into timeshare periods[12] or a condominium unit in which timeshare estates have been created.[13] A timeshare plan is any arrangement, plan, or similar device in which a purchaser gives consideration for

[8] For more information about ARDA, *see* http://www.arda.org/who-we-are/default.aspx (last visited March 5, 2015).
[9] Section 721.07, F.S.
[10] Section 721.13(1)(a), F.S. The duties of a managing entity are detailed in s. 721.13(3), F.S.
[11] Section 721.07(5)(t)3., F.S.
[12] Section 721.05(41), F.S.
[13] Section 718.103(26), F.S.

ownership rights in, or a right to use, any accommodations and facilities for less than a full year during any given year, but not necessarily for consecutive years.[14]

Public Offering Statement

Prior to offering any timeshare plan, a developer must submit a public offering statement, which must include certain information and disclosures, to the division for approval.[15] Any amendment to an approved offering statement must be filed with the division for approval before it may become effective.[16]

Sections 721.07(3) and 721.551(2), F.S., provide that public offering statements and amendments to timeshare instruments for component sites located in this state are not required to be provided to purchasers who do not receive a timeshare estate or an interest in a specific multisite timeshare plan in that component site.

Sections 721.07(5) and 721.55(5), F.S., limit liability for nonmaterial errors or omissions for any developer who, in good faith, attempts to comply with the requirements of ss. 721.07 or 721.55, F.S., related to public offering statements, if, in fact, he or she has substantially complied with the disclosure requirements of ch. 721, F.S.

Leasehold Accommodations in a Timeshare Trust

Sections 721.08(2)(c) and 721.53(1)(e) F.S., which regulate timeshare trusts, do not specify whether leasehold accommodations may be included in a timeshare trust and how they should be disclosed in a public offering statement or to interestholders.

Disposition of Timeshare Trust Property

Sections 721.08(2)(c) and 721.53(1)(e), F.S., require that any transfer or encumbrance of timeshare trust property approved by the voting interests of the timeshare plan must be approved by a court. Section 721.08(2)(c), F.S., relating to non-multisite timeshare plans, also provides that the division has standing to advise the court on its decision.

Transfer of Reservation System Following the Discharge of the Managing Entity

Section 721.14, F.S., provides for the discharge of management entity for a timeshare plan after it has been purchased. Section 714.14, F.S., does not provide for the disposition of the reservation system and the data in that system in the event the managing entity is discharged.

Section 721.56(5), F.S., provides that the reservation system of a nonspecific multisite timeshare plan is considered a facility of the timeshare plan. However, the reservation system is not a facility of any specific multisite timeshare plan, nor is it a facility of any multisite timeshare plan in which timeshare estates are offered pursuant to s. 721.57, F.S., relating to the offering of timeshare estates in multisite timeshare plans.

[14] Section 721.05(39), F.S.
[15] Sections 721.07 and 721.55, F.S.
[16] Section 721.07(3)(a)1., F.S.

Section 721.56(5)(a), F.S., permits the manager or management firm and the purchasers or owners' association to agree that the manager or management firm own the reservation system and will continue to own the system in the event of a discharge of the management entity pursuant to s. 721.14, F.S. In regards to the data in the reservation system, s. 721.56(5)(b), F.S., provides the procedure and criteria for establishing a trust for the reservation system of a nonspecific multisite timeshare plan in the event the plan's managing entity is terminated.

Annual Managing Entity Fee

Section 721.27, F.S., requires each managing entity of a timeshare plan located in this state to pay an annual fee of $2 for each 7 days of annual use availability that exists within the timeshare plan at that time. Section 721.27, F.S., limits the maximum amount of such filing fee to $25,000 or the total filing fee due with respect to the timeshare units in the multisite timeshare plan that are located in this state pursuant to s. 721.07(4)(a),F.S.,[17] whichever is greater.

Section 21.58, F.S., also provides that managing entities of multisite timeshare plans must pay the annual fee required by s. 721.27, F.S. According to ARDA, these provisions operate to require managing entities to pay annual fees twice if they have timeshare estates in both a single site plan and a multisite plan.

Term of Nonspecific Multisite Timeshare Plans and other Required Disclosures

Section 721.54, F.S., prohibits a person from representing to a purchaser of a nonspecific multisite timeshare plan that the term of the plan for that purchaser is longer than the shortest term of availability of any of the accommodations included in the plan at the time of purchase. However, for other specific multisite timeshare plans, s. 721.55(4)(a), F.S., requires that the term of each component site within the timeshare plan be disclosed in the multisite timeshare plan public offering statement.

Section 721.55(4)(h), F.S., provides the disclosures that must be included in a multisite timeshare plan public offering statement. It requires that the offering statement must also include a description of the purchaser's liability for common expenses and specifies the information that must be included in that description.

Substitutions and Deletions for Multisite Timeshare Plans

Section 721.552(2), F.S., permits substitutions of accommodations and facilities for nonspecific multisite timeshare plans that are "substantially similar" to the existing accommodations and facilities. Substitutions are limited to no more than 25 percent of the available accommodations at a given component site per year. Before a substitution occurs, notice must be provided to all the purchasers of the timeshare plan. However, under limited circumstances, a managing entity may substitute all accommodations in a given year if a written plan of substitution has been

[17] Section 721.07 (4)(a), F.S., provides a fee upon the filing of a filed public offering statement. The required filing fee is $2 for each 7 days of annual use availability in each timeshare unit that may be offered as a part of the proposed timeshare plan pursuant to the filing.

provided to each purchaser of the timeshare plan and approved by a majority of purchasers and a majority of the board of administration.

III. Effect of Proposed Changes:

Definitions

The bill amends s. 721.05(34), F.S., to revise the definition of the term "timeshare estate" to provide that an ownership interest in a condominium or cooperative unit or a beneficial interest in a timeshare trust coupled with a right to occupy a timeshare unit is required for such interest to qualify as a timeshare estate. The bill also provides that a beneficial trust in a qualifying multisite timeshare trust is also a timeshare estate.

Public Offering Statement

The bill amends ss. 721.07(3), F.S., to provide that public offering amendments to timeshare instruments for component sites located in this state are only required to be delivered to purchasers who receive a specific interest in that component site. The bill provides a comparable amendment to s. 721.55(5)(b), F.S., relating to multisite vacation and timeshare plans.
The bill amends ss. 721.07(5), F.S., to expand the limitation on liability for developers who have in good faith attempted to and substantially complied with all the provisions of ch. 721, F.S. Current law limits the good faith limitation on liability to violations of the disclosure requirements. The bill provides that any nonmaterial errors, omissions, or violations of ch. 721, F.S., for which a developer has limited liability under these section, are not considered violations of ch. 721, F.S., and do not give rise to any purchaser cancellation rights. The bill provides a comparable amendment to s. 721.55(5)(b), F.S., relating to multisite timeshare plans.

Leasehold Accommodations in a Timeshare Trust

The bill amends s. 721.08(2)(c) 4.a., F.S., to provide that if the accommodations or facilities of a single-site timeshare trust plan are subject to a lease, the unexpired term of the lease must be disclosed as the term of the timeshare plan. The bill provides a comparable amendment to s. 721.53(1)(e), F.S., relating to multisite timeshare plans.

Disposition of Timeshare Trust Property

The bill amends ss. ss. 721.08(2)(c) and 721.53(1)(e), F.S., to provide that, subject to the statutory provisions regulating changes to component site accommodations or facilities in s. 721.552, F.S., a vote of the voting interests of the timeshare plan is not required for substitution or automatic deletion of accommodations or facilities in timeshare trusts.

The bill also amends ss. ss. 721.08(2)(c) and 721.53(1)(e), F.S., to delete the requirement for judicial approval of any transfer or encumbrance of timeshare trust property after approval by the voting interests of the timeshare plan. The bill also amends s. 721.08(2)(c), F.S., to delete the provision granting the division standing to advise the court in a transfer related to non-multisite timeshare plans.

Extension or Termination of Timeshare Plans

The bill creates s. 721.125, F.S., to provide a process for timeshare instruments that have been in existence for at least 25 years and are silent as to how the plan terminates or is extended. The bill requires an affirmative vote or written consent from 60 percent of all the voting interests in the timeshare plan extend or terminate the term of a timeshare plan. If the term of a timeshare plan is extended, all rights, privileges, duties, and obligations created under applicable law or the timeshare instrument continue in full force. If a timeshare plan is terminated, the termination has immediate effect pursuant to applicable law and the timeshare instrument. A termination or extension vote or consent proposed for a component site of a multisite timeshare plan located in this state is effective only if the person authorized to make additions or substitutions approves.

Transfer of Reservation System Following the Discharge of the Managing Entity

The bill creates s. 721.14(4), F.S., to permit the owners' association and the manager or management firm to enter into a written agreement for the transition procedures and related time periods in the event the manager or management firm is discharged.

Section 721.14(4)(b), F.S., provides a procedure to be followed in the event there is no written agreement for the transfer of relevant owner data and reservation system information. It requires that the managing entity transfer the information to the owners' association within 90 days after receiving notice of the termination vote. Within 10 days after the completed transfer of the data, the timeshare plan must reimburse the managing entity for all reasonable costs incurred in effecting the transfer of information.

The bill deletes the provisions in s. 721.56(5), F.S., related to the transfer of reservation system and owner data for multisite timeshare plans. The procedure in s. 721.14(4), F.S., apply to terminations of managing entities of single site or multisite timeshare plans.

Annual Managing Entity Fee

The bill amends s. 721.27, F.S., to provide that only one annual fee is due and payable for any 7 days of annual use availability that is included within both a single site and multisite timeshare plan.

The bill also amends s. 721.58, F.S., to delete the annual fee requirement for multisite timeshare plans.

Definitions – Multisite Timeshare Plans

The bill amends s. 721.52, F.S., to amend the definitions of the terms "nonspecific multisite timeshare plan" and "specific multisite timeshare plan" to delete the condition that such plans contain timeshare licenses or personal property timeshare interests.

Term of Nonspecific Multisite Timeshare Plans and other Required Disclosures

The bill amends ss. 721.54, F.S., and 721.55(4)(a), F.S., to delete the distinction between specific and nonspecific multisite timeshare plans in regards to the duty to disclose the term of each

component site within the timeshare plans. The bill requires that both specific and nonspecific multisite timeshare plans disclose the term of each component site within the timeshare plan and disclose, in conspicuous type, the term of each component site that is shorter than the term of the timeshare plan.

Current law, s. 721.55(4)(h), F.S., caps the annual increase in common expense assessments for multisite timeshare plans in a given year at 125 percent of the previous year. There are currently no exceptions to the cap.

The bill also amends s. 721.55(4)(h), F.S., to require that the multisite timeshare plan public offering statement that the component site common expenses and ad valorem taxes may not be included in calculating the total common expense assessment for the multisite plan in any given year.

Multisite Timeshare Estates

The bill amends s. 721.55(5)(7), F.S., relating to the required disclosures in the public offering statement, s. 721.551(2), F.S., relating to the delivery of the public offering statement, and s. 721.552(2), F.S., relating to amendments to multisite timeshare plans, to delete references to plans offering timeshare estate pursuant to s. 721.57, F.S.

The bill also amends s. 721.57(2), F.S., to delete the reference to a timeshare trust in the context of a specific multisite timeshare plan.

Substitutions and Deletions for Multisite Timeshare Plans

The bill amends s. 721.552(2), F.S., to provide for the substitution of accommodations. It modifies the notice required before a substitution will occur to include a statement that purchasers have the right to object to the proposed substitution. The 25 percent limitation on substitutions is repealed and replaced with the following provisions:

- If the developer is authorized to make substitutions, the developer is annually limited to substitution of 10 percent of the annual use availability in the multisite timeshare plan;
- If the managing entity is authorized to make substitutions, and the managing entity is under common ownership or control with the developer, the managing entity is annually limited to substitution of 10 percent of the annual use availability in the multisite timeshare plan;
- If the managing entity is authorized to make substitutions, and the managing entity is not under common ownership or control with the developer, the managing entity is annually limited to substitution of 25 percent of the annual use availability in the multisite timeshare plan; and
- If at least 10 percent of purchasers in the timeshare plan object to a proposed substitution, a meeting of the purchasers must be held. Unless the substitution is rejected by a majority of purchasers voting, it is deemed approved.

The bill deletes the provision in s. 721.552(2), F.S., which permits a managing entity to substitute all accommodations pursuant to a plan approved by a majority of purchasers and a majority of the board. The bill amends this provision to permit substitutions by purchasers

without limit if the proposed substitution is approved in advance by a majority of voting purchasers, provided at least 25 percent of the total number of purchasers cast votes.

The bill creates s. 721.552(2)(g), F.S., to provide that the trustee of a timeshare trust may convey title to any accommodation and facility that has been designated or approved for substitution when directed by the authorized person without any further vote or other authorization from the purchasers of the multisite timeshare plan.

Currently, s. 721.552(3), F.S., allows for the automatic deletion of component sites only if a sufficient number of purchasers of the plan will also be deleted to maintain a one-to-one right to use ratio. The bill amends this provision to also allow for automatic deletions if replacement accommodations that are substantially similar to or better than the deleted accommodations are provided.

Effective Date

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

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill eliminates duplicate payment of managing entity annual fees by managing entities that manage both single site and multisite timeshare plans. According to the department, the amount of savings to these managing entities for FY 2015-16 is estimated to be $338,704.

C. Government Sector Impact:

The bill eliminates duplicate payment of managing entity annual fees by managing entities that manage both single site and multisite timeshare plans. The department

estimates that this will reduce revenue by $338,704 for FY 2015-16, $370,000 for FY 2016-17, and $400,000) for FY 2017-18.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 721.05, 721.07, 721.08, 721.125, 721.14, 721.27, 721.52, 721.53, 721.54, 721.55, 721.551, 721.552, 721.56, 721.57, and 721.58.

IX. Additional Information:

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

None.

B. Amendments:

None.

By Senator Stargel

15-00546C-15 2015932__

A bill to be entitled

An act relating to timeshares; amending s. 721.05, F.S.; revising the term "timeshare estate"; amending s. 721.07, F.S.; revising provisions pertaining to multisite timeshare plans and clarifying single-site timeshare plan developer liability for nonmaterial errors or omissions; amending s. 721.08, F.S.; providing that leasehold accommodations or facilities may be added to a timeshare trust; providing that a vote of the voting interests of a timeshare plan is not required for substitution or automatic deletion of multisite timeshare trust property; removing the requirement for court approval of trustee dispositions of timeshare trust property; creating s. 721.125, F.S.; providing for extension or termination of timeshare plans; amending s. 721.14, F.S.; providing for the transfer of reservation system data upon termination of managing entity; amending s. 721.27, F.S.; clarifying the annual fees due from managing entities of all timeshare plans; amending s. 721.52, F.S.; revising the definitions of the terms "nonspecific multisite timeshare plan" and "specific multisite timeshare plan"; amending s. 721.53, F.S.; providing that leasehold accommodations or facilities may be added to a multisite timeshare trust; providing that a vote of the voting interests of a multisite timeshare plan is not required for substitution or automatic deletion of multisite timeshare trust property; removing the requirement for court approval

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of trustee dispositions of multisite timeshare trust property; amending s. 721.54, F.S.; eliminating the term restrictions for nonspecific multisite timeshare plans; amending s. 721.55, F.S.; requiring the conspicuous disclosure of the term of each component site in a multisite timeshare plan; modifying the cap on common expense assessment increases for multisite timeshare; clarifying multisite timeshare plan developer liability for nonmaterial errors or omissions; amending s. 721.551, F.S.; clarifying the obligation to deliver component site documents to purchasers; amending s. 721.552, F.S.; providing procedures for substitutions and automatic deletions of multisite timeshare plan accommodations and facilities; amending s. 721.56, F.S.; relocating data transfer obligations upon termination of managing entity to s. 721.14, F.S; amending s. 721.57, F.S.; providing for the offering of timeshare estates in a specific multistate timeshare plan; amending s. 721.58, F.S.; transferring the requirement to pay annual fees by managing entities of multisite timeshare plans to s. 721.27; providing an effective date.

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

Section 1. Subsection (34) of section 721.05, Florida Statutes, is amended to read:

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

(34) "Timeshare estate" means a right to occupy a timeshare unit, coupled with a freehold estate or an estate for years with a future interest in a timeshare property or a specified portion thereof, or coupled with~~. The term includes~~ an ownership interest in a condominium unit pursuant to s. 718.103, an ownership interest in a cooperative unit pursuant to s. 719.103, or a direct or indirect beneficial interest in a trust that complies in all respects with ~~the provisions of~~ s. 721.08(2)(c)4. or s. 721.53(1)(e), provided that the trust does not contain any personal property timeshare interests. A timeshare estate is a parcel of real property under the laws of this state.

Section 2. Paragraph (a) of subsection (3) and paragraph (gg) of subsection (5) of section 721.07, Florida Statutes, are amended to read:

721.07 Public offering statement.—Prior to offering any timeshare plan, the developer must submit a filed public offering statement to the division for approval as prescribed by s. 721.03, s. 721.55, or this section. Until the division approves such filing, any contract regarding the sale of that timeshare plan is subject to cancellation by the purchaser pursuant to s. 721.10.

(3)(a)1. Any change to an approved public offering statement filing must ~~shall~~ be filed with the division for approval as an amendment prior to becoming effective. The division shall have 20 days after receipt of a proposed amendment to approve or cite deficiencies in the proposed amendment. If the division fails to act within 20 days, the amendment will be deemed approved. If the proposed amendment

adds a new component site to an approved multisite timeshare plan, the division's initial period in which to approve or cite deficiencies is 45 days. If the developer fails to adequately respond to any deficiency notice within 30 days, the division may reject the amendment. Subsequent to such rejection, a new filing fee pursuant to subsection (4) and a new division initial review period pursuant to this paragraph ~~shall~~ apply to any refiling or further review of the rejected amendment.

2. For filings only subject to this part, each approved amendment to the approved purchaser public offering statement, other than an amendment made only for the purpose of the addition of a phase or phases to the timeshare plan in the manner described in the timeshare instrument or any amendment that does not materially alter or modify the offering in a manner that is adverse to a purchaser, shall be delivered to a purchaser no later than 10 days prior to closing. For filings made under part II, each approved amendment to the multisite timeshare plan purchaser public offering statement, other than an amendment made only for the purpose of the addition, substitution, or deletion of a component site pursuant to part II or the addition of a phase or phases to a component site of a multisite timeshare plan in the manner described in the timeshare instrument or any amendment that does not materially alter or modify the offering in a manner that is adverse to a purchaser, shall be delivered to a purchaser no later than 10 days prior to closing.

3. For filing only subject to part II, amendments made to a timeshare instrument for a component site located in this state are only ~~not~~ required to be delivered to purchasers who ~~do not~~

receive ~~a timeshare estate or~~ an interest in a specific multisite timeshare plan in that component site. Amendments made to a timeshare instrument for a component site not located in this state are not required to be delivered to purchasers.

(5) Every filed public offering statement for a timeshare plan which is not a multisite timeshare plan shall contain the information required by this subsection. The division is authorized to provide by rule the method by which a developer must provide such information to the division.

(gg)1. Such other information as is necessary to fairly, meaningfully, and effectively disclose all aspects of the timeshare plan, including, but not limited to, any disclosures made necessary by the operation of s. 721.03(8). ~~However,~~

2. If a developer has, in good faith, attempted to comply with the requirements of this chapter ~~section,~~ and if the developer~~, in fact, he or she~~ has substantially complied with the ~~disclosure~~ requirements of this chapter, nonmaterial errors or omissions are ~~shall~~ not ~~be~~ actionable, are not violations of this chapter, and do not give rise to any purchaser cancellation right.

Section 3. Paragraph (c) of subsection (2) of section 721.08, Florida Statutes, is amended to read:

721.08 Escrow accounts; nondisturbance instruments; alternate security arrangements; transfer of legal title.—

(2) One hundred percent of all funds or other property which is received from or on behalf of purchasers of the timeshare plan or timeshare interest prior to the occurrence of events required in this subsection shall be deposited pursuant to an escrow agreement approved by the division. The funds or

other property may be released from escrow only as follows:

(c) *Compliance with conditions.*—

1. Timeshare licenses.—If the timeshare plan is one in which timeshare licenses are to be sold and no cancellation or default has occurred, the escrow agent may release the escrowed funds or other property to or on the order of the developer upon presentation of:

a. An affidavit by the developer that all of the following conditions have been met:

(I) Expiration of the cancellation period.

(II) Completion of construction.

(III) Closing.

(IV) Either:

(A) Execution, delivery, and recordation by each interestholder of the nondisturbance and notice to creditors instrument, as described in this section; or

(B) Transfer by the developer of legal title to the subject accommodations and facilities, or all use rights therein, into a trust satisfying the requirements of subparagraph 4. and the execution, delivery, and recordation by each other interestholder of the nondisturbance and notice to creditors instrument, as described in this section.

b. A certified copy of each recorded nondisturbance and notice to creditors instrument.

c. One of the following:

(I) A copy of a memorandum of agreement, as defined in s. 721.05, together with satisfactory evidence that the original memorandum of agreement has been irretrievably delivered for recording to the appropriate official responsible for

maintaining the public records in the county in which the subject accommodations and facilities are located. The original memorandum of agreement must be recorded within 180 days after the date on which the purchaser executed her or his purchase agreement.

(II) A notice delivered for recording to the appropriate official responsible for maintaining the public records in each county in which the subject accommodations and facilities are located notifying all persons of the identity of an independent escrow agent or trustee satisfying the requirements of subparagraph 4. that shall maintain separate books and records, in accordance with good accounting practices, for the timeshare plan in which timeshare licenses are to be sold. The books and records shall indicate each accommodation and facility that is subject to such a timeshare plan and each purchaser of a timeshare license in the timeshare plan.

2. Timeshare estates.—If the timeshare plan is one in which timeshare estates are to be sold and no cancellation or default has occurred, the escrow agent may release the escrowed funds or other property to or on the order of the developer upon presentation of:

a. An affidavit by the developer that all of the following conditions have been met:

(I) Expiration of the cancellation period.

(II) Completion of construction.

(III) Closing.

b. If the timeshare estate is sold by agreement for deed, a certified copy of the recorded nondisturbance and notice to creditors instrument, as described in this section.

c. Evidence that each accommodation and facility:

(I) Is free and clear of the claims of any interestholders, other than the claims of interestholders that, through a recorded instrument, are irrevocably made subject to the timeshare instrument and the use rights of purchasers made available through the timeshare instrument;

(II) Is the subject of a recorded nondisturbance and notice to creditors instrument that complies with subsection (3) and s. 721.17; or

(III) Has been transferred into a trust satisfying the requirements of subparagraph 4.

d. Evidence that the timeshare estate:

(I) Is free and clear of the claims of any interestholders, other than the claims of interestholders that, through a recorded instrument, are irrevocably made subject to the timeshare instrument and the use rights of purchasers made available through the timeshare instrument; or

(II) Is the subject of a recorded nondisturbance and notice to creditors instrument that complies with subsection (3) and s. 721.17.

3. Personal property timeshare interests.—If the timeshare plan is one in which personal property timeshare interests are to be sold and no cancellation or default has occurred, the escrow agent may release the escrowed funds or other property to or on the order of the developer upon presentation of:

a. An affidavit by the developer that all of the following conditions have been met:

(I) Expiration of the cancellation period.

(II) Completion of construction.

(III) Closing.

b. If the personal property timeshare interest is sold by agreement for transfer, evidence that the agreement for transfer complies fully with s. 721.06 and this section.

c. Evidence that one of the following has occurred:

(I) Transfer by the owner of the underlying personal property of legal title to the subject accommodations and facilities or all use rights therein into a trust satisfying the requirements of subparagraph 4.; or

(II) Transfer by the owner of the underlying personal property of legal title to the subject accommodations and facilities or all use rights therein into an owners' association satisfying the requirements of subparagraph 5.

d. Evidence of compliance with ~~the provisions of~~ subparagraph 6., if required.

e. If a personal property timeshare plan is created with respect to accommodations and facilities that are located on or in an oceangoing vessel, including a "documented vessel" or a "foreign vessel," as defined and governed by 46 U.S.C., chapter 301:

(I) In making the transfer required in sub-subparagraph c., the developer shall use as its transfer instrument a document that establishes and protects the continuance of the use rights in the subject accommodations and facilities in a manner that is enforceable by the trust or owners' association.

(II) The transfer instrument must ~~shall~~ comply fully with ~~the provisions of~~ this chapter, must ~~shall~~ be part of the timeshare instrument, and must ~~shall~~ contain specific provisions that:

(A) Prohibit the vessel owner, the developer, any manager or operator of the vessel, the owners' association or the trustee, the managing entity, or any other person from incurring any liens against the vessel except for liens that are required for the operation and upkeep of the vessel, including liens for fuel expenditures, repairs, crews' wages, and salvage, and except as provided in sub-sub-subparagraphs 4.b.(III) and 5.b.(III). All expenses, fees, and taxes properly incurred in connection with the creation, satisfaction, and discharge of any such permitted lien, or a prorated portion thereof if less than all of the accommodations on the vessel are subject to the timeshare plan, shall be common expenses of the timeshare plan.

(B) Grant a lien against the vessel in favor of the owners' association or trustee to secure the full and faithful performance of the vessel owner and developer of all of their obligations to the purchasers.

(C) Establish governing law in a jurisdiction that recognizes and will enforce the timeshare instrument and the laws of the jurisdiction of registry of the vessel.

(D) Require that a description of the use rights of purchasers be posted and displayed on the vessel in a manner that will give notice of such rights to any party examining the vessel. This notice must identify the owners' association or trustee and include a statement disclosing the limitation on incurring liens against the vessel described in sub-sub-sub-subparagraph (A).

(E) Include the nondisturbance and notice to creditors instrument for the vessel owner and any other interestholders.

(F) The owners' association created under subparagraph 5.

or trustee created under subparagraph 4. shall have access to any certificates of classification in accordance with the timeshare instrument.

(III) If the vessel is a foreign vessel, the vessel must be registered in a jurisdiction that permits a filing evidencing the use rights of purchasers in the subject accommodations and facilities, offers protection for such use rights against unfiled and inferior claims, and recognizes the document or instrument creating such use rights as a lien against the vessel.

(IV) In addition to the disclosures required by s. 721.07(5), the public offering statement and purchase contract must contain a disclosure in conspicuous type in substantially the following form:

The laws of the State of Florida govern the offering of this timeshare plan in this state. There are inherent risks in purchasing a timeshare interest in this timeshare plan because the accommodations and facilities of the timeshare plan are located on a vessel that will sail into international waters and into waters governed by many different jurisdictions. Therefore, the laws of the State of Florida cannot fully protect your purchase of an interest in this timeshare plan. Specifically, management and operational issues may need to be addressed in the jurisdiction in which the vessel is registered, which is (insert jurisdiction in which vessel is registered) . Concerns of purchasers may be sent to (insert name of applicable regulatory agency and address) .

4. Trust.—

a. If the subject accommodations or facilities, or all use rights therein, are to be transferred into a trust in order to comply with this paragraph, the ~~such~~ transfer must ~~shall~~ take place pursuant to this subparagraph. If the accommodations or facilities included in such transfer are subject to a lease, the unexpired term of the lease must be disclosed as the term of the timeshare plan pursuant to s. 721.07(5)(f)4.

b. Before ~~Prior to~~ the transfer ~~by each interestholder~~ of the subject accommodations and facilities, or all use rights therein, to a trust, any lien or other encumbrance against such accommodations and facilities, or use rights therein, must ~~shall~~ be made subject to a nondisturbance and notice to creditors instrument pursuant to subsection (3). A ~~No~~ transfer pursuant to this subparagraph does not ~~shall~~ become effective until the trustee accepts the ~~such~~ transfer and the responsibilities set forth herein. A trust established pursuant to this subparagraph must ~~shall~~ comply with the following provisions:

(I) The trustee must ~~shall~~ be an individual or a business entity authorized and qualified to conduct trust business in this state. Any corporation authorized to do business in this state may act as trustee in connection with a timeshare plan pursuant to this chapter. The trustee must be independent from any developer or managing entity of the timeshare plan or any interestholder of any accommodation or facility of such plan.

(II) The trust must ~~shall~~ be irrevocable so long as any purchaser has a right to occupy any portion of the timeshare property pursuant to the timeshare plan.

(III) The trustee may ~~shall~~ not convey, hypothecate,

mortgage, assign, lease, or otherwise transfer or encumber in any fashion any interest in or portion of the timeshare property with respect to which any purchaser has a right of use or occupancy unless the timeshare plan is terminated pursuant to the timeshare instrument, or such conveyance, hypothecation, mortgage, assignment, lease, transfer, or encumbrance is approved by a vote of two-thirds of all voting interests of the timeshare plan. Subject to s. 721.552, a vote of the voting interests of the timeshare plan is not required for substitution or for automatic deletion of accommodations or facilities ~~and such decision is declared by a court of competent jurisdiction to be in the best interests of the purchasers of the timeshare plan. The trustee shall notify the division in writing within 10 days after receiving notice of the filing of any petition relating to obtaining such a court order. The division shall have standing to advise the court of the division's interpretation of the statute as it relates to the petition.~~

(IV) All purchasers of the timeshare plan or the owners' association of the timeshare plan must ~~shall~~ be the express beneficiaries of the trust. The trustee must ~~shall~~ act as a fiduciary to the beneficiaries of the trust. The personal liability of the trustee must ~~shall~~ be governed by ss. 736.08125, 736.08163, 736.1013, and 736.1015. The agreement establishing the trust must ~~shall~~ set forth the duties of the trustee. The trustee must ~~shall~~ be required to furnish promptly to the division upon request a copy of the complete list of the names and addresses of the owners in the timeshare plan and a copy of any other books and records of the timeshare plan required to be maintained pursuant to s. 721.13 that are in the

possession, custody, or control of the trustee. All expenses reasonably incurred by the trustee in the performance of its duties, together with any reasonable compensation of the trustee, must ~~shall~~ be common expenses of the timeshare plan.

(V) The trustee may ~~shall~~ not resign upon less than 90 days' prior written notice to the managing entity and the division. A ~~No~~ resignation does not ~~shall~~ become effective until a substitute trustee, approved by the division, is appointed by the managing entity and accepts the appointment.

(VI) The documents establishing the trust arrangement must ~~shall~~ constitute a part of the timeshare instrument.

(VII) For trusts holding property in a timeshare plan located outside this state, the trust and trustee holding such property are ~~shall be~~ deemed in compliance with the requirements of this subparagraph if the ~~such~~ trust and trustee are authorized and qualified to conduct trust business under the laws of the ~~such~~ jurisdiction and the agreement or law governing the ~~such~~ trust arrangement provides substantially similar protections for the purchaser as are required in this subparagraph for trusts holding property in a timeshare plan in this state.

(VIII) The trustee must ~~shall~~ have appointed a registered agent in this state for service of process. In the event such a registered agent is not appointed, service of process may be served pursuant to s. 721.265.

5. Owners' association.—

a. If the subject accommodations or facilities, or all use rights therein, are to be transferred into an owners' association in order to comply with this paragraph, such

transfer must ~~shall~~ take place pursuant to this subparagraph.

b. Prior to the transfer ~~by each interestholder~~ of the subject accommodations and facilities, or all use rights therein, to an owners' association, any lien or other encumbrance against such accommodations and facilities, or use rights therein, must ~~shall~~ be made subject to a nondisturbance and notice to creditors instrument pursuant to subsection (3). A ~~No~~ transfer pursuant to this subparagraph does not ~~shall~~ become effective until the owners' association accepts the ~~such~~ transfer and the responsibilities set forth herein. An owners' association established pursuant to this subparagraph must ~~shall~~ comply with the following provisions:

(I) The owners' association must ~~shall~~ be a business entity authorized and qualified to conduct business in this state. Control of the board of directors of the owners' association must be independent from any developer or managing entity of the timeshare plan or any interestholder.

(II) The bylaws of the owners' association must ~~shall~~ provide that the corporation may not be voluntarily dissolved without the unanimous vote of all owners of personal property timeshare interests so long as any purchaser has a right to occupy any portion of the timeshare property pursuant to the timeshare plan.

(III) The owners' association may ~~shall~~ not convey, hypothecate, mortgage, assign, lease, or otherwise transfer or encumber in any fashion any interest in or portion of the timeshare property with respect to which any purchaser has a right of use or occupancy, unless the timeshare plan is terminated pursuant to the timeshare instrument, or unless such

conveyance, hypothecation, mortgage, assignment, lease, transfer, or encumbrance is approved by a vote of two-thirds of all voting interests of the association and the ~~such~~ decision is declared by a court of competent jurisdiction to be in the best interests of the purchasers of the timeshare plan. The owners' association must ~~shall~~ notify the division in writing within 10 days after receiving notice of the filing of any petition relating to obtaining such a court order. The division has ~~shall have~~ standing to advise the court of the division's interpretation of the statute as it relates to the petition.

(IV) All purchasers of the timeshare plan must ~~shall~~ be members of the owners' association and must ~~shall~~ be entitled to vote on matters requiring a vote of the owners' association as provided in this chapter or the timeshare instrument. The owners' association must ~~shall~~ act as a fiduciary to the purchasers of the timeshare plan. The articles of incorporation establishing the owners' association must ~~shall~~ set forth the duties of the owners' association. All expenses reasonably incurred by the owners' association in the performance of its duties, together with any reasonable compensation of the officers or directors of the owners' association, must ~~shall~~ be common expenses of the timeshare plan.

(V) The documents establishing the owners' association must ~~shall~~ constitute a part of the timeshare instrument.

(VI) For owners' associations holding property in a timeshare plan located outside this state, the owners' association holding the ~~such~~ property is ~~shall be~~ deemed in compliance with the requirements of this subparagraph if such owners' association is authorized and qualified to conduct

owners' association business under the laws of such jurisdiction and the agreement or law governing such arrangement provides substantially similar protections for the purchaser as are required in this subparagraph for owners' associations holding property in a timeshare plan in this state.

(VII) The owners' association must ~~shall~~ have appointed a registered agent in this state for service of process. In the event such a registered agent cannot be located, service of process may be made pursuant to s. 721.265.

6. Personal property subject to certificate of title.—If any personal property that is an accommodation or facility of a timeshare plan is subject to a certificate of title in this state pursuant to chapter 319 or chapter 328, the following notation must be made on such certificate of title pursuant to s. 319.27(1) or s. 328.15(1):

The further transfer or encumbrance of the property subject to this certificate of title, or any lien or encumbrance thereon, is subject to the requirements of section 721.17, Florida Statutes, and the transferee or lienor agrees to be bound by all of the obligations set forth therein.

7. Certified document copies.—If the developer has previously provided a certified copy of any document required by this paragraph, she or he may for all subsequent disbursements substitute a true and correct copy of the certified copy, provided no changes to the document have been made or are required to be made.

8. Rights transferred into trust or owners' association.—In

the event that use rights relating to an accommodation or facility are transferred into a trust pursuant to subparagraph 4. or into an owners' association pursuant to subparagraph 5., all other interestholders, including the owner of the underlying fee or underlying personal property, must execute a nondisturbance and notice to creditors instrument pursuant to subsection (3).

Section 4. Section 721.125, Florida Statutes, is created to read:

721.125 Extension or termination of timeshare plans.—

(1) Unless the timeshare instrument provides otherwise, the vote or written consent, or both, of at least 60 percent of all of the voting interests in the timeshare plan may extend or terminate the term of a timeshare plan at any time. If the term of a timeshare plan is extended pursuant to this section, all rights, privileges, duties, and obligations created under applicable law or the timeshare instrument continue in full force to the same extent as if the extended termination date of the timeshare plan were the original termination date of the timeshare plan. If a timeshare plan terminates pursuant to this section, the termination has immediate effect pursuant to applicable law and the timeshare instrument as if the effective date of the termination were the original date of termination.

(2) If a termination or extension vote or consent pursuant to subsection (1) is proposed for a component site of a multisite timeshare plan located in this state, the proposed termination or extension is effective only if the person authorized to make additions or substitutions of accommodations and facilities pursuant to the timeshare instrument also

approves the termination or extension.

(3) This section applies only to a timeshare plan that has been in existence for at least 25 years as of the effective date of the termination or extension vote or consent required by subsection (1).

Section 5. Subsection (4) of section 721.14, Florida Statutes, is amended to read:

721.14 Discharge of managing entity.—

(4)(a) An owners' association and a manager or management firm may, in the management contract or other written document, agree to the transition procedures and related time periods to be followed in the event the manager or management firm is discharged pursuant to this section. If there is no written agreement between the parties which covers the matters set forth in paragraphs (b) and (c), the provisions of paragraphs (b) and (c) shall apply.

(b) Within 90 days after the date on which the manager or management firm is notified by the owners' association of the successful termination vote pursuant to subsection (1), the terminated managing entity shall transfer to the owners' association or the new manager or management firm all relevant data held by the managing entity and related to any reservation system for the timeshare plan, including, but not limited to:

1. The names, addresses, and reservation status of all accommodations.

2. The names and addresses of all purchasers of timeshare interests.

3. All outstanding confirmed reservations and reservation requests.

4. Such other records and information as are necessary to permit the uninterrupted operation and administration of the timeshare plan. However, the information required to be transferred does not include private information of the terminated managing entity which is not directly related to operation and management of the timeshare plan.

(c) All reasonable costs incurred by the terminated managing entity in carrying out the transfer of information required by this subsection shall be reimbursed to the terminated managing entity as a common expense of the timeshare plan within 10 days after the completed transfer of the data described in paragraph (b) ~~This section shall not apply to personal property timeshare plans~~.

Section 6. Section 721.27, Florida Statutes, is amended to read:

721.27 Annual managing entity fee ~~for each timeshare unit in plan~~.—For each timeshare unit ~~On January 1 of each year, each managing entity of a timeshare plan~~ located in this state, the managing entity must ~~shall~~ collect as a common expense and pay to the division on January 1 of each year an annual fee of $2 for each 7 days of annual use availability that exist within the timeshare plan at that time. Only one fee is due and payable for any 7 days of annual use availability that is included within both a single-site timeshare plan under this part and a multisite timeshare plan under part II~~, subject to any limitations on the amount of such annual fee pursuant to s. 721.58~~. If any portion of the annual fee is not paid by March 1, the managing entity may be assessed a penalty pursuant to s. 721.26.

Section 7. Subsections (5) and (7) of section 721.52, Florida Statutes, are amended to read:

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

(5) "Nonspecific multisite timeshare plan" means a multisite timeshare plan ~~containing timeshare licenses or personal property timeshare interests,~~ with respect to which a purchaser receives a right to use all of the accommodations and facilities, if any, of the multisite timeshare plan through the reservation system, but no specific right to use any particular accommodations and facilities for the remaining term of the multisite timeshare plan in the event that the reservation system is terminated for any reason prior to the expiration of the term of the multisite timeshare plan.

(7) "Specific multisite timeshare plan" means a multisite timeshare plan ~~containing timeshare licenses or personal property timeshare interests,~~ with respect to which a purchaser receives a specific right to use accommodations and facilities, if any, at one component site of a multisite timeshare plan, together with use rights in the other accommodations and facilities of the multisite timeshare plan created by or acquired through the reservation system.

Section 8. Paragraph (e) of subsection (1) of section 721.53, Florida Statutes, is amended to read:

721.53 Subordination instruments; alternate security arrangements.—

(1) With respect to each accommodation or facility of a multisite timeshare plan, the developer shall provide the division with satisfactory evidence that one of the following has occurred with respect to each interestholder prior to

offering the accommodation or facility as a part of the multisite timeshare plan:

(e) The interestholder has transferred the subject accommodation or facility or all use rights therein to a trust that complies with this paragraph. If the accommodation or facility included in such transfer is subject to a lease, the unexpired term of the lease must be disclosed as the term of that component site pursuant to s. 721.55(4)(a). Prior to the ~~such~~ transfer, any lien or other encumbrance against the ~~such~~ accommodation or facility must ~~shall~~ be made subject to a nondisturbance and notice to creditors instrument pursuant to paragraph (a) or a subordination and notice to creditors instrument pursuant to paragraph (b). A ~~No~~ transfer pursuant to this paragraph does not ~~shall~~ become effective until the trust accepts the ~~such~~ transfer and the responsibilities set forth herein. A trust established pursuant to this paragraph must ~~shall~~ comply with the following provisions:

1. The trustee must ~~shall~~ be an individual or a business entity authorized and qualified to conduct trust business in this state. Any corporation authorized to do business in this state may act as trustee in connection with a timeshare plan pursuant to this chapter. The trustee must be independent from any developer or managing entity of the timeshare plan or any interestholder of any accommodation or facility of such plan. The same trustee may hold the accommodations and facilities, or use rights therein, for one or more of the component sites of the timeshare plan.

2. The trust must ~~shall~~ be irrevocable so long as any purchaser has a right to occupy any portion of the timeshare

property pursuant to the timeshare plan.

3. The trustee may ~~shall~~ not convey, hypothecate, mortgage, assign, lease, or otherwise transfer or encumber in any fashion any interests in or portion of the timeshare property with respect to which any purchaser has a right of use or occupancy unless the timeshare plan is terminated pursuant to the timeshare instrument, or the timeshare property held in trust is deleted from a multisite timeshare plan pursuant to s. 721.552(3), or such conveyance, hypothecation, mortgage, assignment, lease, transfer, or encumbrance is approved by vote of two-thirds of all voting interests of the timeshare plan. Subject to s. 721.552, a vote of the voting interests of the timeshare plan is not required for substitution or for automatic deletion of accommodations or facilities ~~and such decision is declared by a court of competent jurisdiction to be in the best interests of the purchasers of the timeshare plan~~.

4. All purchasers of the timeshare plan or the owners' association of the timeshare plan must ~~shall~~ be express beneficiaries of the trust. The trustee must ~~shall~~ act as a fiduciary to the beneficiaries of the trust. The personal liability of the trustee must ~~shall~~ be governed by ss. 736.08125, 736.08163, 736.1013, and 736.1015. The agreement establishing the trust must ~~shall~~ set forth the duties of the trustee. The trustee must ~~shall~~ be required to furnish promptly to the division upon request a copy of the complete list of the names and addresses of the owners in the timeshare plan and a copy of any other books and records of the timeshare plan required to be maintained pursuant to s. 721.13 which ~~that~~ are in the possession of the trustee. All expenses reasonably

incurred by the trustee in the performance of its duties, together with any reasonable compensation of the trustee, must ~~shall~~ be common expenses of the timeshare plan.

5. The trustee may ~~shall~~ not resign upon less than 90 days' prior written notice to the managing entity and the division. A ~~No~~ resignation is not ~~shall become~~ effective until a substitute trustee, approved by the division, is appointed by the managing entity and accepts the appointment.

