The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

JUDICIARY
Senator Flores, Chair
Senator Joyner, Vice Chair

MEETING DATE: Tuesday, February 22, 2011
TIME: 9:00 a.m.—12:00 noon
PLACE: *Toni Jennings Committee Room,* 110 Senate Office Building

MEMBERS: Senator Flores, Chair; Senator Joyner, Vice Chair; Senators Bogdanoff, Richter, Simmons, and Thrasher

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
		Discussion of "Bad Faith" Insurance Litigation: The committee will receive presentations from invited speakers advocating for or against reforms to the law governing a civil action alleging that an insurer acted in bad faith for failing to settle a claim.	
1	**SB 568** Judiciary	OGSR/Court Records/Court Monitors/Guardianship ; Amends provisions relating to public record exemptions for court records relating to court monitors in guardianship proceedings. Consolidates provisions. Provides that orders appointing nonemergency court monitors are exempt rather than confidential and exempt. Provides that only court orders finding no probable cause are confidential and exempt. Saves the exemptions from repeal under the Open Government Sunset Review Act. Removes the scheduled repeal of the exemption. JU 02/22/2011 GO RC	
2	**SB 570** Judiciary	OGSR/Interference With Custody; Amends a provision relating to a public records exemption for information submitted to a sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody. Saves the exemption from repeal under the Open Government Sunset Review Act. Deletes a provision providing for the repeal of the exemption. JU 02/22/2011 GO RC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
3	**SB 572** Judiciary	OGSR/Statewide Public Guardianship Office; Repeals provisions relating to an exemption from public records requirements for information that identifies donors and prospective donors to the direct-support organization of the Statewide Public Guardianship Office. Saves the exemption from repeal under the Open Government Sunset Review Act. Abrogates the scheduled repeal of the exemption. JU 02/22/2011 GO RC	

The Florida Senate

2010 Florida Statutes (including Special Session A)

Title XXXVII INSURANCE	Chapter 624 INSURANCE CODE: ADMINISTRATION AND GENERAL PROVISIONS	View Entire Chapter

624.155 Civil remedy.—

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

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

1. Section 626.9541(1)(i), (o), or (x);
2. Section 626.9551;
3. Section 626.9705;
4. Section 626.9706;
5. Section 626.9707; or
6. Section 627.7283.

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

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

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

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

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

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

1. The statutory provision, including the specific language of the statute, which the authorized insurer allegedly violated.
2. The facts and circumstances giving rise to the violation.
3. The name of any individual involved in the violation.
4. Reference to specific policy language that is relevant to the violation, if any. If the person bringing the civil action is a third party claimant, she or he shall not be required to reference the specific policy language if the authorized insurer has not provided a copy of the policy to the third party claimant pursuant to written request.
5. A statement that the notice is given in order to perfect the right to pursue the civil remedy authorized by

this section.

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

(d) No action shall lie if, within 60 days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected.

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

(f) The applicable statute of limitations for an action under this section shall be tolled for a period of 65 days by the mailing of the notice required by this subsection or the mailing of a subsequent notice required by this subsection.

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

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

(a) Willful, wanton, and malicious;

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

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

Any person who pursues a claim under this subsection shall post in advance the costs of discovery. Such costs shall be awarded to the authorized insurer if no punitive damages are awarded to the plaintiff.

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

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

(8) The civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state. Any person may obtain a judgment under either the common-law remedy of bad faith or this statutory remedy, but shall not be entitled to a judgment under both remedies. This section shall not be construed to create a common-law cause of action. The damages recoverable pursuant to this section shall include those damages which are a reasonably foreseeable result of a specified violation of this section by the authorized insurer and may include an award or judgment in an amount that exceeds the policy limits.

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

History.–ss. 9, 809(1st), ch. 82-243; s. 78, ch. 83-216; s. 2, ch. 83-288; s. 2, ch. 86-262; s. 1, ch. 87-278; s. 1, ch. 88-166; s. 30, ch. 90-119; ss. 187, 188, ch. 91-108; s. 4, ch. 91-429; s. 176, ch. 97-102; s. 2, ch. 2003-148; s. 757, ch. 2003-261; s. 2, ch. 2005-218.

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February 17, 2011

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Dear Eric:

As you requested, this letter will outline proposed legislative reforms to end lawyer games, protect the consumer, hold insurers' feet to the fire, and get cases settled quickly and fairly.

We have listened and taken to heart the Senators' questions concerning the effect and reach of the original bill. I am pleased to report that we have narrowly tailored and improved the bill to ensure that consumers are protected and that insurers acting wrongfully will have to pay dearly for their misdeeds.

Let me be absolutely clear. This bill will not abolish a cause of action for bad faith. It will not protect against wrongful conduct. To the contrary, it will end the shameful legal games in which the object is to NEVER TO SETTLE AT ALL, and in which the insured becomes a hostage to a claimant's pursuit of deep pockets.

The following is an outline of how the Legislature can facilitate fair and prompt settlements and protect the consumer:

1. Written Offer Required

Insurers should not be liable for bad-faith failure to settle when they have never received a legitimate offer to settle. Therefore, the bill should preclude bad-faith liability unless the insurer rejected a written offer. The offer should be free from any conditions other than payment of money, specify the relevant line of coverage, and state the basis of the claim.