6. The documents establishing the trust arrangement must ~~shall~~ constitute a part of the timeshare instrument.

7. For trusts holding property in component sites located outside this state, the trust holding such property is ~~shall be~~ deemed in compliance with the requirements of this paragraph, if the ~~such~~ trust is authorized and qualified to conduct trust business under the laws of the ~~such~~ jurisdiction and the agreement or law governing the ~~such~~ trust arrangement provides substantially similar protections for the purchaser as are required in this paragraph for trusts holding property in a component site located in this state.

8. The trustee must appoint ~~shall have appointed~~ a registered agent in this state for service of process. In the event ~~such~~ a registered agent is not appointed, service of process may be served pursuant to s. 721.265.

Section 9. Section 721.54, Florida Statutes, is amended to read:

~~721.54 Term of nonspecific multisite timeshare plans.—It shall be a violation of this part to represent to a purchaser of a nonspecific multisite timeshare plan as defined in s. 721.52(5) that the term of the plan for that purchaser is longer~~

~~than the shortest term of availability of any of the accommodations included within the plan at the time of purchase.~~

Section 10. Paragraphs (a) and (h) of subsection (4), subsection (5), and paragraph (l) of subsection (7) of section 721.55, Florida Statutes, are amended to read:

721.55 Multisite timeshare plan public offering statement.—Each filed public offering statement for a multisite timeshare plan shall contain the information required by this section and shall comply with the provisions of s. 721.07, except as otherwise provided therein. The division is authorized to provide by rule the method by which a developer must provide such information to the division. Each multisite timeshare plan filed public offering statement shall contain the following information and disclosures:

(4) A text, which shall include, where applicable, the information and disclosures set forth in paragraphs (a)-(l).

(a) A description of the multisite timeshare plan, including its term, legal structure, ~~and~~ form of ownership, and~~.~~ ~~For multisite timeshare plans in which the purchaser will receive a timeshare estate pursuant to s. 721.57 and for specific multisite timeshare plans, the description must also include~~ the term of each component site within the multisite timeshare plan. The term of each component site which is shorter than the term of the multisite timeshare plan must be disclosed in conspicuous type.

(h) A description of the purchaser's liability for common expenses of the multisite timeshare plan, including the following:

1. A description of the common expenses of the plan,

including the method of allocation and assessment of such common expenses, whether component site common expenses and real estate taxes are included within the total common expense assessment of the multisite timeshare plan, and, if not, the manner in which timely payment of component site common expenses and real estate taxes will ~~shall~~ be accomplished.

2. A description of any cap imposed upon the level of common expenses payable by the purchaser.

a. ~~In no event shall~~ The total common expense assessment for the multisite timeshare plan in a given calendar year may not exceed 125 percent of the total common expense assessment for the plan in the previous calendar year.

b. Component site common expenses and ad valorem taxes may not be included in calculating the total common expense assessment under sub-subparagraph a.

3. A description of the entity responsible for the determination of the common expenses of the multisite timeshare plan, as well as any entity which may increase the level of common expenses assessed against the purchaser at the multisite timeshare plan level.

4. A description of the method used to collect common expenses, including the entity responsible for such collections, and the lien rights of any entity for nonpayment of common expenses. If the common expenses of any component site are collected by the managing entity of the multisite timeshare plan, a statement to that effect together with the identity and address of the escrow agent required by s. 721.56(3).

5. If the purchaser will receive an interest in a nonspecific multisite timeshare plan, a statement that a

multisite timeshare plan budget is attached to the public offering statement as an exhibit pursuant to paragraph (7)(c). The multisite timeshare plan budget must ~~shall~~ comply with ~~the provisions of~~ s. 721.07(5)(t).

6. If the developer intends to guarantee the level of assessments for the multisite timeshare plan, the ~~such~~ guarantee must be based upon a good faith estimate of the revenues and expenses of the multisite timeshare plan. The guarantee must include a description of the following:

a. The specific time period, measured in one or more calendar or fiscal years, during which the guarantee will be in effect.

b. A statement that the developer will pay all common expenses incurred in excess of the total revenues of the multisite timeshare plan, if the developer is to be excused from the payment of assessments during the guarantee period.

c. The level, expressed in total dollars, at which the developer guarantees the assessments. If the developer has reserved the right to extend or increase the guarantee level, a disclosure must be included to that effect.

7. If required under applicable law, the developer must ~~shall~~ also disclose the following matters for each component site:

a. Any limitation upon annual increases in common expenses;

b. The existence of any bad debt or working capital reserve; and

c. The existence of any replacement or deferred maintenance reserve.

(5)(a) ~~Such~~ Other information as the division determines is

necessary to fairly, meaningfully, and effectively disclose all aspects of the multisite timeshare plan, including, but not limited to, any disclosures made necessary by the operation of s. 721.03(8).

(b) ~~However,~~ If a developer has, in good faith, attempted to comply with the requirements of this chapter ~~section,~~ and if~~, in fact,~~ the developer has substantially complied with the ~~disclosure~~ requirements of this chapter, nonmaterial errors or omissions are ~~shall~~ not ~~be~~ actionable, are not violations of this chapter, and do not give rise to any purchaser cancellation right.

(7) The following documents must ~~shall~~ be included as exhibits to the filed public offering statement, if applicable:

(l)1. If the multisite timeshare plan contains any component sites located in this state, the information required by s. 721.07(5) pertaining to each such component site unless exempt pursuant to s. 721.03.

2. If the purchaser receives ~~will receive a timeshare estate pursuant to s. 721.57, or~~ an interest in a specific multisite timeshare plan~~, in a~~ component site that is located outside ~~of~~ this state but that ~~which~~ is offered in this state, the information required by s. 721.07(5) pertaining to that component site, provided, however, that ~~the provisions of~~ s. 721.07(5)(t) must ~~shall~~ only require disclosure of information related to the estimated budget for the timeshare plan and purchaser's expenses as required by the jurisdiction in which the component site is located.

Section 11. Paragraph (c) of subsection (2) of section 721.551, Florida Statutes, is amended to read:

721.551 Delivery of multisite timeshare plan purchaser public offering statement.—

(2) The developer shall furnish each purchaser with the following:

(c) If the purchaser receives ~~will receive a timeshare estate pursuant to s. 721.57, or~~ an interest in a specific multisite timeshare plan~~, in a~~ component site located in this state, the developer must ~~shall~~ also furnish the purchaser with the information required to be delivered pursuant to s. 721.07(6)(a) and (b) for that ~~the~~ component site ~~in which the purchaser will receive an estate or interest in a specific multisite timeshare plan~~.

Section 12. Subsection (2) and paragraph (c) of subsection (3) of section 721.552, Florida Statutes, are amended to read:

721.552 Additions, substitutions, or deletions of component site accommodations or facilities; purchaser remedies for violations.—Additions, substitutions, or deletions of component site accommodations or facilities may be made only in accordance with the following:

(2) SUBSTITUTIONS.—

(a) Substitutions are available only for nonspecific multisite timeshare plans. Specific multisite timeshare plans ~~or plans offering timeshare estates pursuant to s. 721.57~~ may not contain an accommodation substitution right.

(b) The timeshare instrument must ~~shall~~ provide for the following:

1. The basis upon which new accommodations and facilities may be substituted for existing accommodations and facilities of the multisite timeshare plan; by whom substitutions may be made;

and the basis upon which the determination may be made to cause the ~~such~~ substitutions to occur.

2. The replacement accommodations and facilities must provide purchasers with an opportunity to enjoy a substantially similar or improved vacation experience as compared to the experience ~~as was~~ available at ~~with~~ the replaced accommodation or facility. In determining whether the replacement accommodations and facilities will provide a substantially similar or improved vacation experience, all relevant factors must be considered, including, but not limited to, some or all of the following: size, capacity, furnishings, maintenance, location (geographic, topographic, and scenic), demand, ~~and~~ availability for purchaser use, and recreational capabilities.

3. The extent, if any, to which purchasers will have the right to consent to any proposed substitutions.

(c) ~~No~~ Substitutions may not be made during the first year after the developer begins to offer the multisite timeshare plan.

(d)1. If the timeshare instrument provides that the developer, acting unilaterally, is the person authorized to make substitutions, the developer may not substitute ~~No more than 25 percent of the~~ available accommodations in the multisite timeshare plan ~~at a given component site may undergo substitution~~ in a given calendar year pursuant to paragraph (e) if the number of such substituted accommodations provides more than 10 percent of the total annual use availability in the multisite timeshare plan calculated in 7-day increments ~~in which substitution is permitted~~. ~~This paragraph shall be interpreted to permit the substitution of an entire component site over a 4-~~

~~year period.~~

2. If the timeshare instrument provides that the managing entity is the person authorized to make substitutions and if the managing entity is under common ownership or control with the developer, the managing entity may not substitute available accommodations in the multisite timeshare plan in a given calendar year pursuant to paragraph (e) if the number of the substituted accommodations provides more than 10 percent of the total annual use availability in the multisite timeshare plan calculated in 7-day increments.

3. If the timeshare instrument provides that the managing entity is the person authorized to make substitutions and if the managing entity is not under common ownership or control with the developer, the managing entity may not substitute available accommodations in the multisite timeshare plan in a given calendar year pursuant to paragraph (e) if the number of the substituted accommodations provides more than 25 percent of the total annual use availability in the multisite timeshare plan calculated in 7-day increments.

4. If the person authorized to make substitutions receives, within 21 days after the date of the notice of substitution required by paragraph (e), a written objection to the proposed substitution from at least 10 percent of all purchasers in the multisite timeshare plan, the managing entity must conduct a meeting of the purchasers within 30 days after the end of the 21-day period. The proposed substitution is deemed ratified unless a majority of purchasers voting in person or by proxy at the meeting reject the proposed substitution, provided that at least 25 percent of all purchasers cast votes. This subparagraph

does not apply if the timeshare instrument provides that purchasers will have no right to consent to any proposed substitution.

5. This paragraph does not apply if the proposed substitution has been approved in advance pursuant to paragraph (f).

(e) The person authorized to make substitutions must ~~shall~~ notify all purchasers of the multisite timeshare plan in writing of her or his intention to delete accommodations or facilities ~~at a given component site~~ and to substitute them with other specified accommodations or facilities pursuant to this subsection. This notice must be given at least 6 months in advance of the date that the proposed substitution will occur; must state the last day after the end of the 6-month period on which reservations will be accepted from purchasers for use of the accommodations to be deleted; and must state that purchasers shall have 21 days after the date of the notice of substitution to file a written objection with the person authorized to make substitutions.~~, and the notice must inform the purchasers that they may reserve the use of the accommodations to be deleted during this 6-month period. At the end of the 6-month period,~~ The person authorized to make substitutions may delete accommodations for substitution only after there are no longer any pending purchaser reservations for those accommodations ~~only to the extent that they were not reserved during the 6-month period~~.

(f) The person authorized to make substitutions may make unlimited substitutions ~~If the managing entity of a multisite timeshare plan includes an owners' association composed of all~~

~~purchasers or a corporation which owns or controls the accommodations and facilities of the plan, the board of administration of either of which is comprised of a majority of board members elected by purchasers other than the developer, and if such managing entity has the right to make substitutions pursuant to the timeshare instrument, all of the available accommodations at a given component site may undergo substitution~~ in a given year without compliance with paragraphs (d) and (e) if a proposed ~~written plan of~~ substitution is ~~provided to each purchaser has been~~ approved in advance by a majority of the purchasers of the multisite timeshare plan voting in person or by proxy at a meeting called for that purpose, provided that at least 25 percent of the total number of purchasers cast votes ~~the board of administration and by a majority of all purchasers in the plan~~. ~~The plan of substitution must:~~

~~1. Specifically identify the component site being replaced and the proposed substitute component site.~~

~~2. Contain information regarding prior demand for purchaser use of the component site being replaced.~~

~~3. Provide the results of a survey of purchaser attitudes regarding the component site being replaced and the proposed substitute component site.~~

~~4. Explain the practical and business reasons for effecting a total substitution within the given calendar year.~~

~~5. Provide a plan for handling reservation requests during the substitution period for both the component site being replaced and the proposed substitute component site.~~

Substitutions made pursuant to this paragraph are ~~shall~~ not ~~be~~ subject to ~~the provisions of~~ subparagraph (b)2.

(g) If the person authorized to make substitutions has complied with this subsection and the timeshare instrument, the trustee of a timeshare trust qualified under s. 721.53(1)(e) may convey title to any accommodation and facility that has been designated or approved for substitution when directed by the person authorized to make substitutions without any further vote or other authorization of the purchasers of the multisite timeshare plan.

(h) The person who is authorized by the timeshare instrument to make substitutions to the multisite timeshare plan pursuant to this subsection must ~~shall~~ act as a fiduciary ~~in such capacity~~ in the best interests of the purchasers of the plan as a whole and must ~~shall~~ adhere to the demand balancing standard set forth in s. 721.56(6) in connection with the ~~such~~ substitutions. Substitutions that are otherwise permitted may be made only so long as a one-to-one use right to use night requirement ratio is maintained at all times.

(3) DELETIONS.—

(c) *Automatic deletion.*—The timeshare instrument may provide that a component site will be automatically deleted upon the expiration of its term ~~in a timeshare plan other than a nonspecific multisite timeshare plan~~ or as otherwise provided in the timeshare instrument. However, the timeshare instrument must also provide that in the event a component site is deleted from the plan in this manner, either a sufficient number of purchasers of the plan will also be deleted, or a sufficient number of replacement accommodations and facilities that comply

with subparagraph (2)(b)2. will be substituted for the deleted accommodations and facilities, so as to maintain no greater than a one-to-one use right to use night requirement ratio.

Section 13. Subsection (5) of section 721.56, Florida Statutes, is amended to read:

721.56 Management of multisite timeshare plans; reservation systems; demand balancing.—

(5) ~~(a)1. The reservation system is a facility of any nonspecific multisite timeshare plan. The reservation system is not a facility of any specific multisite timeshare plan, nor is it a facility of any multisite timeshare plan in which timeshare estates are offered pursuant to s. 721.57.~~

~~2. The reservation system of any multisite timeshare plan shall include any computer software and hardware employed for the purpose of enabling or facilitating the operation of the reservation system.~~ Nothing ~~contained~~ in this part precludes ~~shall preclude~~ a manager or management firm that is serving as managing entity of a multisite timeshare plan from providing in its contract with the purchasers or owners' association of the multisite timeshare plan or in the timeshare instrument that the manager or management firm owns the reservation system and that the managing entity will ~~shall~~ continue to own the reservation system in the event the purchasers discharge the managing entity pursuant to s. 721.14.

~~(b) In the event of a termination of a managing entity of a nonspecific multisite timeshare plan, which managing entity owns the reservation system, irrespective of whether the termination is voluntary or involuntary and irrespective of the cause of such termination, in addition to any other remedies available to purchasers in this part, the terminated managing entity shall, prior to such termination, establish a trust meeting the criteria set forth in this paragraph. It is the intent of the Legislature that this trust arrangement provide for an adequate period of continued operation of the reservation system of the multisite timeshare plan, during which period the new managing entity shall make provision for the acquisition of a substitute reservation system.~~

~~1. The trust shall be established with an independent trustee. Both the terminated managing entity and the new managing entity shall attempt to agree on an acceptable trustee. In the event they cannot agree on an acceptable trustee, they shall each designate a nominee, and the two nominees shall select the trustee.~~

~~2. The terminated managing entity shall take all steps necessary to enable the trustee or the trustee's designee to operate the reservation system in the same manner as provided in the timeshare instrument and the public offering statement. The trustee may, but shall not be required to, contract with the terminated managing entity for the continued operation of the reservation system. In the event the trustee elects to contract with the terminated managing entity, that managing entity shall be required to operate the reservation system and shall be entitled to payment for that service. The payment shall in no event exceed the amount previously paid to the terminated managing entity for operation of the reservation system.~~

~~3. The trust shall remain in effect for a period of no longer than 1 year following the date of termination of the managing entity.~~

~~4. Nothing contained in this subsection shall abrogate or otherwise interfere with any proprietary rights in the reservation system that have been reserved by the discharged managing entity, in its management contract or otherwise, so long as such proprietary rights are not asserted in a manner that would prevent the continued operation of the reservation system as contemplated in this subsection.~~

~~(c) In the event of a termination of a managing entity of a timeshare estate or specific multisite timeshare plan, which managing entity owns the reservation system, irrespective of whether the termination is voluntary or involuntary and irrespective of the cause of such termination, in addition to any other remedies available to purchasers in this part, the terminated managing entity shall, prior to such termination, promptly transfer to each component site managing entity all relevant data contained in the reservation system with respect to that component site, including, but not limited to:~~

~~1. The names, addresses, and reservation status of component site accommodations.~~

~~2. The names and addresses of all purchasers of timeshare interests at that component site.~~

~~3. All outstanding confirmed reservations and reservation requests for that component site.~~

~~4. Such other component site records and information as are necessary, in the reasonable discretion of the component site managing entity, to permit the uninterrupted operation and administration of the component site, provided that a given component site managing entity shall not be entitled to any information regarding other component sites or regarding the~~

~~terminated multisite timeshare plan managing entity.~~

~~All reasonable costs incurred by the terminated managing entity in effecting the transfer of information required by this paragraph shall be reimbursed to the terminated managing entity on a pro rata basis by each component site, and the amount of such reimbursement shall constitute a common expense of each component site.~~

Section 14. Section 721.57, Florida Statutes, is amended to read:

721.57 Offering of timeshare estates in specific multisite timeshare plans; required provisions in the timeshare instrument.—

(1) In addition to meeting all the requirements of part I, timeshare estates offered in a specific multisite timeshare plan must meet the requirements of subsection (2). Any offering of timeshare estates in a specific multisite timeshare plan that does not comply with these requirements shall be deemed to be an offering of a timeshare license.

(2) The timeshare instrument of a specific multisite timeshare plan in which timeshare estates are offered~~, other than a trust meeting the requirements of s. 721.08,~~ must contain or provide for all of the following matters:

(a) The purchaser will receive a timeshare estate as defined in s. 721.05 in one of the component sites of the specific multisite timeshare plan. The use rights in the other component sites of the multisite timeshare plan must ~~shall~~ be made available to the purchaser through the reservation system pursuant to the timeshare instrument.

(b) In the event that the reservation system is terminated or otherwise becomes unavailable for any reason prior to the expiration of the term of the specific multisite timeshare plan:

1. The purchaser will be able to continue to use the accommodations and facilities of the component site in which she or he has been conveyed a timeshare estate in the manner described in the timeshare instrument for that component site for the remaining term of the timeshare estate; and

2. Any use rights in that component site which had previously been made available through the reservation system to purchasers of the specific multisite timeshare plan who were not offered a timeshare estate at that component site will terminate when the reservation system is terminated or otherwise becomes unavailable for any reason.

Section 15. Section 721.58, Florida Statutes, is amended to read:

721.58 Filing fee~~; annual fee~~.—

~~(1)~~ The developer of the multisite timeshare plan must ~~shall~~ pay the filing fee required by s. 721.07(4)(a); however, the maximum amount of such filing fee is ~~shall be~~ $25,000 or the total filing fee due with respect to the timeshare units in the multisite timeshare plan that are located in this state pursuant to s. 721.07(4)(a), whichever is greater.

~~(2) The managing entity of the multisite timeshare plan shall pay the annual fee required by s. 721.27; provided, however, that the maximum amount of such annual fee shall be $25,000 or the total annual fee due with respect to the timeshare units in the multisite timeshare plan that are located in this state calculated pursuant to s. 721.07(4)(a), whichever is greater.~~

Section 16. This act shall take effect July 1, 2015.

The Florida Senate

COMMITTEE VOTE RECORD

COMMITTEE: Judiciary
ITEM: SB 932
FINAL ACTION: Favorable
MEETING DATE: Tuesday, March 31, 2015
TIME: 4:00 —6:00 p.m.
PLACE: 110 Senate Office Building

FINAL VOTE								
Yea	**Nay**	**SENATORS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
X		Bean						
X		Benacquisto						
X		Brandes						
	X	Joyner						
X		Simmons						
X		Simpson						
X		Soto						
X		Stargel						
		Ring, VICE CHAIR						
X		Diaz de la Portilla, CHAIR						
8	1	**TOTALS**						
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:
Higher Education, *Chair*
Appropriations Subcommittee on Education
Fiscal Policy
Judiciary
Military and Veterans Affairs, Space, and Domestic Security
Regulated Industries

JOINT COMMITTEE:
Joint Committee on Public Counsel Oversight

SENATOR KELLI STARGEL
15th District

March 12, 2015

The Honorable Miguel Diaz de la Portilla
Senate Judiciary Committee, Chair
406 Senate Office Building
404 S. Monroe Street
Tallahassee, FL 32399

Dear Chair Diaz de la Portilla:

I am respectfully requesting that SB 932, related to *Timeshares*, be placed on the next committee agenda.

Thank you for your consideration and please do not hesitate to contact me should you have any questions.

Sincerely,

Kelli Stargel
State Senator, District 15

Cc: Tom Cibula/ Staff Director
Shirley Proctor/ AA

REPLY TO:
❒ 2033 East Edgewood Drive, Suite 1, Lakeland, Florida 33803
❒ 324 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5015

Senate's Website: *www.flsenate.gov*

ANDY GARDINER
President of the Senate

GARRETT RICHTER
President Pro Tempore

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/15
Meeting Date

SB932
Bill Number (if applicable)

Topic Timeshare

Amendment Barcode (if applicable)

Name Kurt Gruber

Job Title Attorney

Address SunTrust Center #2300 200 S Orange Ave
Street

Phone 407-649-4000

Orlando FL 32801
City *State* *Zip*

Email

Speaking: [X] For [ ] Against [ ] Information

Waive Speaking: [ ] In Support [ ] Against
(The Chair will read this information into the record.)

Representing American Resort Development Association, Baker Hostetler

Appearing at request of Chair: [ ] Yes [X] No

Lobbyist registered with Legislature: [X] Yes [ ] No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/15
Meeting Date

932
Bill Number (if applicable)

Topic Timeshares

Amendment Barcode (if applicable)

Name Patrick Kennedy

Job Title Attorney

Address 10720 72nd St. Ste 305
Street

Phone 727-214-0700

Largo FL 33777
City *State* *Zip*

Email patrick@finnlawgroup.com

Speaking: ☐ For ☒ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☐ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/15
Meeting Date

932
Bill Number (if applicable)

Topic Timeshare Bill

Amendment Barcode (if applicable)

Name Gary Hunter

Job Title Attorney

Address 119 S. Monroe St. Suite 300
Street

Phone 222-7500

Tallahassee FL 32312
City *State* *Zip*

Email ghunter@hgslaw.com

Speaking: ☑ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing American Resort ~~Development~~ Development Association

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

3.31.15
Meeting Date

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

SB 437
Bill Number (if applicable)

Topic TIMESHARE BILL

Amendment Barcode (if applicable)

Name GREGORY CRISP

Job Title CEO - NATIONAL TIMESHARE OWNERS ASSN

Address 470 LAKE CAROLYN STE 300
Street

Phone 727.688.0630

ST. PETE FL 33716
City *State* *Zip*

Email GREG@NTOASSOC.COM

Speaking: ☐ For ☑ Against ☐ Information

Waive Speaking: ☐ In Support ☑ Against
(The Chair will read this information into the record.)

Representing NTOA

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☐ Yes ☑ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	CS/SB 1224
INTRODUCER:	Judiciary and Senator Joyner
SUBJECT:	Health Care Representatives
DATE:	April 2, 2015
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Caldwell	Cibula	JU	**Fav/CS**
2.			HP	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1224 authorizes the appointment of a health care surrogate which is not conditioned upon the incapacity of the principal. It allows for the principal's health information to be shared with the surrogate prior to incapacity. The bill also allows the parents, legal custodian, or legal guardian of a minor to name a health care surrogate to act for a minor if the parents, legal custodian, or legal guardian cannot be timely contacted to make medical decisions for the minor.

II. Present Situation:

Part II of ch. 765, F.S., entitled "Health Care Surrogate," governs the designation of health care surrogates in Florida. A health care surrogate is a competent adult expressly designated by a principal to make health care decisions on behalf of the principal upon the principal's incapacity.[1] Section 765.203, F.S., provides a suggested form for the designation of a health care surrogate. If an adult fails to designate a surrogate or a designated surrogate is unwilling or unable to perform his or her duties, a health care facility may seek the appointment of a proxy[2] to serve as surrogate upon the incapacity of such person.[3] A surrogate appointed by the principal or

[1] Section 765.101(16), F.S.

[2] "Proxy" means a competent adult who has not been expressly designated to make health care decisions for a particular incapacitated individual, but who, nevertheless, is authorized pursuant to s. 765.401, F.S., to make health care decisions for such individual. s. 765.101(15), F.S.

[3] Sections 765.202(4) and 765.401, F.S.

by proxy, may, subject to any limitations and instructions provided by the principal, take the following actions:[4]

- Make all health care decisions[5] for the principal during the principal's incapacity;
- Consult expeditiously with appropriate health care providers to provide informed consent, including written consent where required, provided that such consent reflects the principal's wishes or the principal's best interests;
- Have access to the appropriate medical records of the principal;
- Apply for public benefits for the principal and have access to information regarding the principal's income, assets, and financial records to the extent required to make such application;
- Authorize the release of information and medical records to appropriate persons to ensure continuity of the principal's health care; and
- Authorize the admission, discharge, or transfer of the principal to or from a health care facility.[6]

The surrogate's authority to act commences upon a determination that the principle is incapacitated.[7] A determination of incapacity is required to be made by an attending physician.[8] If the physician's evaluation finds that the principal is incapacitated and the principal has designated a health care surrogate, a health care facility will notify such surrogate in writing that her or his authority under the instrument has commenced.[9] The heath care surrogate's authority continues until a determination that the principal has regained capacity. If a principal goes in and out of capacity, a redetermination of incapacity is necessary each time before a health care surrogate may make health care decisions.[10]

This process can hinder effective and timely assistance and is cumbersome. Further, some competent persons desire the assistance of a health care surrogate with the sometimes complex task of understanding health care treatments and procedures and with making health care decisions, but may not effectively empower such persons to act on their behalf due to the restriction that a health care surrogate act only for incapacitated persons.

Additionally, there is no statutory authority for a minor to designate a health care surrogate or for a health care facility to seek a proxy to serve as a health care surrogate for a minor when his or her parents, legal custodian, or legal guardian cannot be timely contacted by the health care provider.

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[4] Section 765.205, F.S.

[5] "Health care decision" means: informed consent, refusal of consent, or withdrawal of consent to any and all health care, including life-prolonging procedures and mental health treatment, unless otherwise stated in the advance directives; the decision to apply for private, public, government, or veterans' benefits to defray the cost of health care; the right of access to all records of the principal reasonably necessary for a health care surrogate to make decisions involving health care and to apply for benefits; and the decision to make an anatomical gift pursuant to part V of ch. 765, F.S.

[6] Section 765.205(1), F.S.

[7] Section 765.204(3), F.S.

[8] Section 765.204, F.S.

[9] Section 765.204(2), F.S.

[10] Section 765.204(3), F.S.

III. Effect of Proposed Changes:

Health Care Surrogate for an Adult

The bill creates s. 765.202(6), F.S., (**section 8**) to provide that an individual may elect to appoint a health care surrogate who may act while the individual is still competent to make healthcare decisions and to have access to the individual's health information. To that end, the bill:

- Adds a legislative finding at s. 765.102(3), F.S., (**section 3**) that some adults want a health care surrogate to assist them with making medical decisions or accessing health information.
- Provides that statutory provisions for review of the decision of a health care surrogate at s. 765.105, F.S., (**section 5**) do not apply where the individual who appointed the health care surrogate is still competent.
- Amends s. 765.204, F.S., (**section 12**) the law regarding a finding of incapacity, to require a health care facility to notify the surrogate upon a finding of incapacity. The notification requirement also requires notice to the attorney in fact if the health care facility knows of a durable power of attorney.
- Amends s. 765.205, F.S., (**section 13**) the law regarding the responsibilities of a health care surrogate, to provide that, if a surrogate's authority or an attorney in fact's authority exists while the patient is still competent, the patient's wishes are controlling. A physician and a health care provider must, in this situation, clearly communicate to the patient about every decision made and who made it.
- Adds that an alternate may also act where the primary surrogate is not reasonably available. Current law such as s. 765.202(3), F.S., (**section 8**) provides that an alternate health care surrogate may act where the primary surrogate is unwilling or unable to act.

Section 765.203, F.S., (**section 9**) is amended to add a suggested form for the designation of a health care surrogate and delete the current form. The information on the form includes:

- The principal's name,
- A statement that the principal designates as his or her health care surrogate,
- The name, address, and phone number of the surrogate,
- A statement relating to the healthcare surrogate who is not willing, able, or reasonably available to perform his or her duties, and an opportunity to designate an alternate health care surrogate,
- Instructions and authorization for health care that includes some fill in the blank, some required initialing, and further specific instructions and restrictions,
- Instructions and notice of how to amend or revoke the surrogate designation,
- Acknowledgements as to understanding and authority delegated,
- Signature and date, printed name and address of the principal, and
- Signature and date, printed name and address of two witnesses.

Health Care Surrogate for a Minor

In general, a minor does not have the legal right to consent to medical care or treatment. Instead, for non-emergency treatment, a parent or legal guardian must give consent. As to emergency treatment, if the parents, legal custodian or legal guardian of a minor cannot be timely contacted to give consent for medical treatment of a minor, s. 743.0645(2), F.S., sets forth a list of people

who have the power to consent on behalf of the minor. There is no general statutory authority for non-emergency medical treatment of a minor without consent of a parent or legal guardian.

It is common for parents and legal guardians to go on vacation and leave their children with a caregiver, and equally common for parents and legal guardians to allow a minor to travel and stay with relatives or friends for a period of time. Lawyers routinely draft a power of attorney authorizing caregivers to consent to medical treatment of the minor, despite there being no statutory authority for such document.

The bill creates s. 765.2035, F.S., (**section 10**) to create statutory authority for a parent or legal guardian to designate a health care surrogate who may consent to medical care for a minor. The designation must be in writing and signed by two witnesses. The designated surrogate may not be a witness.

Like a surrogate for an adult, an alternate surrogate may be appointed to act if the original surrogate is not willing, able, or reasonably available to act.

In addition to regular and emergency treatment, a health care surrogate for a minor is authorized to consent to mental health treatment unless the document specifically provides otherwise. The appointment of a health care surrogate for a minor remains in place until the termination date provided in the designation (if any), the minor reaches the age of majority, or the designation is revoked.

The bill also creates a sample form for minors at s. 765.2038, F.S. (**section 11**).

The bill amends s. 743.0645, F.S., (**section 1**) the statute on other persons who may consent to medical care or treatment of a minor, to conform to the changes made in the bill. The bill also amends that statute to recognize that a power of attorney regarding consent to authorize health care for a minor, executed between July 1, 2001, and September 30, 2015, (the day before the effective date of this bill) will be recognized as authority to consent to treatment. A designation of health care surrogate or a power of attorney is deemed to include authority to consent to surgery or anesthesia unless those procedures are specifically excluded.

Other

The bill amends ss. 765.102 and 765.202, F.S., (**sections 3 and 8**) to specify that a right to consent to treatment of an individual (adult or minor) also includes the right to obtain health information regarding that individual. Section 765.101, F.S., (**section 2**) is amended to add a definition for the term "health information" to be consistent with the Health Insurance Portability and Accountability Act (known as "HIPAA"). The terms "health care," "health information," "minor's principal," "primary physician," and "reasonably available" are also added and defined. The definitions of the terms "advanced directive," "attending physician," "close personal friend," "health care decision," and "principal" are amended.

The term "surrogate" that is currently defined to mean "any competent adult expressly designated by a principal to make health care decisions" is amended to add "and receive health information. The principal may stipulate whether the authority of the surrogate to make health

care decisions or to receive health information is exercisable immediately without the necessity for a determination of capacity or only upon the principal's incapacity as provided in s. 765.204." The phrase "on behalf of the principal upon the principal's incapacity" in the current definition is deleted.

The bill makes technical changes by revising references to the type of physician (i.e., attending or primary) consistent with the definitions in statutes related to advance directives, health care surrogates, pain management, palliative care, capacity, living wills, determination of patient condition, persistent vegetative state, and anatomical gifts. This change in terminology should have no practical effect.

Finally, technical and conforming changes are made throughout the bill.

The bill takes effect on October 1, 2013.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

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

C. Government Sector Impact:

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

VI. Technical Deficiencies:

In the bill's definition of the term "surrogate" is a statement of the delegated authority:

> The principal may stipulate whether the authority of the surrogate to make health care decisions or to receive health information is exercisable immediately without the necessity for a determination of capacity or only upon the principal's incapacity as provided in s. 765.204.

This authority does not contribute to clarifying who the surrogate is. It is substantive and would fit better in Part II, relating to the health care surrogate.[11]

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 743.0645, 765.101, 765.102, 765.104, 765.105, 765.1103, 765.1105, 765.202, 765.203, 765.204, 765.205, 765.302, 765.303, 765.304, 765.306, 765.404, and 765.516.

This bill creates the following sections 765.2035 and 765.2038 of the Florida Statutes.

IX. Additional Information:

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

CS by Judiciary on March 31, 2015:

The CS makes the following changes to the bill:

- Deletes the requirement that power of attorney documents affected by the changes in the bill must be executed before October 1, 2015.
- Reinstates the definition of "attending physician" and revises the meaning to the physician providing treatment and care of the patient while the patient receives treatment or care in a hospital defined in s. 395.002(12), F.S.
- Revises the definition of the term "close personal friend" to change the type of physician referenced from attending or treating to primary.
- Modifies the surrogate designation form to add instructions and notice of how to amend or revoke the surrogate designation.
- Adds the condition that an attending physician must notify the primary physician of his or her determination that the principal lacks capacity.
- Removes the caveat that even though a surrogate has been designated, self-determination of the principal is controlling and that the primary physician does not have to communication to the principal the decision made by the surrogate.
- Changes the references to an attending and/or treating physician to references to a primary physician and makes other conforming changes.

[11] See Office of Bill Drafting Services, The Florida Senate, *Manual for Drafting Legislation*, p. 45 (6th ed. 2009).

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
04/02/2015	.	
	.	
	.	
	.	

The Committee on Judiciary (Joyner) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. Paragraph (b) of subsection (1) and paragraph (a) of subsection (2) of section 743.0645, Florida Statutes, are amended to read:

743.0645 Other persons who may consent to medical care or treatment of a minor.—

(1) As used in this section, the term:

(b) "Medical care and treatment" includes ordinary and


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necessary medical and dental examination and treatment, including blood testing, preventive care including ordinary immunizations, tuberculin testing, and well-child care, but does not include surgery, general anesthesia, provision of psychotropic medications, or other extraordinary procedures for which a separate court order, health care surrogate designation under s. 765.2035 executed after September 30, 2015, power of attorney executed after July 1, 2001, or informed consent as provided by law is required, except as provided in s. 39.407(3).

(2) Any of the following persons, in order of priority listed, may consent to the medical care or treatment of a minor who is not committed to the Department of Children and Families or the Department of Juvenile Justice or in their custody under chapter 39, chapter 984, or chapter 985 when, after a reasonable attempt, a person who has the power to consent as otherwise provided by law cannot be contacted by the treatment provider and actual notice to the contrary has not been given to the provider by that person:

(a) A health care surrogate designated under s. 765.2035 after September 30, 2015, or a person who possesses a power of attorney to provide medical consent for the minor. A health care surrogate designation under s. 765.2035 executed after September 30, 2015, and a power of attorney executed after July 1, 2001, to provide medical consent for a minor includes the power to consent to medically necessary surgical and general anesthesia services for the minor unless such services are excluded by the individual executing the health care surrogate for a minor or power of attorney.

There shall be maintained in the treatment provider's records of the minor documentation that a reasonable attempt was made to contact the person who has the power to consent.

Section 2. Section 765.101, Florida Statutes, is amended to read:

765.101 Definitions.—As used in this chapter:

(1) "Advance directive" means a witnessed written document or oral statement in which instructions are given by a principal or in which the principal's desires are expressed concerning any aspect of the principal's health care or health information, and includes, but is not limited to, the designation of a health care surrogate, a living will, or an anatomical gift made pursuant to part V of this chapter.

(2) "Attending physician" means the ~~primary~~ physician who has primary responsibility for the treatment and care of the patient while the patient receives such treatment or care in a hospital as defined in s. 395.002(12).

(3) "Close personal friend" means any person 18 years of age or older who has exhibited special care and concern for the patient, and who presents an affidavit to the health care facility or to the primary ~~attending or treating~~ physician stating that he or she is a friend of the patient; is willing and able to become involved in the patient's health care; and has maintained such regular contact with the patient so as to be familiar with the patient's activities, health, and religious or moral beliefs.

(4) "End-stage condition" means an irreversible condition that is caused by injury, disease, or illness which has resulted in progressively severe and permanent deterioration, and which,

to a reasonable degree of medical probability, treatment of the condition would be ineffective.

(5) "Health care" means care, services, or supplies related to the health of an individual and includes, but is not limited to, preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the individual's physical or mental condition or functional status or that affect the structure or function of the individual's body.

(6) ~~(5)~~ "Health care decision" means:

(a) Informed consent, refusal of consent, or withdrawal of consent to any and all health care, including life-prolonging procedures and mental health treatment, unless otherwise stated in the advance directives.

(b) The decision to apply for private, public, government, or veterans' benefits to defray the cost of health care.

(c) The right of access to health information ~~all records~~ of the principal reasonably necessary for a health care surrogate or proxy to make decisions involving health care and to apply for benefits.

(d) The decision to make an anatomical gift pursuant to part V of this chapter.

(7) ~~(6)~~ "Health care facility" means a hospital, nursing home, hospice, home health agency, or health maintenance organization licensed in this state, or any facility subject to part I of chapter 394.

(8) ~~(7)~~ "Health care provider" or "provider" means any person licensed, certified, or otherwise authorized by law to administer health care in the ordinary course of business or


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practice of a profession.

(9) "Health information" means any information, whether oral or recorded in any form or medium, as defined in 45 C.F.R. s. 160.103 and the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. s. 1320d, as amended, that:

(a) Is created or received by a health care provider, health care facility, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and

(b) Relates to the past, present, or future physical or mental health or condition of the principal; the provision of health care to the principal; or the past, present, or future payment for the provision of health care to the principal.

(10) ~~(8)~~ "Incapacity" or "incompetent" means the patient is physically or mentally unable to communicate a willful and knowing health care decision. For the purposes of making an anatomical gift, the term also includes a patient who is deceased.

(11) ~~(9)~~ "Informed consent" means consent voluntarily given by a person after a sufficient explanation and disclosure of the subject matter involved to enable that person to have a general understanding of the treatment or procedure and the medically acceptable alternatives, including the substantial risks and hazards inherent in the proposed treatment or procedures, and to make a knowing health care decision without coercion or undue influence.

(12) ~~(10)~~ "Life-prolonging procedure" means any medical procedure, treatment, or intervention, including artificially

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provided sustenance and hydration, which sustains, restores, or supplants a spontaneous vital function. The term does not include the administration of medication or performance of medical procedure, when such medication or procedure is deemed necessary to provide comfort care or to alleviate pain.

(13) ~~(11)~~ "Living will" or "declaration" means:

(a) A witnessed document in writing, voluntarily executed by the principal in accordance with s. 765.302; or

(b) A witnessed oral statement made by the principal expressing the principal's instructions concerning life-prolonging procedures.

(14) "Minor's principal" means a principal who is a natural guardian as defined in s. 744.301(1); legal custodian; or, subject to chapter 744, legal guardian of the person of a minor.

(15) ~~(12)~~ "Persistent vegetative state" means a permanent and irreversible condition of unconsciousness in which there is:

(a) The absence of voluntary action or cognitive behavior of any kind.

(b) An inability to communicate or interact purposefully with the environment.

(16) ~~(13)~~ "Physician" means a person licensed pursuant to chapter 458 or chapter 459.

(17) "Primary physician" means a physician designated by an individual or the individual's surrogate, proxy, or agent under a durable power of attorney, as provided in chapter 709, to have primary responsibility for the individual's health care or, in the absence of a designation or if the designated physician is not reasonably available, a physician who undertakes the responsibility.

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(18)~~(14)~~ "Principal" means a competent adult executing an advance directive and on whose behalf health care decisions are to be made or health care information is to be received, or both.

(19)~~(15)~~ "Proxy" means a competent adult who has not been expressly designated to make health care decisions for a particular incapacitated individual, but who, nevertheless, is authorized pursuant to s. 765.401 to make health care decisions for such individual.

(20) "Reasonably available" means readily able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the patient's health care needs.

(21)~~(16)~~ "Surrogate" means any competent adult expressly designated by a principal to make health care decisions and to receive health information. The principal may stipulate whether the authority of the surrogate to make health care decisions or to receive health information is exercisable immediately without the necessity for a determination of incapacity or only upon the principal's incapacity as provided in s. 765.204 ~~on behalf of the principal upon the principal's incapacity~~.

(22)~~(17)~~ "Terminal condition" means a condition caused by injury, disease, or illness from which there is no reasonable medical probability of recovery and which, without treatment, can be expected to cause death.

Section 3. Subsections (3) through (6) of section 765.102, Florida Statutes, are renumbered as subsections (4) through (7), respectively, present subsections (2) and (3) are amended, and a new subsection (3) is added to that section, to read:

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765.102 Legislative findings and intent.—

(2) To ensure that such right is not lost or diminished by virtue of later physical or mental incapacity, the Legislature intends that a procedure be established to allow a person to plan for incapacity by executing a document or orally designating another person to direct the course of his or her health care or receive his or her health information, or both, ~~medical treatment~~ upon his or her incapacity. Such procedure should be less expensive and less restrictive than guardianship and permit a previously incapacitated person to exercise his or her full right to make health care decisions as soon as the capacity to make such decisions has been regained.

(3) The Legislature also recognizes that some competent adults may want to receive immediate assistance in making health care decisions or accessing health information, or both, without a determination of incapacity. The Legislature intends that a procedure be established to allow a person to designate a surrogate to make health care decisions or receive health information, or both, without the necessity for a determination of incapacity under this chapter.

(4) ~~(3)~~ The Legislature recognizes that for some the administration of life-prolonging medical procedures may result in only a precarious and burdensome existence. In order to ensure that the rights and intentions of a person may be respected even after he or she is no longer able to participate actively in decisions concerning himself or herself, and to encourage communication among such patient, his or her family, and his or her physician, the Legislature declares that the laws of this state recognize the right of a competent adult to make

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an advance directive instructing his or her physician to provide, withhold, or withdraw life-prolonging procedures~~,~~ or to designate another to make the health care ~~treatment~~ decision for him or her in the event that such person should become incapacitated and unable to personally direct his or her health ~~medical~~ care.

Section 4. Subsection (1) of section 765.104, Florida Statutes, is amended to read:

765.104 Amendment or revocation.—

(1) An advance directive ~~or designation of a surrogate~~ may be amended or revoked at any time by a competent principal:

(a) By means of a signed, dated writing;

(b) By means of the physical cancellation or destruction of the advance directive by the principal or by another in the principal's presence and at the principal's direction;

(c) By means of an oral expression of intent to amend or revoke; or

(d) By means of a subsequently executed advance directive that is materially different from a previously executed advance directive.

Section 5. Section 765.105, Florida Statutes, is amended to read:

765.105 Review of surrogate or proxy's decision.—

(1) The patient's family, the health care facility, or the primary ~~attending~~ physician, or any other interested person who may reasonably be expected to be directly affected by the surrogate or proxy's decision concerning any health care decision may seek expedited judicial intervention pursuant to rule 5.900 of the Florida Probate Rules, if that person

believes:

(a) ~~(1)~~ The surrogate or proxy's decision is not in accord with the patient's known desires or ~~the provisions of~~ this chapter;

(b) ~~(2)~~ The advance directive is ambiguous, or the patient has changed his or her mind after execution of the advance directive;

(c) ~~(3)~~ The surrogate or proxy was improperly designated or appointed, or the designation of the surrogate is no longer effective or has been revoked;

(d) ~~(4)~~ The surrogate or proxy has failed to discharge duties, or incapacity or illness renders the surrogate or proxy incapable of discharging duties;

(e) ~~(5)~~ The surrogate or proxy has abused his or her powers; or

(f) ~~(6)~~ The patient has sufficient capacity to make his or her own health care decisions.

(2) This section does not apply to a patient who is not incapacitated and who has designated a surrogate who has immediate authority to make health care decisions and receive health information, or both, on behalf of the patient.

Section 6. Subsection (1) of section 765.1103, Florida Statutes, is amended to read:

765.1103 Pain management and palliative care.—

(1) A patient shall be given information concerning pain management and palliative care when he or she discusses with the primary ~~attending or treating~~ physician, or such physician's designee, the diagnosis, planned course of treatment, alternatives, risks, or prognosis for his or her illness. If the

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patient is incapacitated, the information shall be given to the patient's health care surrogate or proxy, court-appointed guardian as provided in chapter 744, or attorney in fact under a durable power of attorney as provided in chapter 709. The court-appointed guardian or attorney in fact must have been delegated authority to make health care decisions on behalf of the patient.

Section 7. Section 765.1105, Florida Statutes, is amended to read:

765.1105 Transfer of a patient.—

(1) A health care provider or facility that refuses to comply with a patient's advance directive, or the treatment decision of his or her surrogate or proxy, shall make reasonable efforts to transfer the patient to another health care provider or facility that will comply with the directive or treatment decision. This chapter does not require a health care provider or facility to commit any act which is contrary to the provider's or facility's moral or ethical beliefs, if the patient:

(a) Is not in an emergency condition; and

(b) Has received written information upon admission informing the patient of the policies of the health care provider or facility regarding such moral or ethical beliefs.

(2) A health care provider or facility that is unwilling to carry out the wishes of the patient or the treatment decision of his or her surrogate or proxy because of moral or ethical beliefs must within 7 days either:

(a) Transfer the patient to another health care provider or facility. The health care provider or facility shall pay the

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costs for transporting the patient to another health care provider or facility; or

(b) If the patient has not been transferred, carry out the wishes of the patient or the patient's surrogate or proxy, unless ~~the provisions of~~ s. 765.105 applies ~~apply~~.

Section 8. Subsections (1), (3), and (4) of section 765.202, Florida Statutes, are amended, subsections (6) and (7) are renumbered as subsections (7) and (8), respectively, and a new subsection (6) is added to that section, to read:

765.202 Designation of a health care surrogate.—

(1) A written document designating a surrogate to make health care decisions for a principal or receive health information on behalf of a principal, or both, shall be signed by the principal in the presence of two subscribing adult witnesses. A principal unable to sign the instrument may, in the presence of witnesses, direct that another person sign the principal's name as required herein. An exact copy of the instrument shall be provided to the surrogate.

(3) A document designating a health care surrogate may also designate an alternate surrogate provided the designation is explicit. The alternate surrogate may assume his or her duties as surrogate for the principal if the original surrogate is not willing, able, or reasonably available ~~unwilling or unable~~ to perform his or her duties. The principal's failure to designate an alternate surrogate shall not invalidate the designation of a surrogate.

(4) If neither the designated surrogate nor the designated alternate surrogate is willing, able, or reasonably available ~~able or willing~~ to make health care decisions on behalf of the

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principal and in accordance with the principal's instructions, the health care facility may seek the appointment of a proxy pursuant to part IV.

(6) A principal may stipulate in the document that the authority of the surrogate to receive health information or make health care decisions or both is exercisable immediately without the necessity for a determination of incapacity as provided in s. 765.204.

Section 9. Section 765.203, Florida Statutes, is amended to read:

765.203 Suggested form of designation.—A written designation of a health care surrogate executed pursuant to this chapter may, but need not be, in the following form:

DESIGNATION OF HEALTH CARE SURROGATE

I, ...(name)..., designate as my health care surrogate under s. 765.202, Florida Statutes:

Name: ...(name of health care surrogate)...
Address: ...(address)...
Phone: ...(telephone)...

If my health care surrogate is not willing, able, or reasonably available to perform his or her duties, I designate as my alternate health care surrogate:

Name: ...(name of alternate health care surrogate)...
Address: ...(address)...

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Phone: ...(telephone)...

INSTRUCTIONS FOR HEALTH CARE

I authorize my health care surrogate to:

...(Initial here)... Receive any of my health information, whether oral or recorded in any form or medium, that:

1. Is created or received by a health care provider, health care facility, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and

2. Relates to my past, present, or future physical or mental health or condition; the provision of health care to me; or the past, present, or future payment for the provision of health care to me.

I further authorize my health care surrogate to:

...(Initial here)... Make all health care decisions for me, which means he or she has the authority to:

1. Provide informed consent, refusal of consent, or withdrawal of consent to any and all of my health care, including life-prolonging procedures.

2. Apply on my behalf for private, public, government, or veterans' benefits to defray the cost of health care.

3. Access my health information reasonably necessary for the health care surrogate to make decisions involving my health care and to apply for benefits for me.

4. Decide to make an anatomical gift pursuant to part V of chapter 765, Florida Statutes.

...(Initial here)... Specific instructions and


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restrictions: .....
.....
.....

To the extent I am capable of understanding, my health care surrogate shall keep me reasonably informed of all decisions that he or she has made on my behalf and matters concerning me.

THIS HEALTH CARE SURROGATE DESIGNATION IS NOT AFFECTED BY MY SUBSEQUENT INCAPACITY EXCEPT AS PROVIDED IN CHAPTER 765, FLORIDA STATUTES.

PURSUANT TO SECTION 765.104, FLORIDA STATUTES, I UNDERSTAND THAT I MAY, AT ANY TIME WHILE I RETAIN MY CAPACITY, REVOKE OR AMEND THIS DESIGNATION BY:

(1) SIGNING A WRITTEN AND DATED INSTRUMENT WHICH EXPRESSES MY INTENT TO AMEND OR REVOKE THIS DESIGNATION;

(2) PHYSICALLY DESTROYING THIS DESIGNATION THROUGH MY OWN ACTION OR BY THAT OF ANOTHER PERSON IN MY PRESENCE AND UNDER MY DIRECTION;

(3) VERBALLY EXPRESSING MY INTENTION TO AMEND OR REVOKE THIS DESIGNATION; OR

(4) SIGNING A NEW DESIGNATION THAT IS MATERIALLY DIFFERENT FROM THIS DESIGNATION.

MY HEALTH CARE SURROGATE'S AUTHORITY BECOMES EFFECTIVE WHEN MY PRIMARY PHYSICIAN DETERMINES THAT I AM UNABLE TO MAKE MY OWN HEALTH CARE DECISIONS UNLESS I INITIAL EITHER OR BOTH OF THE FOLLOWING BOXES:

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IF I INITIAL THIS BOX [....], MY HEALTH CARE SURROGATE'S AUTHORITY TO RECEIVE MY HEALTH INFORMATION TAKES EFFECT IMMEDIATELY.

IF I INITIAL THIS BOX [....], MY HEALTH CARE SURROGATE'S AUTHORITY TO MAKE HEALTH CARE DECISIONS FOR ME TAKES EFFECT IMMEDIATELY.

SIGNATURES: Sign and date the form here:

...(date)... ...(sign your name)...

...(address)... ...(print your name)...

...(city)... ...(state)...

SIGNATURES OF WITNESSES:

First witness Second witness

...(print name)... ...(print name)...

...(address)... ...(address)...

...(city)... ...(state)... ...(city)... ...(state)...

...(signature of witness)... ...(signature of witness)...

...(date)... ...(date)...

~~Name:....(Last)....(First)....(Middle Initial)....~~

~~In the event that I have been determined to be incapacitated to provide informed consent for medical treatment and surgical and diagnostic procedures, I wish to designate as my surrogate for health care decisions:~~

~~Name:.....~~

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~~Address:.....~~
~~Zip~~
~~..... Code:.....~~

~~Phone:.....~~

~~If my surrogate is unwilling or unable to perform his or her duties, I wish to designate as my alternate surrogate:~~
~~Name:.....~~
~~Address:.....~~
~~Zip~~
~~..... Code:.....~~

~~Phone:.....~~

~~I fully understand that this designation will permit my designee to make health care decisions and to provide, withhold, or withdraw consent on my behalf; to apply for public benefits to defray the cost of health care; and to authorize my admission to or transfer from a health care facility.~~
~~Additional instructions (optional):.....~~
~~.....~~
~~.....~~
~~.....~~

~~I further affirm that this designation is not being made as a condition of treatment or admission to a health care facility. I will notify and send a copy of this document to the following persons other than my surrogate, so they may know who my surrogate is.~~
~~Name:.....~~
~~Name:.....~~

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~~.....~~
~~.....~~
~~Signed:.....~~
~~Date:.....~~
~~Witnesses:~~ ~~1.....~~
~~2. .....~~

Section 10. Section 765.2035, Florida Statutes, is created to read:

765.2035 Designation of a health care surrogate for a minor.—

(1) A natural guardian as defined in s. 744.301(1), legal custodian, or legal guardian of the person of a minor may designate a competent adult to serve as a surrogate to make health care decisions for the minor. Such designation shall be made by a written document signed by the minor's principal in the presence of two subscribing adult witnesses. If a minor's principal is unable to sign the instrument, the principal may, in the presence of witnesses, direct that another person sign the minor's principal's name as required by this subsection. An exact copy of the instrument shall be provided to the surrogate.

(2) The person designated as surrogate may not act as witness to the execution of the document designating the health care surrogate.

(3) A document designating a health care surrogate may also designate an alternate surrogate; however, such designation must be explicit. The alternate surrogate may assume his or her

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duties as surrogate if the original surrogate is not willing, able, or reasonably available to perform his or her duties. The minor's principal's failure to designate an alternate surrogate does not invalidate the designation.

(4) If neither the designated surrogate or the designated alternate surrogate is willing, able, or reasonably available to make health care decisions for the minor on behalf of the minor's principal and in accordance with the minor's principal's instructions, s. 743.0645(2) shall apply as if no surrogate had been designated.

(5) A natural guardian as defined in s. 744.301(1), legal custodian, or legal guardian of the person of a minor may designate a separate surrogate to consent to mental health treatment for the minor. However, unless the document designating the health care surrogate expressly states otherwise, the court shall assume that the health care surrogate authorized to make health care decisions for a minor under this chapter is also the minor's principal's choice to make decisions regarding mental health treatment for the minor.

(6) Unless the document states a time of termination, the designation shall remain in effect until revoked by the minor's principal. An otherwise valid designation of a surrogate for a minor shall not be invalid solely because it was made before the birth of the minor.

(7) A written designation of a health care surrogate executed pursuant to this section establishes a rebuttable presumption of clear and convincing evidence of the minor's principal's designation of the surrogate and becomes effective pursuant to s. 743.0645(2)(a).

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Section 11. Section 765.2038, Florida Statutes, is created to read:

765.2038 Designation of health care surrogate for a minor; suggested form.—A written designation of a health care surrogate for a minor executed pursuant to this chapter may, but need not be, in the following form:

DESIGNATION OF HEALTH CARE SURROGATE
FOR MINOR

I/We, ...(name/names)..., the [....] natural guardian(s) as defined in s. 744.301(1), Florida Statutes; [....] legal custodian(s); [....] legal guardian(s) [check one] of the following minor(s):

.....;
.....;
.....,

pursuant to s. 765.2035, Florida Statutes, designate the following person to act as my/our surrogate for health care decisions for such minor(s) in the event that I/we am/are not able or reasonably available to provide consent for medical treatment and surgical and diagnostic procedures:

Name: ...(name)...
Address: ...(address)...
Zip Code: ...(zip code)...
Phone: ...(telephone)...

If my/our designated health care surrogate for a minor is

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not willing, able, or reasonably available to perform his or her duties, I/we designate the following person as my/our alternate health care surrogate for a minor:

Name: ...(name)...
Address: ...(address)...
Zip Code: ...(zip code)...
Phone: ...(telephone)...

I/We authorize and request all physicians, hospitals, or other providers of medical services to follow the instructions of my/our surrogate or alternate surrogate, as the case may be, at any time and under any circumstances whatsoever, with regard to medical treatment and surgical and diagnostic procedures for a minor, provided the medical care and treatment of any minor is on the advice of a licensed physician.

I/We fully understand that this designation will permit my/our designee to make health care decisions for a minor and to provide, withhold, or withdraw consent on my/our behalf, to apply for public benefits to defray the cost of health care, and to authorize the admission or transfer of a minor to or from a health care facility.

I/We will notify and send a copy of this document to the following person(s) other than my/our surrogate, so that they may know the identity of my/our surrogate:

Name: ...(name)...

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Name: ...(name)...

Signed: ...(signature)...
Date: ...(date)...

WITNESSES:
1. ...(witness)...
2. ...(witness)...

Section 12. Section 765.204, Florida Statutes, is amended to read:

765.204 Capacity of principal; procedure.—

(1) A principal is presumed to be capable of making health care decisions for herself or himself unless she or he is determined to be incapacitated. Incapacity may not be inferred from the person's voluntary or involuntary hospitalization for mental illness or from her or his intellectual disability.

(2) If a principal's capacity to make health care decisions for herself or himself or provide informed consent is in question, the primary or attending physician shall evaluate the principal's capacity and, if the evaluating physician concludes that the principal lacks capacity, enter that evaluation in the principal's medical record. If the evaluating ~~attending~~ physician has a question as to whether the principal lacks capacity, another physician shall also evaluate the principal's capacity, and if the second physician agrees that the principal lacks the capacity to make health care decisions or provide informed consent, the health care facility shall enter both physician's evaluations in the principal's medical record. If the principal has designated a health care surrogate or has

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delegated authority to make health care decisions to an attorney in fact under a durable power of attorney, the health care facility shall notify such surrogate or attorney in fact in writing that her or his authority under the instrument has commenced, as provided in chapter 709 or s. 765.203. If an attending physician determines that the principal lacks capacity, the hospital in which the attending physician made such a determination shall notify the principal's primary physician of the determination.

(3) The surrogate's authority shall commence upon a determination under subsection (2) that the principal lacks capacity, and such authority shall remain in effect until a determination that the principal has regained such capacity. Upon commencement of the surrogate's authority, a surrogate who is not the principal's spouse shall notify the principal's spouse or adult children of the principal's designation of the surrogate. In the event the primary ~~attending~~ physician determines that the principal has regained capacity, the authority of the surrogate shall cease, but shall recommence if the principal subsequently loses capacity as determined pursuant to this section.

(4) Notwithstanding subsections (2) and (3), if the principal has designated a health care surrogate and has stipulated that the authority of the surrogate is to take effect immediately, or has appointed an agent under a durable power of attorney as provided in chapter 709 to make health care decisions for the principal, the health care facility shall notify such surrogate or agent in writing when a determination of incapacity has been entered into the principal's medical

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record.

(5)~~(4)~~ A determination made pursuant to this section that a principal lacks capacity to make health care decisions shall not be construed as a finding that a principal lacks capacity for any other purpose.

(6)~~(5)~~ If ~~In the event~~ the surrogate is required to consent to withholding or withdrawing life-prolonging procedures, ~~the provisions of~~ part III applies ~~shall apply~~.

Section 13. Paragraph (d) of subsection (1) and subsection (2) of section 765.205, Florida Statutes, are amended to read:

765.205 Responsibility of the surrogate.—

(1) The surrogate, in accordance with the principal's instructions, unless such authority has been expressly limited by the principal, shall:

(d) Be provided access to the appropriate health information ~~medical records~~ of the principal.

(2) The surrogate may authorize the release of health information ~~and medical records~~ to appropriate persons to ensure the continuity of the principal's health care and may authorize the admission, discharge, or transfer of the principal to or from a health care facility or other facility or program licensed under chapter 400 or chapter 429.

Section 14. Subsection (2) of section 765.302, Florida Statutes, is amended to read:

765.302 Procedure for making a living will; notice to physician.—

(2) It is the responsibility of the principal to provide for notification to her or his primary ~~attending or treating~~ physician that the living will has been made. In the event the

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principal is physically or mentally incapacitated at the time the principal is admitted to a health care facility, any other person may notify the physician or health care facility of the existence of the living will. A primary ~~An attending or treating~~ physician or health care facility which is so notified shall promptly make the living will or a copy thereof a part of the principal's medical records.

Section 15. Subsection (1) of section 765.303, Florida Statutes, is amended to read:

765.303 Suggested form of a living will.—

(1) A living will may, BUT NEED NOT, be in the following form:

Living Will

Declaration made this .... day of ...., ...(year)..., I, ..., willfully and voluntarily make known my desire that my dying not be artificially prolonged under the circumstances set forth below, and I do hereby declare that, if at any time I am incapacitated and

...(initial)... I have a terminal condition

or ...(initial)... I have an end-stage condition

or ...(initial)... I am in a persistent vegetative state

and if my primary ~~attending or treating~~ physician and another consulting physician have determined that there is no reasonable medical probability of my recovery from such condition, I direct that life-prolonging procedures be withheld or withdrawn when the application of such procedures would serve only to prolong artificially the process of dying, and that I be permitted to die naturally with only the administration of medication or the performance of any medical procedure deemed necessary to provide

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me with comfort care or to alleviate pain.

It is my intention that this declaration be honored by my family and physician as the final expression of my legal right to refuse medical or surgical treatment and to accept the consequences for such refusal.

In the event that I have been determined to be unable to provide express and informed consent regarding the withholding, withdrawal, or continuation of life-prolonging procedures, I wish to designate, as my surrogate to carry out the provisions of this declaration:

Name:.....

Address:.....

Zip

..... Code:.....

Phone:.....

I understand the full import of this declaration, and I am emotionally and mentally competent to make this declaration.

Additional Instructions (optional):

.....

.....

.....

....(Signed)....

....Witness....

....Address....

....Phone....

....Witness....

....Address....

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....Phone....

Section 16. Subsection (1) of section 765.304, Florida Statutes, is amended to read:

765.304 Procedure for living will.—

(1) If a person has made a living will expressing his or her desires concerning life-prolonging procedures, but has not designated a surrogate to execute his or her wishes concerning life-prolonging procedures or designated a surrogate under part II, the person's primary ~~attending~~ physician may proceed as directed by the principal in the living will. In the event of a dispute or disagreement concerning the primary ~~attending~~ physician's decision to withhold or withdraw life-prolonging procedures, the primary ~~attending~~ physician shall not withhold or withdraw life-prolonging procedures pending review under s. 765.105. If a review of a disputed decision is not sought within 7 days following the primary ~~attending~~ physician's decision to withhold or withdraw life-prolonging procedures, the primary ~~attending~~ physician may proceed in accordance with the principal's instructions.

Section 17. Section 765.306, Florida Statutes, is amended to read:

765.306 Determination of patient condition.—In determining whether the patient has a terminal condition, has an end-stage condition, or is in a persistent vegetative state or may recover capacity, or whether a medical condition or limitation referred to in an advance directive exists, the patient's primary ~~attending or treating~~ physician and at least one other consulting physician must separately examine the patient. The findings of each such examination must be documented in the

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patient's medical record and signed by each examining physician before life-prolonging procedures may be withheld or withdrawn.

Section 18. Section 765.404, Florida Statutes, is amended to read:

765.404 Persistent vegetative state.—For persons in a persistent vegetative state, as determined by the person's primary ~~attending~~ physician in accordance with currently accepted medical standards, who have no advance directive and for whom there is no evidence indicating what the person would have wanted under such conditions, and for whom, after a reasonably diligent inquiry, no family or friends are available or willing to serve as a proxy to make health care decisions for them, life-prolonging procedures may be withheld or withdrawn under the following conditions:

(1) The person has a judicially appointed guardian representing his or her best interest with authority to consent to medical treatment; and

(2) The guardian and the person's primary ~~attending~~ physician, in consultation with the medical ethics committee of the facility where the patient is located, conclude that the condition is permanent and that there is no reasonable medical probability for recovery and that withholding or withdrawing life-prolonging procedures is in the best interest of the patient. If there is no medical ethics committee at the facility, the facility must have an arrangement with the medical ethics committee of another facility or with a community-based ethics committee approved by the Florida Bio-ethics Network. The ethics committee shall review the case with the guardian, in consultation with the person's primary ~~attending~~ physician, to

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determine whether the condition is permanent and there is no reasonable medical probability for recovery. The individual committee members and the facility associated with an ethics committee shall not be held liable in any civil action related to the performance of any duties required in this subsection.

Section 19. Paragraph (c) of subsection (1) of section 765.516, Florida Statutes, is amended to read:

765.516 Donor amendment or revocation of anatomical gift.—

(1) A donor may amend the terms of or revoke an anatomical gift by:

(c) A statement made during a terminal illness or injury addressed to the primary ~~an attending~~ physician, who must communicate the revocation of the gift to the procurement organization.

Section 20. This act shall take effect October 1, 2015.

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

And the title is amended as follows:

Delete everything before the enacting clause

and insert:

A bill to be entitled

An act relating to health care representatives; amending s. 743.0645, F.S.; conforming provisions to changes made by the act; amending s. 765.101, F.S.; defining terms for purposes of provisions relating to health care advanced directives; revising definitions to conform to changes made by the act; amending s. 765.102, F.S.; revising legislative intent to include reference to surrogate authority that is not dependent on a determination of incapacity; amending s. 765.104,

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F.S.; conforming provisions to changes made by the act; amending s. 765.105, F.S.; conforming provisions to changes made by the act; providing an exception for a patient who has designated a surrogate to make health care decisions and receive health information without a determination of incapacity being required; amending ss. 765.1103 and 765.1105, F.S.; conforming provisions to changes made by the act; amending s. 765.202, F.S.; revising provisions relating to the designation of health care surrogates; amending s. 765.203, F.S.; revising the suggested form for designation of a health care surrogate; creating s. 765.2035, F.S.; providing for the designation of health care surrogates for minors; providing for designation of an alternate surrogate; providing for decisionmaking if neither the designated surrogate nor the designated alternate surrogate is willing, able, or reasonably available to make health care decisions for the minor on behalf of the minor's principal; authorizing designation of a separate surrogate to consent to mental health treatment for a minor; providing that the health care surrogate authorized to make health care decisions for a minor is also the minor's principal's choice to make decisions regarding mental health treatment for the minor unless provided otherwise; providing that a written designation of a health care surrogate establishes a rebuttable presumption of clear and convincing evidence of the minor's principal's designation of the surrogate;


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creating s. 765.2038, F.S.; providing a suggested form for the designation of a health care surrogate for a minor; amending s. 765.204, F.S.; conforming provisions to changes made by the act; providing for notification of incapacity of a principal; amending s. 765.205, F.S.; conforming provisions to changes made by the act; amending ss. 765.302, 765.303, 765.304, 765.306, 765.404, and 765.516, F.S.; conforming provisions to changes made by the act; providing an effective date.

By Senator Joyner

19-00673-15 20151224__

A bill to be entitled

An act relating to health care representatives; amending s. 743.0645, F.S.; conforming provisions to changes made by the act; amending s. 765.101, F.S.; defining terms for purposes of provisions relating to health care advanced directives; revising definitions to conform to changes made by the act; amending s. 765.102, F.S.; revising legislative intent to include reference to surrogate authority that is not dependent on a determination of incapacity; amending s. 765.104, F.S.; conforming provisions to changes made by the act; amending s. 765.105, F.S.; conforming provisions to changes made by the act; providing an exception for a patient who has designated a surrogate to make health care decisions and receive health information without a determination of incapacity being required; amending ss. 765.1103 and 765.1105, F.S.; conforming provisions to changes made by the act; amending s. 765.202, F.S.; revising provisions relating to the designation of health care surrogates; amending s. 765.203, F.S.; revising the suggested form for designation of a health care surrogate; creating s. 765.2035, F.S.; providing for the designation of health care surrogates for minors; providing for designation of an alternate surrogate; providing for decisionmaking if neither the designated surrogate nor the designated alternate surrogate is willing, able, or reasonably available to make health care decisions for the minor on behalf of the minor's principal;

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authorizing designation of a separate surrogate to consent to mental health treatment for a minor; providing that the health care surrogate authorized to make health care decisions for a minor is also the minor's principal's choice to make decisions regarding mental health treatment for the minor unless provided otherwise; providing that a written designation of a health care surrogate establishes a rebuttable presumption of clear and convincing evidence of the minor's principal's designation of the surrogate; creating s. 765.2038, F.S.; providing a suggested form for the designation of a health care surrogate for a minor; amending s. 765.204, F.S.; conforming provisions to changes made by the act; providing for notification of incapacity of a principal; amending s. 765.205, F.S.; conforming provisions to changes made by the act; providing an additional requirement when a patient has designated a surrogate to make health care decisions and receive health information, or both, without a determination of incapacity being required; amending ss. 765.302, 765.303, 765.304, 765.306, 765.404, and 765.516, F.S.; conforming provisions to changes made by the act; providing an effective date.

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

Section 1. Paragraph (b) of subsection (1) and paragraph (a) of subsection (2) of section 743.0645, Florida Statutes, are amended to read:

743.0645 Other persons who may consent to medical care or treatment of a minor.—

(1) As used in this section, the term:

(b) "Medical care and treatment" includes ordinary and necessary medical and dental examination and treatment, including blood testing, preventive care including ordinary immunizations, tuberculin testing, and well-child care, but does not include surgery, general anesthesia, provision of psychotropic medications, or other extraordinary procedures for which a separate court order, health care surrogate designation under s. 765.2035 executed after September 30, 2015, power of attorney executed after July 1, 2001, but before October 1, 2015, or informed consent as provided by law is required, except as provided in s. 39.407(3).

(2) Any of the following persons, in order of priority listed, may consent to the medical care or treatment of a minor who is not committed to the Department of Children and Families or the Department of Juvenile Justice or in their custody under chapter 39, chapter 984, or chapter 985 when, after a reasonable attempt, a person who has the power to consent as otherwise provided by law cannot be contacted by the treatment provider and actual notice to the contrary has not been given to the provider by that person:

(a) A health care surrogate designated under s. 765.2035 after September 30, 2015, or a person who possesses a power of attorney to provide medical consent for the minor executed before October 1, 2015. A health care surrogate designation under s. 765.2035 executed after September 30, 2015, and a power of attorney executed after July 1, 2001, but before October 1,

2015, to provide medical consent for a minor includes the power to consent to medically necessary surgical and general anesthesia services for the minor unless such services are excluded by the individual executing the health care surrogate designation for a minor or power of attorney.

There shall be maintained in the treatment provider's records of the minor documentation that a reasonable attempt was made to contact the person who has the power to consent.

Section 2. Section 765.101, Florida Statutes, is amended to read:

765.101 Definitions.—As used in this chapter:

(1) "Advance directive" means a witnessed written document or oral statement in which instructions are given by a principal or in which the principal's desires are expressed concerning any aspect of the principal's health care or health information, and includes, but is not limited to, the designation of a health care surrogate, a living will, or an anatomical gift made pursuant to part V of this chapter.

~~(2) "Attending physician" means the primary physician who has responsibility for the treatment and care of the patient.~~

(2)~~(3)~~ "Close personal friend" means any person 18 years of age or older who has exhibited special care and concern for the patient, and who presents an affidavit to the health care facility or to the ~~attending or~~ treating physician stating that he or she is a friend of the patient; is willing and able to become involved in the patient's health care; and has maintained such regular contact with the patient so as to be familiar with the patient's activities, health, and religious or moral

beliefs.

(3) ~~(4)~~ "End-stage condition" means an irreversible condition that is caused by injury, disease, or illness which has resulted in progressively severe and permanent deterioration, and which, to a reasonable degree of medical probability, treatment of the condition would be ineffective.

(4) "Health care" means care, services, or supplies related to the health of an individual and includes, but is not limited to, preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the individual's physical or mental condition or functional status or that affect the structure or function of the individual's body.

(5) "Health care decision" means:

(a) Informed consent, refusal of consent, or withdrawal of consent to any and all health care, including life-prolonging procedures and mental health treatment, unless otherwise stated in the advance directives.

(b) The decision to apply for private, public, government, or veterans' benefits to defray the cost of health care.

(c) The right of access to health information ~~all records~~ of the principal reasonably necessary for a health care surrogate or proxy to make decisions involving health care and to apply for benefits.

(d) The decision to make an anatomical gift pursuant to part V of this chapter.

(6) "Health care facility" means a hospital, nursing home, hospice, home health agency, or health maintenance organization licensed in this state, or any facility subject to part I of

chapter 394.

(7) "Health care provider" or "provider" means any person licensed, certified, or otherwise authorized by law to administer health care in the ordinary course of business or practice of a profession.

(8) "Health information" means any information, whether oral or recorded in any form or medium, as defined in 45 C.F.R. s. 160.103 and the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. s. 1320d, as amended, that:

(a) Is created or received by a health care provider, health care facility, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and

(b) Relates to the past, present, or future physical or mental health or condition of the principal; the provision of health care to the principal; or the past, present, or future payment for the provision of health care to the principal.

(9) ~~(8)~~ "Incapacity" or "incompetent" means the patient is physically or mentally unable to communicate a willful and knowing health care decision. For the purposes of making an anatomical gift, the term also includes a patient who is deceased.

(10) ~~(9)~~ "Informed consent" means consent voluntarily given by a person after a sufficient explanation and disclosure of the subject matter involved to enable that person to have a general understanding of the treatment or procedure and the medically acceptable alternatives, including the substantial risks and hazards inherent in the proposed treatment or procedures, and to

make a knowing health care decision without coercion or undue influence.

(11) ~~(10)~~ "Life-prolonging procedure" means any medical procedure, treatment, or intervention, including artificially provided sustenance and hydration, which sustains, restores, or supplants a spontaneous vital function. The term does not include the administration of medication or performance of medical procedure, when such medication or procedure is deemed necessary to provide comfort care or to alleviate pain.

(12) ~~(11)~~ "Living will" or "declaration" means:

(a) A witnessed document in writing, voluntarily executed by the principal in accordance with s. 765.302; or

(b) A witnessed oral statement made by the principal expressing the principal's instructions concerning life-prolonging procedures.

(13) "Minor's principal" means a principal who is a natural guardian as defined in s. 744.301(1); legal custodian; or, subject to chapter 744, legal guardian of the person of a minor.

(14) ~~(12)~~ "Persistent vegetative state" means a permanent and irreversible condition of unconsciousness in which there is:

(a) The absence of voluntary action or cognitive behavior of any kind.

(b) An inability to communicate or interact purposefully with the environment.

(15) ~~(13)~~ "Physician" means a person licensed pursuant to chapter 458 or chapter 459.

(16) "Primary physician" means a physician designated by an individual or the individual's surrogate, proxy, or agent under a durable power of attorney as provided in chapter 709, to have

primary responsibility for the individual's health care or, in the absence of a designation or if the designated physician is not reasonably available, a physician who undertakes the responsibility.

(17) ~~(14)~~ "Principal" means a competent adult executing an advance directive and on whose behalf health care decisions are to be made or health care information is to be received, or both.

(18) ~~(15)~~ "Proxy" means a competent adult who has not been expressly designated to make health care decisions for a particular incapacitated individual, but who, nevertheless, is authorized pursuant to s. 765.401 to make health care decisions for such individual.

(19) "Reasonably available" means readily able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the patient's health care needs.

(20) ~~(16)~~ "Surrogate" means any competent adult expressly designated by a principal to make health care decisions and to receive health information. The principal may stipulate whether the authority of the surrogate to make health care decisions or to receive health information is exercisable immediately without the necessity for a determination of incapacity or only upon the principal's incapacity as provided in s. 765.204 ~~on behalf of the principal upon the principal's incapacity~~.

(21) ~~(17)~~ "Terminal condition" means a condition caused by injury, disease, or illness from which there is no reasonable medical probability of recovery and which, without treatment, can be expected to cause death.

Section 3. Present subsections (3) through (6) of section 765.102, Florida Statutes, are renumbered as subsections (4) through (7), respectively, present subsections (2) and (3) are amended, and a new subsection (3) is added to that section, to read:

765.102 Legislative findings and intent.—

(2) To ensure that such right is not lost or diminished by virtue of later physical or mental incapacity, the Legislature intends that a procedure be established to allow a person to plan for incapacity by executing a document or orally designating another person to direct the course of his or her health care or receive his or her health information, or both, ~~medical treatment~~ upon his or her incapacity. Such procedure should be less expensive and less restrictive than guardianship and permit a previously incapacitated person to exercise his or her full right to make health care decisions as soon as the capacity to make such decisions has been regained.

(3) The Legislature also recognizes that some competent adults may want to receive immediate assistance in making health care decisions or accessing health information, or both, without a determination of incapacity. The Legislature intends that a procedure be established to allow a person to designate a surrogate to make health care decisions or receive health information, or both, without the necessity for a determination of incapacity under this chapter.

(4) ~~(3)~~ The Legislature recognizes that for some the administration of life-prolonging medical procedures may result in only a precarious and burdensome existence. In order to ensure that the rights and intentions of a person may be

respected even after he or she is no longer able to participate actively in decisions concerning himself or herself, and to encourage communication among such patient, his or her family, and his or her physician, the Legislature declares that the laws of this state recognize the right of a competent adult to make an advance directive instructing his or her physician to provide, withhold, or withdraw life-prolonging procedures~~,~~ or to designate another to make the health care ~~treatment~~ decision for him or her in the event that such person should become incapacitated and unable to personally direct his or her health ~~medical~~ care.

Section 4. Subsection (1) of section 765.104, Florida Statutes, is amended to read:

765.104 Amendment or revocation.—

(1) An advance directive ~~or designation of a surrogate~~ may be amended or revoked at any time by a competent principal:

(a) By means of a signed, dated writing;

(b) By means of the physical cancellation or destruction of the advance directive by the principal or by another in the principal's presence and at the principal's direction;

(c) By means of an oral expression of intent to amend or revoke; or

(d) By means of a subsequently executed advance directive that is materially different from a previously executed advance directive.

Section 5. Section 765.105, Florida Statutes, is amended to read:

765.105 Review of surrogate or proxy's decision.—

(1) The patient's family, the health care facility, or the

~~attending~~ physician, or any other interested person who may reasonably be expected to be directly affected by the surrogate or proxy's decision concerning any health care decision may seek expedited judicial intervention pursuant to rule 5.900 of the Florida Probate Rules, if that person believes:

(a) ~~(1)~~ The surrogate or proxy's decision is not in accord with the patient's known desires or ~~the provisions of~~ this chapter;

(b) ~~(2)~~ The advance directive is ambiguous, or the patient has changed his or her mind after execution of the advance directive;

(c) ~~(3)~~ The surrogate or proxy was improperly designated or appointed, or the designation of the surrogate is no longer effective or has been revoked;

(d) ~~(4)~~ The surrogate or proxy has failed to discharge duties, or incapacity or illness renders the surrogate or proxy incapable of discharging duties;

(e) ~~(5)~~ The surrogate or proxy has abused his or her powers; or

(f) ~~(6)~~ The patient has sufficient capacity to make his or her own health care decisions.

(2) This section does not apply to a patient who is not incapacitated and who has designated a surrogate who has immediate authority to make health care decisions and receive health information, or both, on behalf of the patient.

Section 6. Subsection (1) of section 765.1103, Florida Statutes, is amended to read:

765.1103 Pain management and palliative care.—

(1) A patient shall be given information concerning pain

management and palliative care when he or she discusses with the ~~attending or~~ treating physician~~,~~ or such physician's designee, the diagnosis, planned course of treatment, alternatives, risks, or prognosis for his or her illness. If the patient is incapacitated, the information shall be given to the patient's health care surrogate or proxy, court-appointed guardian as provided in chapter 744, or attorney in fact under a durable power of attorney as provided in chapter 709. The court-appointed guardian or attorney in fact must have been delegated authority to make health care decisions on behalf of the patient.

Section 7. Section 765.1105, Florida Statutes, is amended to read:

765.1105 Transfer of a patient.—

(1) A health care provider or facility that refuses to comply with a patient's advance directive, or the treatment decision of his or her surrogate or proxy, shall make reasonable efforts to transfer the patient to another health care provider or facility that will comply with the directive or treatment decision. This chapter does not require a health care provider or facility to commit any act which is contrary to the provider's or facility's moral or ethical beliefs, if the patient:

(a) Is not in an emergency condition; and

(b) Has received written information upon admission informing the patient of the policies of the health care provider or facility regarding such moral or ethical beliefs.

(2) A health care provider or facility that is unwilling to carry out the wishes of the patient or the treatment decision of

his or her surrogate or proxy because of moral or ethical beliefs must within 7 days either:

(a) Transfer the patient to another health care provider or facility. The health care provider or facility shall pay the costs for transporting the patient to another health care provider or facility; or

(b) If the patient has not been transferred, carry out the wishes of the patient or the patient's surrogate or proxy, unless ~~the provisions of~~ s. 765.105 applies ~~apply~~.

Section 8. Subsections (1), (3), and (4) of section 765.202, Florida Statutes, are amended, present subsections (6) and (7) are renumbered as subsections (7) and (8), respectively, and a new subsection (6) is added to that section, to read:

765.202 Designation of a health care surrogate.—

(1) A written document designating a surrogate to make health care decisions for a principal or receive health information on behalf of a principal, or both, shall be signed by the principal in the presence of two subscribing adult witnesses. A principal unable to sign the instrument may, in the presence of witnesses, direct that another person sign the principal's name as required herein. An exact copy of the instrument shall be provided to the surrogate.

(3) A document designating a health care surrogate may also designate an alternate surrogate provided the designation is explicit. The alternate surrogate may assume his or her duties as surrogate for the principal if the original surrogate is not willing, able, or reasonably available ~~unwilling or unable~~ to perform his or her duties. The principal's failure to designate an alternate surrogate shall not invalidate the designation of a

surrogate.

(4) If neither the designated surrogate nor the designated alternate surrogate is willing, able, or reasonably available ~~able or willing~~ to make health care decisions on behalf of the principal and in accordance with the principal's instructions, the health care facility may seek the appointment of a proxy pursuant to part IV.

(6) A principal may stipulate in the document that the authority of the surrogate to receive health information or make health care decisions or both is exercisable immediately without the necessity for a determination of incapacity as provided in s. 765.204.

Section 9. Section 765.203, Florida Statutes, is amended to read:

765.203 Suggested form of designation.—A written designation of a health care surrogate executed pursuant to this chapter may, but need not be, in the following form:

DESIGNATION OF HEALTH CARE SURROGATE

I, ...(name)...., designate as my health care surrogate under s. 765.202, Florida Statutes:

Name: ...(name of health care surrogate)...
Address: ...(address)...
Phone: ...(telephone)...

If my health care surrogate is not willing, able, or reasonably available to perform his or her duties, I designate as my

alternate health care surrogate:

Name: ...(name of alternate health care surrogate)...
Address: ...(address)...
Phone: ...(telephone)...

INSTRUCTIONS FOR HEALTH CARE

I authorize my health care surrogate to:

...(Initial here)... Receive any of my health information, whether oral or recorded in any form or medium, that:

1. Is created or received by a health care provider, health care facility, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and

2. Relates to my past, present, or future physical or mental health or condition; the provision of health care to me; or the past, present, or future payment for the provision of health care to me.

I further authorize my health care surrogate to:

...(Initial here)... Make all health care decisions for me, which means he or she has the authority to:

1. Provide informed consent, refusal of consent, or withdrawal of consent to any and all of my health care, including life-prolonging procedures.

2. Apply on my behalf for private, public, government, or veterans' benefits to defray the cost of health care.

3. Access my health information reasonably necessary for the health care surrogate to make decisions involving my health care and to apply for benefits for me.

4. Decide to make an anatomical gift pursuant to part V of chapter 765, Florida Statutes.

...(Initial here)... Specific instructions and restrictions:.....
.....
.....

To the extent I am capable of understanding, my health care surrogate shall keep me reasonably informed of all decisions that he or she has made on my behalf and matters concerning me.

THIS HEALTH CARE SURROGATE DESIGNATION IS NOT AFFECTED BY MY SUBSEQUENT INCAPACITY EXCEPT AS PROVIDED IN CHAPTER 765, FLORIDA STATUTES.

MY HEALTH CARE SURROGATE'S AUTHORITY BECOMES EFFECTIVE WHEN MY PRIMARY PHYSICIAN DETERMINES THAT I AM UNABLE TO MAKE MY OWN HEALTH CARE DECISIONS UNLESS I INITIAL EITHER OR BOTH OF THE FOLLOWING BOXES:

IF I INITIAL THIS BOX [ ], MY HEALTH CARE SURROGATE'S AUTHORITY TO RECEIVE MY HEALTH INFORMATION TAKES EFFECT IMMEDIATELY.

IF I INITIAL THIS BOX [ ], MY HEALTH CARE SURROGATE'S AUTHORITY TO MAKE HEALTH CARE DECISIONS FOR ME TAKES EFFECT IMMEDIATELY.

SIGNATURES: Sign and date the form here:
...(date)... ...(sign your name)...
...(address)... ...(print your name)...
...(city)... ...(state)...

SIGNATURES OF WITNESSES:

First witness	Second witness
...(print name)...	...(print name)...
...(address)...	...(address)...
...(city)...	...(city)...
...(state)...	...(state)...
...(signature of witness)...	...(signature of witness)...
...(date)...	...(date)...