2. Full Disclosure Required

Insurers need all relevant information to fairly evaluate any claim. Therefore, when making an offer to settle, the claimant should provide all relevant information, including the identity of witnesses, medical reports and other documents, and a computation of all claimed damages. The claimant should have a continuing duty timely to supplement these disclosures as

additional information or documents become available. And the insured should have a corresponding duty to provide all available information about the incident giving rise to the claim.

3. Reasonable Period of Time to Evaluate Provided

Insurers need sufficient time to fairly evaluate claims. But claimants' "offers" frequently include arbitrary and unreasonable deadlines for acceptance. Thus, the bill should provide insurers a reasonable time for evaluation. Insurers should not be liable in bad faith if they tender policy limits within the later of (i) ninety (90) days after actual notice of the accident or incident giving rise to the claim, or (ii) sixty (60) days from the claimant's written offer.

4. Protection When Faced with Multiple Claimants

Insurers often receive competing claims for limited insurance proceeds. They should not be exposed to liability from one claimant because other claimants exhausted the limited insurance proceeds. Thus, reform should include provisions allowing insurers to make proceeds available to all claimants. More specifically, an insurer faced with multiple claims should avoid bad-faith liability if it promptly files an interpleader action and tenders policy limits. Alternatively, an insurer faced with multiple claims should avoid bad-faith liability if it makes policy limits available in arbitration (at the insurer's expense). In either case, the proceeds would be distributed to the claimants on a pro-rata basis, following a determination of each claimant's damages.

5. Full Cooperation Required

Just as insurers have a duty to act in good faith towards their insureds, the insureds, claimants, and their representatives should have a statutory duty of cooperation in claims handling. Nonetheless, claimants frequently "set up" bad-faith claims by inducing the insurer into taking actions that will later be characterized as "bad faith." The reforms should provide additional defenses to curtail this conduct. Specifically, claimants and insureds should have a duty to fully cooperate in the claims-handling process, including responding to reasonable inquiries, communicating promptly, and complying with all reasonable requests for information. Claimants and insureds would violate this duty by purposefully inducing the insurer to *not settle*, such as by deliberately withholding information or misrepresenting the nature or extent of the injuries. A claimant's or insured's failure to satisfy this duty would provide the insurer an affirmative defense that, if proven, would preclude liability.

6. Bad-Faith Standard Amended

The current statutory bad-faith standard is vague. It allows for bad-faith claims when the insurer was "[n]ot attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests." § 624.155, Fla. Stat. The current jury instruction provides no additional guidance to jurors. The reform should make the standard more specific.

7. Uninsured Motorist Bad-Faith Damages Limited

Currently, an insured suing his uninsured motorist carrier for bad-faith failure to settle may recover "the total amount of the claimant's damages, including the amount in excess of the policy limits, any interest on unpaid benefits, reasonable attorney's fees and costs, and any damages caused by a violation of a law of this state. The total amount of the claimant's damages is recoverable whether caused by an insurer or by a third-party tortfeasor." Thus, an insured may recover exponentially more than his or her insurance limits. This windfall recovery should be limited to two times the policy limits or the amount of underlying damages, whichever is less.

8. Common-Law Cause of Action Eliminated

Currently, bad-faith causes of action exist at common law and by statute. Because claimants can elect either, amendments to the statutory claims would have little practical effect if claimants could avoid the statute by asserting common-law claims. Therefore, the reform should eliminate the common-law claim and provide that the statutory claim is exclusive.

* * *

You also requested information about the number of presenters. It appears we will have no fewer than three or more than five presenters; they will include practitioners and others who can explain the problems and injustices rampant in this area.

We greatly appreciate your time and the Committee's consideration.

Sincerely,

George N. Meros, Jr.

The Florida Justice Association
submitted the following materials.

FLORIDA'S LAW REQUIRING INSURANCE COMPANIES TO TREAT THEIR POLICYHOLDERS IN GOOD FAITH SHOULD NOT BE CHANGED

Current Law Has Served Insurance Consumers and Companies Well Since 1938

People and businesses enter contracts every day in Florida, and just about every day, disputes arise about whether one side of the contract has broken its end of the deal. Virtually all of those disputes are governed by common law rules present in American law for hundreds of years.

Insurance contracts are no different. Insurance companies file lawsuits every day in Florida, asking the courts to relieve them of their contractual promises based on common law rules. Customers of insurance companies also sometimes file lawsuits against their insurers based on common law rules when an insurer has broken its end of the deal.

Florida's common law rule requiring insurers to act in good faith has served Florida well since 1938 and has always effectively protected insurance companies from the "shameful legal games" decried by proponents.

Under Florida's common law rules, an insurer is already completely immune from liability if only negligence causes its customer to suffer a multi-million dollar loss. The customer must prove that the insurer not only failed to settle within the policy limit but that it: 1) should have settled based on the information available; and 2) realistically could have settled had it acted fairly, honestly, and with due regard for the interests of its customer.

Yet, insurers propose to replace the common law rules with a special statutory system designed to eliminate insurer accountability.