~~Name:....(Last)....(First)....(Middle Initial)....~~

~~In the event that I have been determined to be incapacitated to provide informed consent for medical treatment and surgical and diagnostic procedures, I wish to designate as my surrogate for health care decisions:~~

~~Name:.....~~

~~Address:.....~~

~~Zip Code:.....~~

~~.....~~

~~Phone:.....~~

~~If my surrogate is unwilling or unable to perform his or her duties, I wish to designate as my alternate surrogate:~~

~~Name:.....~~

~~Address:.....~~

~~Zip Code:.....~~

~~.....~~

~~Phone:.....~~

~~I fully understand that this designation will permit my designee to make health care decisions and to provide, withhold, or withdraw consent on my behalf; to apply for public benefits to defray the cost of health care; and to authorize my admission to or transfer from a health care facility.~~

~~Additional instructions (optional):.....~~

~~.....~~

~~.....~~

~~.....~~

~~I further affirm that this designation is not being made as a condition of treatment or admission to a health care facility. I will notify and send a copy of this document to the following persons other than my surrogate, so they may know who my surrogate is.~~

~~Name:.....~~

~~Name:.....~~

~~.....~~

~~.....~~

~~Signed:.....~~

~~Date:.....~~

~~Witnesses:~~ ~~1.....~~

~~2.....~~

Section 10. Section 765.2035, Florida Statutes, is created to read:

765.2035 Designation of a health care surrogate for a minor.—

(1) A natural guardian as defined in s. 744.301(1), legal custodian, or legal guardian of the person of a minor may designate a competent adult to serve as a surrogate to make health care decisions for the minor. Such designation shall be made by a written document signed by the minor's principal in the presence of two subscribing adult witnesses. If a minor's principal is unable to sign the instrument, the principal may, in the presence of witnesses, direct that another person sign the minor's principal's name as required by this subsection. An exact copy of the instrument shall be provided to the surrogate.

(2) The person designated as surrogate may not act as witness to the execution of the document designating the health care surrogate.

(3) A document designating a health care surrogate may also designate an alternate surrogate; however, such designation must be explicit. The alternate surrogate may assume his or her duties as surrogate if the original surrogate is not willing, able, or reasonably available to perform his or her duties. The minor's principal's failure to designate an alternate surrogate does not invalidate the designation.

(4) If neither the designated surrogate or the designated alternate surrogate is willing, able, or reasonably available to make health care decisions for the minor on behalf of the minor's principal and in accordance with the minor's principal's instructions, s. 743.0645(2) shall apply as if no surrogate had been designated.

(5) A natural guardian as defined in s. 744.301(1), legal custodian, or legal guardian of the person of a minor may designate a separate surrogate to consent to mental health

treatment for the minor. However, unless the document designating the health care surrogate expressly states otherwise, the court shall assume that the health care surrogate who is authorized to make health care decisions for a minor under this chapter is also the minor's principal's choice to make decisions regarding mental health treatment for the minor.

(6) Unless the document states a time of termination, the designation shall remain in effect until revoked by the minor's principal. An otherwise valid designation of a surrogate for a minor shall not be invalid solely because it was made before the birth of the minor.

(7) A written designation of a health care surrogate executed pursuant to this section establishes a rebuttable presumption of clear and convincing evidence of the minor's principal's designation of the surrogate and becomes effective pursuant to s. 743.0645(2)(a).

Section 11. Section 765.2038, Florida Statutes, is created to read:

765.2038 Designation of health care surrogate for a minor; suggested form.—A written designation of a health care surrogate for a minor executed pursuant to this chapter may, BUT NEED NOT, be, in the following form:

DESIGNATION OF HEALTH CARE SURROGATE

FOR MINOR

I/We, _...(name/names)..., the [....] natural guardian(s) as defined in s. 744.301(1), Florida Statutes; [....] legal custodian(s); [....] legal guardian(s) [check one] of the following minor(s):

.....;
.....;
.....,

pursuant to s. 765.2035, Florida Statutes, designate the following person to act as my/our surrogate for health care decisions for such minor(s) in the event that I/we am/are not able or reasonably available to provide consent for medical treatment and surgical and diagnostic procedures:

Name: ...(name)...
Address: ...(address)...
Zip Code: ...(zip code)...
Phone: ...(telephone)...

If my/our designated health care surrogate for a minor is not willing, able, or reasonably available to perform his or her duties, I/we designate the following person as my/our alternate health care surrogate for a minor:

Name: ...(name)...
Address: ...(address)...
Zip Code: ...(zip code)...
Phone: ...(telephone)...

I/We authorize and request all physicians, hospitals, or other providers of medical services to follow the instructions of my/our surrogate or alternate surrogate, as the case may be, at any time and under any circumstances whatsoever, with regard

to medical treatment and surgical and diagnostic procedures for a minor, provided the medical care and treatment of any minor is on the advice of a licensed physician.

I/We fully understand that this designation will permit my/our designee to make health care decisions for a minor and to provide, withhold, or withdraw consent on my/our behalf, to apply for public benefits to defray the cost of health care, and to authorize the admission or transfer of a minor to or from a health care facility.

I/We will notify and send a copy of this document to the following person(s) other than my/our surrogate, so that they may know the identity of my/our surrogate:

Name: ...(name)...
Name: ...(name)...

Signed: ...(signature)...
Date: ...(date)...

WITNESSES:
1. ...(witness)...
2. ...(witness)...

Section 12. Section 765.204, Florida Statutes, is amended to read:

765.204 Capacity of principal; procedure.—

(1) A principal is presumed to be capable of making health care decisions for herself or himself unless she or he is

determined to be incapacitated. Incapacity may not be inferred from the person's voluntary or involuntary hospitalization for mental illness or from her or his intellectual disability.

(2) If a principal's capacity to make health care decisions for herself or himself or provide informed consent is in question, the ~~attending~~ physician shall evaluate the principal's capacity and, if the physician concludes that the principal lacks capacity, enter that evaluation in the principal's medical record. If the ~~attending~~ physician has a question as to whether the principal lacks capacity, another physician shall also evaluate the principal's capacity, and if the second physician agrees that the principal lacks the capacity to make health care decisions or provide informed consent, the health care facility shall enter both physician's evaluations in the principal's medical record. If the principal has designated a health care surrogate or has delegated authority to make health care decisions to an attorney in fact under a durable power of attorney, the health care facility shall notify such surrogate or attorney in fact in writing that her or his authority under the instrument has commenced, as provided in chapter 709 or s. 765.203.

(3) The surrogate's authority shall commence upon a determination under subsection (2) that the principal lacks capacity, and such authority shall remain in effect until a determination that the principal has regained such capacity. Upon commencement of the surrogate's authority, a surrogate who is not the principal's spouse shall notify the principal's spouse or adult children of the principal's designation of the surrogate. In the event the ~~attending~~ physician determines that

the principal has regained capacity, the authority of the surrogate shall cease, but shall recommence if the principal subsequently loses capacity as determined pursuant to this section.

(4) Notwithstanding subsections (2) and (3), if the principal has designated a health care surrogate and has stipulated that the authority of the surrogate is to take effect immediately, or has appointed an agent under a durable power of attorney as provided in chapter 709 to make health care decisions for the principal, the health care facility shall notify such surrogate or agent in writing when a determination of incapacity has been entered into the principal's medical record.

(5) ~~(4)~~ A determination made pursuant to this section that a principal lacks capacity to make health care decisions shall not be construed as a finding that a principal lacks capacity for any other purpose.

(6) ~~(5)~~ If ~~In the event~~ the surrogate is required to consent to withholding or withdrawing life-prolonging procedures, ~~the provisions of~~ part III applies ~~shall apply~~.

Section 13. Section 765.205, Florida Statutes, is amended to read:

765.205 Responsibility of the surrogate.—

(1) The surrogate, in accordance with the principal's instructions, unless such authority has been expressly limited by the principal, shall:

(a) Have authority to act for the principal and to make all health care decisions for the principal during the principal's incapacity.

(b) Consult expeditiously with appropriate health care providers to provide informed consent, and make only health care decisions for the principal which he or she believes the principal would have made under the circumstances if the principal were capable of making such decisions. If there is no indication of what the principal would have chosen, the surrogate may consider the patient's best interest in deciding that proposed treatments are to be withheld or that treatments currently in effect are to be withdrawn.

(c) Provide written consent using an appropriate form whenever consent is required, including a physician's order not to resuscitate.

(d) Be provided access to the appropriate health information ~~medical records~~ of the principal.

(e) Apply for public benefits, such as Medicare and Medicaid, for the principal and have access to information regarding the principal's income and assets and banking and financial records to the extent required to make application. A health care provider or facility may not, however, make such application a condition of continued care if the principal, if capable, would have refused to apply.

(2) The surrogate may authorize the release of health information ~~and medical records~~ to appropriate persons to ensure the continuity of the principal's health care and may authorize the admission, discharge, or transfer of the principal to or from a health care facility or other facility or program licensed under chapter 400 or chapter 429.

(3) Notwithstanding subsections (1) and (2), if the principal has designated a health care surrogate and has

stipulated that the authority of the surrogate is to take effect immediately, or has appointed an agent under a durable power of attorney as provided in chapter 709 to make health care decisions for the principal, the fundamental right of self-determination of every competent adult regarding his or her health care decisions shall be controlling. Before implementing a health care decision made for a principal who is not incapacitated, the primary physician, another physician, a health care provider, or a health care facility, if possible, must promptly communicate to the principal the decision made and the identity of the person making the decision.

(4) ~~(3)~~ If, after the appointment of a surrogate, a court appoints a guardian, the surrogate shall continue to make health care decisions for the principal, unless the court has modified or revoked the authority of the surrogate pursuant to s. 744.3115. The surrogate may be directed by the court to report the principal's health care status to the guardian.

Section 14. Subsection (2) of section 765.302, Florida Statutes, is amended to read:

765.302 Procedure for making a living will; notice to physician.—

(2) It is the responsibility of the principal to provide for notification to her or his ~~attending or~~ treating physician that the living will has been made. In the event the principal is physically or mentally incapacitated at the time the principal is admitted to a health care facility, any other person may notify the physician or health care facility of the existence of the living will. A ~~An attending or~~ treating physician or health care facility which is so notified shall

promptly make the living will or a copy thereof a part of the principal's medical records.

Section 15. Subsection (1) of section 765.303, Florida Statutes, is amended to read:

765.303 Suggested form of a living will.—

(1) A living will may, BUT NEED NOT, be in the following form:

Living Will

Declaration made this .... day of ...., ...(year)..., I, ..., willfully and voluntarily make known my desire that my dying not be artificially prolonged under the circumstances set forth below, and I do hereby declare that, if at any time I am incapacitated and

...(initial)... I have a terminal condition

or ...(initial)... I have an end-stage condition

or ...(initial)... I am in a persistent vegetative state

and if my ~~attending or~~ treating physician and another consulting physician have determined that there is no reasonable medical probability of my recovery from such condition, I direct that life-prolonging procedures be withheld or withdrawn when the application of such procedures would serve only to prolong artificially the process of dying, and that I be permitted to die naturally with only the administration of medication or the performance of any medical procedure deemed necessary to provide me with comfort care or to alleviate pain.

It is my intention that this declaration be honored by my family and physician as the final expression of my legal right to refuse medical or surgical treatment and to accept the

consequences for such refusal.

In the event that I have been determined to be unable to provide express and informed consent regarding the withholding, withdrawal, or continuation of life-prolonging procedures, I wish to designate, as my surrogate to carry out the provisions of this declaration:

Name:.....

Address:.....

Zip

..... Code:.....

Phone:.....

I understand the full import of this declaration, and I am emotionally and mentally competent to make this declaration.

Additional Instructions (optional):

.....

.....

.....

....(Signed)....

....Witness....

....Address....

....Phone....

....Witness....

....Address....

....Phone....

Section 16. Subsection (1) of section 765.304, Florida Statutes, is amended to read:

765.304 Procedure for living will.—

(1) If a person has made a living will expressing his or her desires concerning life-prolonging procedures, but has not designated a surrogate to execute his or her wishes concerning life-prolonging procedures or designated a surrogate under part II, the person's ~~attending~~ physician may proceed as directed by the principal in the living will. In the event of a dispute or disagreement concerning the ~~attending~~ physician's decision to withhold or withdraw life-prolonging procedures, the ~~attending~~ physician shall not withhold or withdraw life-prolonging procedures pending review under s. 765.105. If a review of a disputed decision is not sought within 7 days following the ~~attending~~ physician's decision to withhold or withdraw life-prolonging procedures, the ~~attending~~ physician may proceed in accordance with the principal's instructions.

Section 17. Section 765.306, Florida Statutes, is amended to read:

765.306 Determination of patient condition.—In determining whether the patient has a terminal condition, has an end-stage condition, or is in a persistent vegetative state or may recover capacity, or whether a medical condition or limitation referred to in an advance directive exists, the patient's ~~attending or~~ treating physician and at least one other consulting physician must separately examine the patient. The findings of each such examination must be documented in the patient's medical record and signed by each examining physician before life-prolonging procedures may be withheld or withdrawn.

Section 18. Section 765.404, Florida Statutes, is amended to read:

765.404 Persistent vegetative state.—For persons in a persistent vegetative state, as determined by the person's ~~attending~~ physician in accordance with currently accepted medical standards, who have no advance directive and for whom there is no evidence indicating what the person would have wanted under such conditions, and for whom, after a reasonably diligent inquiry, no family or friends are available or willing to serve as a proxy to make health care decisions for them, life-prolonging procedures may be withheld or withdrawn under the following conditions:

(1) The person has a judicially appointed guardian representing his or her best interest with authority to consent to medical treatment; and

(2) The guardian and the person's ~~attending~~ physician, in consultation with the medical ethics committee of the facility where the patient is located, conclude that the condition is permanent and that there is no reasonable medical probability for recovery and that withholding or withdrawing life-prolonging procedures is in the best interest of the patient. If there is no medical ethics committee at the facility, the facility must have an arrangement with the medical ethics committee of another facility or with a community-based ethics committee approved by the Florida Bio-ethics Network. The ethics committee shall review the case with the guardian, in consultation with the person's ~~attending~~ physician, to determine whether the condition is permanent and there is no reasonable medical probability for recovery. The individual committee members and the facility associated with an ethics committee shall not be held liable in any civil action related to the performance of any duties

required in this subsection.

Section 19. Paragraph (c) of subsection (1) of section 765.516, Florida Statutes, is amended to read:

765.516 Donor amendment or revocation of anatomical gift.—

(1) A donor may amend the terms of or revoke an anatomical gift by:

(c) A statement made during a terminal illness or injury addressed to a treating ~~an attending~~ physician, who must communicate the revocation of the gift to the procurement organization.

Section 20. This act shall take effect October 1, 2015.

The Florida Senate

COMMITTEE VOTE RECORD

COMMITTEE: Judiciary
ITEM: SB 1224
FINAL ACTION: Favorable with Committee Substitute
MEETING DATE: Tuesday, March 31, 2015
TIME: 4:00 —6:00 p.m.
PLACE: 110 Senate Office Building

FINAL VOTE			3/31/2015 1 Amendment 872356 Joyner					
Yea	**Nay**	**SENATORS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
X		Bean						
X		Benacquisto						
X		Brandes						
X		Joyner						
X		Simmons						
X		Simpson						
X		Soto						
X		Stargel						
		Ring, VICE CHAIR						
X		Diaz de la Portilla, CHAIR						
9	0	**TOTALS**	RCS	-				
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:
Appropriations Subcommittee on Criminal and Civil Justice, *Vice Chair*
Appropriations
Health Policy
Higher Education
Judiciary
Rules

JOINT COMMITTEE:
Joint Legislative Budget Commission

SENATOR ARTHENIA L. JOYNER
Democratic Leader
19th District

March 3, 2015

Senator Miguel Diaz de la Portilla, Chair
Senate Committee on Judiciary
515 Knott Building
404 S. Monroe Street
Tallahassee, FL 32399-1100

Dear Chairman Diaz de la Portilla:

This is to request that Senate Bill 1224, Health Care Representatives, be placed on the agenda for the Committee on Judiciary. Your consideration of this request is greatly appreciated.

Sincerely,

Arthenia L. Joyner
State Senator, District 19

ALJ/rr

REPLY TO:
☐ 508 W. Dr. Martin Luther King, Jr. Blvd., Suite C, Tampa, Florida 33603-3415 (813) 233-4277
☐ 200 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5019 FAX: (813) 233-4280

Senate's Website: *www.flsenate.gov*

ANDY GARDINER
President of the Senate

GARRETT RICHTER
President Pro Tempore

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3·31·15
Meeting Date

SB 1224
Bill Number (if applicable)

Topic _____

Amendment Barcode (if applicable)

Name Martha Edenfield

Job Title _____

Address 215 So. Monroe Street # 815
Street

Tallahassee FL 32301
City *State* *Zip*

Phone 850-999-4100

Email medenfield@deanmead.com

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against
(The Chair will read this information into the record.)

Representing The Real Property, Probate + Trust Law Section of the Florida Bar

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 1298
INTRODUCER:	Senator Simmons
SUBJECT:	Insurance for Short-term Rental and Transportation Network Companies
DATE:	March 30, 2015 REVISED: 03/31/15

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Billmeier	Knudson	BI	**Favorable**
2.	Brown	Cibula	JU	**Favorable**
3.			AP	

I. Summary:

SB 1298 specifies minimum insurance requirements for short-term rental network (STR) and transportation network companies (TNC). The bill requires the TNC and the STR to provide written notice to drivers and lessors of the insurance provided by the TNC and STR and requires the insurer to indemnify and defend its insured.

A short-term rental network company is an online website, such as airbnb.com, which facilitates rentals of private lodgings ranging from the rental of a room in a home to an entire house or apartment. A transportation network company application, or app, such as uber.com, connects persons who need transportation by vehicle to private drivers. Compensation is charged for both services.

Short-term Rental Network Company

The bill requires a short-term rental network company to carry primary insurance that insures the participating lessor for personal injury and property damage in an amount of at least $1 million of liability coverage. The bill does not limit the liability of a short term rental network company for an amount that exceeds coverage limits.

Transportation Network Companies

The bill requires transportation network companies to carry insurance. The bill creates two time periods during which the TNC insurance must provide different coverages: a "ride-acceptance" period and an "on-call" period. The ride acceptance period is the period from the time a driver accepts a ride request to the time the ride is completed.

The bill requires the TNC to carry, during the ride-acceptance period liability coverage of at least $1 million for death, bodily injury, and property damage and uninsured and underinsured

motorist coverage, personal injury protection, and physical damage coverage if the driver carries this coverage on a personal motor vehicle insurance policy.

The "on-call" period is the period of time when a driver is using the application to find passengers but has not accepted a ride request. During the on-call period, the TNC company insurance must provide insurance coverage, including liability coverage for death and bodily injury of at least $125,000 per person and $250,000 per incident, liability coverage for property damage of at least $50,000, and uninsured and underinsured motorist coverage of at least $250,000.

II. Present Situation:

Technological advances have led to new methods for consumers to arrange and pay for transportation and short-term rentals, including software applications that make use of mobile smartphone applications, Internet web pages, and email and text messages.

Ridesharing companies, such as Lyft, Uber, and SideCar, describe themselves as "transportation network companies" (TNCs), rather than as vehicles for hire. Short-term rental companies (STRs), such as Airbnb, use the Internet or smartphone applications to connect potential hosts who wish to rent their homes or rooms in their homes with persons who desire short-term rentals.

Short-term Rental Networks

Many homeowner policies exclude from coverage losses that occur when the home is used for business purposes. This exclusion can lead to situations in which homeowners who use their homes for short-term rentals are subject to liability claims without liability insurance. Short-term rental networks are dealing with the issue in different ways. One company advertises an insurance product that replaces homeowner coverage and provides short-term rental coverage as well.[1] Another provides coverage as part of its agreement with clients as secondary coverage.[2] However, some homeowner policies cover short-term rentals in certain situations.[3] According to the Office of Insurance Regulation, at least one property insurer in the state allows short term rentals of 1-3 weeks with eligibility subject to an underwriting evaluation and an additional $50 premium. In contrast, the Florida Hurricane Catastrophe Fund (FHCF) will not provide coverage if a property is rented for six or more rental periods to different renters in a 12 month period.[4]

A number of cities and counties regulate short-term rentals by imposing restrictions, requiring licensing, and charging taxes. The city of St. Helena, California adopted perhaps the most restrictive ordinance on short-term rentals, short of an outright ban. Under the ordinance, short-term rentals must have a permit. Permit applicants must submit an application containing a floor plan of the property, a non-refundable fee of $1,075, and a $200 fee for a mailing list and labels

[1] *See* HomeAway, *Do I need a special vacation rental insurance policy for my property?* http://help.homeaway.com/articles/en_US/Article/Do-I-need-a-special-vacation-rental-insurance-policy-for-my-property(last visited March 28, 2015).
[2] *See* Airbnb, *Host Protection Insurance*, https://www.airbnb.com/host-protection-insurance (last visited March 28, 2015).
[3] *See* Ron Lieber, *A Liability Risk for Airbnb Hosts*, THE NEW YORK TIMES, (December 5, 2014) http://www.nytimes.com/2014/12/06/your-money/airbnb-offers-homeowner-liability-coverage-but-hosts-still-have-risks.html.
[4] Office of Insurance Regulation, *2015 Agency Legislative Bill Analysis* (March 9, 2015).

for the planning department to notify neighbors. Proof of a fire inspection, subject to reinspection annually, is also required. If 30 percent of neighbors file a written protest, the planning commission will hold a hearing to review the application. Once issued, a permit for a short-term rental is valid for 2 years.

The ordinance also imposes conditions on properties used as short-term rentals and their owners. For example, the rental must provide at least two on-site parking spaces, the property may not be a multi-family unit, and the owner must include house policies in rental agreements which are posted in each guest bedroom. Owners must collect and remit to the city a 12 percent transient occupancy tax.[5]

Transportation Network Companies

Ridesharing companies, or transportation network companies, use smartphone technology to connect individuals who want to ride with private drivers for a fee. A driver logs onto a phone application that indicates the driver is ready to accept passengers. Potential passengers log on, learn which drivers are nearby, see photographs, receive a fare estimate, and decide whether to accept a ride. If the passenger accepts a ride, the driver is notified and proceeds to pick up the passenger. Once at the destination, payment is made through the phone application.

Some state and local governments have taken steps to recognize and regulate companies using these new technologies. Six states so far, California, Colorado, Illinois, Kentucky, Rhode Island, and Virginia, along with Washington, D.C., have enacted legislation regarding transportation network companies.[6]

Drivers generally use their personal vehicles and most personal automobile policies contain a "livery" exclusion that excludes coverage if the vehicle is carrying passengers for hire.[7] Consequently, most personal automobile insurance policies do not cover damage or loss when a car is being used for commercial ridesharing. Some ridesharing companies provide insurance for portions of the time when the driver is operating the vehicle. For example, Uber advertises that its policy provides from the moment a driver accepts a trip to its conclusion, $1 million of liability per incident, $1 million of uninsured/underinsured motorist coverage per incident, and comprehensive and collision insurance if the driver holds personal comprehensive and collision coverage on the vehicle.[8] Coverage provided by ridesharing companies is often secondary to a

[5] MUN. CODE CHAPTER 17.134, St. Helena, CA; Other cities and counties that regulate short-term rentals include: Austin, TX (requires all persons who wish to provide short-term rentals for less than 30 consecutive days to possess an operating license, provide notice to adjacent neighbors through the planning department, and submit a $285 application fee (ORD. NO. 20130926-144)); Monterey County (requires an administrative permit, minimum rentals of 7 consecutive days or the longer if specified in the property covenants or conditions, and provides that a person who violates the ordinance is subject to a misdemeanor charge (ORD. NO. 21.64.280)); Maui County (prohibits short-term rentals outside of the hotel district and imposes a $1,000 fine for violations, along with a daily fine of up to $1,000 (MAUI CTY. CODE CH. 19.37)); Pacific County (requires licensing and collection of local taxes, including the local lodging tax (PACIFIC CTY. ORD. NO. 162)). National Conference of State Legislatures (NCSL), E-mail from Erica Michel (Mar. 26, 2015) (on file with the Senate Committee on Judiciary).

[6] National Conference of State Legislatures (NCSL), *State TNC Regulatory Actions 2014-2015* (March 23, 2015) (on file with the Senate Committee on Judiciary).

[7] The "livery" exclusion in Florida is mentioned in the definition of "motor vehicle insurance" contained in s. 627.041, F.S.

[8] *See* Uber, *Insurance for Uberx with Ridesharing*, (February 10, 2014) http://blog.uber.com/ridesharinginsurance and Uber, *Eliminating Ridesharing Insurance Ambiguity*, (February 14, 2014) http://blog.uber.com/uberXridesharinginsurance.

driver's personal insurance policy. Secondary coverage means that the ridesharing company policy provides coverage when the personal policy does not.

Taxis and limousines must maintain a motor vehicle liability policy with minimum limits of $125,000 per person for bodily injury, up to $250,000 per incident for bodily injury, and $50,000 for property damage.[9]

III. Effect of Proposed Changes:

The bill specifies minimum insurance requirements on short-term rentals and transportation network companies. A short-term rental network (STR) company is an online website, such as airbnb.com, which facilitates rentals of private lodgings ranging from the rental of a room in a home to an entire house or apartment. A transportation network company (TNC) website, such as uber.com, connects persons who need transportation by vehicle to private drivers.

Short-Term Rental Network Company Insurance

The bill defines the following terms:

- An application is an Internet-enabled application or platform owned or used by a short-term rental network company or any similar method of providing rental services to a participating renter.
- A participating lessor is a person who makes a short-term rental property available through an application to participating renters.
- A short-term rental network company is an entity for which participating lessors provide prearranged, short-term rentals for compensation using an application to connect a participating renter with a participating lessor.
- A short-term rental property can be all or part of a residential property, condominium, tenancy in common, apartment, or other rental unit.

The bill requires short-term rental network companies to carry insurance that:

- Is primary.
- Insures the participating lessor against direct physical loss to the property and its contents, exclusive of the property of the renter, with limits equal to any multi- or named-peril property insurance maintained by the lessor.
- Provides liability coverage for personal injury and property damage with limits of at least $1 million to cover the short-term rental network company, a lessor, and persons using or occupying the property.
- May not require as a prerequisite of coverage that another insurance policy first deny a claim.

The bill does not limit liability of a short term rental network company for an amount that exceeds coverage limits.

The bill requires a short-term rental network company to provide written notice to a participating lessor relating to insurance coverage. The notice must:

[9] *See* s. 324.032(1), F.S.

- Inform the participating lessor of the insurance coverages and limits of liability that the short-term rental network company provides during the short-term rental period.
- Advise the participating lessor in writing that the participating lessor's personal insurance policy may not provide the insurance coverage required by the bill.

The bill requires an insurer that provides short-term rental network company insurance to defend and indemnify the insured.

During the short-term rental period, the participating lessor's personal insurance policy for the short term rental property may not:
- Be required to provide primary or excess coverage.
- Provide any coverage to the participating lessor, the participating renter, or a third party unless the policy expressly provides this coverage.
- Provide a duty to indemnify or defend for liabilities arising during the short-term rental period unless the policy expressly provides.

Before or after the rental period, the lessor's personal policy for the rental property may not provide coverage for claims arising from any rental arrangement entered into by a renter with the company or the lessor for the property or for acts and omissions related to the rental arrangement unless the policy provides for such coverage.

The bill requires a short-term rental network company or its insurer to cooperate with other insurers in a claims investigation to facilitate the exchange of information. The information must include the number and duration of all short-term rental periods made with respect to the short-term rental property for the 12 months preceding the date of loss.

Transportation Network Company Insurance

This bill defines a transportation network company as an entity for which drivers provide transportation services for compensation using an application to connect a passenger with a driver.

The bill requires TNCs to carry insurance.[10] The bill creates two time periods during which the TNC insurance must provide different coverages: a "ride-acceptance" period and an "on-call" period.

The bill defines "ride-acceptance" period as starting when a driver accepts a ride request made through an application and ending when the driver completes the ride request on the application or the ride is completed, whichever is later. If the ride is not completed, the ride-acceptance period ends at the time the ride request is terminated by the driver or requester.

During the ride-acceptance period, the TNC insurance must provide:
- Liability coverage of at least $1 million for death, bodily injury, and property damage.
- Uninsured and underinsured motorist coverage of at least $1 million.

[10] The bill defines TNC insurance as "an insurance policy that expressly provides coverage for a participating driver's use of a motor vehicle in connection with an application."

- Personal injury protection as required under s. 627.736, F.S.
- Physical damage coverage, including collision or comprehensive physical damage coverage, if the driver carries such coverage on his or her personal motor vehicle insurance policy.

The bill defines the "on-call" period as the period:
- Beginning at the time the driver logs onto an application and ending at the time the driver accepts a ride request through the application; or
- Beginning at the time the driver completes a ride request on an application, or the ride is complete, whichever is later, or, if not completed, beginning at the time the ride request is terminated by the driver or requester, and ending at the time the driver accepts another ride request on the application or logs off the application.

During the on-call period, the TNC company insurance must provide:
- Liability coverage for death and bodily injury of at least $125,000 per person and $250,000 per incident.
- Liability coverage for property damage of at least $50,000.
- Uninsured and underinsured motorist coverage of at least $250,000.
- Personal injury protection as required under s. 627.736, F.S
- Physical damage coverage, including collision or comprehensive physical damage coverage, if the driver carries the coverage on a personal motor vehicle insurance policy.

Coverage requirements may be satisfied by TNC insurance maintained by a driver, by a company, or by both. If the requirement is satisfied by a policy maintained by the driver, the TNC must verify that the insurance policy is specifically written to cover the driver's use of a motor vehicle in connection with an application. If a driver fails to continuously maintain the required insurance, the TNC must provide it. The TNC insurance policy may not require as a condition of coverage that coverage first be denied under another motor vehicle insurance policy.

The bill requires a participating driver to carry proof of TNC insurance coverage at all times during the use of a motor vehicle in connection with an application. If the participating driver is involved in an accident, the driver shall provide insurance coverage information to any party involved in the accident and to a police officer.

The bill requires a TNC to disclose in writing to a participating driver the insurance coverage and limits of liability the company provides when the driver uses a motor vehicle in connection with an application. The company shall advise the driver that the personal motor vehicle insurance policy of the driver may not provide the required insurance coverage.

The bill requires an insurer that provides TNC insurance to defend and indemnify the insured.

The bill provides that it cannot be construed to require a participating driver's personal motor vehicle insurance policy to provide primary or excess coverage during the on-call period or the ride-acceptance period. The personal motor vehicle insurance policy of the driver or motor vehicle owner may not, during the on-call period or ride-acceptance period, provide any coverage to the driver, motor vehicle owner, or a third party or have a duty to defend or

indemnify the driver's activities in connection with the company unless the policy expressly provides otherwise.

The bill requires the TNC or its insurer to cooperate with other insurers in a claims investigation to facilitate the exchange of information. The information must include the date and time at which the accident occurred which involved a participating driver and the precise times that the driver logged on and off the application.

This bill takes effect July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill imposes insurance requirements on STRs and TNCs which do not currently exist in law. The cost of complying with insurance requirements is not known. If the cost of insurance mandated by the bill is significant, the bill may have a negative effect on the businesses that are unable to absorb the costs or pass the costs onto their customers.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill takes effect July 1, 2015. Whether insurers will be able to offer the required policies by that date is unknown.

The bill could have the effect of requiring licensees such as hotels and motels, pursuant to ch. 509, F.S., to obtain insurance.

The bill does not contain enforcement provisions if TNC companies do not comply with the insurance requirements.

The Office of Insurance Regulation notes that TNC insurance is required to include physical damage coverage, but limits of coverage and deductibles are not specified.[11]

VIII. Statutes Affected:

The bill creates the following sections of the Florida Statutes: 627.716 and 627.748.

IX. Additional Information:

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

None.

B. Amendments:

None.

[11] Office of Ins. Reg., *supra* note 4, at 3.

By Senator Simmons

10-00842A-15 20151298__

A bill to be entitled

An act relating to insurance for short-term rental and transportation network companies; creating s. 627.716, F.S.; defining terms; establishing insurance requirements for short-term rental network companies during certain timeframes; requiring a short-term rental network company to make certain written disclosures to participating lessors; requiring an insurer to defend and indemnify an insured in this state; prohibiting the personal insurance policy of a participating lessor of a short-term rental property from providing specified coverage during certain timeframes except under specified circumstances; requiring a short-term rental network company and its insurer to cooperate with certain claims investigations; providing that the section does not limit the liability of a short-term rental network company under specified circumstances; creating s. 627.748, F.S.; defining terms; establishing insurance requirements for transportation network companies and participating drivers during certain timeframes; requiring a transportation network company to make certain written disclosures to participating drivers; requiring an insurer to defend and indemnify an insured in this state; prohibiting the personal motor vehicle insurance policy of a participating driver from providing specified coverage during certain timeframes except under specified circumstances; requiring a transportation network company and its

10-00842A-15 20151298__

insurer to cooperate with certain claims investigations; requiring participating drivers to carry proof of insurance coverage; providing for application of certain coverage requirements; providing an effective date.

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

Section 1. Section 627.716, Florida Statutes, is created to read:

627.716 Short-term rental network company insurance.—

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

(a) "Application" means an Internet-enabled application or platform owned or used by a short-term rental network company or any similar method of providing rental services to a participating renter.

(b) "Participating lessor" means a person who makes a short-term rental property available through an application to participating renters.

(c) "Participating renter" means a person who enters into a short-term rental arrangement through an application.

(d) "Short-term rental network company" or "company" means an organization, including, but not limited to, a corporation, limited liability company, partnership, sole proprietorship, or other entity for which participating lessors provide prearranged, short-term rentals for compensation using an application to connect a participating renter with a participating lessor.

(e) "Short-term rental network company insurance" means an

insurance policy that expressly provides coverage as required by this section at all times during the short-term rental period.

(f) "Short-term rental period" means the period beginning at the time the participating renter first uses or occupies the short-term rental property and ending at the time the participating renter vacates the short-term rental property.

(g) "Short-term rental property" means the entirety or any portion of a residential property, condominium, tenancy in common, apartment, or other rental unit located in this state which is owned or rented by a participating lessor.

(2)(a) During the short-term rental period, a short-term rental network company shall maintain short-term rental network company insurance that is primary and that:

1. Insures the participating lessor against direct physical loss to the short-term rental property and its contents, exclusive of the property of the participating renter, with limits equal to any multi- or named-peril property insurance maintained by the participating lessor.

2. Provides liability coverage for personal injury and property damage with limits of at least $1 million which covers the acts and omissions of the short-term rental network company, a participating lessor, and all persons using or occupying the short-term rental property.

(b) Short-term rental network company insurance may not require as a prerequisite of coverage that another insurance policy first deny a claim.

(3) A short-term rental network company shall disclose in writing to a participating lessor the insurance coverages and limits of liability that the short-term rental network company

provides during the short-term rental period. The company shall advise the participating lessor in writing that the participating lessor's personal insurance policy may not provide the insurance coverage required by subsection (2).

(4) An insurer that provides short-term rental network company insurance shall defend and indemnify in this state the insured in accordance with the policy's provisions.

(5)(a) During the short-term rental period, the participating lessor's personal insurance policy for the short-term rental property may not:

1. Be required to provide primary or excess coverage.

2. Provide any coverage to the participating lessor, the participating renter, or a third party unless the policy, with or without a separate charge, expressly provides for such coverage or contains an amendment or endorsement to provide such coverage.

3. Have any duty to indemnify or defend for liabilities arising during the short-term rental period unless the policy, with or without a separate charge, expressly provides for such duties or contains an amendment or endorsement to provide for such duties.

(b) Before or after the short-term rental period, the participating lessor's personal policy for the short-term rental property may not provide coverage for claims arising from any rental arrangement entered into by a participating renter with the short-term rental company or the participating lessor for the short-term rental property or for acts and omissions related to the rental arrangement unless the policy, with or without a separate charge, provides for such coverage or contains an

amendment or endorsement to provide such coverage.

(6) In a claims investigation, a short-term rental network company or its insurer shall cooperate with other insurers to facilitate the exchange of information, which must include the number and duration of all short-term rental periods made with respect to the short-term rental property for the 12 months preceding the date of loss.

(7) This section does not limit the liability of a short-term rental network company arising out of the use or occupancy of short-term rental property by a participating renter for an amount that exceeds the limits specified in subsection (2).

Section 2. Section 627.748, Florida Statutes, is created to read:

627.748 Transportation network company insurance.—

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

(a) "Application" means an Internet-enabled application or platform owned or used by a transportation network company or any similar method for providing transportation services to a passenger.

(b) "On-call period" means the period beginning at the time the driver:

1. Logs onto an application and ending at the time the driver accepts a ride request through the application; or

2. Completes a ride request on an application, or the ride is complete, whichever is later, or, if not completed, beginning at the time the ride request is terminated by the driver or requester, and ending at the time the driver accepts another ride request on the application or logs off the application.

(c) "Participating driver" or "driver" means a person who

uses a motor vehicle in connection with an application to connect with a passenger.

(d) "Ride-acceptance period" means the period beginning at the time a driver accepts a ride request made through an application and ending at the time the driver completes the ride request on the application or the ride is completed, whichever is later, or, if not completed, ending at the time the ride request is terminated by the driver or requester.

(e) "Transportation network company" or "company" means an organization, including, but not limited to, a corporation, limited liability company, partnership, sole proprietorship, or other entity for which drivers operating a vehicle in this state provide transportation services for compensation using an application to connect a passenger with a participating driver.

(f) "Transportation network company insurance" means an insurance policy that expressly provides coverage for a participating driver's use of a motor vehicle in connection with an application.

(2)(a) During the ride-acceptance period, transportation network company insurance must provide:

1. Liability coverage of at least $1 million for death, bodily injury, and property damage.

2. Uninsured and underinsured motorist coverage of at least $1 million.

3. Personal injury protection as required under s. 627.736.

4. Physical damage coverage, including collision or comprehensive physical damage coverage, if the driver carries such coverage on his or her personal motor vehicle insurance policy.

(b) During the on-call period, transportation network company insurance must provide:

1. Liability coverage for death and bodily injury of at least $125,000 per person and $250,000 per incident.

2. Liability coverage for property damage of at least $50,000.

3. Uninsured and underinsured motorist coverage of at least $250,000.

4. Personal injury protection as required under s. 627.736.

5. Physical damage coverage, including collision or comprehensive physical damage coverage, if the driver carries such coverage on his or her personal motor vehicle insurance policy.

(c) The coverage requirements of this subsection may be satisfied by transportation network company insurance maintained by a driver, by a company, or, in combination, by both. If the requirement is satisfied by a policy maintained by the driver, the company shall verify that the insurance policy is specifically written to cover the driver's use of a motor vehicle in connection with an application. If a driver fails to continuously maintain the transportation network company insurance required by this subsection, the transportation network company shall provide such insurance.

(d) A transportation network company insurance policy may not require as a prerequisite of coverage that another motor vehicle insurance policy first deny a claim.

(3) A transportation network company shall disclose in writing to a participating driver the insurance coverage and limits of liability the company provides when the driver uses a

motor vehicle in connection with an application. The company shall advise the driver that the personal motor vehicle insurance policy of the driver may not provide the insurance coverage required under subsection (2), except as provided in subsection (5).

(4) An insurer that provides transportation network company insurance shall defend and indemnify in this state the insured in accordance with the policy's provisions.

(5)(a) This section may not be construed to require that a participating driver's personal motor vehicle insurance policy provide primary or excess coverage during the on-call period or the ride-acceptance period.

(b) Unless the policy expressly provides otherwise, with or without a separate charge, or the policy contains an amendment or endorsement to provide such coverage, for which a separately stated premium is charged, the personal motor vehicle insurance policy of the driver or motor vehicle owner may not, during the on-call period or ride-acceptance period, provide any coverage to the driver, motor vehicle owner, or a third party or have a duty to defend or indemnify the driver's activities in connection with the company.

(6) In a claims investigation, a transportation network company or its insurer shall cooperate with other insurers to facilitate the exchange of information, which must include the date and time at which the accident occurred which involved a participating driver and the precise times that the driver logged on and off the application.

(7) A participating driver shall carry proof of transportation network company insurance coverage at all times

during his or her use of a motor vehicle in connection with an application. In the event of an accident, a driver shall, upon request, provide insurance coverage information to any party involved in the accident and to a police officer.

(8) Notwithstanding any law regarding primary or excess policy coverage, this section determines the minimum obligations of an insurance policy issued to a transportation network company and a participating driver using a motor vehicle in connection with an application.

Section 3. This act shall take effect July 1, 2015.

The Florida Senate

COMMITTEE VOTE RECORD

COMMITTEE: Judiciary
ITEM: SB 1298
FINAL ACTION: Favorable
MEETING DATE: Tuesday, March 31, 2015
TIME: 4:00 —6:00 p.m.
PLACE: 110 Senate Office Building

FINAL VOTE								
Yea	**Nay**	**SENATORS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
X		Bean						
X		Benacquisto						
X		Brandes						
X		Joyner						
X		Simmons						
X		Simpson						
X		Soto						
X		Stargel						
		Ring, VICE CHAIR						
X		Diaz de la Portilla, CHAIR						
9	0	**TOTALS**						
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

The Florida Senate

Committee Agenda Request

To: Senator Miguel Diaz de la Portilla, Chair
Committee on Judiciary

Subject: Committee Agenda Request

Date: March 23, 2015

I respectfully request that **Senate Bill 1298**, relating to Insurance for Short-term Rental and Transportation Network Companies, be placed on the:

☐ committee agenda at your earliest possible convenience.

☒ next committee agenda.

Senator David Simmons
Florida Senate, District 10

File signed original with committee office

S-020 (03/2004)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/15
Meeting Date

1298
Bill Number (if applicable)

Topic Insurance for Short Term rental/TNC

Amendment Barcode (if applicable)

Name Ellyn Bogdanoff

Job Title

Address 908 S. Andrews Ave
Street

Ft Lauderdale FL 33316
City *State* *Zip*

Phone 954 232.5678

Email

Speaking: [X] For [X] Against [X] Information

Waive Speaking: [ ] In Support [ ] Against
(The Chair will read this information into the record.)

Representing Florida Taxi Cab Assn.

Appearing at request of Chair: [ ] Yes [X] No

Lobbyist registered with Legislature: [X] Yes [ ] No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

5-31-15
Meeting Date

1298
Bill Number (if applicable)

Topic _____

Amendment Barcode (if applicable)

Name Logan Mc Faddin

Job Title _____

Address 215 South Monroe St
Street

Phone _____

_____
City *State* *Zip*

Email _____

Speaking: ☒ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Property & Casualty Insurance Assoc.

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

March 31, 2015
Meeting Date

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

SB 1298
Bill Number (if applicable)

Topic Insurance for Short-term Rental & Transportation Co's
Amendment Barcode (if applicable)

Name Richard Turner

Job Title General Counsel

Address 230 S. Adams
Street

Tallahassee FL 32301
City *State* *Zip*

Phone 850 224-2250

Email RTurner@FRLA.ORG

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Florida Restaurant & Lodging Association

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3.31.15
Meeting Date

1298
Bill Number (if applicable)

Topic Ridesharing

Amendment Barcode (if applicable)

Name Ashley Mayer

Job Title Cap City Consulting

Address 101 E College 302
Street

Tallahassee FL 32301
City *State* *Zip*

Phone 222-9075

Email akahler@capcityconsult.com

Speaking: ☒ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing American Insurance Assoc. (AIA)

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
402 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
12/31/14	SM	Unfavorable
3/31/15	JU	Favorable
	AHS	
	AP	

December 31, 2014

The Honorable Andy Gardiner
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 28** – Senator Diaz de la Portilla
Relief of Charles Pandrea

SPECIAL MASTER'S FINAL REPORT

BASED ON A JURY AWARD OF $808,554.78 AGAINST THE NORTH BROWARD HOSPITAL DISTRICT, THIS CONTESTED CLAIM FOR LOCAL FUNDS ARISES FROM THE DEATH OF JANET PANDREA, WHO RECEIVED NEGLIGENT MEDICAL TREATMENT FOR CANCER, WHICH DISEASE (A POSTMORTEM EXAM REVEALED) SHE DID NOT HAVE.

CURRENT STATUS:

On November 21, 2008, John G. Van Laningham, an administrative law judge from the Division of Administrative Hearings, serving as a Senate special master, held a de novo hearing on a previous version of this bill, SB 50 (2009). After the hearing, the judge issued a report containing findings of fact and conclusions of law and recommended that the bill be reported UNFAVORABLY. The 2009 report was reissued for SB 28 (2012), the most recent version of the claim bill for which a report is available. The 2012 report is attached as an addendum to this report.

Due to the passage of time since the hearing, the Senate President reassigned the claim to me, Thomas C. Cibula. My responsibilities were to review the records relating to the claim bill, be available for questions from the members, and determine whether any changes have occurred since the

hearing, which if known at the hearing, might have significantly altered the findings or recommendation in the previous report.

According to counsel for the parties, no changes have occurred since the hearing which might have altered the findings and recommendations in the report. Additionally, the prior claim bills on which the attached special master report is based, is effectively identical to claim bill filed for the 2015 Legislative Session.

Respectfully submitted,

Thomas C. Cibula
Senate Special Master

THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
402 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
12/2/11	SM	Unfavorable

December 2, 2011

The Honorable Mike Haridopolos
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 28 (2012)** – Senator Ellyn Setnor Bogdanoff
Relief of Charles Pandrea

SPECIAL MASTER'S FINAL REPORT

BASED ON A JURY AWARD OF $808,554.78 AGAINST THE NORTH BROWARD HOSPITAL DISTRICT, THIS CONTESTED CLAIM FOR LOCAL FUNDS ARISES FROM THE DEATH OF JANET PANDREA, WHO RECEIVED NEGLIGENT MEDICAL TREATMENT FOR CANCER, WHICH DISEASE (A POSTMORTEM EXAM REVEALED) SHE DID NOT HAVE.

FINDINGS OF FACT:

On January 7, 2002, Janet Pandrea, 65, saw her primary care physician, Dr. Martin Stone, because she had been coughing for two weeks. Dr. Stone prescribed an antibiotic and some cough medicine and instructed Mrs. Pandrea to return for a follow-up visit in three months. Her symptoms did not improve, however, and so she saw Dr. Stone again one week later. This time, the doctor ordered a chest X-ray.

The X-ray, taken on January 14, 2002, revealed a mass in Mrs. Pandrea's chest, which the radiologist suspected was cancerous. Based on the abnormal chest X-ray, Dr. Stone ordered a computed tomography (CAT) chest scan with contrast. The CAT scan was performed on January 17, 2002. The study showed an encapsulated anterior mediastinal mass, measuring six centimeters by four centimeters, with signs of calcification. Upon learning this, Dr. Stone ordered a

fine-needle biopsy, which was performed on January 24, 2002. The specimen, consisting of three "cores," plus three tiny tissue fragments, was fixed in formalin (preserved in a formaldehyde solution) and sent to the pathologist for interpretation.

Dr. Peter A. Tsivis is a pathologist who was, at all relevant times, an employee of the North Broward Hospital District (District). (The District operates the Coral Springs Medical Center, a public facility where Dr. Tsivis worked.) Dr. Tsivis received Mrs. Pandrea's tissue specimen on January 24, 2002. After examining the specimen, Dr. Tsivis prepared a Surgical Pathology Report, which contained the following findings:

> SPECIMEN DEMONSTRATE[S]
> MALIGNANT NEOPLASM CONSISTENT
> WITH MALIGNANT NON-HODGKIN'S
> LYMPHOMA (SEE MICROSCOPIC).

To explain, "malignant neoplasm" is the medical term of art for cancer. Non-Hodgkin's lymphoma (NHL) is a categorical description which denotes a variety of different cancers, approximately 30 in number, that originate in the lymphatic system. (In other words, NHL is not a particular cancer, but a particular spectrum of cancers.) Thus, Dr. Tsivis interpreted the specimen (unconditionally) as being positive for cancer, and he found that the cancer he had seen was "consistent with" diseases falling under the category NHL. But Dr. Tsivis pointedly did not state that Mrs. Pandrea's cancer *was* NHL, nor did he attempt to classify the type of NHL that he believed the disease might be.

Dr. Tsivis further qualified his "pathology diagnosis" with a "microscopic description" providing, in pertinent part, as follows:

> The microscopic features [of the specimen] are interpreted as consistent with a malignant non-Hodgkin's lymphoma. *However, the material in this specimen is insufficient for any confirmatory studies* such as immunohistochemistry.

> Additional tissue for further light microscopy possible immunoperoxidase and for flow cytometry studies is suggested for further evaluation if clinically indicated.

(Emphasis added.)

In view of Dr. Tsivis's findings, Dr. Stone referred Mrs. Pandrea to Dr. Abraham Rosenberg, an oncologist, whom she first saw on January 30, 2002. On Dr. Rosenberg's orders, an abdominal CAT scan and a positron emission tomography (PET) scan were performed on February 2, 2002. The CAT scan showed no evidence that the cancer had spread into Mrs. Pandrea's abdominal organs. The PET scan, however, produced a less encouraging result.

The doctor who interpreted Mrs. Pandrea's PET scan corroborated Dr. Tsivis's finding of an abnormality "consistent with" a malignant lymphoma. The PET scan added a new datum, namely that the tumor's metabolic characteristics suggested the cancer was a relatively non-aggressive one.

The PET scan prompted Dr. Rosenberg to move forward with his treatment plan. He saw Mrs. Pandrea on February 6, 2002, and performed a bone marrow test, which was negative for cancer. Also on that date, Dr. Rosenberg called Dr. Tsivis and requested that immunohistochemistries (or "stains") be made on the existing biopsy specimen, to look for certain proteins in the tissue which could help differentiate the type of cancer involved.

Despite having requested that Dr. Tsivis perform these "stains," Dr. Rosenberg decided on February 6, 2002, to begin giving Mrs. Pandrea chemotherapy. He chose a regimen appropriate for treating "B-cell" lymphomas. Dr. Rosenberg believed (and hoped) that Mrs. Rosenberg had B-cell lymphoma because that particular cancer is more common than T-cell lymphoma (the next likeliest possibility in his opinion) and is more responsive to treatment than the T-cell disease.

Mrs. Pandrea had her first round of chemotherapy on February 7, 2002. Mrs. Pandrea did not tolerate the treatment well. She became nauseous, began vomiting, and had a

seizure, all of which ultimately sent her to the hospital on February 10, 2002. It was determined that she probably had developed an adverse reaction to one of the chemotherapy agents. Dr. Rosenberg decided to discontinue the use of that drug and substitute another agent.

Meantime, on February 14, 2002, Dr. Tsivis performed the immunostaining that Dr. Rosenberg had requested. The result was *inconsistent* with a B-cell lymphoma, the putative condition for which Mrs. Pandrea was being treated. But the findings, Dr. Tsivis wrote in his Surgical Pathology Addendum Report, were "insufficient for further diagnostic evaluation of [the] specimen." Dr. Tsivis's bottom line remained the same as before: malignant neoplasm (cancer) consistent with malignant NHL.

Dr. Rosenberg should have changed his treatment plan based on Dr. Tsivis's Addendum Report, which at a minimum cast doubt on Dr. Rosenberg's working assumption that Mrs. Pandrea had a B-cell lymphoma. Dr. Rosenberg did *not* make any adjustments, however, because *he never saw the addendum*, which for reasons unknown was not delivered to Dr. Rosenberg, though Dr. Tsivis had sent it to him in the usual manner according to his routine practice. Despite having not received, within a reasonable time, the results of the pathology tests he had ordered, Dr. Rosenberg never followed up to find out what the "stains" had shown, which was his responsibility.

On February 27, 2002, Mrs. Pandrea underwent a second round of chemotherapy. She soon began having more medical problems, including muscle weakness and pain, secondary to the chemotherapy. On March 6, 2002, Dr. Rosenberg prescribed an antibiotic because Mrs. Pandrea's white blood cell count was low. The antibiotic triggered a serious side effect: rhabdomyolysis, which is characterized by the rapid breakdown of muscle tissue. On March 18, 2002, Mrs. Pandrea was admitted into the hospital, where her condition worsened dramatically over the next two weeks. She experienced respiratory failure on March 21, 2002, which led to emergency abdominal surgery on March 27. Following the surgery, Mrs. Pandrea developed an infection, and then sepsis. She died on April 2, 2002.

A postmortem examination revealed that Mrs. Pandrea did not have cancer after all. The mediastinal mass was actually a benign thymoma, which in all likelihood could have been removed without endangering Mrs. Pandrea's life, had an accurate and timely diagnosis of her condition been made.

* * *

The issues of ultimate fact in dispute here are (1) whether Dr. Tsivis was negligent in interpreting the biopsy specimen as he did, and (2) whether Dr. Tsivis's negligence (if he were negligent) was the *proximate cause* of Mrs. Pandrea's injury (death). If it is determined that Dr. Tsivis's negligence was the proximate cause of Mrs. Pandrea's death, then a third issue arises, namely: What percentage of the fault should be assigned to Dr. Tsivis (and through him, to the District)?

The question of whether Dr. Tsivis was negligent is a close one, and the evidence is in conflict. To review, he interpreted the biopsy specimen as positive for cancer, suspicious for NHL, but insufficient as a basis for confirming the existence of NHL, much less the specific type of NHL. The autopsy proved that Dr. Tsivis was wrong in finding "cancer," and it is undisputed that he was mistaken in this regard. This does not mean, however, that his interpretation fell below the standard of care.

Claimant's expert pathologist (Dr. Harris) testified that, in her opinion, the standard of care required Dr. Tsivis to state that there was not enough tissue in the specimen to conclude whether the mass was benign or malignant. In other words, according to *Claimant's* expert, Dr. Tsivis was not required to diagnose a benign thymoma, but rather he should have said that the specimen was inconclusive, and left it at that.

The difference between Dr. Tsivis's actual report and the "reasonable report" described by Dr. Harris is largely a matter of degree, not of kind. Dr. Tsivis's report committed (erroneously) to a diagnosis of "cancer," and offered a tentative diagnosis of NHL, but made clear that additional information would be needed to make and confirm a definitive diagnosis. In Dr. Harris's "reasonable report," the suspected cancer (based on the chest X-ray) would be neither confirmed nor ruled out. Hence both reports, at bottom, are of the same

kind (inconclusive). One (Dr. Tsivis's) is merely less so than the other.

It is determined, therefore, that although Dr. Tsivis was mistaken in finding that Mrs. Pandrea had cancer, he was not negligent in doing so. That said, however, even if Dr. Tsivis were found to have been negligent, the outcome would be the same, based on the additional (and alternative) findings that follow.

Claimant contends that but for Dr. Tsivis's negligence, Mrs. Pandrea would not have been treated for a cancer she didn't have, and thus would not have developed the complications secondary to such treatment which ultimately led to her death. Whether this is true, as a matter of fact, is far from clear, however. Conceivably, the outcome would have been the same *regardless* of Dr. Tsivis's negligence, due to the actions of others that would have taken place anyway. The undersigned nevertheless gives the benefit of the doubt to Claimant on this issue, and finds that Dr. Tsivis's negligence was *a* cause-in-fact of the injury.

For legal liability to attach to negligent conduct, it is necessary, but not sufficient, that the negligent conduct have been a cause-in-fact of the plaintiff's injury. In addition to this necessary "but for" causal connection, the negligence must also be regarded as the legal or "proximate" cause of the injury. The outcome determinative question here thus becomes whether Mrs. Pandrea's death was the foreseeable consequence of Dr. Tsivis's negligence, foreseeability being the touchstone of proximate cause.

With this question in view, the undersigned does not see much, if any, *operational* difference between what Dr. Tsivis wrote in his report, on the one hand, and what Dr. Harris (Claimant's expert) testified he should have written, on the other. That is, in terms of the reasonably foreseeable practical effects of one pathologic interpretation versus the other, nothing really distinguishes between them. This is because the evidence overwhelmingly establishes (and it is found) that Dr. Tsivis's report was not "diagnostic," meaning that it was neither specific enough nor definitive enough to support a reasonable decision to commence treatment. His report reasonably required that further diagnostic tests be run—just

as Dr. Harris's hypothetical "reasonable report" would have done.[1]

Thus, even assuming Dr. Tsivis were negligent, the fact is, it was *not* reasonably foreseeable that his pathology report would form the basis for a decision to start treating Mrs. Pandrea for NHL. What *was* foreseeable, rather, was that the physician responsible for Mrs. Pandrea's diagnosis and treatment would order another biopsy so that a definitive pathologic diagnosis could be obtained. This is what Dr. Rosenberg should have done on receipt of Dr. Tsivis's report, according to the applicable standard of care. But instead Dr. Rosenberg breached the standard of care by starting Mrs. Pandrea on chemotherapy before confirming that she had a specific type of NHL. Dr. Tsivis could not reasonably have foreseen that such negligence would occur based on his (Dr. Tsivis's) pathology report.

To elaborate on this finding, it is the undersigned's determination, based on the evidence presented, that Dr. Tsivis's negligence did not set in motion a chain of events leading to Mrs. Pandrea's death. In a broad sense, the "ball was rolling" before Dr. Tsivis became involved. After all, prior to the biopsy and Dr. Tsivis's interpretation of the specimen, Mrs. Pandrea had sought medical treatment, and a chest X-ray had been taken, which the radiologist had found was suspicious for cancer. It was not Dr. Tsivis's report, therefore, that started Mrs. Pandrea down the road to medical care.

In a narrower sense, it is fair to say that, in fact, by the time Dr. Tsivis came into the case, the *diagnostic* ball was rolling along due to the previous actions of others. Put another way, the diagnostic chain of events was already in play. Dr. Tsivis's negligence neither started this chain *nor stopped it*. The latter finding is crucial. If Dr. Tsivis had made a diagnosis that was "actionable" vis-à-vis treatment, he would have (negligently) stopped the diagnostic ball and started the *treatment* ball rolling, initiating a new chain of events. Instead, however, he kept the diagnostic ball rolling, which is exactly what, the undersigned finds (based largely on Claimant's expert's testimony), he should have done.

When Dr. Rosenberg prematurely and negligently started Mrs. Pandrea on chemotherapy, he broke the diagnostic chain of events and started the *treatment* ball rolling. Dr.

Tsivis's negligence did not start this chain of events which led to Mrs. Pandrea's death; it merely provided the occasion for Dr. Rosenberg's *intervening and superseding* negligence, which led to Mrs. Pandrea's untimely death.

Dr. Tsivis's negligence thus can be regarded as the proximate cause of Mrs. Pandrea's death only if Dr. Rosenberg's negligence was itself a reasonably foreseeable (i.e. a probable, and not merely possible) consequence of Dr. Tsivis's conduct.

On the question of foreseeability, there is no evidence establishing that Dr. Tsivis had actual knowledge that patients have died (or suffered serious injury) as a result of negligence similar to his in this instance. Nor is there any proof that the type of harm which Mrs. Pandrea suffered has so frequently resulted from negligence such as Dr. Tsivis's that the same type of harm may be expected again. On the contrary, Mrs. Pandrea's death under the instant circumstances strikes the undersigned as highly unusual and far outside the scope of any fair assessment of the "danger" created by Dr. Tsivis's negligence.

It is the undersigned's determination, therefore, that, as a matter of fact, Dr. Tsivis's negligence was not the proximate cause of Mrs. Pandrea's death. That being the case, he was not at fault here, and therefore neither was the District.

LEGAL PROCEEDINGS:

In December 2002, Charles Pandrea, as the personal representative of his late wife's estate, brought a wrongful death action against the District and a host of others, including Drs. Stone and Rosenberg. The action was filed in the Broward County Circuit Court.

The case was tried before a jury in May 2005 against the following defendants, who remained parties to the suit: The District, Drs. Stone and Rosenberg, and University Hospital Medical Center ("Hospital"). The jury returned a verdict awarding Mr. Pandrea, who was 75 years old at the time, a total of $8,072,498.08 in damages, broken down as follows: (a) $3 million for past pain and suffering; (b) $5 million for future pain and suffering; and (c) $72,498.08 for funeral expenses. The jury apportioned the fault for Mrs. Pandrea's death as follows: Dr. Rosenberg, 50 percent; the Hospital, 28 percent; Dr. Stone, 12 percent; and the District, 10 percent.

The District paid Mr. Pandrea $200,000 under the sovereign immunity cap, leaving unpaid the sum of $608,554.78, which represents the excess portion of the judgment against the District. Mr. Pandrea has settled with all of the private defendants, some of whom paid and were released from further liability before the civil trial, recovering a total of $4.77 million from them. Thus, Mr. Pandrea has collected, to date, nearly $5 million on the wrongful death claim.

CLAIMANT'S ARGUMENTS: The District is vicariously liable for the negligence of its employee, Dr. Tsivis, who misinterpreted the biopsy specimen, rendering a "false positive" diagnosis of cancer, which set in motion the chain of events leading to Mrs. Pandrea's untimely death. Mr. Pandrea is entitled to recover from the District the entire portion of damages for which the jury found the District responsible, namely $808,554.78.

RESPONDENT'S ARGUMENTS: It was not reasonable for Dr. Rosenberg to start Mrs. Pandrea on chemotherapy based on Dr. Tsivis's "non-diagnostic" pathology report—and such negligence on Dr. Rosenberg's part was not a reasonably foreseeable consequence of Dr. Tsivis's conduct. Thus, Dr. Tsivis's negligence, if any, was not the proximate cause of Mrs. Pandrea's death. Further, in the alternative, the award of $8 million was excessive and probably reflected a desire to punish the defendants, sympathy for Mr. Pandrea, or a combination of these, none of which is a proper consideration. There is no compelling reason to enact the instant claim bill.

CONCLUSIONS OF LAW: As provided in s. 768.28, Florida Statutes (2010), sovereign immunity shields the District against tort liability in excess of $200,000 per occurrence. See Eldred v. North Broward Hospital District, 498 So. 2d 911, 914 (Fla. 1986)(§ 768.28 applies to special hospital taxing districts); Paushter v. South Broward Hospital District, 664 So. 2d 1032, 1033 (Fla. 4th DCA 1995).

Under the doctrine of respondeat superior, the District is vicariously liable for the negligent acts of its agents and employees, when such acts are within the course and scope of the agency or employment. See Roessler v. Novak, 858 So. 2d 1158, 1161 (Fla. 2d DCA 2003). Dr. Tsivis was an employee of the District and was acting in the course and scope of his employment when interpreting Mrs. Pandrea's biopsy specimen. Accordingly, Dr. Tsivis's negligence in

connection with the interpretation of this specimen, if any, is attributable to the District.

The fundamental elements of an action for negligence, which the plaintiff must establish in order to recover money damages, are the following:

> (1) The existence of a duty recognized by law requiring the defendant to conform to a certain standard of conduct for the protection of others including the plaintiff;
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> (2) A failure on the part of the defendant to perform that duty; and
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> (3) An injury or damage to the plaintiff proximately caused by such failure.

Stahl v. Metro. Dade Cnty., 438 So. 2d 14, 17 (Fla. 3d DCA 1983).

There is no question that Dr. Tsivis owed Mrs. Pandrea a legal duty to exercise reasonable care in interpreting the biopsy specimen. The first element of the claim, therefore, is satisfied.

As for the second element, however, it is the undersigned's primary determination of ultimate fact that Dr. Tsivis's conduct did not fall below the applicable standard of care. To repeat for emphasis, the undersigned finds, as a matter of fact, that Dr. Tsivis did not fail to perform the legal duty he owed Mrs. Pandrea. The second element of this claim, therefore, is not met.

Additionally, however, and in the alternative, even if Dr. Tsivis did breach the duty of reasonable care he owed Mrs. Pandrea, his negligence, the undersigned finds, was not, as a matter of fact, the proximate cause of Mrs. Pandrea's death. The third element of this claim, therefore, is not met in any event.

"Proximate cause" is an involved legal concept. The "proximate cause" element of a negligence action embraces not only the "but for," causation-in-fact test, but also fairness and policy considerations, usually focusing on whether the consequences of the negligent act were foreseeable in the

exercise of reasonable prudence. See, e.g., Stahl, 438 So. 2d at 17-21.

The issue of causation is complicated in this case by the involvement of multiple defendants, each of whose negligence allegedly combined to produce the sole injury (death) for which Claimant sought (and seeks) to recover (and for which he has recovered a substantial sum). In situations such as this, where there were several wrongs but one injury, the negligent actors are referred to as "joint tortfeasors." See, e.g., D'Amario v. Ford Motor Co., 806 So. 2d 424, 435 n.12 (Fla. 2001).

Generally speaking, each joint tortfeasor whose negligence was a proximate cause of the plaintiff's injury is liable for his or her share of the damages, under comparative fault principles. In this case, for instance, the jury apportioned the fault between the four defendants who remained in the suit at trial, assigning to each a percentage of responsibility for Mrs. Pandrea's death. (The District, recall, was found by the jury to have been 10 percent at fault, due to the actions of Dr. Tsivis.)

A negligent party is *not* liable for someone else's injury, however, if a separate force or action was "the active and efficient intervening cause, the sole proximate cause or an independent cause." Dep't of Transp. v. Anglin, 502 So. 2d 896, 898 (Fla. 1987). Such a supervening act of negligence so completely disrupts the chain of events set in train by the original tortfeasor's conduct that any negligence which occurred before the supervening act is considered too remote to be the proximate cause of any injury resulting from the supervening act. On the other hand, if the intervening cause were foreseeable, which is a question of fact for the trier to decide, then the original negligent party may be held liable. Id. In circumstances involving a foreseeable intervening cause, the original tortfeasor sometimes is said to have "set in motion" the "chain of events" that resulted in the plaintiff's injury. See Gibson v. Avis Rent-a-Car System, Inc., 386 So. 2d 520, 522 (Fla. 1980).[2]

In this case, the question arises whether the negligence of Dr. Rosenberg was an unforeseeable intervening cause which so profoundly and unexpectedly changed the course of events as to sever any reasonable causal connection between Dr. Tsivis's negligence and Mrs. Pandrea's death. Concerning the

question of foreseeability as it arises in the context of an "intervening cause" case, the Florida Supreme Court has explained:

> [T]he question of whether to absolve a negligent actor of liability is more a question of responsibility [than physical causation]. W. Prosser, Law of Torts, § 44 (4th Ed. 1971); L. Green, Rationale of Proximate Cause, 14270 (1927); Comment, 1960 Duke L.J. 88 (1960). If an intervening cause is foreseeable the original negligent actor may still be held liable. The question of whether an intervening cause is foreseeable is for the trier of fact.
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> Another way of stating the question whether the intervening cause was foreseeable is to ask whether the harm that occurred was within the scope of the danger attributable to the defendant's negligent conduct. A person who creates a dangerous situation may be deemed negligent because he violates a duty of care. The dangerous situation so created may result in a particular type of harm. The question whether the harm that occurs was within the scope of the risk created by the defendant's conduct may be answered in a number of ways.
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> First, the legislature may specify the type of harm for which a tortfeasor is liable. See Vining v. Avis Rent-A-Car, above; Concord Florida, Inc. v. Lewin, 341 So.2d 242 (Fla. 3d DCA 1976) cert. denied 348 So.2d 946 (Fla. 1977). Second, it may be shown that the particular defendant had actual knowledge that the same type of harm has resulted in the past from the same type of negligent conduct. See Homan v. County of Dade, 248 So.2d

> 235 (Fla. 3d DCA 1971). Finally, there is the type of harm that has so frequently resulted from the same type of negligence that "'in the field of human experience' the same *type* of result may be expected again." Pinkerton-Hays Lumber Co. v. Pope, 127 So.2d 441, 443 (emphasis in original).

Gibson, 386 So. 2d at 522-23 (citations omitted).

As the trier of fact, the undersigned finds that the negligence of Dr. Rosenberg in prematurely commencing to treat Mrs. Pandrea with chemotherapy was not within the "scope of the risk" created by Dr. Tsivis's negligence in issuing a pathology report that was less inconclusive than it should have been. Dr. Rosenberg's negligence was, as a matter of fact, an unforeseeable, active, and efficient intervening cause; as such, it relieved Dr. Tsivis of liability.

Claimant makes an argument concerning foreseeability that is clever and plausible on its face, but ultimately unpersuasive. The argument invokes the "rule of complete liability of initial tortfeasors." This rule holds that a tortfeasor is responsible for all of the reasonably foreseeable consequences of his actions—even injuries caused downstream by a subsequent tortfeasor (provided the subsequent negligence was reasonably foreseeable). D'Amario, 806 So. 2d at 435-36. Thus, in a multi-wrong, multi-injury scenario, the *initial* tortfeasor can potentially be held responsible for *all* of the plaintiff's damages.

Before going forward with this discussion, an important distinction must be made between *joint* tortfeasors, on the one hand, and *initial/subsequent* tortfeasors, on the other. When several wrongs combine to cause a single injury, the plaintiff can sue the joint tortfeasors together; the fact-finder will apportion the fault among the negligent parties, who will be liable for their respective shares of the damages. In contrast, when several wrongs independently cause *several* separate injuries, the plaintiff can either sue the independent tortfeasors separately and attempt to recover damages from each for the distinct injury caused by the particular negligent party named in each suit, or he can sue the *initial* tortfeasor alone and potentially recover, exclusively from that original

negligent party, all of his damages in the one suit; in that case, however, the negligence of the initial tortfeasor is not compared to that of the subsequent tortfeasor because, unlike a case involving joint tortfeasors, each one's actions were independent of the other and caused separate injuries. Id. at 435.

To make this clearer, consider a common initial/subsequent tortfeasor scenario, which starts with an accident (a car crash, say) in which the plaintiff, in consequence of another's negligence, suffers bodily injuries requiring medical attention, and ends with the plaintiff suffering additional injuries at the hands of his negligent doctor. The person whose negligence caused the initial accident and the doctor who later committed medical malpractice are not *joint* tortfeasors; they are *initial* and *subsequent* tortfeasors. Thus, they cannot be sued together (and have their negligent acts compared). Instead, they must be sued separately in independent actions wherein each might be held responsible for the injuries caused by his own acts of negligence.

Alternatively, under the complete-liability rule, the plaintiff in the above described scenario could sue the initial tortfeasor and seek to recover for *all* of his injuries, even the ones caused by his negligent doctor. Moreover, although "[t]ypically, the question of whether an intervening cause [wa]s reasonably foreseeable is for the jury, . . . an exception exists when subsequent medical negligence in treating the initial injury is involved." Letzter v. Cephas, 792 So. 2d 481, 485 (Fla. 4th DCA 2001). Under this exception, which applies "when one who is negligent injures another causing him to seek medical treatment," id., "negligence in the administration of that medical treatment *is* foreseeable [i.e. is deemed foreseeable as a matter of law] and will not serve to break the chain of causation," id. (Emphasis added). As the Letzter court explained further,

> Where one who has suffered personal injuries by reason of the negligence of another exercises reasonable care in securing the services of a competent physician or surgeon, and in following his advice and instructions, and his injuries are thereafter aggravated or increased by the negligence, mistake, or lack of skill

> of such physician or surgeon, the law regards the negligence of the wrongdoer in causing the original injury as the proximate cause of the damages flowing from the subsequent negligent or unskillful treatment thereof, and holds him liable therefor.

Id. (quoting Stuart v. Hertz Corp., 351 So. 2d 703, 707 (Fla. 1977)). The court added, finally, that:

> When the rule in Stuart v. Hertz applies, the initial tortfeasor's remedy against the succeeding negligent health care provider lies in an action for subrogation. See Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So. 2d 702, 704 (Fla. 1980). The foreseeability rule of Stuart v. Hertz has expressly been held to apply even when the initial tortfeasor is a physician as well. See Davidson v. Gaillard, 584 So. 2d 71, 73-74 (Fla. 1st DCA 1991), disapproved on other grounds by Barth v. Khubani, 748 So. 2d 260 (Fla. 1999).

Id.

To summarize, then, when an initial tortfeasor injures the plaintiff, causing him to seek medical treatment during which a subsequent tortfeasor further injures the plaintiff, the plaintiff can seek to recover damages for all of his injuries from the initial tortfeasor, under the complete-liability rule; in such an action, moreover, the plaintiff need not prove that the medical negligence was foreseeable because the law regards the first injury as the proximate cause of the second.

Pointing to the foregoing principles, Claimant contends that Dr. Rosenberg's negligence was, as a matter of law, the foreseeable consequence of Dr. Tsivis's negligence. For this to be true, Dr. Tsivis would need to be regarded, not as a *joint* tortfeasor whose negligence combined with that of Dr. Rosenberg and others to cause Mrs. Pandrea's death, but as an *initial* tortfeasor whose negligence injured Mrs. Pandrea in some distinct way, causing her to seek medical treatment,

during which, due to the negligence of *subsequent* tortfeasors, she died.

In trying to fit this case into the initial/subsequent tortfeasor mold, Claimant relies on Davidson v. Gaillard, 584 So. 2d 71 (Fla. 1st DCA 1991). In that case, the decedent, Mrs. Davidson, had been treated in 1981 for Hodgkin's Disease, which as a result had gone into remission. Mrs. Davidson began having worrisome symptoms in the summer of 1983, however, and consequently her doctor ordered a CAT scan, which was performed by a radiologist named Dr. Gaillard. Reviewing the results, Dr. Gaillard saw no abnormal mass or tumor and concluded that Mrs. Davidson's cancer had not returned. Based on Dr. Gaillard's diagnosis that the CAT study was negative for cancer, Mrs. Davidson did not immediately receive treatment. Id. at 72.

Mrs. Davidson continued to experience symptoms and returned to her doctor a few months later. It was eventually determined that Mrs. Davidson's cancer had indeed come back and, worse, had spread to her stomach. In April 1984, much of her stomach and some of her pancreas were removed. A second surgery was then performed to remove a tumor that was obstructing Mrs. Davidson's bowel. During this surgery, her bowel was perforated, causing a massive infection which proved fatal. Id.

Mrs. Davidson's husband brought separate lawsuits for negligence against, respectively, Dr. Gaillard for his failure to diagnose Mrs. Davidson in October 1983, and the physicians who treated her in 1984, after the cancer was belatedly found. (The Davidson case under discussion deals solely with the claim against Dr. Gaillard.) At trial, the parties' experts generally agreed that, if Mrs. Davidson had been diagnosed correctly in October 1983, her prognosis would have been reasonably good; with immediate treatment, the cancer likely would have gone into remission. The defense maintained, however, that the primary cause of Mrs. Davidson's death was not Dr. Gaillard's initial, negligent failure to detect the tumor, but rather the subsequent malpractice of the doctors who treated her for cancer. The jury agreed with the defense, finding that Dr. Gaillard's negligence was not a legal cause of Mrs. Davidson's death. Id. at 72-73.

On appeal, the plaintiff argued that the trial court had erred in denying the plaintiff's motion for directed verdict on proximate causation. The plaintiff relied on the complete-liability rule (discussed at length above), which holds that an initial tortfeasor is liable not only for the injuries he, himself, negligently caused, but also, as a matter of law, for the additional injuries resulting from the negligent medical treatment of the initial injuries. The appellate court agreed with the plaintiff and reversed. Id. at 73-74.

While Davidson might appear at first blush to be analogous to the instant case, closer study shows that it is distinguishable. Unlike this case, Davidson plainly involved a multi-injury situation. Indeed, the plaintiff there (unlike Claimant here) brought two lawsuits, one against the "initial" tortfeasor (Dr. Gaillard) and another against the "subsequent" tortfeasors (the treating physicians). To cut to the chase, it is simply incorrect to assert, as Claimant does, that just as Dr. Gaillard's negligence was held to be the proximate cause of Mrs. Davidson's death, *even though (so Claimant contends) Dr. Gaillard's negligence did not physically injure Mrs. Davidson*, so too should Dr. Tsivis's negligence be regarded as the proximate cause of Mrs. Pandrea's death, though he caused her no physical harm. This assertion is incorrect because, in fact, Dr. Gaillard's negligence *did* cause a physical injury: his negligence delayed an accurate diagnosis and treatment for about six months, during which time Mrs. Davidson's cancer spread into her stomach and other organs. Thus, the radiologist's negligence (in giving a false negative diagnosis) *aggravated* Mrs. Davidson's disease, causing her (probably treatable, not imminently fatal) lymphoma to become a metastatic cancer of the stomach, pancreas, and bowels—the separate (and obviously much worse) bodily injury that caused her to seek medical treatment, which was (allegedly) negligently provided.

In this case, it is Claimant's theory that Dr. Tsivis negligently rendered a false *positive* diagnosis, causing Mrs. Pandrea to seek treatment for a disease that she did not actually have. Unlike the situation in Davidson, however, where the radiologist's false *negative* diagnosis *itself* led to an aggravation of the patient's condition (i.e., a separate injury), here Dr. Tsivis's negligence (assuming he were negligent) did not *itself* cause any cognizable injury (emotional distress from a wrong diagnosis not being an issue in this case), but rather

caused an injury (if at all) only in combination with the negligence of Dr. Rosenberg, without which negligence Mrs. Pandrea would not have been treated for a nonexistent cancer. In short, Dr. Tsivis (unlike Dr. Gaillard in Davidson) cannot be considered an "initial" tortfeasor under any reasonable view of the allegations or facts; at best (from Claimant's standpoint) he was a *joint* tortfeasor. (*That*, i.e. as a joint tortfeasor, is how the District was sued, and how the plaintiff's case was presented to the jury, in the civil action that preceded this legislative proceeding.) Thus, the medical negligence of Dr. Rosenberg was not, as a matter of law, the foreseeable consequence of Dr. Tsivis's negligence.

The bottom line is that Dr. Tsivis's negligence was not the proximate cause of Mrs. Pandrea's death, as a matter of fact. The District, therefore, is not legally responsible for this tragic occurrence.

LEGISLATIVE HISTORY: This is the fourth year that this claim has been presented to the Florida Legislature.

ATTORNEYS FEES: Section 768.28(8), Florida Statutes, provides that "[n]o attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any judgment or settlement." "Claimant's law firm, Krupnick Campbell Malone Buser Slama Hancock Liberman & McKee, P.A., has agreed to limit its fees to the "maximum amount permitted under the law." Claimant's attorneys represent that they have incurred approximately $480,000 in litigation costs. The undersigned presumes that most (or all) of the expenses have been paid out of the nearly $5 million Claimant already has received. Information concerning the amount of attorney's fees paid to date is unavailable.

Claimant has retained Lance J. Block to lobby in favor of this bill. The contract between Claimant and Mr. Block calls for a contingency fee of six percent. Mr. Block has attested via affidavit, however, that his fee will be in compliance with any limitations that the bill places on fees and costs.

In its current form, the instant claim bill provides that the "total amount paid for attorney's fees, lobbying fees, costs, and other similar expenses relating to the adoption of this act may not exceed 25 percent of the total amount awarded under this

act." Claimant and his attorneys appear to be willing to abide by this limitation.

GENERAL CONCLUSIONS: Mrs. Pandrea's death should not have happened and would not have occurred but for the medical negligence of Dr. Rosenberg and others besides the District. These other responsible parties have paid substantial sums in damages as a result of their negligent actions—nearly $5 million in gross. Indeed, the District itself has paid $200,000, even though, in the undersigned's judgment (based solely on the evidence presented in this proceeding and made in obedience to the applicable law), the District was not at fault. Thus, Claimant has received substantial compensation for his profound loss.

RECOMMENDATIONS: For the reasons set forth above, I recommend that Senate Bill 28 (2012) be reported UNFAVORABLY.

Respectfully submitted,

John G. Van Laningham
Senate Special Master

cc: Senator Ellyn Setnor Bogdanoff
Debbie Brown, Interim Secretary of the Senate
Counsel of Record

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[1] Indeed, ironically, Dr. Tsivis's "negligent" report, which was ultimately right (more tests are needed) for reasons that were not entirely correct (the patient has cancer of some kind), would tend to increase the likelihood that further testing would be done, as compared to Dr. Harris's "reasonable report," which appears to pose a greater risk (than Dr. Tsivis's report) of causing the patient or her doctor to *forego* further testing or treatment in the near term. Cf. Sunderman v. Agarwal, 750 N.E.2d 1280 (Ill.App. 2001)(pathology report stating that specimen was "inconclusive for malignancy" allegedly caused delay in diagnosis and treatment of decedent's lung cancer; summary judgment in pathologist's favor affirmed because, despite inconclusive pathology report, treating physician believed patient had cancer and recommended treatment accordingly, and thus pathology report not proximate cause of delay).

[2] In contrast, where the intervening cause was not the foreseeable consequence of the original negligent party's conduct, the latter, who is not liable for the resulting injury to the plaintiff (because his negligence was not the proximate cause thereof), may be found to have "provided the occasion" for the later negligence which harmed the plaintiff—but not to have set in motion the injurious chain of events. Anglin, 502 So. 2d at 899.

By Senator Diaz de la Portilla

40-00052-15 201528__

A bill to be entitled

An act for the relief of Charles Pandrea by the North Broward Hospital District; providing for an appropriation to compensate Charles Pandrea, husband of Janet Pandrea, for the death of Janet Pandrea as a result of the negligence of the North Broward Hospital District; providing a limitation on the payment of fees and costs; providing an effective date.

WHEREAS, Janet Pandrea died on April 2, 2002, in Broward County as a result of the treatment that she received for non-Hodgkin's lymphoma, a disease that she did not have, and

WHEREAS, the Coral Springs Medical Center, part of the North Broward Hospital District, by and through its pathologist, Peter Tsivis, M.D., breached the applicable standard of care by and through his diagnosis and interpretation of certain slides as being consistent with non-Hodgkin's lymphoma, when the tissue was a benign thymoma, and

WHEREAS, based upon the misdiagnosis of the benign thymoma as cancer, Mrs. Pandrea was subsequently treated with multiple rounds of chemotherapy to which she had adverse reactions, which led to multiple complications and her eventual demise, and

WHEREAS, Charles and Janet Pandrea were married on May 19, 1956, and they had four children together during the course of their 46-year marriage, and

WHEREAS, Charles Pandrea suffers from the tragic memories of the suffering of his wife from complications from chemotherapy and her prolonged hospital stay and eventual demise, which were related to the initial misdiagnosis, and

40-00052-15 201528__

WHEREAS, Charles Pandrea will continue to suffer mental pain and anguish for the remainder of his life, which has caused and will continue to cause serious psychological problems for him, and

WHEREAS, as a matter of law, a jury in Broward County returned a verdict against the North Broward Hospital District on June 8, 2005, and the verdict was reduced to a final judgment in the amount of $808,554.78 on June 15, 2005, and

WHEREAS, as a matter of law, it was determined that neither Charles Pandrea nor Mrs. Pandrea did anything to cause or contribute to the cause of the losses and injuries complained of, and

WHEREAS, the North Broward Hospital District has paid the statutory limit of $200,000 under s. 768.28, Florida Statutes, and

WHEREAS, the North Broward Hospital District is responsible for paying the remainder of the judgment, which is $608,554.78, NOW, THEREFORE,

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

Section 1. The facts stated in the preamble to this act are found and declared to be true.

Section 2. The North Broward Hospital District is authorized and directed to appropriate from funds of the district not otherwise appropriated and to draw a warrant in the sum of $608,554.78, payable to Charles Pandrea, husband of Janet Pandrea, deceased, as compensation for the death of Janet Pandrea as a result of the negligence of the North Broward

Hospital District.

Section 3. The amount paid by the North Broward Hospital District pursuant to s. 768.28, Florida Statutes, and the amount awarded under this act are intended to provide the sole compensation for all present and future claims arising out of the factual situation described in this act which resulted in the death of Janet Pandrea. The total amount paid for attorney fees, lobbying fees, costs, and other similar expenses relating to this claim may not exceed 25 percent of the amount awarded under this act.

Section 4. This act shall take effect upon becoming a law.

The Florida Senate

COMMITTEE VOTE RECORD

COMMITTEE: Judiciary
ITEM: SB 28
FINAL ACTION: Favorable
MEETING DATE: Tuesday, March 31, 2015
TIME: 4:00 —6:00 p.m.
PLACE: 110 Senate Office Building

FINAL VOTE								
Yea	**Nay**	**SENATORS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
X		Bean						
X		Benacquisto						
	X	Brandes						
X		Joyner						
X		Simmons						
X		Simpson						
	X	Soto						
	X	Stargel						
		Ring, VICE CHAIR						
X		Diaz de la Portilla, CHAIR						
6	3	**TOTALS**						
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/15
Meeting Date

29
Bill Number (if applicable)

Topic AGENDA #17 Pandrea Claims Bill

Amendment Barcode (if applicable)

Name Michael Ryan

Job Title Attorney

Address 12 SE 8th Street
Street

Fort Lauderdale
City *State* *Zip*

Phone 9/763-9181

Email MRyan@Krupnicklaw.com

Speaking: [X] For [ ] Against [ ] Information

Waive Speaking: [ ] In Support [ ] Against
(The Chair will read this information into the record.)