The Myth of "Shameful Legal Games" Does Not Justify the Elimination of Current Law

When someone is catastrophically injured by an at-fault person or business, such that her damages are greater than the policy limit, our system presents her with two choices. She can either 1) seek to recover both the liability insurance and the wealth of the at-fault person or business; or 2) settle for only the liability insurance of the at-fault person or business.

If the injured client chooses the former, her lawyer is responsible for prosecuting a lawsuit, pursuing her claim to a judgment and then collecting the assets of the at-fault person or business. If the injured client chooses the latter, authorizing her lawyer to settle for only the insurance limit, the lawyer still has responsibilities to protect his client's rights by being duly diligent in obtaining accurate information in an expeditious manner and negotiating any release terms.

For instance, if a paralyzed child requires $8 million of medical care, but the parents will settle for what may be only $1 million of liability insurance to avoid litigation, the lawyer has a duty to make certain, through documentation, that there is not an additional $4 million of insurance available to the child that has not been disclosed. In one well-known case, a lawyer's injured clients settled after taking the insurer's word that there was no additional insurance. Later, additional insurance was discovered, so the lawyer and clients sought to back out of the settlement based on the misrepresentation by the insurer. However, the appellate court refused to undo the settlement, reciting a duty of a plaintiff's lawyer to make an "all out effort" to ensure the client's interests are protected before settling. Accordingly, lawyers have both a professional and legal obligation to require more documentation than simply the tender of a check.

Moreover, injured clients rights can be negatively affected by an unjustified passage of time. For instance, the statute of limitations can run on their claim forever barring them from recovering anything at all or they can be faced with serious financial difficulties which require immediate attention. Accordingly, lawyers have a professional and legal duty to their clients to impose reasonable deadlines on insurance companies to comply with requests or to settle.

Of course, lawyers also have a legal duty to review and negotiate the terms of any release documents or other documents the insurance companies will require the injured client to sign. Often times this means the lawyer must require modifications and changes to the release.

Nonetheless, proponents frequently mischaracterize a lawyer's required due diligence in seeking additional documentation, imposing deadlines, or negotiating release terms as a "shameful legal game" designed to "set up" a naïve insurance company.

The truth is, current law protects insurance companies by requiring a Plaintiff's lawyer to make an "all out effort" to secure additional documentation before concluding a settlement agreement. Current law protects insurance companies by barring a Plaintiff's claims if they miss a legal deadline even by one day. And, current law permits an insurance company to protect itself by enforcing every letter of the release document the plaintiff signed. As a result, lawyers representing Plaintiffs have legal obligations to ensure the insurance company does more than simply mail a check. Accordingly, whether it is a request for additional documentation, a deadline, or a modification to a release, these are all part of a lawyer's professional and legal obligation to his client when a catastrophically injured client authorizes a settlement for only the liability insurance.

Lastly, and perhaps most significantly, applying the current common law standard since 1938, no insurance customer or claimant has ever won a reported case against an insurance company where the Plaintiff's lawyer made an unreasonable demand.

The Proposed New Laws Only Encourage More Lawsuits

Under the proposed new laws:

1. The parents of a paralyzed child and their lawyer would now owe legal duties to the drunk driver's insurance company

Currently, the insurer representing the negligent driver has the duty to investigate, identify witnesses, evaluate its customer's exposure, and advise its customer accordingly. However, Gray Robinson proposes that the injured person:

- owe a legal duty of "full cooperation" with the negligent driver's insurer, to do whatever the insurer requires including "communicating promptly and complying with" the insurer's demands.

- be required to pay the expense associated with gathering "all relevant information, including the identify of witnesses, medical reports and other documents, along with a computation of all claimed damages"

- be required provide all the collected information to the negligent driver's insurance company, in spite of the fact that the insurance company was already paid a premium to provide that service to its customer.

Injured people, in addition to everything else they have to face, should not also be required to do the work the negligent driver's insurance company has already been paid to do simply because they have chosen to settle rather than litigate. Because insurers will have no accountability for not settling until the claimant complies, frustrated claimants will abandon settlement in favor of litigation.

2. No matter how many times the parents of a paralyzed child call to beg the insurance company for the money it owes, the insurance company would be immune for not settling.

Gray Robinson proposes that insurance companies would be immune from lawsuits, no matter how egregious their conduct and no matter how many times the injured person calls and tries to settle. It proposes that insurance companies should be immune until the injured person finds and then figures out how to climb through new red tape by making a "written offer" which must be "free from any condition other than payment of money, specify the relevant line of coverage, and state the basis of the claim" sufficient to comply with the new statute, then have the insurance company formally "reject the offer."

Settlements are, no doubt, a two-way street. However, these proposed changes will only encourage insurers to ignore settlement offers until the insurer reads "the magic words." Frustrated claimants will abandon settlement in favor of litigation.

3. Even if the parents of the paralyzed child figured out how to comply with new law and made such an offer, the insurer could be as abusive as it wanted to be for 60-90 days.

Under current law, insurers are afforded a reasonable time to evaluate claims. Insurance customers must prove that the insurance company realistically could have settled. Any time someone has sued an insurance company for failing to settle where the deadline was unreasonable, that case has been resolved in favor of the insurance company.

However, Gray Robinson proposes that a 60-90 day immunity period is required, with no limitation on how abusive the insurer could be during that time.