Representing Charles Pandrea

Appearing at request of Chair: [ ] Yes [X] No

Lobbyist registered with Legislature: [ ] Yes [X] No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31
Meeting Date

28
Bill Number (if applicable)

Topic Pandrea Claim Bill

Amendment Barcode (if applicable)

Name Lance Block

Job Title attorney-lobbyist

Address _____ Phone _____
Street

_____ Email _____
City *State* *Zip*

Speaking: ☑ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing _____

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3-31-15
Meeting Date

28
Bill Number (if applicable)

Topic PANDREA CLAIM BILL

Amendment Barcode (if applicable)

Name JASON UNGER

Job Title

Address 301 S. BRONOUGH ST
Street

Phone 577-9090

TLH FL 32301
City *State* *Zip*

Email junger@gray-robinson.com

Speaking: ☐ For ☒ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing NORTH BROWARD HOSPITAL DISTRICT

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 794
INTRODUCER:	Senator Ring
SUBJECT:	Prejudgment Interest
DATE:	March 9, 2015
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Cibula	JU	**Pre-meeting**
2.			ACJ	
3.			AP	

I. Summary:

SB 794 requires a court, in its final judgment, to include prejudgment interest on the amount of money damages, including court costs and attorney fees, awarded to a plaintiff. Prejudgment interest accrues from the date of the plaintiff's injury or loss. As provided in current law, the applicable interest rate is based on the discount rate of the Federal Reserve Bank of New York plus 400 basis points.

The bill provides that it applies retroactively to all actions that are pending on the effective date of the act and any actions that are initiated on or after that date.

II. Present Situation:

Prejudgment interest is the interest on a judgment that is calculated from the date of the injury or loss until a final judgment is entered for the plaintiff. In contrast, post-judgment interest is interest on a judgment that is calculated from the date of the final judgment until the plaintiff collects the award from the defendant.

Under English common law, prejudgment interest was permitted for claims that were "liquidated" but not for claims that were "unliquidated." A liquidated claim is a claim for an amount that can be determined or measured back to a fixed point in time. It is not speculative or intangible. An unliquidated claim, in contrast, is one that is based on intangible factors and is generally disputed until a jury determines the amount. In personal injury law, examples of these types of damages include pain and suffering, mental anguish, loss of enjoyment of life, and permanent injury.

In assessing prejudgment interest, a claim becomes liquidated when a verdict has the effect of fixing damages as of a prior date.[1]

Florida does not generally allow the award of prejudgment interest for plaintiffs in personal injury[2] and wrongful death claims, but does allow it in some tort areas.[3] The theory for denying prejudgment interest is that damages in personal injury cases are too speculative to liquidate before a final judgment is rendered. An exception to that rule is when a plaintiff can establish that he or she suffered the loss of a vested property right.[4]

One theory of prejudgment interest is that it is not awarded to penalize the losing party but to compensate the claimant for losing the use of the money between the date he or she was entitled to it and the date of the judgment.[5] Proponents of prejudgment interest assert that it promotes fairness by allowing a plaintiff to be fully compensated for his or her injury, including the time span that litigation took place, particularly if the litigation was protracted because the defendant had no incentive to settle the case.[6]

III. Effect of Proposed Changes:

This bill requires a court, in its final judgment, to include prejudgment interest on the amount of money damages, including court costs and attorney fees, awarded to a plaintiff.

The rate of interest is established by the Chief Financial Officer pursuant to s. 55.03, F.S., and accrues from the date of the plaintiff's injury or loss. Pursuant to s. 55.03, F.S., the Chief Financial Officer is required to establish the rate of interest payable on judgments or decrees each quarter using a formula prescribed in statute. The Chief Financial Officer is then responsible for communicating that interest rate to the clerk of courts and chief judge of each judicial circuit for the upcoming quarter. The current quarterly interest rate is 4.75 percent.[7]

The bill also applies retroactively to all actions that are pending on the effective date of the act and any actions that are initiated on or after that date.

This bill takes effect upon becoming law.

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[1] *Argonaut Insurance Company, et al., v. May Plumbing Company, et al.,* 474 So. 2d 212 (Fla. 1985).
[2] *Parker v. Brinson Construction Company and Florida Industrial Commission*, 78 So. 2d 873 (1955).
[3] *Alvarado v. Rice*, 614 So. 2d 498, 500 (Fla. 1993). The Court held that a claimant in a personal injury action is entitled to prejudgment interest on past medical expenses when a trial court finds that the claimant had made actual, out-of-pocket payments on the medical bills at a date before the entry of judgment.
[4] *Amerace Corporation v. Stallings*, 823 So. 2d 110 (Fla. 2002).
[5] *Kearney v. Kearney*, 129 So. 3d 381, 391 (Fla. 1st DCA 2013) rehearing denied January 17, 2014.
[6] According to the Florida Justice Association, 32 states and the District of Columbia now allow for prejudgment interest in personal injury and wrongful death cases. Florida Justice Association, *Prejudgment Interest, (2015) (on file with the Senate Committee on Judiciary).*
[7] Division of Accounting and Auditing, Office of the Chief Financial Officer, *Judgment on Interest Rates,* http://www.myfloridacfo.com/division/AA/Vendors/#.VPtaBk0cSUl (last visited March 7, 2015).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not appear to affect the spending, revenues, or tax authority of cities or counties. As such, the bill does not appear to be a mandate.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill is retroactive to the extent that it increases the amount of damages that may be recoverable for personal injuries that occur before the effective date of the bill. Although the Legislature may enact statutory changes that are procedural or remedial, a statute may not apply retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties.[8] By increasing the amount of damages authorized for causes of action that accrue before the effective date of the bill, this bill potentially could be construed as an unconstitutional penalty.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Plaintiffs who are successful in their claims and entitled to prejudgment interest will benefit financially from this bill by being permitted to receive prejudgment interest from the date of their loss or injury.

C. Government Sector Impact:

None

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

[8] *State Farm Mutual Automobile Insurance Co. v Laforet*, 658 So. 2d 55, 61 (Fla. 1995).

VIII. Statutes Affected:

This bill creates s. 55.031, F.S.

IX. Additional Information:

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

None.

B. Amendments:

None.

874734

LEGISLATIVE ACTION

Senate . House

. . . . . .

The Committee on Judiciary (Ring) recommended the following:

Senate Amendment (with title amendment)

Delete line 16
and insert:
compensatory damages awarded at the rate established pursuant to s.

================ T I T L E A M E N D M E N T ================
And the title is amended as follows:
Delete line 4
and insert:

874734

interest on the amount of compensatory damages awarded to a

785410

LEGISLATIVE ACTION

Senate . House

. .

. .

. .

. .

The Committee on Judiciary (Ring) recommended the following:

Senate Amendment (with title amendment)

Delete lines 19 - 22

and insert:

Section 2. This act applies to causes of action which accrue on or after the effective date of the act.

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

And the title is amended as follows:

Delete lines 5 - 6

and insert:

785410

plaintiff in a final judgment; providing for applicability; providing an effective date.

By Senator Ring

29-00635-15 2015794__

A bill to be entitled

An act relating to prejudgment interest; creating s. 55.031, F.S.; requiring a court to include prejudgment interest on the amount of money damages awarded to a plaintiff in a final judgment; providing for retroactive application; providing an effective date.

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

Section 1. Section 55.031, Florida Statutes, is created to read:

55.031 Prejudgment interest.—In an action in which a plaintiff is entitled to recover money damages, including, but not limited to, court costs or attorney fees, the court shall, in the final judgment, include interest on the amount of the money damages awarded at the rate established pursuant to s. 55.03, with such interest accruing from the date of injury or loss.

Section 2. Section 55.031, Florida Statutes, as created by this act, shall apply retroactively to all actions pending on the effective date of this act and any action initiated on or after such date.

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

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:
Governmental Oversight and Accountability, *Chair*
Appropriations Subcommittee on Finance and Tax, *Vice Chair*
Appropriations
Appropriations Subcommittee on Transportation, Tourism, and Economic Development
Banking and Insurance
Commerce and Tourism
Judiciary
Rules

JOINT COMMITTEES:
Joint Legislative Auditing Committee
Joint Select Committee on Collective Bargaining

SENATOR JEREMY RING
29th District

March 19, 2015

Senator Miguel Diaz de la Portilla
406 Senate Office Building
404 S. Monroe Street
Tallahassee, FL 32399-1100

Dear Chairman Diaz de la Portilla,

I am requesting to be excused from the Senate Judciary Committee scheduled for March 31st due to a pre planned trip to visit my son in Idaho.

Thank you in advance for considering this request to be excused from the Judiciary Committee on the 31st due to these unforeseen conflicts. Please do not hestiate to contact me if you have any questions.

Sincerely,

Jeremy Ring

Jeremy Ring
Senator District 29

REPLY TO:
☐ 5790 Margate Boulevard, Margate, Florida 33063 (954) 917-1392 FAX: (954) 917-1394
☐ 405 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5029

Senate's Website: *www.flsenate.gov*

ANDY GARDINER
President of the Senate

GARRETT RICHTER
President Pro Tempore

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	CS/SB 1212
INTRODUCER:	Commerce and Tourism Committee and Senator Ring
SUBJECT:	Contracts for Goods and Services
DATE:	March 30, 2015 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Siples	McKay	CM	**Fav/CS**
2.	Procaccini	Cibula	JU	**Favorable**
3.			FP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/SB 1212 provides that a contract for goods or services is unlawful if it includes a provision requiring the consumer to waive his or her right to make any statement regarding the seller or lessor of the goods or services. The bill also makes it unlawful for a party to threaten or seek enforcement of such a provision or to penalize the consumer for making a statement regarding his or her experiences with the seller or lessor of the goods or services. The bill provides that any waiver of a consumer's right to provide such statement is contrary to public policy and is void and unenforceable. The bill provides civil penalties for violation of its provisions.

II. Present Situation:

Contracts

The formation of a contract, either written or oral, requires a person or entity to be offered and to accept an agreement for consideration,[1] or an enforceable promise.[2] A contract formed under duress, induced by fraud, or with an individual that lacks capacity are voidable.[3] A contract is

[1] 11 FLA. JUR. 2D *Contracts* s. 25. In some cases, there is a statutory requirement that a contract be written.
[2] The word "consideration" means, "[s]omething (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee; that which motivates a person to do something, esp. to engage in a legal act." BLACK'S LAW DICTIONARY (10th ed. 2014).
[3] 11 FLA. JUR. 2D *Contracts* s. 10.

void, meaning it has no legal effect, if it is unconscionable,[4] contravenes public policy, or is otherwise illegal.[5]

General provisions and definitions for certain commercial transactions are found in the Florida Uniform Commercial Code (UCC).[6] Among other things, the UCC applies to the sale of goods and leases, but does not generally govern contracts for services. "Contract" is defined as the total legal obligation that results from the parties' agreement, consistent with law.[7]

Freedom of Speech

Both the First Amendment of the United States Constitution and Article 1, Section 4 of the Florida Constitution, protect against an infringement on the right of free speech. Although it is legal to waive one's constitutional rights in contracts, the court will determine: (1) whether the waiver was voluntary, free, deliberate, and not procured through intimidation, coercion, or deception; and (2) whether the waiver was executed with full awareness of the nature of the rights being abandoned and the consequences of such abandonment.[8]

Customer Reviews

Many internet websites allow a consumer to share their experience with a particular business through publically accessible, anonoymous or identified, reviews, rating systems, or commenting sections.[9] When seeking services or goods, an individual may take into consideration the reviews that others have shared about their experience with a particular company. According to one study, online reviews are the second most trusted source of information relied on by consumers, behind recommendations from friends and family.[10]

Some businesses have attempted to limit a consumer's ability to share his or her opinion about the business or the goods or services received from the business. Several stories about such contractual clauses have made the news recently:

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[4] Unconscionability is common law doctrine that courts may use to refuse to enforce contractual provisions in which one party overreaches the other party to gain "an unjust and undeserving advantage which it would be inequitable to permit him to enforce." *Steinhardt v. Rudolph*, 422 So. 2d 884, 889 (Fla. 3d DCA 1982) (quoting *Peacock Hotel, Inc. v. Shipman*, 138 So. 44, 46 (1931). Unconscionability may be either procedural, dealing with the factors surrounding the entering of the contract; or substantive, focusing directly on the contract terms. *Steinhardt* at 889 (citing *Kohl v. Bay Colony Club Condominium, Inc.*, 398 So. 2d 865, 867 (Fla. 4th DCA 1981), *reh'g denied*.

[5] 11 FLA. JUR. 2D *Contracts* s. 11.

[6] Chapters 670-680, F.S., are cited as the Uniform Commercial Code (UCC). General provisions of the Uniform Commercial Code are found in ch. 671, F.S.; the Uniform Commercial Code – Sales is found in ch. 672, F.S.; and the Uniform Commercial Code – Leases is found in ch. 680, F.S.

[7] Section 671.201(12), F.S.

[8] *Peterson v. Florida Bar*, 720 F. Supp.2d 1351, 1358 (M.D. Fla. 2010) (citing *Sliney v. State*, 699 So. 2d 662, 668 (Fla. 1997)).

[9] For example, see TripAdvisor, *About TripAdvisor*, *available at* http://www.tripadvisor.com/PressCenter-c6-About_Us.html (last visited March 27, 2015); Yelp.com, *About Us*, *available at* http://www.yelp.com/about (last visited March 27, 2015); and Angieslist.com, *Angie's List*, http://www.angieslist.com/aboutus.htm (last visited March 27, 2015). Additionally, many search engines, such as Google (www.google.com), Yahoo (www.yahoo.com), or Bing (www.bing.com) offer access to consumer reviews within the search engine results.

[10] Nielsen, *Consumer Trust in Online, Social and Mobile Advertising Grows*, (April 10, 2012), *available at* http://www.nielsen.com/us/en/insights/news/2012/consumer-trust-in-online-social-and-mobile-advertising-grows.html (last visited March 27, 2015).

- In 2013, an online retailer threatened enforcement of a non-disparagement clause against customers, after the customers left a negative review on a consumer review website. The retailer demanded removal of the review or a payment of $3,500. The customer refused to pay and the retailer reported the fine for collection, which negatively impacted the customers' credit ratings. The customer filed a lawsuit in a federal district court in Utah seeking compensation for violations of the Fair Credit Reporting Act and tort law. The claim was that the clause was unconscionable and unlawfully restricted First Amendment rights. Ultimately, the customer obtained a default judgment against the retailer and was awarded compensatory and punitive damages, as well as attorney's fees and expenses.[11]
- A hotel in New York posted a policy on its website that indicated it would fine wedding parties $500 for each negative review posted by any member of the wedding party or their guests. After public backlash, this policy was removed.[12]
- Medical Justice provided standard agreements to medical professionals for use in their practices that asked patients to waive the right to, directly or indirectly, provide commentary regarding the practitioner or the services received. Some of the standard agreements required the patient to sign over any written, pictorial, or electronic commentary about the practitioner.[13] One dentist, using a Medical Justice form contract, was sued by a patient. In March 2015, a federal district court in New York ruled the contract was unenforceable and constituted a misuse of copyright law.[14]

Defamation[15]

If a business is concerned about false reviews that may have a negative impact on its business, it may be able to bring a civil action against a consumer who publishes false or misleading reviews. To prevail, the business must show that the customer:

- Published a false statement about the business;
- The false statement was published to a third party; and
- The falsity of the statement caused injury to the business.[16]

III. Effect of Proposed Changes:

Section 1 creates s. 725.09, F.S., to prohibit a contract for the sale or lease of consumer goods or services from including a provision that limits a consumer's right to make statements regarding his or her experiences with the seller or lessor, the seller's or lessor's employees, or the goods or

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[11] Nelson, Steven, *Retailer That Fined Couple $3,500 for Negative Review Hit with Lawsuit*, U.S. NEWS & WORLD REPORT, (December 13, 2013), *available at* http://www.usnews.com/news/articles/2013/12/18/retailer-that-fined-couple-3500-for-negative-review-hit-with-lawsuit (last visited March 19, 2015) and Volokh, Eugene, *Default Judgment Against KlearGear, the Company that Billed Customers for $3,500, Because They Posted a Negative Review*, THE WASHINGTON POST, (May 16, 2014), *available at* http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/16/default-judgment-against-kleargear-the-company-that-billed-customers-for-3500-because-they-posted-a-negative-review/ (last visited March 19, 2015).

[12] Hetter, Katia, CNN, *A $500 Fine for Bad Reviews? Inn's Policy Pummeled*, (August 5, 2014), *available at* http://www.cnn.com/2014/08/04/travel/bad-hotel-review-fine-backlash/ (last visited March 17, 2015).

[13] Doctored Reviews, *available at* http://doctoredreviews.com/patients/the-back-story/ (last visited March 17, 2015).

[14] Lexology.com, *Court Finds Dentist Misused Copyright Law to Stop Bad Yelp Reviews*, (March 17, 2015), *available at* http://www.lexology.com/library/detail.aspx?g=56373e86-0715-4b86-97c7-68582badf0cd (last visited March 17, 2015).

[15] Defamation is defined as the unprivileged publication of false statements that naturally and proximately result in an injury to another. Under Florida law, defamation also includes libel and slander. 19 FLA. JUR. 2D s. 2.

[16] *Razner v. Wellington Regional Medical Center, Inc.*, 837 So. 2d 437, 442 (Fla. 4d DCA 2002) (citing *Valencia v. Citibank Int'l.*, 728 So. 2d 330, 330 (Fla. 3d DCA 1999)).

services. The bill makes it unlawful to threaten or to seek to enforce a provision made unlawful under this bill, or otherwise penalize a consumer for making a statement protected under this bill. Any statement of penalty for undesired reviews about the business included within a contract is null and void.

The bill creates a civil action for the violation of the provisions of the bill which may be brought by a consumer, the Office of Attorney General, or the state attorney for the county in which the violation occurred. A court may impose a civil penalty of no more than $2,500 for the first violation and no more than $5,000 for each subsequent violation. Willful, intentional, or reckless violations may incur an additional civil penalty of up to $10,000. The civil penalty will be awarded to the consumer, if he or she brought the civil action, or to the general fund of the Office of Attorney General or the state attorney, if one of these entities brought the action. The imposition of these civil penalties does not affect any other relief available to the consumer.

The bill does not limit the ability of a host of online consumer reviews or comments from removing consumer reviews or comments that the host may, otherwise, lawfully remove.

Section 2 provides an effective date of July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The United States Constitution and the Florida Constitution prohibit the state from passing any law impairing the obligation of contracts.[17] "[T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear."[18] If a law does impair contracts, the courts will assess whether the law is deemed reasonable and necessary to serve an important public purpose.[19] The

[17] U.S. Const. Article I, § 10; Article I, s. 10, Fla. Const.
[18] *Pomponio v Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774, 779 (Fla. 1979) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978)). *See also General Motors Corp. v. Romein*, 503 U.S. 181 (1992).
[19] *Park Benziger & Co. v. Southern Wine & Spirits, Inc.*, 391 So. 2d 681, 683 (Fla. 1980); *Yellow Cab Co. of Dade County v. Dade County*, 412 So. 2d 395, 397 (Fla. 3rd DCA 1982) (citing *United States Trust Co. v. New Jersey*, 431 U.S. 1, (1977)).

factors that a court will consider when balancing the impairment of contracts with the public purpose include:

- Whether the law was enacted to deal with a broad, generalized economic or social problem;
- Whether the law operates in an area that was already subject to state regulation at the time the parties undertook their contractual obligations, or whether it invades an area never before subject to regulation; and
- Whether the law effects a temporary alteration of the contractual relationships of those within its scope, or whether it works a severe, permanent, and immediate change in those relationships, irrevocably and retroactively.[20]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

To the extent that individuals violate the provisions of the bill, there may be a negative fiscal impact to the state court system or legal agencies seeking to enforce the provisions of the bill. However, some of that costs may be offset by the recovery of civil penalties.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates the section 725.09, Florida Statutes.

[20] *See supra* note 17, at 779.

IX. Additional Information:

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

CS by Commerce and Tourism Committee on March 23, 2015:
The committee substitute moves the bill's provisions from ch. 672, F.S., to ch. 725, F.S.

B. Amendments:

None.

By the Committee on Commerce and Tourism; and Senator Ring

577-02756-15 20151212c1

A bill to be entitled

An act relating to contracts for goods and services; creating s. 725.09, F.S.; prohibiting contracts for the sale or lease of consumer goods or services from waiving the right of the consumer to make certain statements; providing civil penalties; providing construction and applicability; providing an effective date.

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

Section 1. Section 725.09, Florida Statutes, is created to read:

725.09 Right of consumer to make statements.—

(1)(a) A contract for the sale or lease of consumer goods or services may not include a provision waiving the right of the consumer to make any statement regarding the seller or lessor, the seller's or lessor's employees or agents, or the goods or services.

(b) A seller or lessor or its employees or agents may not threaten or seek to enforce a provision prohibited under this subsection or otherwise penalize a consumer for making a statement protected under this subsection.

(c) A waiver of this section is contrary to public policy, void, and unenforceable.

(2)(a) A seller or lessor or its employees or agents that violate this section are subject to a civil penalty not to exceed $2,500 for the first violation and $5,000 for each subsequent violation. For a willful, intentional, or reckless violation, an additional civil penalty not to exceed $10,000 may be assessed.

(b) The penalty shall be assessed and collected in a civil action brought by the consumer, the Attorney General, or the state attorney for the county in which the violation occurred. The penalty shall be payable, as appropriate, to the consumer or to the general fund of the governmental entity that brought the action.

(c) The penalties in this subsection are not exclusive remedies and do not affect other relief or remedies provided by law.

(3) This section does not prohibit a person or business that hosts online consumer reviews or comments from removing a statement that is otherwise lawful to remove.

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

Florida Senate - 2015 **CS for SB 1212**

577-02756-15 20151212c1

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

The Florida Senate

COMMITTEE VOTE RECORD

COMMITTEE: Judiciary
ITEM: CS/SB 1212
FINAL ACTION: Favorable
MEETING DATE: Tuesday, March 31, 2015
TIME: 4:00 —6:00 p.m.
PLACE: 110 Senate Office Building

FINAL VOTE								
Yea	**Nay**	**SENATORS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
X		Bean						
X		Benacquisto						
X		Brandes						
X		Joyner						
X		Simmons						
X		Simpson						
X		Soto						
X		Stargel						
		Ring, VICE CHAIR						
X		Diaz de la Portilla, CHAIR						
9	0	**TOTALS**						
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

The Florida Senate

Committee Agenda Request

To: Senator Miguel Diaz de la Portilla
Senate Committee on Judciary

Subject: Committee Agenda Request

Date: March 26, 2015

I respectfully request that **Senate Bill # 1212,** relating to Contracts for Goods and Services, be placed on the:

☒ committee agenda at your earliest possible convenience.

☐ next committee agenda.

Jeremy Ring

Senator Jeremy Ring
Florida Senate, District 29

File signed original with committee office

S-020 (03/2004)

SENATOR JEREMY RING
29th District

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:
Governmental Oversight and Accountability, *Chair*
Appropriations Subcommittee on Finance and Tax, *Vice Chair*
Appropriations
Appropriations Subcommittee on Transportation, Tourism, and Economic Development
Banking and Insurance
Commerce and Tourism
Judiciary
Rules

JOINT COMMITTEES:
Joint Legislative Auditing Committee
Joint Select Committee on Collective Bargaining

Committee Request

To: Senator Miguel Diaz de la Portilla, Chair
Committee on Judiciary

Subject: Committee Presentation Request

Date: March 30, 2015

I respectfully request that Joel Ramos from my office be allowed to present SB 794, related to Pre-Judgment Interest and SB 1212 related to Contracts for Goods and Services, to the committee at the meeting scheduled for March 31st , 2015. Thank you for your time and consideration.

Sincerely

Jeremy Ring

Jeremy Ring
Senator, District 29

CC. Tom Cibula, Staff Director

REPLY TO:
❒ 5790 Margate Boulevard, Margate, Florida 33063 (954) 917-1392 FAX: (954) 917-1394
❒ 405 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5029

Senate's Website: *www.flsenate.gov*

ANDY GARDINER
President of the Senate

GARRETT RICHTER
President Pro Tempore

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:
Governmental Oversight and Accountability, *Chair*
Appropriations Subcommittee on Finance and Tax, *Vice Chair*
Appropriations
Appropriations Subcommittee on Transportation, Tourism, and Economic Development
Banking and Insurance
Commerce and Tourism
Judiciary
Rules

JOINT COMMITTEES:
Joint Legislative Auditing Committee
Joint Select Committee on Collective Bargaining

SENATOR JEREMY RING
29th District

March 19, 2015

Senator Miguel Diaz de la Portilla
406 Senate Office Building
404 S. Monroe Street
Tallahassee, FL 32399-1100

Dear Chairman Diaz de la Portilla,

I am requesting to be excused from the Senate Judciary Committee scheduled for March 31st due to a pre planned trip to visit my son in Idaho.

Thank you in advance for considering this request to be excused from the Judiciary Committee on the 31st due to these unforeseen conflicts. Please do not hestiate to contact me if you have any questions.

Sincerely,

Jeremy Ring

Jeremy Ring
Senator District 29

REPLY TO:
☐ 5790 Margate Boulevard, Margate, Florida 33063 (954) 917-1392 FAX: (954) 917-1394
☐ 405 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5029

Senate's Website: *www.flsenate.gov*

ANDY GARDINER
President of the Senate

GARRETT RICHTER
President Pro Tempore

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 1452
INTRODUCER:	Senator Detert
SUBJECT:	Mental Health Services in the Criminal Justice System
DATE:	March 30, 2015 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Cibula	JU	**Favorable**
2.			AHS	
3.			AP	

I. Summary:

SB 1452 establishes problem-solving courts to address the unique circumstances and potential for treatment of defendants with serious mental illness, veterans, and substance abusers. Veterans' courts and mental health courts will be authorized to transfer cases to other counties on the same basis as that currently afforded to drug court treatment cases. The bill expands the definition of veterans to include veterans who are discharged or released under a general discharge.

The bill makes other changes to attend to the special needs of defendants who are veterans or who have a serious mental illness.

Mental Health Court Programs

The bill expressly recognizes mental health court programs. A mentally ill defendant at the postadjudicatory stage of the criminal process is eligible for participation if the offense charged is a nonviolent felony that scores low points on a scoresheet, the defendant is amenable to treatment, and the defendant has a prior history or present state of serious mental illness or a prior history of incompetence to proceed at trial.

Forensic Hospital Diversion Pilot Program

This bill creates the Forensic Hospital Diversion Pilot Program, which replicates the model of the Miami-Dade Forensic Alternative Center into 2 additional counties. In addition to Miami-Dade, the DCF will implement the program in Escambia and Hillsborough Counties. The purpose of the program is to divert incarcerated defendants found mentally incompetent to proceed or not guilty by reason of insanity into a therapeutic setting which offers beds and community outpatient treatment.

Conditional Release

Current law authorizes circuit courts to order felony defendants with mental illness onto conditional release rather than secure commitment in a forensic facility. This bill authorizes county courts to order conditional release of misdemeanor defendants with mental illness.

The total fiscal impact of the bill, from the provisions creating the pilot program ($4.5 million) and conditional release for misdemeanor defendants ($74 million), is almost $79 million.

II. Present Situation:

Transfer of Criminal Cases Between Counties

Florida law authorizes the transfer of a criminal case between counties in instances in which:

- An indictment or information is pending in one county and a defendant is arrested or held in another county, if the defendant requests in writing to plea guilty or nolo contendere, waive trial in the county in which the warrant was issued, and consent to disposition of the case in another county. The prosecutor of the court in which the indictment or information is pending must also consent to the transfer.[1]
- An indictment or information is not pending and a defendant is arrested on a warrant issued upon a complaint in a county other than the county of arrest and requests in writing that he or she wishes to plea guilty or nolo contendere, to waive trial in the county in which the warrant was issued, and consent to disposition of the case in the county in which the defendant was arrested. The prosecuting attorney must also consent to the transfer.
- A defendant is eligible to participate in a drug court treatment program as part of a pretrial intervention program. Additionally, the drug court must consent and the following conditions must be met:
  - The authorized representatives of the drug court programs consult about the transfer;
  - The trial court accepts a plea from the defendant of nolo contendere and enters a transfer order[2] for the clerk to transfer the case to the county which has accepted the defendant into its drug court program; and
  - Once the transfer takes place, the clerk must schedule a hearing before the drug court for the defendant to begin the drug court program.[3]

If a case is transferred to a county where the defendant successfully completes a drug court program, the court that received the transfer will dispose of the case by dismissing the criminal charges.[4] If the court finds that the defendant failed to successfully complete the program, the court may order the defendant to continue education and treatment including through substance-

[1] The formal charging document in a criminal case is known as an indictment or an information. Indictments are returned by a grand jury and presented to the court, and an information is made by a prosecutor in the absence of an indictment by the grand jury. BLACK'S LAW DICTIONARY (10th ed. 2014).
[2] The transfer order must include all documents relating to the case, including the probable cause affidavit, charging documents, witness statements, the defendant's written consent to abide by all rules of the drug court program, and the defendant's contact information. Section 910.035(5)(c), F.S.
[3] Section 910.035(1), (2), and (5), F.S.
[4] Section 948.08(6)(c), F.S.

abuse treatment or jail-based treatment programs, or authorize the prosecution of the criminal charges.[5]

Pre-trial Intervention in Criminal Cases

The Department of Corrections (DOC) supervises pretrial intervention programs for defendants who have criminal charges pending. Pretrial intervention is available to defendants who are charged with a misdemeanor or third degree felony as a first offense or who have previously committed one nonviolent misdemeanor.[6]

Before a case may be transferred to another county, the following is required:
- Approval from the administrator of the pretrial intervention program, a victim, the state attorney, and the judge who presided at the initial first appearance of the defendant;
- Voluntary and written agreement from the defendant; and
- Knowing and intelligent waiver of speedy trial rights from the defendant during the term of diversion.[7]

While a defendant is in the program, criminal charges remain pending. If the defendant fails to successfully complete the program, the program administrator may recommend further supervision or the state attorney may resume prosecution of the case. The defendant does not have the right to a public defender unless the offender is subject to incarceration if convicted.[8] If the defendant successfully completes the program, the program administrator may recommend that charges be dismissed without prejudice.[9]

The purpose of pretrial intervention is to offer eligible defendants a sentencing alternative in the form of counseling, education, supervision, and medical and psychological treatment as appropriate.[10]

Veterans Programs and Courts for Criminal Offenders

The Use of Veterans' Courts Nationally

A 2012 national survey found that 71 percent of participants in veterans' courts experienced trauma while serving in the military.[11] More recently, in 2014 a veterans' court report found that 46 percent of participants were diagnosed with substance abuse and mental health problems.

Veterans' courts are modeled after other specialty courts, such as drug courts and mental health courts. The goal of specialty courts is to provide treatment interventions to resolve underlying

[5] *Id*.
[6] A misdemeanor is punishable by up to 1 year term in a county jail and a $500 to a $1,000 fine. Sections 775.08(2) and 775.083(1)(d) and (e), F.S. A felony is punishable by a minimum of more than a 1 year term of imprisonment in a state penitentiary and fines that range from $5,000 to $15,000. Sections 775.08(1) and 775.083(1)(a) through (d), F.S.
[7] Section 948.08 (2), F.S.
[8] Section 948.08(3) and (4), F.S.
[9] Section 948.08(5), F.S. If a case is dismissed without prejudice, the case can be refiled at a later time.
[10] Section 948.08(1), F.S.
[11] Office of Program Policy Analysis & Government Accountability, Research Memorandum, *State-Funded Veterans' Courts in Florida*, pg. 1 (Jan. 30, 2015).

causes of criminal behavior to "reintegrate court participants into society, reduce future involvement with the criminal justice system, and promote public safety."[12]

Like other specialty courts, veterans' courts require the defendant to appear before the court over a specified period of time. On average, it takes 12 to 18 months for a veterans' court to dispose of a case.[13]

Veterans' Courts in Florida Law

The 2012 Florida Legislature placed into law the "T. Patt Maney Veterans' Treatment Intervention Act."[14] The law:

- Recognizes veterans' courts;
- Requires courts to hold a pre-sentencing hearing if a combat veteran alleges military-related injury, to determine if the defendant suffers from certain conditions, such as post-traumatic stress disorder, a traumatic brain injury, or a substance abuse disorder due to military service;
- Establishes pretrial and post-adjudication intervention programs for combat veterans having pending criminal charges or convictions; and
- Enables counties to establish programs to divert eligible defendants who are veterans into treatment programs.

Veterans' Courts

The chief judge of each judicial circuit may establish a Military Veterans and Servicemembers Court Program to serve the special needs of veterans and servicemembers who are convicted of criminal offenses.[15] In sentencing defendants, these specialty courts will consider whether military-related conditions, such as mental illness, traumatic brain injury, or substance abuse can be addressed through programs designed to serve the specific needs of the participant.[16]

As of January 2015, 21 veterans' courts in 20 counties operate in Florida.[17] Seven courts received funding from state general revenue. From July 2013 to October 2014, 45 participants graduated from the state-funded courts.[18] Fifty-two percent of the participants faced felony charges, mainly third-degree felonies.[19] Sixty-two percent of the participants in state-funded veterans' courts between July 2013 and October 2014 had a dual diagnosis of mental health issues and substance abuse.

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[12] *Id*.
[13] *Id.*
[14] Senate Bill 138 (ch. 2012-159, Laws of Fla.).
[15] Section 1.01(14), F.S., defines a veteran as a person who served in active military, naval, or air service who was discharged or released under honorable conditions or who later received an upgraded discharge under honorable conditions. A servicemember is defined as a person serving as a member of the United States Armed Forces on active duty or state active duty and members of the Florida National Guard and United States Reserve Forces. Section 250.01(19), F.S.
[16] The authority for Veterans' Courts Programs is in ch. 394, F.S., which addresses mental health. Section 394.47891, F.S.
[17] Office of Program Policy Analysis & Government Accountability, *supra* note 11 at 2 and 8. Alachua, Clay, Duval, Okaloosa, Orange, Pasco, and Pinellas counties received state general revenue funding to operate in Fiscal Year 2014-15. Other counties having veterans' courts are Brevard, Broward, Collier, Hillsborough, Indian River, Lake, Lee, Marion, Osceola, Palm Beach, Seminole, St. Lucie, and Volusia counties. Volusia County maintains two veterans' courts.
[18] *Id*. at 3.
[19] *Id*. at 5.

Pre-trial Intervention Programs

To be eligible to participate in diversion programs, veterans can be charged with misdemeanors[20] or felonies.[21] However, veterans must not be charged with a disqualifying felony offense. Disqualifying offenses are serious felony offenses and include:

- Kidnapping and attempted kidnapping;
- Murder or attempted murder;
- Aggravated battery or attempted aggravated battery;
- Sexual battery or attempted sexual battery;
- Lewd or lascivious battery and certain other sexual offenses against children;
- Robbery or attempted robbery;
- Burglary or attempted burglary;
- Aggravated assault;
- Aggravated stalking; and
- Treason.[22]

Prior to placement in a program, a veterans' treatment intervention team must develop an individualized coordinated strategy for the veteran. The team must present the coordinated strategy to the veteran in writing before he or she agrees to enter the program. The strategy is modeled after the ten therapeutic jurisprudence principles and key components for treatment-based drug court programs.[23]

During the time that the defendant is allotted participation in the treatment program, the court retains jurisdiction in the case. At the end of the program, the court considers recommendations for disposition by the state attorney and the program administrator. If the veteran successfully completes the treatment program, the court must dismiss the criminal charges. If the court finds that the veteran did not successfully complete the program, the court can either order the veteran to continue in education and treatment or authorize the state attorney to proceed with prosecution.

Eligible veterans who successfully complete the diversion program may petition the court to order the expunction of the arrest record and the plea.

Post-adjudication Treatment Programs

Veterans and servicemembers[24] on probation or community control who committed a crime on or after July 1, 2012, and who suffer from a military-related mental illness, a traumatic brain

[20] Section 948.16 (2)(a), F.S., establishes the misdemeanor pretrial veterans' treatment intervention program.
[21] Section 948.08(7)(a), F.S., authorizes courts to consider veterans charged with non-disqualifying felonies for pretrial veterans' treatment intervention programs.
[22] Section 948.06(8)(c), F.S.
[23] Section 948.08(7)(b), F.S., requires a coordinated strategy for veterans charged with felonies who are participating in pretrial intervention programs. Section 948.16(2)(b), F.S., requires a coordinated strategy for veterans charged with misdemeanors. Section 397.334(4), F.S., requires treatment based court programs to include therapeutic jurisprudence principles and components recognized by the United States Department of Justice and adopted by the Florida Supreme Court Treatment-based Drug Court Steering Committee.
[24] Section 1.01(14), F.S., defines a veteran as a person who served in active military, naval, or air service who was discharged or released under honorable conditions or who later received an upgraded discharge under honorable conditions. A

injury, or a substance abuse disorder may also qualify for treatment programs. A court may impose, as a condition of probation or community control, successful completion of a mental health or substance abuse treatment program.[25]

Mental Health Courts

Florida law does not currently recognize mental health courts as a specialty court.

Forensic Facilities and Mental Health Treatment for Criminal Defendants

State Forensic System

Chapter 916, F.S., governs secure forensic facilities that are under the jurisdiction of the Department of Children and Families. The state forensic system is a network of state facilities and community services for persons who have mental health issues and who are involved with the criminal justice system.

Two types of mentally ill defendants charged with felonies are eligible for involuntary commitment:
- Persons found incompetent to proceed[26] to trial or the entry of a plea; and
- Persons found not guilty by reason of insanity.[27]

Forensic treatment is provided in these settings:
- Separate and secure forensic facilities;
- Civil facilities; and
- Community residential programs or other community settings.

Circuit courts have the option of committing a person to a facility or releasing the person on conditional release.[28] Conditional release is release into the community, accompanied by outpatient care and treatment.[29] The committing court retains jurisdiction over the defendant while the defendant is either under involuntary commitment or conditional release.[30]

The DCF oversees two state-operated facilities, Florida State Hospital and North Florida Evaluation and Treatment Center, and two privately-operated, maximum-security forensic treatment facilities, South Florida Evaluation and Treatment Center and Treasure Coast Treatment Center. In Fiscal Year 2011-2, the appropriation for state forensic facilities was $139 million from the General Revenue Fund.[31]

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servicemember is defined as a person serving as a member of the United States Armed Forces on active duty or state active duty and members of the Florida National Guard and United States Reserve Forces. (Section 250.01(19), F.S.)

[25] Section 948.21, F.S.

[26] Mental incompetence to proceed is defined in s. 916.12(1), F.S.

[27] Section 916.105(1), F.S.; The Florida Rules of Criminal Procedure define what is meant by "not guilty by reason of insanity," rather than the statutes. Section 916.15(1), F.S.

[28] Section 916.17(1), F.S.

[29] *Id*.

[30] Section 916.16(1), F.S.

[31] Budget Subcommittee on Health and Human Services Appropriations, The Florida Senate, *Interim Report 2012-108, The Forensic Mental Health System* (Sept. 2011).

Miami-Dade Forensic Alternative Center

The Miami-Dade Forensic Alternative Center (MDFAC) opened in 2009 as a community-based, forensic commitment program. The MDFAC serves adults:

- Aged 18 years old and older;
- Who have been found by a court to be incompetent to proceed due to serious mental illness or not guilty by reason of insanity for a second or third degree felony; and
- Who do not have a significant history of violence.[32]

The MDFAC provides competency restoration and a continuum of care during commitment and after reentry into the community.[33]

Since Fiscal Year 2011-2012, all but two of the persons served in the program were adjudicated incompetent to proceed. The Center currently operates a 16-bed facility at a daily cost of $284.81 per bed.[34]

III. Effect of Proposed Changes:

The bill provides an alternative to incarceration for mentally ill defendants who are found incompetent to proceed or not guilty by reason of insanity. Also, veterans' courts and mental health courts will be authorized to transfer cases to other counties on the same basis as that currently afforded to drug court treatment cases.

Treatment-based Mental Health Court Programs

This bill authorizes counties to fund, or a chief judge of a circuit to establish a treatment-based mental health court program. The purpose of the program is for persons in the criminal justice system to receive therapeutic mental health treatment. The treatment approach will start with an individualized recovery plan.

Effective for offenses committed on or after July 1, 2015, the sentencing court may place a defendant into a postadjudicatory treatment-based mental health court program if:

- The Defendant's Criminal Punishment Code scoresheet points total 60 points or less;
- The offense is a nonviolent felony;[35]
- The defendant is amenable to mental health treatment; and
- The defendant qualifies on the basis of a prior history of a serious mental illness or incompetence to proceed at trial, or a present state of serious mental illness.

This bill encourages coordination among various state agencies, local government, and law enforcement agencies to establish and support these programs.

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[32] Department of Children and Families (DCF), *2015 Agency Legislative Bill Analysis* (Mar. 4 2015) (on file with the Senate Judiciary Committee).
[33] The Florida Senate, *supra* note 31.
[34] DCF, *supra* note 32, at 2.
[35] A nonviolent felony is defined under the bill as an offense of burglary or trespassing listed under ch. 810, F.S., which is charged as a third-degree felony or a non-forcible felony

A defendant is eligible for the program if the court finds a history of a serious mental health diagnosis, prior findings of incompetence, or the presence of serious mental health symptoms. Participation is voluntary.

Treatment may include:
- Pretrial diversion, including specific pretrial mental health conditions of release;
- Postadjudicatory conditions of mental health probation or community control;
- Involuntary outpatient placement and treatment; or
- Conditional release from forensic facilities.

The Department of Corrections is authorized to designate mental health probation officers to support participants.

Problem-solving Courts

Transfer of Cases to a Problem-solving Court

This bill enables veterans' courts and mental health courts to transfer cases to other counties on the same basis, and under similar conditions as that provided for cases in which defendants are eligible for drug court treatment programs. These three specialty courts are designated by the bill as problem-solving courts.

As is the case for drug court transfers, the county to which the mental health or veterans' court case is transferred must first approve the transfer. Likewise, the court to which the case has been transferred retains jurisdiction to dispose of the case upon the defendant's successful completion of the program, order continued treatment, or authorize prosecution.

Participation in a postadjudicatory problem-solving court program may be considered as a mitigating circumstance in the sentencing of a crime.

Veteran Participants in Problem-solving Courts

The population of veterans is expanded for purposes of participating in veterans' court to include veterans who were discharged or released under a general discharge.

In addition to imposing other conditions, the court may require a veteran who is on probation or community control to participate in treatment for the veteran's mental illness, traumatic brain injury, or substance abuse disorder.

Forensic Hospital Diversion Pilot Program

This bill creates the Forensic Hospital Diversion Pilot Program (Program). The purpose of the program is to divert incarcerated defendants who are found mentally incompetent to proceed at trial with criminal prosecution from state forensic mental health treatment facilities to community outpatient treatment. Goals of treatment are restoration of competency and community reintegration.

Under the bill, the Department of Children and Families (DCF) is required to implement the Program in Escambia, Hillsborough, and Miami-Dade counties. The model for the Program is the Miami-Dade Forensic Alternative Center, currently in operation.