An immunity period will only encourage insurers not to settle during that period. Again, frustrated claimants will abandon settlement in favor of litigation.

4. If multiple children were injured in an accident, the parents of the paralyzed child would be sued, along with all the other parents, by the negligent driver's insurance company.

Multiple claimants can certainly sometimes be a challenging situation for an insurance company. However, under current law, the insurance company is only required to consider the facts and circumstances of each claim and do its best to resolve as much liability as it can.

Gray Robinson proposes that where there are multiple claimants, instead of the insurer using its specially trained claims adjusters to attempt to settle what it can, it should instead be required to "promptly file an interpleader action" against all the injured people or force all the injured people into litigation over an arbitration entitlement. Ironically, proponents of the new reform now suggest the best solution is to force injured people to hire lawyers and litigate their entitlement to compensation.

Obviously, a solution that requires the prompt initiation of litigation by the insurance company against the injured people is not a good solution for encouraging settlements.

5. Where the parents of a paralyzed child purchase uninsured motorist coverage and the insurance company refuses to simply tender the money owed, even after a 60-day immunity period, the proponents still want to eliminate accountability.

Under the current law, an uninsured motorist insurer never has to do anything but pay the money it owes. The uninsured motorist insurer is entitled to a written warning followed by a 60-day immunity period and it never has to do anything at all except pay the amount it owes during that time and it "cures" all its prior misconduct.

Yet, even with the current UM rules, proponents still argue that the law disfavors insurance companies.

It is clear that even where the law already requires written notice, provides the insurance companies with a complete immunity period, and where the only thing the insurance company ever has to do is tender its policy limit, proponents still seeks a dramatic cap so that there is no significant disincentive for insurance companies to abuse claimants.

Taxpayers Against Insurance Bad Faith
submitted the following materials.

T A I B F

February 21, 2011

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Introduction - The person whose voice seems to never get heard in the debate between insurance companies and trial lawyers is the liability **insurance customer**. In fact, once the issue of insurance bad faith is framed as one between trial lawyers and insurance companies, the concerns of the insurance customer are immediately ignored. Especially when the insurance customer is a small business owner who may have worked for years to accumulate assets that could be lost through a lawsuit, we believe their concerned should not be ignored, and should instead be paramount.

The animosity between two naturally adverse parties – insurance companies and personal injury claimants – seemed to have fueled these 'reform' proposals that may be *intended* only to hurt personal injury lawyers and their clients. However, in reality, they threaten to catch small businesses and business owners in the cross fire. The proposals being suggested are not "tort reform" in any traditional sense of that term, because they actually **increase the risk** for a person of trying to operate a small business in the State of Florida.

The proposed 'reforms' do nothing to protect anyone but insurance companies, and strip away the right insurance customers have to hold their insurance companies responsible for breaching duties owed to their customer. By giving special 'grace periods' and 'safe harbors' only to the insurance company (and not to the small business customer' they eviscerate the protection from major lawsuits that a small business desperately needs to be able to survive and prosper in Florida.

Why We Buy Liability Insurance - Small businesses buy liability insurance because they seek to control the risks associated with doing business. However, every policy has a limit, and even the most careful business can, sooner or later, end up with a claim against it that exceeds the liability insurance limit. A judgment substantially in excess of liability insurance limits can crush a small business, destroying all the jobs that the business supports.

Florida Liability Insurance Companies Have Powerful Rights and Important Responsibilities - Florida liability policies give almost total control in handling a liability claim that is made against their customer. Even if the value of the claim is far in excess of the policy limit, the insurance company, not the customer, has exclusive control over the entire claim.

When small businesses give up this control over the claim, and potentially their financial future, they desperately need their insurance companies to react promptly, professionally and efficiently, to deliver on the promises of superior expertise and service are universally part of insurance marketing. Customers need, essentially, for their liability insurance companies to follow the golden rule, and handle the claim made against the customer with the same attention and thoroughness they would if the claim were being presented directly against the insurance company.

That golden rule standard is precisely the standard that the law of bad faith has applied to liability carriers since 1938.

When an insurance customer is faced with a potentially crushing liability claim that could be in excess of the liability policy, the law currently requires the insurer to act with reasonable diligence to

1. investigate the third party's claim against the customer
2. advise the customer if the third party's claim appears to have a value greater than the policy limit,
3. advise its customer to about anything the customer herself needs to do to help the case get settled, and
4. to act diligently and proactively to settle the third party's claim against the customer if it is reasonably possible to do so. This last requirement obligates the insurance company to take the steps necessary to accept a settlement offer if a prudent business person in the position of the customer would do so. To settle most large claims, the insurance company will be required to do more than just write a check to settle the case, but it is never required to do more than what a reasonably person would do, faced with liability for the entire claim.

The Liability Market Has Prospered Under These Standards - These standards have been in place for over 70 years, without significant changes. There have been no recent changes or decisions that require a 'glitch' fixing bill. Moreover, while there may be trouble with first party insurance, like sinkhole and windstorm coverage, the liability insurance market in Florida is as healthy as it has ever been. The television is, in fact, virtually flooded with advertisements from a dozen different liability insurance companies all aggressively competing for the opportunity to write even more liability insurance in Florida.