Participation in the program is limited to persons who are:

- 18 years of age and older;
- Charged with a second or third degree felony;
- Do not have a significant history of violent criminal offenses;
- Have been adjudicated either incompetent to proceed to trial or not guilty by reason of insanity;
- Meet safety and treatment criteria established by the DCF for placement in the community; and
- Would otherwise be admitted to a state mental health treatment facility.

The bill encourages the Florida Supreme Court, in conjunction with the Supreme Court Mental Health and Substance Abuse Committee, to develop educational training for judges in the pilot program counties on the community forensic system.

The DCF is authorized to adopt rules to facilitate to facilitate the provisions of the bill relating to the Program. The bill requires the Office of Program Policy Analysis and Government Accountability (OPPAGA) to submit a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives by December 31, 2016. The report must examine the efficiency and cost-effectiveness of the program, including its effect on public safety.

Conditional Release

A circuit court may order a felony defendant on conditional release instead of involuntary commitment to a forensic facility. This bill authorizes county courts to order the conditional release of a misdemeanor defendant solely for the purpose of providing outpatient care and treatment.

The bill takes effect July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not appear to require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 10 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Persons charged with who are declared incompetent to proceed at trial or not guilty by reason of insanity will benefit from this bill. Rather than being committed to a jail setting or a secure forensic facility, these persons may be committed instead to a clinical hospital setting and therefore receive more optimal mental health treatment. Also, county courts may place misdemeanor defendants who are mentally ill on conditional release.

C. Government Sector Impact:

Forensic Hospital Diversion Pilot Program

This bill replicates the Miami-Dade Forensic Alternative Center Program as a pilot program in 2 other counties.

The program's current contract with the DCF is almost $1.5 million. Funding this model for three programs will require $4.5 million. The DCF anticipates that the redirection of $4.5 million from the department's budget for this program could impact or decrease the provision of services to other department clients. Therefore, the DCF would be unable to absorb the additional costs.

Cost savings may be realized, however, based on the success of the program. The program is able to keep individuals whose competency has been restored in the program rather than in jail while awaiting trial. Doing so may shorten the process, as defendants are less likely to decompensate, or lose competency again from the stress and the less-than-optimal treatment provided in a jail setting. Commitment bed and court cost savings are expected through this bill. Competency is restored more quickly through the program, which requires 103 days on average, than at state facilities, which requires 146 days on average.

In Fiscal Year 2011-12, the average cost for a secure forensic bed was $333 per day. A bed at the program cost much less, at $229 a day in 2011-12.[36] However, the current cost per bed per day at the program is $285 a day.[37]

Conditional Release of Misdemeanor Defendants

Current law only allows circuit courts to release felony defendants who are mentally ill onto conditional release. This bill additionally allows county judges to release misdemeanor defendants who are mentally ill on conditional release. For FY 2012-13, the

[36] The Florida Senate, *supra* note 31.
[37] DCF, *supra* note 32, at 2.

Office of the State Courts Administrator reported a total of 308,467 misdemeanor filings in the state.[38] The current adult population in Florida is 15.6 million, with a serious mental illness rate ranging on average at 5.4 percent.

Multiplying the number of misdemeanor filings, 308,467 by the rate of mental illness, 5.4 percent, 16,657 misdemeanor defendants would be served. Multiplying the number of persons to be served by the average cost of services, which is $4,462, the total cost is estimated at $74 million.

Estimated fiscal costs are the cost of the pilot program ($4.5 million) plus the cost of the conditional release for misdemeanor defendants ($74 million), for a total estimated cost of almost $79 million from the provisions of this bill.[39]

Problem-solving Courts

The Office of State Courts Administrator anticipates additional judicial and court workload from:

- Creating mental health courts, as specialty courts require more extensive hearings and time monitoring than traditional criminal cases. However, cost savings may be realized from lower recidivism and costs of incarceration.
- Expanding the eligibility criteria for veterans. Like other problem-solving courts, veterans' courts require more judicial time than traditional criminal cases. Also, veterans discharged or released under less than honorable conditions are ineligible for benefits from the United States Department of Veterans Affairs. Therefore, the court system would need to access other community resources. However, veterans court is discretionary and expanding the pool of eligible veterans does not require veterans courts to serve this new population.[40]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 394.47891, 910.035, 916.17, 921.0026, 948.01, 948.06, 948.08, 948.16, and 948.21.

This bill creates the following sections of the Florida Statutes: 394.47892 and 916.185.

[38] Office of the State Courts Administrator, *County Criminal Overview, FY 2012-13 Statistical Reference Guide*, http://www.flcourts.org/core/fileparse.php/250/urlt/reference-guide-1213-county-crim.pdf
[39] DCF, *supra* note 28, at 3-6.
[40] Office of the State Courts Administrator, *2015 Judicial Impact Statement* (Mar. 29, 2015).

IX. Additional Information:

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

None.

B. Amendments:

None.

By Senator Detert

28-00242A-15 20151452__

A bill to be entitled

An act relating to mental health services in the criminal justice system; amending s. 394.47891, F.S.; expanding eligibility criteria for military veterans and servicemembers court programs; creating s. 394.47892, F.S.; authorizing the creation of treatment-based mental health court programs; amending s. 910.035, F.S.; defining the term "problem-solving court"; revising the provisions relating to drug-court programs to apply to problem-solving courts; amending s. 916.17, F.S.; authorizing a county court to order the conditional release of a defendant only for the provision of outpatient care and treatment; creating s. 916.185, F.S.; providing legislative findings and intent; defining terms; creating the Forensic Hospital Diversion Pilot Program; requiring the Department of Children and Families to implement a Forensic Hospital Diversion Pilot Program in three specified judicial circuits; providing eligibility for the pilot program; providing legislative intent concerning training; authorizing the department to adopt rules; directing the Office of Program Policy Analysis and Government Accountability to submit a report to the Governor and the Legislature; amending s. 921.0026, F.S.; adding a postadjudicatory treatment-based mental health program and military veterans and servicemembers court program to the list of mitigating circumstances that may be considered in certain sentencing; amending ss. 948.01 and 948.06, F.S.; authorizing a court to order certain

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defendants to participate in a postadjudicatory mental health court program; amending s. 948.08, F.S.; expanding the definition of the term "veteran" for purposes of eligibility requirements for a pretrial intervention program; amending s. 948.16, F.S.; expanding the definition of the term "veteran" for purposes of eligibility requirements for a misdemeanor pretrial veterans' treatment intervention program; amending s. 948.21, F.S.; authorizing a court to impose certain conditions on certain probationers or community controllees; providing an effective date.

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

Section 1. Section 394.47891, Florida Statutes, is amended to read:

394.47891 Military veterans and servicemembers court programs.—The chief judge of each judicial circuit may establish a Military Veterans and Servicemembers Court Program under which veterans, as defined in s. 1.01, including veterans who were discharged or released under a general discharge, and servicemembers, as defined in s. 250.01, who are convicted of a criminal offense and who suffer from a military-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem can be sentenced in accordance with chapter 921 in a manner that appropriately addresses the severity of the mental illness, traumatic brain injury, substance abuse disorder, or psychological problem through services tailored to the individual needs of the participant.

Entry into any Military Veterans and Servicemembers Court Program must be based upon the sentencing court's assessment of the defendant's criminal history, military service, substance abuse treatment needs, mental health treatment needs, amenability to the services of the program, the recommendation of the state attorney and the victim, if any, and the defendant's agreement to enter the program.

Section 2. Section 394.47892, Florida Statutes, is created to read:

394.47892 Treatment-based mental health court programs.—

(1) The chief judge of each judicial circuit may establish, or individual counties may fund, a treatment-based mental health court program under which persons in the justice system assessed with a mental illness are processed in such a manner as to appropriately address the severity of the identified mental illness through treatment services tailored to the individual needs of the participant. It is the intent of the Legislature to encourage the Department of Corrections, the Department of Children and Families, the Department of Juvenile Justice, the Department of Health, the Department of Law Enforcement, the Department of Education, and such agencies, local governments, law enforcement agencies, other interested public or private entities, and individuals to support the creation and establishment of these problem-solving court programs. Participation in the treatment-based mental health court programs does not divest any public or private agency of its responsibility for a child or an adult, but enables these agencies to better meet the needs of the child or the adult through shared responsibilities and resources.

(2) A defendant is eligible for the treatment-based mental health court program if the court makes a determination of eligibility based on a prior history of a known, serious mental health diagnosis, prior findings of incompetence, or the present observation of serious mental health symptoms. The treatment-based mental health court program may include pretrial diversion, including specific pretrial mental health conditions of release, postadjudicatory conditions of mental health probation or community control, involuntary outpatient placement and treatment, or conditional release under chapter 916. The treatment-based mental health court program must employ principles of therapeutic jurisprudence, including an individualized recovery plan, restitution or mitigation as may be appropriate, the use of multidisciplinary treatment teams, periodic court reviews and representation by counsel, peer support services, and other recovery tools necessary to achieve a stabilized condition and prevent recidivism and rearrest.

Section 3. Section 910.035, Florida Statutes, is amended to read:

910.035 Transfer from county for plea and sentence or for participation in a problem-solving court.—

(1) INDICTMENT OR INFORMATION PENDING.—A defendant arrested or held in a county other than that in which an indictment or information is pending against him or her may state in writing that he or she wishes to plead guilty or nolo contendere, to waive trial in the county in which the indictment or information is pending, and to consent to disposition of the case in the county in which the defendant was arrested or is held, subject to the approval of the prosecuting attorney of the court in

which the indictment or information is pending. Upon receipt of the defendant's statement and the written approval of the prosecuting attorney, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding, or certified copies thereof, to the clerk of the court of competent jurisdiction for the county in which the defendant is held, and the prosecution shall continue in that county upon the information or indictment originally filed. In the event a fine is imposed upon the defendant in that county, two-thirds thereof shall be returned to the county in which the indictment or information was originally filed.

(2) INDICTMENT OR INFORMATION NOT PENDING.—A defendant arrested on a warrant issued upon a complaint in a county other than the county of arrest may state in writing that he or she wishes to plead guilty or nolo contendere, to waive trial in the county in which the warrant was issued, and to consent to disposition of the case in the county in which the defendant was arrested, subject to the approval of the prosecuting attorney of the court in which the indictment or information is pending. Upon receipt of the defendant's statement and the written approval of the prosecuting attorney, and upon the filing of an information or the return of an indictment, the clerk of the court from which the warrant was issued shall transmit the papers in the proceeding, or certified copies thereof, to the clerk of the court of competent jurisdiction in the county in which the defendant was arrested, and the prosecution shall continue in that county upon the information or indictment originally filed.

(3) EFFECT OF NOT GUILTY PLEA.—If, after the proceeding has

been transferred pursuant to subsection (1) or subsection (2), the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced, and the proceeding shall be restored to the docket of that court. The defendant's statement that he or she wishes to plead guilty or nolo contendere shall not be used against the defendant.

(4) APPEARANCE IN RESPONSE TO A SUMMONS.—For the purpose of initiating a transfer under this section, a person who appears in response to a summons shall be treated as if he or she had been arrested on a warrant in the county of such appearance.

(5) TRANSFERS FOR PARTICIPATION IN A PROBLEM-SOLVING COURT.—As used in this subsection, the term "problem-solving court" means a drug court pursuant to s. 948.01, s. 948.06, s. 948.08, s. 948.16, or s. 948.20; a veterans' court pursuant to s. 394.47891, s. 948.08, s. 948.16, or s. 948.21; or a mental health court pursuant to s. 394.47892. A ~~Any~~ person eligible for participation in a problem-solving ~~drug~~ court ~~treatment program pursuant to s. 948.08(6)~~ may be eligible to have the case transferred to a county other than that in which the charge arose if the problem-solving ~~drug~~ court ~~program~~ agrees and these procedures ~~if the following conditions~~ are followed ~~met~~:

(a) The authorized representative of the problem-solving ~~drug~~ court ~~program~~ of the county requesting to transfer the case shall consult with the authorized representative of the problem-solving ~~drug~~ court ~~program~~ in the county to which transfer is desired.

(b) If approval for transfer is received from all parties, the trial court must ~~shall~~ accept, in the case of a pretrial problem-solving court, a plea of nolo contendere and enter a

transfer order directing the clerk to transfer the case to the county that ~~which~~ has accepted the defendant into its problem-solving ~~drug~~ court ~~program~~.

(c) The transfer order must ~~shall~~ include a copy of the probable cause affidavit, in the case of a pretrial problem-solving court; any charging or sentencing documents in the case; all reports, witness statements, test results, evidence lists, and other documents in the case; the defendant's mailing address and phone number; and the defendant's written consent to abide by the rules and procedures of the receiving county's problem-solving ~~drug~~ court ~~program~~.

(d) After the transfer takes place, the clerk shall set the matter for a hearing before the problem-solving ~~drug~~ court ~~program~~ judge and the court shall ensure the defendant's entry into the problem-solving ~~drug~~ court ~~program~~.

(e) Upon successful completion of the problem-solving ~~drug~~ court ~~program~~, the jurisdiction to which the case has been transferred shall dispose of the case ~~pursuant to s. 948.08(6)~~. If the defendant does not complete the problem-solving ~~drug~~ court ~~program~~ successfully, the jurisdiction to which the case has been transferred shall dispose of the case within the guidelines of the Criminal Punishment Code.

Section 4. Subsections (1) and (2) of section 916.17, Florida Statutes, are amended to read:

916.17 Conditional release.—

(1) Except for an inmate currently serving a prison sentence, the committing court may order a conditional release of any defendant in lieu of an involuntary commitment to a facility pursuant to s. 916.13 or s. 916.15 based upon an

approved plan for providing appropriate outpatient care and treatment. A county court may order the conditional release of a defendant only for purposes of the provision of outpatient care and treatment. Upon a recommendation that outpatient treatment of the defendant is appropriate, a written plan for outpatient treatment, including recommendations from qualified professionals, must be filed with the court, with copies to all parties. Such a plan may also be submitted by the defendant and filed with the court with copies to all parties. The plan shall include:

(a) Special provisions for residential care or adequate supervision of the defendant.

(b) Provisions for outpatient mental health services.

(c) If appropriate, recommendations for auxiliary services such as vocational training, educational services, or special medical care.

In its order of conditional release, the court shall specify the conditions of release based upon the release plan and shall direct the appropriate agencies or persons to submit periodic reports to the court regarding the defendant's compliance with the conditions of the release and progress in treatment, with copies to all parties.

(2) Upon the filing of an affidavit or statement under oath by any person that the defendant has failed to comply with the conditions of release, that the defendant's condition has deteriorated to the point that inpatient care is required, or that the release conditions should be modified, the court shall hold a hearing within 7 days after receipt of the affidavit or

statement under oath. After the hearing, the court may modify the release conditions. The court may also order that any ~~the~~ defendant who is charged with a felony be returned to the department if it is found, after the appointment and report of experts, that the person meets the criteria for involuntary commitment under s. 916.13 or s. 916.15.

Section 5. Section 916.185, Florida Statutes, is created to read:

916.185 Forensic Hospital Diversion Pilot Program.—

(1) LEGISLATIVE FINDINGS AND INTENT.—The Legislature finds that many jail inmates who have serious mental illnesses and who are committed to state forensic mental health treatment facilities for restoration of competency to proceed could be served more effectively and at less cost in community-based alternative programs. The Legislature further finds that many people who have serious mental illnesses and who have been discharged from state forensic mental health treatment facilities could avoid recidivism in the criminal justice and forensic mental health systems if they received specialized treatment in the community. Therefore, it is the intent of the Legislature to create the Forensic Hospital Diversion Pilot Program to serve individuals who have mental illnesses or co-occurring mental illnesses and substance use disorders and who are admitted to or are at risk of entering state forensic mental health treatment facilities, prisons, jails, or state civil mental health treatment facilities.

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

(a) "Best practices" means treatment services that incorporate the most effective and acceptable interventions

available in the care and treatment of individuals who are diagnosed as having mental illnesses or co-occurring mental illnesses and substance use disorders.

(b) "Community forensic system" means the community mental health and substance use forensic treatment system, including the comprehensive set of services and supports provided to individuals involved in or at risk of becoming involved in the criminal justice system.

(c) "Evidence-based practices" means interventions and strategies that, based on the best available empirical research, demonstrate effective and efficient outcomes in the care and treatment of individuals who are diagnosed as having mental illnesses or co-occurring mental illnesses and substance use disorders.

(3) CREATION.—There is created a Forensic Hospital Diversion Pilot Program to provide, when appropriate, competency-restoration and community-reintegration services in locked residential treatment facilities, based on considerations of public safety, the needs of the individual, and available resources.

(a) The department shall implement a Forensic Hospital Diversion Pilot Program in Escambia, Hillsborough, and Miami-Dade Counties, in conjunction with the First Judicial Circuit, the Thirteenth Judicial Circuit, and the Eleventh Judicial Circuit, respectively, which shall be modeled after the Miami-Dade Forensic Alternative Center, taking into account local needs and resources.

(b) In creating and implementing the program, the department shall include a comprehensive continuum of care and

services that use evidence-based practices and best practices to treat people who have mental health and co-occurring substance use disorders.

(c) The department and the respective judicial circuits shall implement this section within available resources. The department may reallocate resources from forensic mental health programs or other adult mental health programs serving individuals involved in the criminal justice system.

(4) ELIGIBILITY.—Participation in the Forensic Hospital Diversion Pilot Program is limited to persons who:

(a) Are 18 years of age or older;

(b) Are charged with a felony of the second degree or a felony of the third degree;

(c) Do not have a significant history of violent criminal offenses;

(d) Have been adjudicated incompetent to proceed to trial or not guilty by reason of insanity under this part;

(e) Meet public safety and treatment criteria established by the department for placement in a community setting; and

(f) Would be admitted to a state mental health treatment facility if not for the availability of the Forensic Hospital Diversion Pilot Program.

(5) TRAINING.—The Legislature encourages the Florida Supreme Court, in consultation and cooperation with the Supreme Court Mental Health and Substance Abuse Committee, to develop educational training for judges in the pilot program areas on the community forensic system.

(6) RULEMAKING.—The department may adopt rules under ss. 120.536(1) and 120.54 to administer this section.

(7) REPORT.—The Office of Program Policy Analysis and Government Accountability shall review and evaluate the Forensic Hospital Diversion Pilot Program and submit a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives by December 31, 2016. The report shall examine the efficiency and cost-effectiveness of providing forensic mental health services in secure, outpatient, community-based settings. In addition, the report shall examine the impact of the Forensic Hospital Diversion Pilot Program on public health and safety.

Section 6. Paragraph (m) of subsection (2) of section 921.0026, Florida Statutes, is amended to read:

921.0026 Mitigating circumstances.—This section applies to any felony offense, except any capital felony, committed on or after October 1, 1998.

(2) Mitigating circumstances under which a departure from the lowest permissible sentence is reasonably justified include, but are not limited to:

(m) The defendant's offense is a nonviolent felony, the defendant's Criminal Punishment Code scoresheet total sentence points under s. 921.0024 are 60 points or fewer, and the court determines that the defendant is amenable to the services of a postadjudicatory treatment-based drug court program; a postadjudicatory treatment-based mental health court program; or a postadjudicatory treatment-based military veterans and servicemembers court program; and is otherwise qualified to participate in the program as part of the sentence. For purposes of this paragraph, the term "nonviolent felony" has the same meaning as provided in s. 948.08(6).

Section 7. Subsection (8) is added to section 948.01, Florida Statutes, to read:

948.01 When court may place defendant on probation or into community control.—

(8)(a) Notwithstanding s. 921.0024 and effective for offenses committed on or after July 1, 2015, the sentencing court may place the defendant into a postadjudicatory treatment-based mental health court program if the defendant's Criminal Punishment Code scoresheet total sentence points under s. 921.0024 are 60 points or fewer, the offense is a nonviolent felony, the defendant is amenable to mental health treatment, and the defendant is otherwise qualified under s. 394.47892(2). The satisfactory completion of the program must be a condition of the defendant's probation or community control. As used in this subsection, the term "nonviolent felony" means a third degree felony violation under chapter 810 or any other felony offense that is not a forcible felony as defined in s. 776.08.

(b) The defendant must be fully advised of the purpose of the program, and the defendant must agree to enter the program. The original sentencing court shall relinquish jurisdiction of the defendant's case to the postadjudicatory treatment-based mental health court program until the defendant is no longer active in the program, the case is returned to the sentencing court due to the defendant's termination from the program for failure to comply with the terms thereof, or the defendant's sentence is completed.

(c) The Department of Corrections is authorized to designate mental health probation officers to support individuals under the supervision of the mental health court.

Section 8. Paragraph (j) is added to subsection (2) of section 948.06, Florida Statutes, to read:

948.06 Violation of probation or community control; revocation; modification; continuance; failure to pay restitution or cost of supervision.—

(2)

(j) 1. Notwithstanding s. 921.0024 and effective for offenses committed on or after July 1, 2015, the court may order the defendant to successfully complete a postadjudicatory treatment-based mental health court program if:

a. The court finds or the offender admits that the offender has violated his or her community control or probation;

b. The offender has 60 or fewer total sentence points after including points for the violation on his or her Criminal Punishment Code scoresheet under s. 921.0024;

c. The underlying offense is a nonviolent felony;

d. The court determines that the offender is amenable to the services of a postadjudicatory treatment-based mental health court program;

e. The court has explained the purpose of the program to the offender and the offender has agreed to participate; and

f. The offender is otherwise qualified to participate in the program under s. 394.47892(2).

2. After the court orders the modification of community control or probation, the original sentencing court shall relinquish jurisdiction of the offender's case to the postadjudicatory treatment-based mental health court program until the offender is no longer active in the program, the case is returned to the sentencing court due to the offender's

termination from the program for failure to comply with the terms thereof, or the offender's sentence is completed.

Section 9. Paragraph (a) of subsection (7) of section 948.08, Florida Statutes, is amended to read:

948.08 Pretrial intervention program.—

(7)(a) Notwithstanding any provision of this section, a person who is charged with a felony, other than a felony listed in s. 948.06(8)(c), and identified as a veteran, as defined in s. 1.01, including a veteran who was discharged or released under a general discharge, or servicemember, as defined in s. 250.01, who suffers from a military service-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem, is eligible for voluntary admission into a pretrial veterans' treatment intervention program approved by the chief judge of the circuit, upon motion of either party or the court's own motion, except:

1. If a defendant was previously offered admission to a pretrial veterans' treatment intervention program at any time before trial and the defendant rejected that offer on the record, the court may deny the defendant's admission to such a program.

2. If a defendant previously entered a court-ordered veterans' treatment program, the court may deny the defendant's admission into the pretrial veterans' treatment program.

Section 10. Paragraph (a) of subsection (2) of section 948.16, Florida Statutes, is amended to read:

948.16 Misdemeanor pretrial substance abuse education and treatment intervention program; misdemeanor pretrial veterans' treatment intervention program.—

(2)(a) A veteran, as defined in s. 1.01, including a veteran who was discharged or released under a general discharge, or servicemember, as defined in s. 250.01, who suffers from a military service-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem, and who is charged with a misdemeanor is eligible for voluntary admission into a misdemeanor pretrial veterans' treatment intervention program approved by the chief judge of the circuit, for a period based on the program's requirements and the treatment plan for the offender, upon motion of either party or the court's own motion. However, the court may deny the defendant admission into a misdemeanor pretrial veterans' treatment intervention program if the defendant has previously entered a court-ordered veterans' treatment program.

Section 11. Section 948.21, Florida Statutes, is amended to read:

948.21 Condition of probation or community control; military servicemembers and veterans.—

(1) Effective for a probationer or community controllee whose crime was committed on or after July 1, 2012, and who is a veteran, as defined in s. 1.01, or servicemember, as defined in s. 250.01, who suffers from a military service-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem, the court may, in addition to any other conditions imposed, impose a condition requiring the probationer or community controllee to participate in a treatment program capable of treating the probationer or community controllee's mental illness, traumatic brain injury, substance abuse

disorder, or psychological problem.

(2) Effective for a probationer or community controllee whose crime was committed on or after July 1, 2015, and who is a veteran, as defined in s. 1.01, including a veteran who was discharged or released under a general discharge, or a servicemember, as defined in s. 250.01, who suffers from a military service-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem, the court may impose, in addition to any other conditions imposed, a condition requiring the probationer or community controllee to participate in a treatment program established to treat the probationer or community controllee's mental illness, traumatic brain injury, substance abuse disorder, or psychological problem.

(3) The court shall give preference to treatment programs for which the probationer or community controllee is eligible through the United States Department of Veterans Affairs or the Florida Department of Veterans' Affairs. The Department of Corrections is not required to spend state funds to implement this section.

Section 12. This act shall take effect July 1, 2015.

The Florida Senate

COMMITTEE VOTE RECORD

COMMITTEE: Judiciary
ITEM: SB 1452
FINAL ACTION: Favorable
MEETING DATE: Tuesday, March 31, 2015
TIME: 4:00 —6:00 p.m.
PLACE: 110 Senate Office Building

FINAL VOTE								
Yea	**Nay**	**SENATORS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
X		Bean						
X		Benacquisto						
X		Brandes						
X		Joyner						
X		Simmons						
X		Simpson						
VA		Soto						
X		Stargel						
		Ring, VICE CHAIR						
X		Diaz de la Portilla, CHAIR						
9	0	**TOTALS**						
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

The Florida Senate

Committee Agenda Request

To: Senator Miguel Diaz de la Portilla, Chair
Committee on Judiciary

Subject: Committee Agenda Request

Date: March 5, 2015

I respectfully request that **Senate Bill #1452**, relating to Mental Health Services in the Criminal Justice System, be placed on the:

☐ committee agenda at your earliest possible convenience.

☒ next committee agenda.

Senator Nancy C. Detert
Florida Senate, District 28

File signed original with committee office

S-020 (03/2004)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

03/31/15
Meeting Date

1452
Bill Number (if applicable)

Topic _____

Amendment Barcode (if applicable)

Name Washington Sanchez

Job Title Col. USA

Address 2229 Gates Drive
Street

Phone 850-322-8455

Tallahassee, FL 32312
City *State* *Zip*

Email _____

Speaking: ☒ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Florida Veterans Foundation

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3.31.15
Meeting Date

1452
Bill Number (if applicable)

Topic HEALTH CARE/CRIMINAL JUSTICE SYSTEM

Amendment Barcode (if applicable)

Name LAURA YOUMANS (YO-MANS)

Job Title LEGISLATIVE ADVOCATE

Address 100 N. MONROE ST
Street

Phone 294-1838

TAL FL 32301
City *State* *Zip*

Email LYOUMANS@FLCOUNTIES.COM

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing FLORIDA ASSOCIATION OF COUNTIES

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

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S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/15
Meeting Date

1452
Bill Number (if applicable)

Topic Mental Health & Veterans Courts

Amendment Barcode (if applicable)

Name Dan Hendrickson

Job Title legislative liaison (vol)

Address 319 E Park Ave
Street

Phone 850/570-1967

Tallahassee — *City* | Fl — *State* | 32302 — *Zip*

Email danbhendrickson@comcast.net

Speaking: ☑ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Big Bend Mental Health Coalition, NorthFlorida Veterans Standdown Legal, NAMI Tallahassee

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☐ Yes ☑ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/15
Meeting Date

SB1452
Bill Number (if applicable)

Topic Mental Health Serves in the CJ System
Amendment Barcode (if applicable)

Name Denise Marzullo

Job Title Executive Director

Address 8280 Princeton Sq Blvd. #8
Street

Jacksonville FL 32256
City *State* *Zip*

Phone 904-738-8426

Email denise@mhajax.org

Speaking: [X] For [ ] Against [ ] Information

Waive Speaking: [X] In Support [ ] Against
(The Chair will read this information into the record.)

Representing Mental Health America of Northeast Florida

Appearing at request of Chair: [ ] Yes [X] No

Lobbyist registered with Legislature: [ ] Yes [X] No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/15
Meeting Date

SB 1452
Bill Number (if applicable)

Topic RE Mental Health Services in the Crim. Justice System

Amendment Barcode (if applicable)

Name Christian Minor

Job Title Dir. of Gov. Affairs

Address 204 S. Monroe St. Suite 201
Street

Phone 321-223-4252

Tallahassee FL 32301
City *State* *Zip*

Email

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing The Florida Smart Justice Alliance

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 1226
INTRODUCER:	Senator Detert
SUBJECT:	Guardianship
DATE:	March 30, 2015
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Crosier	Hendon	CF	**Favorable**
2.	Davis	Cibula	JU	**Favorable**
3.			FP	

I. Summary:

SB 1226 amends and reorganizes chapter 744, F.S., the Guardianship chapter. The Statewide Public Guardianship Office, which currently exists within the Department of Elderly Affairs (DOEA) and has oversight for public guardians for indigent people in the state, is expanded and renamed the Office of Public and Professional Guardians. In its new capacity, the office is given the additional responsibility of administering professional guardians who have not previously been closely regulated by the state. The newly titled office remains housed within the Department of Elderly Affairs (DOEA).

The executive director of the new Office of Public and Professional Guardians (the Office) remains an appointee of the Secretary of the DOEA, but with expanded responsibilities. The bill establishes the additional duties and responsibilities of the executive director and requires the annual registration of professional guardians. The Department of Elderly Affairs sets the fee for registration and licensing of a professional guardian which may not exceed $500.

The Office is directed to adopt rules to establish disciplinary oversight, including receiving and investigating complaints, conducting hearings, and taking administrative action pursuant to ch. 120, F.S.

The bill also directs the chief judge in each judicial circuit to compile a list of professional guardians and provide the list to the clerk of the court. Professional guardians must be certified by the Office to be included on the list. The court appoints professional guardians in the order in which names appear on the applicable registry, unless the court makes a finding on the record to appoint a professional guardian out of order.

The bill is effective July 1, 2015. The bill will increase costs for the DOEA associated with regulating professional guardians.

II. Present Situation:

Guardianship

Guardianship is a concept whereby a "guardian" acts for another, called a "ward," whom the law regards as incapable of managing his or her own affairs due to age or incapacity. Guardianships are generally disfavored due to the loss of individual civil rights, and a guardian may be appointed only if the court finds there is no sufficient alternative to guardianship. There are two main forms of guardianship: guardianship over the person or guardianship over the property, which may be limited or plenary. For adults, a guardianship may be established when a person has demonstrated that he or she is unable to manage his or her own affairs. If the adult is competent, this can be accomplished voluntarily. However, in situations where an individual's mental competence is in question, an involuntary guardianship may be established through the adjudication of incompetence which is based on the determination of a court appointed examination committee.

Florida courts have long recognized the relationship between a guardian and his or her ward as a classic fiduciary relationship.[1] A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of that relationship.[2] The most basic duty of a fiduciary is the duty of loyalty: a fiduciary must refrain from self-dealing, must not take unfair advantage of the ward, must act in the best interest of the ward, and must disclose material facts.[3] In addition to the duty of loyalty, a fiduciary also owes a duty of care to carry out its responsibilities in an informed and considered manner. Section 744.362, F.S., imposes specific duties upon a guardian consistent with the basic duties of a fiduciary including protecting and preserving the property of the ward's overall physical and social health. A guardian is also under a duty to file an initial guardianship report,[4] an annual guardianship report,[5] and an annual accounting of the ward's property.[6] The reports provide evidence of the guardian's faithful execution of his or her fiduciary duties.[7]

At the heart of a court's interpretation of a fiduciary relationship is a concern that persons who assume trustee-like positions with discretionary power over the interests of others might breach their duties and abuse their position. Section 744.446, F.S., explicitly states that the "fiduciary relationship which exists between the guardian and the ward may not be used for the private gain of the guardian other than the remuneration for fees and expenses provided by law." Section 744.446(4), F.S., also provides that in the event of "a breach by the guardian of the guardian's fiduciary duty, the court shall take those necessary actions to protect the ward and the ward's assets."

[1] *Lawrence v. Norris*, 563 So.2d 195, 197 (Fla. 1st DCA 1990).
[2] *Doe v. Evans*, 814 So.2d 370, 374 (Fla. 2002).
[3] *Capital Bank v. MVP, Inc.* 644 So.2d 515, 520 (Fla. 3d DCA 1994).
[4] Section 744.362, F.S.
[5] Section 744.367, F.S.
[6] Section 744.3678, F.S.
[7] Section 744.368, F.S.

Professional Guardians

In Florida, a "professional guardian" means any guardian who has, at any time, rendered services to three or more wards as their guardian.[8] A professional guardian must register with the Statewide Public Guardianship Office annually.[9] There are currently 465 professional guardians registered with the Statewide Public Guardianship Office.[10] Professional guardians must receive a minimum of 40 hours of instruction and training. Each professional guardian must receive a minimum of 16 hours of continuing education every 2 years after the initial educational requirement is met. The instruction and education must be completed through a course approved or offered by the Statewide Public Guardianship Office.[11] Professional guardians are subject to level 2 background checks,[12] an investigation of the guardian's credit history,[13] and are required to demonstrate competency to act as a professional guardian by taking an examination approved by DOEA.[14] These requirements do not apply, however, to a professional guardian or the employees of that professional guardian when that guardian is a trust company, a state banking corporation, state savings association authorized and qualified to exercise fiduciary powers in this state, or a national banking association or federal savings and loan association authorized and qualified to exercise fiduciary duties in this state.[15]

Public Guardianship Act

The Public Guardianship Act is established in s. 744.701, F.S. The Legislature created the Statewide Public Guardianship Office in 1999 to provide oversight for all public guardians.[16] The executive director of the Statewide Public Guardianship Office, after consultation with the chief judge and other judges within the judicial circuit may establish one or more office of public guardian within the judicial circuit.[17] A public guardian may serve an incapacitated person if there is no family member or friend, other person, bank, or corporation willing and qualified to serve as guardian.[18] A person serving as a public guardian is considered a professional guardian for purposes of regulation, education, and registration.[19] Public guardianship offices are established in all 20 circuits in the state.[20]

Determining Incapacity

The process to determine incapacity and the appointment of a guardian begins with petitions filed in the appropriate circuit court. The petitions must be served on and read to the alleged incapacitated person. The notice and copies of the petitioner must be provided to the attorney for

[8] Section 744.102(17), F.S.
[9] Section 744.1083(1) and (2), F.S.
[10] Telephone conversation with the Department of Elder Affairs on March 9, 2015.
[11] Section 744.1085(3), F.S.
[12] Section 744.1085(5), F.S.
[13] Section 744.1085(4), F.S.
[14] Section 744.1085(6), F.S.
[15] Section 744.1085(10), F.S.
[16] Section 744.7021, F.S.
[17] Section 744.703(1), F.S.
[18] Section 744.704(1), F.S.
[19] Section 744.102(17), F.S.
[20] Meeting with the Department of Elder Affairs on February 2, 2015.

the alleged incapacitated person, and served on all next of kin identified in the petition. The notice must include the time and place for the court hearing to inquire into the capacity of the alleged incapacitated person, that an attorney has been appointed to represent that person and that, if he or she is determined to be incapable of exercising certain rights, a guardian will be appointed to exercise those rights on his or her behalf.[21] In the hearing on the petition alleging incapacity, the partial or total incapacity of the person must be established by clear and convincing evidence.[22]

The court must enter a written order determining incapacity after finding that a person is incapacitated with respect to the exercise of a particular right or all rights. A person is determined to be incapacitated only with respect to those rights specified in the court's order.[23] When an order determines that a person is incapable of exercising delegable rights, the court must consider whether there is an alternative to guardianship which will sufficiently address the problems of the incapacitated person. If an alternative to guardianship will not sufficiently address the problems of the incapacitated person, a guardian will be appointed.[24] If a petition for appointment of a guardian has been filed, an order appointing a guardian must be issued contemporaneously with the order adjudicating the person incapacitated.[25] If a petition for the appointment of a guardian has not been filed at the time of the hearing on the petition to determine incapacity, the court may appoint an emergency temporary guardian.[26]

Court Proceedings

The court retains jurisdiction over all guardianships and shall review the appropriateness and extent of a guardianship annually.[27] At any time, any interested person, including the ward, may petition the court for review alleging that the guardian is not complying with the guardianship plan or is exceeding his or her authority under the guardianship plan and is not acting in the best interest of the ward. If the petition for review is found to be without merit the court may assess costs and attorney fees against the petitioner.[28]

Section 744.108, F.S., governs the award of compensation to a guardian or attorney in connection with a guardianship. It provides that "a guardian, or an attorney who has rendered services to the ward or to the guardian on the ward's behalf, is entitled to a reasonable fee for services rendered and reimbursement of costs incurred on behalf of the ward."[29] Section 744.108(8), F.S., provides that fees and costs incurred in determining compensation are part of the guardianship administration and are generally awardable from the guardianship estate, unless the court finds the requested compensation substantially unreasonable.[30]

[21] Section 744.331(1), F.S.
[22] Section 744.331(5)(c), F.S.
[23] Section 744.331(6), F.S.
[24] Section 744.331(6)(b), F.S.
[25] Section 744.344(3), F.S.
[26] Section 744.344(4), F.S.
[27] Section 744.372, F.S.
[28] Section 744.3715, F.S.
[29] Section 744.108(1), F.S.
[30] Section 744.108(8), F.S.

A ward has the right to be restored to capacity at the earliest possible time.[31] The ward, or any interested person filing a suggestion of capacity, has the burden of proving the ward is capable of exercising some or all of the rights which were removed. Immediately upon the filing of the suggestion of capacity, the court shall appoint a physician to examine the ward. The physician must examine the ward and file a report with the court within 20 days.[32] All objections to the suggestion of capacity must be filed within 20 days after formal notice is served on the ward, guardian, attorney for the ward, if any, and any other interested persons designated by the court.[33] If an objection is timely filed, or if the medical examination suggests that full restoration is not appropriate, the court must set the matter for hearing.[34] The level of proof required to show capacity is not presently spelled out in the statute. In a study and work group report by the Florida Developmental Disabilities Council, dated February 28, 2014, Palm Beach County court personnel performed a limited review of a random sample of 76 guardianship files for persons over the age of 18. Among these, over two thirds were of persons with age-related disabilities. After reviewing the files, the senior auditor for the circuit reported that there were no cases where the guardianship plan recommended the restoration of any rights of the incapacitated persons.[35]

Media Reports

Beginning on December 6, 2014, the Sarasota Herald Tribune published a series of articles titled "The Kindness of Strangers – Inside Elder Guardianship in Florida," which detailed abuses occurring in guardianships. The paper examined guardianship court case files and conducted interviews with wards, family, and friends caught in the system against their will.[36] The paper concluded that Florida has cobbled together an efficient way to identify and care for helpless elders, using the probate court system to place them under guardianship. However, critics say this system often ignores basic individual rights and most often plays out in secret, with hearings and files typically closed to the public.[37] The paper also concluded that monitoring assets and tapping their assets is a growth business: In 2003, there were 23 registered professional guardians in Florida, according to the Department of Elder Affairs. Today there are more than 440 – an increase greater than 1,800 percent in 11 years.[38]

III. Effect of Proposed Changes:

The bill renames the Statewide Public Guardianship Office and significantly expands its duties. The office is renamed the Office of Public and Professional Guardians and, as its name implies, now has oversight for both public and professional guardians. While public guardians, who provide services for indigent people, have been regulated by the state, professional guardians have not been as closely regulated.

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[31] Section 744.3215(1)(c), F.S.
[32] Section 744.464(2)(b), F.S.
[33] Section 744.464(2)(c),(d)
[34] Section 744.464(2)(e), F.S.
[35] Florida Developmental Disabilities Council, *Restoration of Capacity Study and Work Group Report*, February 28, 2014 (on file with the Senate Committee on Children, Families and Elder Affairs).
[36] Barbara Peters Smith, *the Kindness of Strangers – Inside Elder Guardianship in Florida,* HERALD TRIBUNE (December 6, 2014) http://extra.heraldtribune.com/2014/12/06/well-oiled-machine/.
[37] *Id* at page 2.
[38] *Id.*

This bill establishes the regulation and supervision of professional guardians by giving the Department of Elderly Affairs the authority to investigate and discipline professional guardians for misconduct.

Legislative Intent (Section 4)

The bill amends the legislative intent language in s. 744.1012, F.S., and finds that private guardianship is inadequate where there is no willing and responsible family member or friend, other person, bank, or corporation available to serve as guardian for an incapacitated person and such person does not have adequate income or wealth for the compensation of the private guardian. The Legislature establishes the Office of Public and Professional Guardians which allows the establishment of public guardians to provide services for incapacitated persons when no private guardian is available and that a public guardian must be provided only to those persons whose needs cannot be met through less drastic means of intervention.

Office of Public and Professional Guardians (Section 8)

The bill creates the Office of Public and Professional Guardians within the Department of Elderly Affairs. The executive director of the Office of Public and Professional Guardians must review the standards and criteria for the education, registration, and certification of public and professional guardians in Florida. The executive director is directed to develop a guardianship training program curriculum to be offered to all guardians, whether public or private.

The executive director's oversight responsibilities for professional guardians, include, but are not limited to:

- Developing and implementing a monitoring tool to use for regular monitoring activities of professional guardians; however, this monitoring tool does not include a financial audit as required to be performed by the clerk of the circuit court under s. 744.368, F.S.
- Developing procedures for the review of an allegation that a professional guardian has violated an applicable statute, fiduciary duty, standard of practice, rule, regulation, or other requirement governing the conduct of professional guardians.
- Establishing disciplinary proceedings, including the authority to conduct investigations and take appropriate administrative action under ch. 120, F.S.
- Assisting the chief judge in each circuit to establish a registry to allow for the appointment of a professional guardian on a rotating basis.

Discipline of Professional Guardians (Section 11)

The bill creates s. 744.2004, F.S., and directs the Office of Public and Professional Guardians to adopt rules to review, and if appropriate, investigate allegations that a professional guardian has violated an applicable statute, fiduciary duty, standard of practice, rule, regulation, or other requirement governing the conduct of professional guardians. The Office must also establish disciplinary proceedings, conduct hearings, and take administrative action pursuant to ch. 120, F.S. Disciplinary actions may include, but are not limited to, requiring guardians to participate in additional educational courses, imposing additional monitoring of the guardianships being served by the professional guardian, and suspending and revoking the guardian's license. If the final

recommendation from a disciplinary proceeding is for the suspension or revocation of the guardian's license, the recommendation must be provided to any court that oversees any guardianship to which the professional guardian is appointed.

Professional Guardian Registry (Section 12)

The bill creates a registry of professional guardians for use by the court in appointing guardians. The registry is to be compiled by the chief judge in each circuit and provided to and maintained by the clerk of the court in each county of the circuit. A professional guardian must be certified by the Office to be included on the registry. The court may appoint a professional guardian out of order only upon entering a finding of good cause into the record.