It is important that state policy be shaped by these market realities and the needs of insurance customers, rather than the strong emotions that develop, perhaps inevitably, as a result of the rivalry between claimant attorneys and insurance companies. **We should not strip the rights of small business to create a "solution" to a problem that does not exist.**

In specific response to the proposals –

1. **No insurer is required to settle a claim against their customer unless the claimant makes a is a written offer that requires nothing but the payment of money to be accepted.** This is ill advised on several fronts. When they are dealing with large, bad liability cases, that could crush a small business customer, Florida businesses need their insurance companies to get ***proactive in their investigation and make affirmative attempts to settle***, rather than passively waiting on the claimants to make an offer. In fact, the best chance to settle an excess liability case with a claimant will often be soon after the accident, before the claimant gets 'lawyered up', and while they can still use settlement proceeds for necessities and immediate medical therapies. We would like our insurers to take full advantage of that opportunity rather than to passively wait until it may be too late.

   Small businesses faced with an excess liability ***welcome any settlement offer*** that the plaintiff is willing to make. We certainly do not want to put barriers and restrictions into the path of settlement. If for example, a badly injured person makes an offer to settle a claim worth ten million dollars for the payment of a one million dollar policy limit, but only if the insurance company will provide a certified copy of its policy, or get an affidavit from the customer that there is no other insurance, the insurance company needs to act reasonably to pave the path to the settlement that is critically important to the small business customer.

   Insurance companies, whose ads promise exemplary claims service and attention should not be able to just write their check and then ignore other reasonable elements needed to completely conclude the excess claim and protect their customer from bankruptcy.

2. **No insurer should ever have to settle a claim to protect its customer unless the third party provides all medical reports, all witness statements, all damages calculations, etc. with their offer.**

   a. While insurance companies certainly need information to evaluate the claim, that does not mean that every claim requires every piece of relevant information to be concluded. As an extreme example, if the driver of a company's truck with $100,000 liability insurance admits he was distracted by texting, and plowed into the rear of a stopped car, and the driver of that car is an 18 year old girl who was rendered quadriplegic by the accident, the company should promptly pay the $100,000 to settle the claim against its customer if it becomes possible to do so. The insurer should not be permitted to just passively wait until the girl has hired a lawyer, that lawyer has gotten statements from every witness, gotten every medical report from the hospital and all the doctors who saw her, gotten expert reports from economists and the like to calculate her damages.

      In a tragic case like that, the injured girl may never be willing to settle for just the policy limits, and if she chooses not to, that is her right. However if she DOES make

such an offer to settle her claim for $100,000, and the insurance company refused in bad faith to accept that offer, it should not be able to leave its customer to face bankruptcy just because the girl failed to produce, for example, a routine anesthesiologist report , or one of two of her medical bills.

b. Perhaps more importantly, the duty to investigate the facts needed to evaluate the claim is the insurance company's duty. The customer does not pay premiums to the plaintiff's lawyer, and has no control over who that lawyer will be. The customer does pay premiums to an insurance company, usually based on the company's promise that it is trustworthy and professional enough to investigate the accident facts on the customer's behalf. Of course, in some cases, there may be some facts that the insurer cannot obtain without the claimant – such as medical records – and in some cases those could be critical to the decision whether to settle. However, those considerations can only be done on a case by case basis and not with a cookie cutter, one method fits all cases approach.

c. The law currently accommodates that, allowing the jury to ***consider ALL the circumstances of the case***, such as whether the insurer acted diligently, whether the claimant or her attorney were cooperative, whether there were important facts that were in dispute or simply not available, in deciding whether a company acted in bad faith. Every case is so different, that no other cookie cutter type standard makes sense.

3. **Minimum 'Safe Harbor" Periods Restricting Settlement Offers Protect Only the Insurance Company and Not the Insurance Customer –** The law of bad faith does not require insurance companies to do the impossible. Nor does it require them to do anything that a reasonable person in their customer's position would not do. If, for example, the only chance to settle a case has a deadline so soon after the accident that it would not be prudent to accept it, then the insurer cannot be faulted for that decision. If the deadline is so short, or the conditions so difficult to accept that they are practically impossible, it is not bad faith if the insurer does not accept.

However, ***what is reasonable in one case may not be reasonable in another.*** If there are complicated liability questions, coverage questions, or multiple claimants all clamoring for the same dollars, a carrier will legitimately need more time. If, however it is a case like that described above, where a texting truck driver clearly crippled an innocent person, the business faced with liability would be thrilled to have an offer to settle within policy limits within a week after the accident. WHO WOULDN'T!?

And more importantly, why would any business want to restrict or limit the settlement offers that its insurance company would have to consider. Large businesses may be able to afford that sort of gamesmanship, but small businesses need excess claims against them settled just as soon as it can be responsibly done. No type of safe harbor, or minimum time

deadline that helps only the insurance company by allowing it to just ignore a settlement opportunity until it is perhaps too late to accept it, makes any sense at all for small business. ***The insurance company is protected by these 'safe harbor' periods, but the insurance customer is not,*** which is the opposite of the purpose liability insurance is supposed to serve.

4. **Multiple Claimant Safe Harbors Protecting Only the Insurance Companies, Not Their Customers** - Like all other "safe harbors" being proposed, these protect only the insurance company. A business that is faced with multiple claims and limited coverage needs more than anything the superior expertise and claims service most insurance companies claim to offer. It does not protect the business if the insurance company can just write a check and abandon the customer to fend for themselves against the multiple claimants who are, naturally, looking out only for themselves.

   Make no mistake, no liability insurer who acts in good faith should have to pay more than its policy limits, no matter how many claimants there are. That is the law now, and has been for generations. On the other hand, if there is limited coverage compared to the claims, it is critical that the available insurance money be used wisely, to blot out as much liability for the customer as possible. As an example, if a wreck presents three whiplash claims and one crippling spinal cord injury, and the spinal cord injury can only be settled by the payment of the entire insurance policy, a reasonable person would evaluate those claims and probably decide to pay the huge claim, and blot out the multi-million dollar exposure. The law does not require the insurance company to be perfect, nor can it be subjected to 'Monday Morning Quarterbacking'. All it is required to do is to act reasonably, on the unique facts of each particular case, and after investigating all claims, to take the action that it deems to be best for its insurance customer.

Customer's Rights to Sue Its Insurer for Bad Faith Should Depend on Whether the Plaintiff Acted Helpfully in Presenting Claim. The customer who is getting sued by an injured person owes no duty to help that person sue him. Conversely, the small business should not expect that the person suing him will necessarily assist the customer in the defense or settlement of that claim.

Instead of counting on cooperation from the adverse party whom his business has perhaps severely injured, small businesses pay their chosen liability insurance company a premium to be their proactive advocate. Part of every premium dollar is paying, in advance, for investigation and claims handling expertise to protect the customer against claims, whether the claimants are friendly or mean, or anyplace in between.

It may well be true that many claimants with terrible injuries actually hope than an insurance company will fail in its duties and act in bad faith. It is equally possible that the insurance company and its customer hope for the plaintiff lawyer to fail in his duties to his

client and, for example, let the statute of limitations expire. That is a far cry, however, from suggesting that either party can *cause* the other to breach their obligations to their respective clients, just by wishing it were true.

The truth is that an insurance company who focuses less on the imagined voodoo powers of adverse parties, and more on performing its own responsibilities owed to its customer will never have to worry about being somehow 'set up' to act in bad faith, and cheat its customer out of the protection that the customer paid for.

5. **The Current Standard, That Lets Insurance Companies And Their Customers Consider ALL the Circumstances of Each Unique and Individual Case, is the Only Reasonable Approach to Claims Handling.** Every case is unique. Some are simple, some are complex. Sometimes when damages are high and policy limits are low, the decision to settle can be made in minutes. Other times, when issues are complex and evidence is disputed, it can legitimately takes weeks, months, or years to responsibly decide how to resolve a claim in the best interests of the customer.

Only a standard, such as the one that has been in place since 1938 that takes into account all the unique and variable circumstances of each particular case adequately protects the interests of both insurance companies and their small business customers. There is just no justification for changing it and no alternative that can properly be applied to the endless myriad of conditions that can apply to claims.

Statutory bad faith, where there can be more rigid deadlines and grace periods, makes sense for first party claims, like UM claims or homeowners claims where there is no third party making a claim against the insurance customer. The existing statutes address those claims well and should not be amended. But the existing common law standards, that take into account all the circumstance of the individual case should also not be changed.

The James Madison institute, in its paper about the state of Florida Insurance law titled "Solutions to Restore Florida's Property Insurance Marketplace to Protect Taxpayers and the Insured" wrote that The Legislature should

> change the definitions of bad faith, particularly as it relates to sinkholes, to "level the playing field." In particular, insurers that obtain scientifically valid opinions that sinkholes did not cause a given loss should be protected from additional penalties for "bad faith" denials, even when it turns out they were incorrect. **On the other hand, as much as the insurance industry may desire it, the Legislature should resist efforts to make**

further, deeper changes to bad faith laws simply in order to deal with Florida's real sinkhole problem. *(emphasis added).*

We concur.

Taxpayers Against Insurance Bad Faith

1234 E. 5th Avenue, Tampa, FL 33605

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Feature

*18 INSURANCE BAD FAITH: THE "SETUP MYTH"

Rutledge R. **Liles** [FNa1]

When testifying in insurance bad faith cases, allegations to the effect that the carrier has been set up by the insured and the insured's attorney and/or the third-party claimant and his or her attorney are frequently encountered. Such allegations are generally accompanied by an acrimonious charge of foul play, charade, dirty pool, contrivance, and so on.

Much has been written about insurance bad faith and the alleged "setup." As one writer correctly observed: "No subject is more likely to stir up controversy between plaintiffs' lawyers and insurance companies than the honored and reviled practice of setting up an insurance company for a bad faith claim." [FN1]

The angst created by the bad faith environment always seems to be laid at the doorstep of the insured or third-party claimant. In my experience, however, it is the insurance carrier that sets itself up for bad faith. The insured or claimant merely presents the opportunity by simply doing what should be done. Carriers never quite seem to be up to the challenge of responding in kind—a course of conduct that could provide comfortable insulation.