Joining Forces for Public Guardianship (Section 22)

The bill provides the legislative intent to establish the Joining Forces for Public Guardianship matching grant program to assist counties in establishing and funding community-supported public guardianship programs.

Organizational Changes (Remaining Sections)

The remaining sections of the bill make technical changes and relocate what is currently part II, Venue, to part I, General Provisions, retitles part II as Public and Professional Guardians and makes other conforming changes to carry out the intent of the act.

Effective Date (Section 36)

The bill takes effect July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not appear to have an impact on cities or counties and as such, does not appear to be a mandate for constitutional purposes.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

B. Private Sector Impact:

Professional guardians will be regulated by Department of Elderly Affairs.

C. Government Sector Impact:

The Department of Elder Affairs will see increased costs associated with regulating private guardians. The department would need budget and FTEs to perform the duties required by the bill. There will also be increased costs to the department's general counsel's office as the professional guardians will be able to challenge decisions by the department under ch. 120, F.S. The department currently provides education to professional guardians statewide and there are 456 such guardians that would be regulated under this bill. The number of wards represented by the 456 guardians is unknown as this time and would need to be considered when estimating the cost of regulation.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 744.1012, 744.2001, 744.2002, 744.2003, 744.2005, 744.2006, 744.2009, 744.2101, 744.2103, 744.2104, 744.2105, 744.2106, 744.2107, 744.2108, 744.2109, 400.148, 744.3135, 415.1102, 744.331, 20.415 and 744.524.

This bill renumbers the following sections of the Florida Statutes: 744.1096, 744.1097, 744.1098, 744.7021, 744.1083, 744.1085, 744.344, 744.703, 744.704, 744.705, 744.706, 744.707, 744.709, 744.708, 744.7081, 744.7082, 744.712, 744.713, 744.714, and 744.715.

This bill creates the following sections of the Florida Statutes: 744.2004

This bill repeals the following sections of the Florida Statutes: 744.701, 744.702, 744.7101, and 744.711.

IX. Additional Information:

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

None.

B. Amendments:

None.

By Senator Detert

28-01081A-15 20151226__

A bill to be entitled

An act relating to guardianship; providing directives to the Division of Law Revision and Information; amending s. 744.1012, F.S.; revising legislative intent; renumbering s. 744.201, F.S.; renumbering and amending s. 744.202, F.S.; conforming a cross-reference; renumbering s. 744.2025, F.S.; renumbering and amending s. 744.7021, F.S.; revising the responsibilities of the executive director for the Office of Public and Professional Guardians; conforming provisions to changes made by the act; renumbering and amending s. 744.1083, F.S.; removing a provision authorizing the executive director to suspend or revoke the registration of a guardian who commits certain violations; removing the requirement of written notification to the chief judge of the judicial circuit upon the executive director's denial, suspension, or revocation of a registration; conforming provisions to changes made by the act; conforming a cross-reference; renumbering and amending s. 744.1085, F.S.; removing an obsolete provision; conforming provisions to changes made by the act; conforming a cross-reference; creating s. 744.2004, F.S.; requiring the Office of Public and Professional Guardians to adopt rules; requiring the office, under certain circumstances, to make a specified recommendation to a court of competent jurisdiction; renumbering and amending s. 744.344, F.S.; requiring that a professional guardian appointed by a court to

28-01081A-15 20151226__

represent an allegedly incapacitated person be selected from a registry of professional guardians; requiring the chief judge of a circuit court to compile a list of professional guardians by county and provide the list to the clerk of court in each county; providing requirements for inclusion in the registry; providing procedures for a court to appoint a professional guardian; providing an exception; requiring the clerk of the court to maintain the registry and provide the court with the name of a professional guardian for appointment; renumbering and amending s. 744.703, F.S.; conforming provisions to changes made by the act; renumbering ss. 744.704 and 744.705, F.S.; renumbering and amending ss. 744.706 and 744.707, F.S.; conforming provisions to changes made by the act; renumbering s. 744.709, F.S.; renumbering and amending ss. 744.708, 744.7081, and 744.7082, F.S.; conforming provisions to changes made by the act; renumbering and amending s. 744.712, F.S.; providing legislative intent; conforming provisions; renumbering and amending ss. 744.713, 744.714, and 744.715, F.S.; conforming provisions to changes made by the act; repealing s. 744.701, F.S.; relating to a short title; repealing s. 744.702, F.S.; relating to legislative intent; repealing s. 744.7101, F.S.; relating to a short title; repealing s. 744.711, F.S.; relating to legislative findings and intent; amending ss. 400.148, 744.3135, and 744.331, F.S.; conforming provisions to changes made by the act; amending ss.

20.415, 415.1102, and 744.524, F.S.; conforming cross-references; making technical changes; providing an effective date.

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

Section 1. The Division of Law Revision and Information is directed to add ss. 744.1096-744.1098, Florida Statutes, created by this act, to part I of chapter 744, Florida Statutes.

Section 2. The Division of Law Revision and Information is directed to retitle part II of chapter 744, Florida Statutes, consisting of ss. 744.2001-744.2109, Florida Statutes, as "PUBLIC AND PROFESSIONAL GUARDIANS."

Section 3. The Division of Law Revision and Information is directed to remove part IX of chapter 744, Florida Statutes.

Section 4. Section 744.1012, Florida Statutes, is amended to read:

744.1012 Legislative intent.—The Legislature finds:

(1) That adjudicating a person totally incapacitated and in need of a guardian deprives such person of all her or his civil and legal rights and that such deprivation may be unnecessary.

(2) ~~The Legislature further finds~~ That it is desirable to make available the least restrictive form of guardianship to assist persons who are only partially incapable of caring for their needs and that alternatives to guardianship and less intrusive means of assistance should always be explored, including, but not limited to, guardian advocates, before an individual's rights are removed through an adjudication of incapacity.

(3) By recognizing that every individual has unique needs and differing abilities, the Legislature declares that it is the purpose of this act to promote the public welfare by establishing a system that permits incapacitated persons to participate as fully as possible in all decisions affecting them; that assists such persons in meeting the essential requirements for their physical health and safety, in protecting their rights, in managing their financial resources, and in developing or regaining their abilities to the maximum extent possible; and that accomplishes these objectives through providing, in each case, the form of assistance that least interferes with the legal capacity of a person to act in her or his own behalf. This act shall be liberally construed to accomplish this purpose.

(4) That private guardianship is inadequate where there is no willing and responsible family member or friend, other person, bank, or corporation available to serve as guardian for an incapacitated person, and such person does not have adequate income or wealth for the compensation of a private guardian.

(5) The Legislature intends, through the establishment of the Office of Public and Professional Guardians, to permit the establishment of offices of public guardians for the purpose of providing guardianship services for incapacitated persons when no private guardian is available.

(6) That a public guardian be provided only to those persons whose needs cannot be met through less drastic means of intervention.

Section 5. Section 744.201, Florida Statutes, is renumbered as section 744.1096, Florida Statutes.

Section 6. Section 744.202, Florida Statutes, is renumbered as section 744.1097, Florida Statutes, and subsection (3) of that section is amended to read:

744.1097 ~~744.202~~ Venue.—

(3) When the residence of an incapacitated person is changed to another county, the guardian shall petition to have the venue of the guardianship changed to the county of the acquired residence, except as provided in s. 744.1098 ~~s. 744.2025~~.

Section 7. Section 744.2025, Florida Statutes, is renumbered as section 744.1098, Florida Statutes.

Section 8. Section 744.7021, Florida Statutes, is renumbered as section 744.2001, Florida Statutes, and amended to read:

744.2001 ~~744.7021 Statewide Public Guardianship~~ Office of Public and Professional Guardians.—There is hereby created the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians within the Department of Elderly Affairs.

(1) The Secretary of Elderly Affairs shall appoint the executive director, who shall be the head of the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians. The executive director must be a member of The Florida Bar, knowledgeable of guardianship law and of the social services available to meet the needs of incapacitated persons, shall serve on a full-time basis, and shall personally, or through a representative ~~representatives~~ of the office, carry out the purposes and functions of the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians in accordance with state and federal law. The executive director shall serve at the

pleasure of and report to the secretary.

(2) The executive director shall, within available resources:~~,~~

(a) Have oversight responsibilities for all public and professional guardians.

(b) Review the standards and criteria for the education, registration, and certification of public and professional guardians in Florida.

(3) The executive director's oversight responsibilities of professional guardians shall include, but not be limited to:

(a) The development and implementation of a monitoring tool to be used for regular monitoring activities of professional guardians related to the management of each ward and his or her personal affairs. This monitoring may not include a financial audit as required by the clerk of the circuit court under s. 744.368.

(b) The development of procedures, in consultation with professional guardianship associations, for the review of an allegation that a professional guardian has violated an applicable statute, fiduciary duty, standard of practice, rule, regulation, or other requirement governing the conduct of professional guardians.

(c) The establishment of disciplinary proceedings, including the authority to conduct investigations and take appropriate administrative action pursuant to chapter 120.

(d) Assist the chief judge in each judicial circuit to establish a registry to allow for the appointment of professional guardians in rotating order as provided in s. 744.2005.

(4) The executive director's oversight responsibilities of public guardians shall include, but not be limited to:

(a) The ~~executive director shall~~ review of the current public guardian programs in Florida and other states.

(b) The development ~~executive director~~, in consultation with local guardianship offices, of ~~shall develop~~ statewide performance measures and standards.

(c) The ~~executive director shall~~ review of ~~the~~ various methods of funding public guardianship programs, the kinds of services being provided by such programs, and the demographics of the wards. In addition, the executive director shall review and make recommendations regarding the feasibility of recovering a portion or all of the costs of providing public guardianship services from the assets or income of the wards.

(d) By January 1 of each year, providing ~~the executive director shall provide~~ a status report and providing ~~provide~~ further recommendations to the secretary that address the need for public guardianship services and related issues.

(e) In consultation with the Florida Guardianship Foundation, the development of a guardianship training program curriculum that may be offered to all guardians, whether public or private.

(5) The executive director may provide assistance to local governments or entities in pursuing grant opportunities. The executive director shall review and make recommendations in the annual report on the availability and efficacy of seeking Medicaid matching funds. The executive director shall diligently seek ways to use existing programs and services to meet the needs of public wards.

~~(f) The executive director, in consultation with the Florida Guardianship Foundation, shall develop a guardianship training program curriculum that may be offered to all guardians whether public or private.~~

(6)~~(3)~~ The executive director may conduct or contract for demonstration projects authorized by the Department of Elderly Affairs, within funds appropriated or through gifts, grants, or contributions for such purposes, to determine the feasibility or desirability of new concepts of organization, administration, financing, or service delivery designed to preserve the civil and constitutional rights of persons of marginal or diminished capacity. Any gifts, grants, or contributions for such purposes shall be deposited in the Department of Elderly Affairs Administrative Trust Fund.

Section 9. Section 744.1083, Florida Statutes, is renumbered as section 744.2002, Florida Statutes, subsections (1) through (5) of that section are amended, and subsections (7) and (10) of that section are republished, to read:

744.2002 ~~744.1083~~ Professional guardian registration.—

(1) A professional guardian must register with the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians established in part II ~~IX~~ of this chapter.

(2) Annual registration shall be made on forms furnished by the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians and accompanied by the applicable registration fee as determined by rule. The fee may not exceed $100.

(3) Registration must include the following:

(a) Sufficient information to identify the professional

guardian, as follows:

1. If the professional guardian is a natural person, the name, address, date of birth, and employer identification or social security number of the person.

2. If the professional guardian is a partnership or association, the name, address, and employer identification number of the entity.

(b) Documentation that the bonding and educational requirements of s. 744.2003 ~~s. 744.1085~~ have been met.

(c) Sufficient information to distinguish a guardian providing guardianship services as a public guardian, individually, through partnership, corporation, or any other business organization.

(4) Prior to registering a professional guardian, the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians must receive and review copies of the credit and criminal investigations conducted under s. 744.3135. The credit and criminal investigations must have been completed within the previous 2 years.

(5) The executive director of the office may deny registration to a professional guardian if the executive director determines that the guardian's proposed registration, including the guardian's credit or criminal investigations, indicates that registering the professional guardian would violate any provision of this chapter. ~~If a guardian who is currently registered with the office violates a provision of this chapter, the executive director of the office may suspend or revoke the guardian's registration. If the executive director denies registration to a professional guardian or suspends or~~

~~revokes a professional guardian's registration, the Statewide Public Guardianship Office must send written notification of the denial, suspension, or revocation to the chief judge of each judicial circuit in which the guardian was serving on the day of the office's decision to deny, suspend, or revoke the registration.~~

(7) A trust company, a state banking corporation or state savings association authorized and qualified to exercise fiduciary powers in this state, or a national banking association or federal savings and loan association authorized and qualified to exercise fiduciary powers in this state, may, but is not required to, register as a professional guardian under this section. If a trust company, state banking corporation, state savings association, national banking association, or federal savings and loan association described in this subsection elects to register as a professional guardian under this subsection, the requirements of subsections (3) and (4) do not apply and the registration must include only the name, address, and employer identification number of the registrant, the name and address of its registered agent, if any, and the documentation described in paragraph (3)(b).

(10) A state college or university or an independent college or university that is located and chartered in Florida, that is accredited by the Commission on Colleges of the Southern Association of Colleges and Schools or the Accrediting Council for Independent Colleges and Schools, and that confers degrees as defined in s. 1005.02(7) may, but is not required to, register as a professional guardian under this section. If a state college or university or independent college or university

elects to register as a professional guardian under this subsection, the requirements of subsections (3) and (4) do not apply and the registration must include only the name, address, and employer identification number of the registrant.

Section 10. Section 744.1085, Florida Statutes, is renumbered as section 744.2003, Florida Statutes, subsections (3), (6), and (9) of that section are amended, and subsection (8) of that section is republished, to read:

744.2003 ~~744.1085~~ Regulation of professional guardians; application; bond required; educational requirements.—

(3) Each professional guardian defined in s. 744.102(17) and public guardian must receive a minimum of 40 hours of instruction and training. Each professional guardian must receive a minimum of 16 hours of continuing education every 2 calendar years after the year in which the initial 40-hour educational requirement is met. The instruction and education must be completed through a course approved or offered by the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians. The expenses incurred to satisfy the educational requirements prescribed in this section may not be paid with the assets of any ward. This subsection does not apply to any attorney who is licensed to practice law in this state.

(6) ~~After July 1, 2005,~~ Each professional guardian is ~~shall be~~ required to demonstrate competency to act as a professional guardian by taking an examination approved by the Department of Elderly Affairs.

(a) The Department of Elderly Affairs shall determine the minimum examination score necessary for passage of guardianship examinations.

(b) The Department of Elderly Affairs shall determine the procedure for administration of the examination.

(c) The Department of Elderly Affairs or its contractor shall charge an examination fee for the actual costs of the development and the administration of the examination. The fee for registration and licensing of a professional guardian may not~~, not to~~ exceed $500.

(d) The Department of Elderly Affairs may recognize passage of a national guardianship examination in lieu of all or part of the examination approved by the Department of Elderly Affairs, except that all professional guardians must take and pass an approved examination section related to Florida law and procedure.

(8) The Department of Elderly Affairs shall waive the examination requirement in subsection (6) if a professional guardian can provide:

(a) Proof that the guardian has actively acted as a professional guardian for 5 years or more; and

(b) A letter from a circuit judge before whom the professional guardian practiced at least 1 year which states that the professional guardian had demonstrated to the court competency as a professional guardian.

(9) ~~After July 1, 2004,~~ The court may ~~shall~~ not appoint any professional guardian who has not met the requirements of this section and s. 744.2002 ~~s. 744.1083~~.

Section 11. Section 744.2004, Florida Statutes, is created to read:

744.2004 Complaints; disciplinary proceedings; penalties; enforcement.—

(1) The Office of Public and Professional Guardians shall adopt rules to:

(a) Review, and if determined appropriate, investigate an allegation that a professional guardian has violated an applicable statute, fiduciary duty, standard of practice, rule, regulation, or other requirement governing the conduct of professional guardians.

(b) Establish disciplinary proceedings, conduct hearings, and take administrative action pursuant to chapter 120. Disciplinary actions include, but are not limited to, requiring a professional guardian to participate in additional educational courses provided by the Office of Public and Professional Guardians, imposing additional monitoring by the office of the guardianships to which the professional guardian is appointed, and suspension or revocation of a professional guardian's license.

(2) If the office makes a final recommendation for the suspension or revocation of a professional guardian's license, it must provide the recommendation to the court of competent jurisdiction for any guardianship case to which the professional guardian is currently appointed.

Section 12. Section 744.344, Florida Statutes, is renumbered as section 744.2005, Florida Statutes, and amended to read:

744.2005 ~~744.344~~ Order of appointment.—

(1) A professional guardian appointed by the court to provide representation of an alleged incapacitated person shall be selected from a registry of professional guardians.

(2) In using a registry:

(a) The chief judge of the judicial circuit shall compile a list of professional guardians by county and provide the list to the clerk of court in each county. To be included on a registry, the professional guardian must be certified by the Office of Public and Professional Guardians.

(b) The court shall appoint professional guardians in the order in which the names appear on the applicable registry, unless the court makes a finding of good cause on the record for appointment of a professional guardian out of order. The clerk of the court shall maintain the registry and provide to the court the name of the professional guardian for appointment. A professional guardian not appointed in the order in which her or his name appears on the list shall remain next in order.

(3) ~~(1)~~ The court may hear testimony on the question of who is entitled to preference in the appointment of a guardian. Any interested person may intervene in the proceedings.

(4) The order appointing a guardian must state the nature of the guardianship as either plenary or limited. If limited, the order must state that the guardian may exercise only those delegable rights which have been removed from the incapacitated person and specifically delegated to the guardian. The order shall state the specific powers and duties of the guardian.

(5) ~~(2)~~ The order appointing a guardian must be consistent with the incapacitated person's welfare and safety, must be the least restrictive appropriate alternative, and must reserve to the incapacitated person the right to make decisions in all matters commensurate with the person's ability to do so.

(6) ~~(3)~~ If a petition for appointment of guardian has been filed, an order appointing a guardian must be issued

contemporaneously with the order adjudicating the person incapacitated. The order must specify the amount of the bond to be given by the guardian and must state specifically whether the guardian must place all, or part, of the property of the ward in a restricted account in a financial institution designated pursuant to s. 69.031.

(7) ~~(4)~~ If a petition for the appointment of a guardian has not been filed at the time of the hearing on the petition to determine capacity, the court may appoint an emergency temporary guardian in the manner and for the purposes specified in s. 744.3031.

(8) ~~(5)~~ A plenary guardian shall exercise all delegable rights and powers of the incapacitated person.

(9) ~~(6)~~ A person for whom a limited guardian has been appointed retains all legal rights except those which have been specifically granted to the guardian in the court's written order.

Section 13. Section 744.703, Florida Statutes, is renumbered as 744.2006, Florida Statutes, and subsections (1) and (6) of that section are amended, to read:

744.2006 ~~744.703~~ Office of public and professional guardians ~~guardian~~; appointment, notification.—

(1) The executive director of the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians, after consultation with the chief judge and other circuit judges within the judicial circuit and with appropriate advocacy groups and individuals and organizations who are knowledgeable about the needs of incapacitated persons, may establish, within a county in the judicial circuit or within the judicial circuit,

one or more offices of public and professional guardian and if so established, shall create a list of persons best qualified to serve as the public guardian, who have been investigated pursuant to s. 744.3135. The public guardian must have knowledge of the legal process and knowledge of social services available to meet the needs of incapacitated persons. The public guardian shall maintain a staff or contract with professionally qualified individuals to carry out the guardianship functions, including an attorney who has experience in probate areas and another person who has a master's degree in social work, or a gerontologist, psychologist, registered nurse, or nurse practitioner. A public guardian that is a nonprofit corporate guardian under s. 744.309(5) must receive tax-exempt status from the United States Internal Revenue Service.

(6) Public guardians who have been previously appointed by a chief judge prior to the effective date of this act pursuant to this section may continue in their positions until the expiration of their term pursuant to their agreement. However, oversight of all public guardians shall transfer to the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians upon the effective date of this act. The executive director of the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians shall be responsible for all future appointments of public guardians pursuant to this act.

Section 14. Section 744.704, Florida Statutes, is renumbered as section 744.2007, Florida Statutes.

Section 15. Section 744.705, Florida Statutes, is renumbered as section 744.2008, Florida Statutes.

Section 16. Section 744.706, Florida Statutes, is

renumbered as section 744.2009, Florida Statutes, and amended to read:

744.2009 ~~744.706~~ Preparation of budget.—Each public guardian, whether funded in whole or in part by money raised through local efforts, grants, or any other source or whether funded in whole or in part by the state, shall prepare a budget for the operation of the office of public guardian to be submitted to the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians. As appropriate, the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians will include such budgetary information in the Department of Elderly Affairs' legislative budget request. The office of public guardian shall be operated within the limitations of the General Appropriations Act and any other funds appropriated by the Legislature to that particular judicial circuit, subject to the provisions of chapter 216. The Department of Elderly Affairs shall make a separate and distinct request for an appropriation for the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians. However, this section may ~~shall~~ not be construed to preclude the financing of any operations of the office of the public guardian by moneys raised through local effort or through the efforts of the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians.

Section 17. Section 744.707, Florida Statutes, is renumbered as section 744.2101, Florida Statutes, and amended to read:

744.2101 ~~744.707~~ Procedures and rules.—The public guardian, subject to the oversight of the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians, is authorized to:

(1) Formulate and adopt necessary procedures to assure the efficient conduct of the affairs of the ward and general administration of the office and staff.

(2) Contract for services necessary to discharge the duties of the office.

(3) Accept the services of volunteer persons or organizations and provide reimbursement for proper and necessary expenses.

Section 18. Section 744.709, Florida Statutes, is renumbered as section 744.2102, Florida Statutes.

Section 19. Section 744.708, Florida Statutes, is renumbered as section 744.2103, Florida Statutes, and subsections (3), (4), (5), and (7) of that section are amended, to read:

744.2103 ~~744.708~~ Reports and standards.—

(3) A public guardian shall file an annual report on the operations of the office of public guardian, in writing, by September 1 for the preceding fiscal year with the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians, which shall have responsibility for supervision of the operations of the office of public guardian.

(4) Within 6 months of his or her appointment as guardian of a ward, the public guardian shall submit to the clerk of the court for placement in the ward's guardianship file and to the executive director of the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians a report on his or her efforts to locate a family member or friend, other person, bank, or corporation to act as guardian of the ward and a report on the ward's potential to be restored to capacity.

(5)(a) Each office of public guardian shall undergo an independent audit by a qualified certified public accountant at least once every 2 years. A copy of the audit report shall be submitted to the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians.

(b) In addition to regular monitoring activities, the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians shall conduct an investigation into the practices of each office of public guardian related to the managing of each ward's personal affairs and property. If feasible, the investigation shall be conducted in conjunction with the financial audit of each office of public guardian under paragraph (a).

(7) The ratio for professional staff to wards shall be 1 professional to 40 wards. The ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians may increase or decrease the ratio after consultation with the local public guardian and the chief judge of the circuit court. The basis for the decision to increase or decrease the prescribed ratio must be included in the annual report to the secretary.

Section 20. Section 744.7081, Florida Statutes, is renumbered as section 744.2104, Florida Statutes, and amended to read:

744.2104 ~~744.7081~~ Access to records by the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians; confidentiality.—Notwithstanding any other provision of law to the contrary, any medical, financial, or mental health records held by an agency, or the court and its agencies, which are necessary to evaluate the public guardianship system, to assess

the need for additional public guardianship, or to develop required reports, shall be provided to the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians upon that office's request. Any confidential or exempt information provided to the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians shall continue to be held confidential or exempt as otherwise provided by law. All records held by the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians relating to the medical, financial, or mental health of vulnerable adults as defined in chapter 415, persons with a developmental disability as defined in chapter 393, or persons with a mental illness as defined in chapter 394, shall be confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

Section 21. Section 744.7082, Florida Statutes, is renumbered as section 744.2105, Florida Statutes, and subsections (1) through (5) and (8) of that section are amended, to read:

744.2105 ~~744.7082~~ Direct-support organization; definition; use of property; board of directors; audit; dissolution.—

(1) DEFINITION.—As used in this section, the term "direct-support organization" means an organization whose sole purpose is to support the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians and is:

(a) A not-for-profit corporation incorporated under chapter 617 and approved by the Department of State;

(b) Organized and operated to conduct programs and activities; to raise funds; to request and receive grants, gifts, and bequests of moneys; to acquire, receive, hold,

invest, and administer, in its own name, securities, funds, objects of value, or other property, real or personal; and to make expenditures to or for the direct or indirect benefit of the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians; and

(c) Determined by the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians to be consistent with the goals of the office, in the best interests of the state, and in accordance with the adopted goals and mission of the Department of Elderly Affairs and the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians.

(2) CONTRACT.—The direct-support organization shall operate under a written contract with the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians. The written contract must provide for:

(a) Certification by the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians that the direct-support organization is complying with the terms of the contract and is doing so consistent with the goals and purposes of the office and in the best interests of the state. This certification must be made annually and reported in the official minutes of a meeting of the direct-support organization.

(b) The reversion of moneys and property held in trust by the direct-support organization:

1. To the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians if the direct-support organization is no longer approved to operate for the office;

2. To the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians if the direct-support organization

ceases to exist;

3. To the Department of Elderly Affairs if the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians ceases to exist; or

4. To the state if the Department of Elderly Affairs ceases to exist.

The fiscal year of the direct-support organization shall begin on July 1 of each year and end on June 30 of the following year.

(c) The disclosure of the material provisions of the contract, and the distinction between the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians and the direct-support organization, to donors of gifts, contributions, or bequests, including such disclosure on all promotional and fundraising publications.

(3) BOARD OF DIRECTORS.—The Secretary of Elderly Affairs shall appoint a board of directors for the direct-support organization from a list of nominees submitted by the executive director of the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians.

(4) USE OF PROPERTY.—The Department of Elderly Affairs may permit, without charge, appropriate use of fixed property and facilities of the department or the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians by the direct-support organization. The department may prescribe any condition with which the direct-support organization must comply in order to use fixed property or facilities of the department or the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians.

(5) MONEYS.—Any moneys may be held in a separate depository account in the name of the direct-support organization and subject to the provisions of the written contract with the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians. Expenditures of the direct-support organization shall be expressly used to support the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians. The expenditures of the direct-support organization may not be used for the purpose of lobbying as defined in s. 11.045.

(8) DISSOLUTION.—A ~~After July 1, 2004, any~~ not-for-profit corporation incorporated under chapter 617 that is determined by a circuit court to be representing itself as a direct-support organization created under this section, but that does not have a written contract with the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians in compliance with this section, is considered to meet the grounds for a judicial dissolution described in s. 617.1430(1)(a). The ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians shall be the recipient for all assets held by the dissolved corporation which accrued during the period that the dissolved corporation represented itself as a direct-support organization created under this section.

Section 22. Section 744.712, Florida Statutes, is renumbered as section 744.2106, Florida Statutes, and subsections (1) and (3) are amended, to read:

744.2106 ~~744.712~~ Joining Forces for Public Guardianship grant program; purpose.—The Legislature intends to establish the Joining Forces for Public Guardianship matching grant program for the purpose of assisting counties to establish and fund

community-supported public guardianship programs. The Joining Forces for Public Guardianship matching grant program shall be established and administered by the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians within the Department of Elderly Affairs. The purpose of the program is to provide startup funding to encourage communities to develop and administer locally funded and supported public guardianship programs to address the needs of indigent and incapacitated residents.

(1) The ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians may distribute the grant funds as follows:

(a) As initial startup funding to encourage counties that have no office of public guardian to establish an office, or as initial startup funding to open an additional office of public guardian within a county whose public guardianship needs require more than one office of public guardian.

(b) As support funding to operational offices of public guardian that demonstrate a necessity for funds to meet the public guardianship needs of a particular geographic area in the state which the office serves.

(c) To assist counties that have an operating public guardianship program but that propose to expand the geographic area or population of persons they serve, or to develop and administer innovative programs to increase access to public guardianship in this state.

Notwithstanding this subsection, the executive director of the office may award emergency grants if he or she determines that

the award is in the best interests of public guardianship in this state. Before making an emergency grant, the executive director must obtain the written approval of the Secretary of Elderly Affairs. Subsections (2), (3), and (4) do not apply to the distribution of emergency grant funds.

(3) If an applicant is eligible and meets the requirements to receive grant funds more than once, the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians shall award funds to prior awardees in the following manner:

(a) In the second year that grant funds are awarded, the cumulative sum of the award provided to one or more applicants within the same county may not exceed 75 percent of the total amount of grant funds awarded within that county in year one.

(b) In the third year that grant funds are awarded, the cumulative sum of the award provided to one or more applicants within the same county may not exceed 60 percent of the total amount of grant funds awarded within that county in year one.

(c) In the fourth year that grant funds are awarded, the cumulative sum of the award provided to one or more applicants within the same county may not exceed 45 percent of the total amount of grant funds awarded within that county in year one.

(d) In the fifth year that grant funds are awarded, the cumulative sum of the award provided to one or more applicants within the same county may not exceed 30 percent of the total amount of grant funds awarded within that county in year one.

(e) In the sixth year that grant funds are awarded, the cumulative sum of the award provided to one or more applicants within the same county may not exceed 15 percent of the total amount of grant funds awarded within that county in year one.

The ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians may not award grant funds to any applicant within a county that has received grant funds for more than 6 years.

Section 23. Section 744.713, Florida Statutes, is renumbered as section 744.2107, Florida Statutes, and amended to read:

744.2107 ~~744.713~~ Program administration; duties of the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians.—The ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians shall administer the grant program. The office shall:

(1) Publicize the availability of grant funds to entities that may be eligible for the funds.

(2) Establish an application process for submitting a grant proposal.

(3) Request, receive, and review proposals from applicants seeking grant funds.

(4) Determine the amount of grant funds each awardee may receive and award grant funds to applicants.

(5) Develop a monitoring process to evaluate grant awardees, which may include an annual monitoring visit to each awardee's local office.

(6) Ensure that persons or organizations awarded grant funds meet and adhere to the requirements of this act.

Section 24. Section 744.714, Florida Statutes, is renumbered as section 744.2108, Florida Statutes, and paragraph (b) of subsection (1) and paragraph (b) of subsection (2) of

that section are amended, to read:

744.2108 ~~744.714~~ Eligibility.—

(1) Any person or organization that has not been awarded a grant must meet all of the following conditions to be eligible to receive a grant:

(b) The applicant must have already been appointed by, or is pending appointment by, the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians to become an office of public guardian in this state.

(2) Any person or organization that has been awarded a grant must meet all of the following conditions to be eligible to receive another grant:

(b) The applicant must have been appointed by, or is pending reappointment by, the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians to be an office of public guardian in this state.

Section 25. Section 744.715, Florida Statutes, is renumbered as section 744.2109, Florida Statutes, and subsections (2) and (4) of that section are amended, to read:

744.2109 ~~744.715~~ Grant application requirements; review criteria; awards process.—Grant applications must be submitted to the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians for review and approval.

(2) If the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians determines that an applicant meets the requirements for an award of grant funds, the office may award the applicant any amount of grant funds the executive director deems appropriate, if the amount awarded meets the requirements of this act. The office may adopt a rule allocating

the maximum allowable amount of grant funds which may be expended on any ward.

(4)(a) In the first year of the Joining Forces for Public Guardianship program's existence, the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians shall give priority in awarding grant funds to those entities that:

1. Are operating as appointed offices of public guardians in this state;

2. Meet all of the requirements for being awarded a grant under this act; and

3. Demonstrate a need for grant funds during the current fiscal year due to a loss of local funding formerly raised through court filing fees.

(b) In each fiscal year after the first year that grant funds are distributed, the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians may give priority to awarding grant funds to those entities that:

1. Meet all of the requirements of this act for being awarded grant funds; and

2. Submit with their application an agreement or confirmation from a local funding source, such as a county, municipality, or any other public or private organization, that the local funding source will contribute matching funds totaling an amount equal to or exceeding $2 for every $1 of grant funds awarded by the office. An entity may submit with its application agreements or confirmations from multiple local funding sources showing that the local funding sources will pool their contributed matching funds to the public guardianship program for a combined total of not less than $2 for every $1 of grant

funds awarded. In-kind contributions allowable under this section shall be evaluated by the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians and may be counted as part or all of the local matching funds.

Section 26. Section 744.701, Florida Statutes, is repealed.

Section 27. Section 744.702, Florida Statutes, is repealed.

Section 28. Section 744.7101, Florida Statutes, is repealed.

Section 29. Section 744.711, Florida Statutes, is repealed.

Section 30. Subsection (5) of section 400.148, Florida Statutes, is amended to read:

400.148 Medicaid "Up-or-Out" Quality of Care Contract Management Program.—

(5) The agency shall, jointly with the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians, develop a system in the pilot project areas to identify Medicaid recipients who are residents of a participating nursing home or assisted living facility who have diminished ability to make their own decisions and who do not have relatives or family available to act as guardians in nursing homes listed on the Nursing Home Guide Watch List. The agency and the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians shall give such residents priority for publicly funded guardianship services.

Section 31. Subsection (3), paragraph (c) of subsection (4), and subsections (5) and (6) of section 744.3135, Florida Statutes, are amended to read:

744.3135 Credit and criminal investigation.—

(3) For professional guardians, the court and the ~~Statewide~~

~~Public Guardianship~~ Office of Public and Professional Guardians shall accept the satisfactory completion of a criminal history record check by any method described in this subsection. A professional guardian satisfies the requirements of this section by undergoing an electronic fingerprint criminal history record check. A professional guardian may use any electronic fingerprinting equipment used for criminal history record checks. The ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians shall adopt a rule detailing the acceptable methods for completing an electronic fingerprint criminal history record check under this section. The professional guardian shall pay the actual costs incurred by the Federal Bureau of Investigation and the Department of Law Enforcement for the criminal history record check. The entity completing the record check must immediately send the results of the criminal history record check to the clerk of the court and the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians. The clerk of the court shall maintain the results in the professional guardian's file and shall make the results available to the court.

(4)

(c) The Department of Law Enforcement shall search all arrest fingerprints received under s. 943.051 against the fingerprints retained in the statewide automated biometric identification system under paragraph (b). Any arrest record that is identified with the fingerprints of a person described in this paragraph must be reported to the clerk of court. The clerk of court must forward any arrest record received for a professional guardian to the ~~Statewide Public Guardianship~~

Office of Public and Professional Guardians within 5 days. Each professional guardian who elects to submit fingerprint information electronically shall participate in this search process by paying an annual fee to the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians of the Department of Elderly Affairs and by informing the clerk of court and the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians of any change in the status of his or her guardianship appointment. The amount of the annual fee to be imposed for performing these searches and the procedures for the retention of professional guardian fingerprints and the dissemination of search results shall be established by rule of the Department of Law Enforcement. At least once every 5 years, the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians must request that the Department of Law Enforcement forward the fingerprints maintained under this section to the Federal Bureau of Investigation.

(5)(a) A professional guardian, and each employee of a professional guardian who has a fiduciary responsibility to a ward, must complete, at his or her own expense, an investigation of his or her credit history before and at least once every 2 years after the date of the guardian's registration with the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians.

(b) The ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians shall adopt a rule detailing the acceptable methods for completing a credit investigation under this section. If appropriate, the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians may administer

credit investigations. If the office chooses to administer the credit investigation, the office may adopt a rule setting a fee, not to exceed $25, to reimburse the costs associated with the administration of a credit investigation.

(6) The ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians may inspect at any time the results of any credit or criminal history record check of a public or professional guardian conducted under this section. The office shall maintain copies of the credit or criminal history record check results in the guardian's registration file. If the results of a credit or criminal investigation of a public or professional guardian have not been forwarded to the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians by the investigating agency, the clerk of the court shall forward copies of the results of the investigations to the office upon receiving them.

Section 32. Paragraph (e) of subsection (2) of section 415.1102, Florida Statutes, is amended to read:

415.1102 Adult protection teams.—

(2) Such teams may be composed of, but need not be limited to:

(e) Public and professional guardians as described in part II ~~IX~~ of chapter 744.

Section 33. Paragraph (d) of subsection (3) of section 744.331, Florida Statutes, is amended to read:

744.331 Procedures to determine incapacity.—

(3) EXAMINING COMMITTEE.—

(d) A member of an examining committee must complete a minimum of 4 hours of initial training. The person must complete

2 hours of continuing education during each 2-year period after the initial training. The initial training and continuing education program must be developed under the supervision of the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians, in consultation with the Florida Conference of Circuit Court Judges; the Elder Law and the Real Property, Probate and Trust Law sections of The Florida Bar; the Florida State Guardianship Association; and the Florida Guardianship Foundation. The court may waive the initial training requirement for a person who has served for not less than 5 years on examining committees. If a person wishes to obtain his or her continuing education on the Internet or by watching a video course, the person must first obtain the approval of the chief judge before taking an Internet or video course.

Section 34. Paragraph (a) of subsection (1) of section 20.415, Florida Statutes, is amended to read:

20.415 Department of Elderly Affairs; trust funds.—The following trust funds shall be administered by the Department of Elderly Affairs:

(1) Administrative Trust Fund.

(a) Funds to be credited to and uses of the trust fund shall be administered in accordance with ss. 215.32, 744.534, and 744.2001 ~~744.7021~~.

Section 35. Section 744.524, Florida Statutes, is amended to read:

744.524 Termination of guardianship on change of domicile of resident ward.—When the domicile of a resident ward has changed as provided in s. 744.1098 ~~s. 744.2025~~, and the foreign court having jurisdiction over the ward at the ward's new

domicile has appointed a guardian and that guardian has qualified and posted a bond in an amount required by the foreign court, the guardian in this state may file her or his final report and close the guardianship in this state. The guardian of the property in this state shall cause a notice to be published once a week for 2 consecutive weeks, in a newspaper of general circulation published in the county, that she or he has filed her or his accounting and will apply for discharge on a day certain and that jurisdiction of the ward will be transferred to the state of foreign jurisdiction. If an objection is filed to the termination of the guardianship in this state, the court shall hear the objection and enter an order either sustaining or overruling the objection. Upon the disposition of all objections filed, or if no objection is filed, final settlement shall be made by the Florida guardian. On proof that the remaining property in the guardianship has been received by the foreign guardian, the guardian of the property in this state shall be discharged. The entry of the order terminating the guardianship in this state shall not exonerate the guardian or the guardian's surety from any liability previously incurred.

Section 36. This act shall take effect July 1, 2015.

The Florida Senate

COMMITTEE VOTE RECORD

COMMITTEE: Judiciary
ITEM: SB 1226
FINAL ACTION: Favorable
MEETING DATE: Tuesday, March 31, 2015
TIME: 4:00 —6:00 p.m.
PLACE: 110 Senate Office Building

FINAL VOTE								
Yea	**Nay**	**SENATORS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
VA		Bean						
X		Benacquisto						
X		Brandes						
X		Joyner						
X		Simmons						
X		Simpson						
VA		Soto						
X		Stargel						
		Ring, VICE CHAIR						
X		Diaz de la Portilla, CHAIR						
9	0	**TOTALS**						
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

The Florida Senate

Committee Agenda Request

To: Senator Miguel Diaz de la Portilla, Chair
Committee on Judiciary

Subject: Committee Agenda Request

Date: March 12, 2015

I respectfully request that **Senate Bill #1226**, relating to Guardianship, be placed on the:

☐ committee agenda at your earliest possible convenience.

☒ next committee agenda.

Nancy Detert

Senator Nancy C. Detert
Florida Senate, District 28

File signed original with committee office

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/15
Meeting Date

1226
Bill Number (if applicable)

Amendment Barcode (if applicable)

Topic Guardianship

Name Sylvia Smith

Job Title Director of Public Policy

Address 2728 Centerview Dr
Street

Tallahassee FL 32301
City *State* *Zip*

Phone 322-2258

Email SylviaS@disabilityrightsflorida.org

Speaking: [X] For [ ] Against [ ] Information

Waive Speaking: [X] In Support [ ] Against
(The Chair will read this information into the record.)

Representing Disability Rights Florida

Appearing at request of Chair: [ ] Yes [X] No

Lobbyist registered with Legislature: [X] Yes [ ] No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

3-31-15
Meeting Date

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

SB 1226
Bill Number (if applicable)

Topic SB1226 Guardianship Reform

Amendment Barcode (if applicable)

Name DOUG FRANKS

Job Title Elder Rights Advocate

Address 1034 Justice Ln
Street
Acworth GA 30102
City *State* *Zip*

Phone 6785703010

Email Muctechworks@mac.com

Speaking: ☑ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Ernestine Franks & AAAPG.net

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☐ Yes ☑ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting) SB 1226

Meeting Date — *Bill Number (if applicable)*

Topic For Profit Guardianship Reform — *Amendment Barcode (if applicable)*

Name DOUG FRANKS

Job Title Ernestine Franks Son

Address 1034 Justice Ln — Phone 6785703010
Street

Acworth GA 30102 — Email mactechworks@gmail.com
City *State* *Zip*

Speaking: ☑ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Ernestine Franks & AAAPG.Net

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☐ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/15
Meeting Date

SB1226
Bill Number (if applicable)

Topic GUARDIANSHIP

Amendment Barcode (if applicable)

Name LIDYA ABRAMOVICI

Job Title

Address 19355 TURNBERRY WAY
Street

Phone 305-457-0701

AVENTURA FL 33180
City *State* *Zip*

Email lidya1@gmail.com

Speaking: [X] For [ ] Against [ ] Information

Waive Speaking: [ ] In Support [ ] Against
(The Chair will read this information into the record.)

Representing Myself & AMERICANS AGAINST ABUSIVE PROBATE GUARDIANSHIP

Appearing at request of Chair: [ ] Yes [X] No

Lobbyist registered with Legislature: [ ] Yes [X] No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/15
Meeting Date

SB1226
Bill Number (if applicable)

Topic GUARDIANSHIP

Amendment Barcode (if applicable)

Name LIDYA ABRAMOVICH

Job Title

Address 19355 TURNBERRY WAY
Street

AVENTURA FL 33180
City *State* *Zip*

Phone 305-457-0701

Email lidya1@gmail.com

Speaking: [X] For [ ] Against [ ] Information

Waive Speaking: [ ] In Support [ ] Against
(The Chair will read this information into the record.)

Representing MYSELF & AMERICANS AGAINST ABUSIVE PROBATE GUARDIANSHIP

Appearing at request of Chair: [ ] Yes [X] No

Lobbyist registered with Legislature: [ ] Yes [X] No

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S-001 (10/14/14)