Under Florida law, any person may bring a civil action against an insurer when such person is damaged by the insurer's failure to attempt "[i]n good faith to settle claims when, under all circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests." [FN2]

Until the 20th century, actions for breaches of insurance contracts were treated the same as any other breach of contract action, and damages were generally limited to those contemplated by the parties at the time they entered into the contract. [FN3] With the passage of time, however, insurance contracts began to be viewed as distinguishable from other types of contracts because they came to "occupy a unique institutional role" in modern society and affected a large number of people whose rates were dependent upon the acts of not only themselves, but also the acts of other insureds. [FN4] This became especially true when liability policies began to replace traditional indemnity policies as the standard form of insurance policy.

With indemnity policies, the insured defended the claim, and the carrier simply paid the claim upon conclusion. With liability policies, however, carriers assumed the obligation of defending the insured, with the insured surrendering control of the handling of the defense. This gave rise to an understandable vulnerability on the part of the insured which, in turn, gave rise to the existence of a fiduciary relationship between the carrier and the insured not unlike that between a lawyer and client. [FN5]

Consequently, courts began to recognize that carriers owed a duty to the insured to act in the insured's best interests rather than their own. In recognition of the fact that courts uniformly have acknowledged that carriers owe their

insureds a duty of good faith and fair dealing, this duty evolved into the requirement that good faith be exercised or bad faith avoided.

In Florida, third-party bad faith actions were recognized as early as 1938. [FN6] Florida, however, is in the minority in holding that an action against an insurer for bad faith failure to settle sounds in contract rather than tort. [FN7] Most states treat such an action as a tort claim or a combination of tort and contract. [FN8] Third-party bad faith claims are recognized under both Florida common law and Florida statute. First-party bad faith claims, however, are entirely a creature of the legislature.

***19** In Florida, there is neither a "set-off" defense nor an affirmative defense of comparative bad faith. [FN9] Similarly, while evidence of negligence may be considered by the jury as it may bear on the question of bad faith, a cause of action based solely on negligence, which does not rise to the level of bad faith, does not lie. [FN10]

In sum, in determining whether an insurer has "acted fairly and honestly towards its insured and with due regard for his interests," the Florida Supreme Court applies the "totality-of-the-circumstances" standard, and not a "fairly debatable" standard. [FN11] Each case is determined on its own facts, and the question of the insurer's failure to act in good faith with due regard for the interests of the insured is for the jury. [FN12]

Enough said about the law of bad faith. Simply stated, jurors do not like or trust insurance companies. In a recent case in which this author engaged in jury selection in a case involving a large national corporation suing multiple carriers for mass tort coverage. The claim was that the carriers were refusing to pay claims as required by the insurance contract. Issues aside, it took five full days to select a jury, with the number of strikes for cause approaching 100. Additional jurors were required to complete the process. Jurors generally believed that if someone pays a premium, that person is entitled to coverage, and that insurance companies jerk their insureds around. This juror mindset developed through personal experience with insurance companies.

This should surprise no one. Certainly, carriers are aware of the environment and prejudice built in to the system. Insurance companies are also manifestly aware of the fiduciary relationship that exists with an insured and with the law of bad faith. Yet, carriers continue to commit acts amounting to bad faith and complain of being set up by plaintiffs' attorneys.

While there are cases where courts and juries have concluded that a "setup" existed and no bad faith occurred, those cases are obvious in their contrivance and based on unreasonable demands containing unreasonable conditions with unreasonable time limits. There, the "totality of the circumstances" made it obvious what was going on. Generally speaking, however, insurance companies set themselves up for the ***20** fall in a fashion that could easily be avoided or remedied.

What, then, are insurance companies doing to set themselves up for bad faith liability and how can they maximize their opportunity to prevail?

The duty to protect the insured does not begin with the receipt of an offer (or demand, depending on the point of view) to settle from the plaintiff's lawyer. It begins with receipt of notice of a claim. It is at that point that a prudent carrier will (or should) actively begin to investigate and evaluate the claim with a mind to obtaining a release for the insured.

The checklist of activities that should be performed by claims handlers during the course of handling the claim include:

1) *Prompt and full investigation of the claim.* A number of carriers wait for things to be brought to them. They want to be spoon fed, not necessarily with regard to a general overview of the case which they gather from an accident

report, but with regard to details surrounding the accident and injury—the details required to make a decision. Carriers need to be proactive in the investigation of a claim. Reactive claims handling is dangerous.

2) *Timely evaluation of the claim and potential exposure with prompt response.* Often, reserves are promptly set at policy limits in recognition of the case potential, with offers to settle being well below what is viewed as the actual value. This author recently testified in a case where there was clear liability with catastrophic injury. The reserve was set at the policy limit within a week of the accident. The insured was informed of the potential for an excess exposure. The case clearly merited the policy limit, which was modest as compared to the potential exposure. Policy limits were not offered for five months, at which time they were rejected. The excuse given was that "we needed more *documentation* of the injury" and "plaintiff's counsel had said he would not accept the limits earlier in time." Suffice it to say that the alleged "need" for documentation was not represented by attempts to obtain the information. Further, even when the decision was made to tender the limits, the carrier neglected to do so, saying plaintiff's counsel had boasted that they would not be accepted in any event.

In this author's opinion, this amounted to compounding the potential for bad faith. How did the carrier know that the limits might not be accepted if tendered? The attorney's letter was written only three weeks post accident, was an obvious attempt to start the bad faith clock running, and, standing alone, would not have supported a bad faith claim. Had the limits been offered earlier in time, even though they may have been rejected, it would have drawn the line at when bad faith arguably may have occurred, rather than extending the time over months. This was especially true, given the fact that when the limits were tendered, the carrier was in possession of no greater information or "documentation" than it had earlier in the case. Presumably, someone in control ultimately awakened to the fact that there had been unreasonable delay.

The importance of a prompt and timely response to an offer to settle cannot be overemphasized. If one truly requires additional information, request an extension. If one has what is needed, make a decision and make an offer.

3) *An organized and professional approach to claims handling: having a plan and uniformly sticking to it.* Momentary oversight, given the volume of claims, is understandable. No one is perfect or expected to be so. However, there is repeated inexcusable neglect and carelessness in claims handling; so obvious, in fact, that one might conclude that it was intentional, at best, or grossly neglectful, at least.

Examples of this abound. The person responsible for the file leaves for vacation at the very time a time demand matures. No one is alerted to the deadline, the assumption being that either it is not serious or it will keep until the claims handler returns. Why was it not handled before the claims handler left? Why was a substitute claims handler not alerted? Why was there no requested extension? Neglect under these circumstances is inexcusable.

Another example can be seen in a carrier's mail handling procedures. On occasion, mail goes to a central location which is different from the location of the claims handler, resulting in unnecessary delay in reaching the responsible person.

Still another is the chain of command for obtaining authority to settle. It takes too long to get to the individual with the power to authorize settlement.

4) *Keep the insured advised of the progress of the case and settlement opportunities, the probable outcome of the case, and the possibility of an excess verdict.* The poor job carriers do in keeping the insured informed is shocking. As earlier stated, a fiduciary relationship exists between the insurer and insured. The insured selects the level of coverage desired and pays the premium. For the payment of an annual premium, the insured transfers the risk of loss to the insurer up to the limits of coverage. In the absence of a claim, there is never a problem. The problem arises when a claim is made, and the claim carries the risk of exceeding the limits of coverage, thereby transferring what could be a catastrophic event back to the insured.***21** Under the terms of the contract, the insured surrenders control of the case to

the insurer.

A carrier is not required to automatically settle a claim that threatens to place the insured at risk for an excess judgment. Rather, the requirement is that it *attempt in good faith to settle* a claim when, under *all* the circumstances, it could and should have done so, had it acted *fairly* and *honestly* toward its insureds *with due regard for the insured's interests*.

This requires fair and honest assessment and, when necessary, prompt resolution rather than gamesmanship. It also demands that the insured be part of the process. After all, once moved beyond the policy limits, one is dealing with the insured's pocketbook. Should not the insured be apprised of what is going on and the potential for personal risk? Should not the insured be heard and have an opportunity to reduce the potential risk by offering to participate in the settlement at some level? No one should seriously question the right of the insured to be involved in the process. Jurors certainly do not, and it is not good to hear from the witness stand that no one ever consulted the insured or even informed him of what the carrier was doing in his name.

Notwithstanding, it is rare to find correspondence or notice from the carrier to the insured other than an initial acknowledgment of the claim and a statement to the effect that "we will assign a lawyer to handle your claim and to enter a defense on your behalf" and that "the claim may exceed your limit of liability, so you might want to hire your own lawyer to advise you at your expense," or words to that effect. After that, absolutely nothing. This practice is improper, and jurors do not hesitate to punish for the slight. Is it really that much trouble to copy the insured with information being exchanged between the carrier and its lawyer? Copying clients with everything should be a matter of course. Their file should be an image of their lawyer's. It seems a small "premium" to pay for the carrier to ensure against a claim that the insured was not kept informed.

5) *Act with due regard for the insured's interests*. Some carriers or, more specifically, claims personnel, view claims handling as a game of poker. They spoon out money in the same fashion as does a poker player, raising the pot with the hope that the opponent will fold. The problem is that, often, they are not playing with their own money. Rather, they are risking the insured's money. *Do not gamble* with the money of others.

6) *Give fair and reasonable consideration to a settlement offer that is not unreasonable under the facts of the case and settle, if possible, in a timely fashion where a reasonably prudent person would do so when faced with the prospect of paying the total recovery*. An insurer has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise ***22** in the management of his own business. [FN13]

Claims handlers are often blinded by the moment. The competitive juices start to flow when the first contact with plaintiff's counsel occurs. This may be by a simple letter of representation, a statutory demand for insurance information, or an offer (demand) made early in the case to settle for policy limits. There seems to exist a "no one is going to tell *me* what to do and when to do it" mentality. It's downhill from that point on.

Time limit demands are simply part of the process. Whether the short window of time constitutes a legitimate "setup" is entirely dependent on the facts of the case and the totality of the circumstances. In some cases, the abbreviated window may be adequate, in others, a "charade." [FN14]

Under certain circumstances, an insurance company can be in bad faith even before a written settlement offer is sent. [FN15] Further, the lack of a formal offer to settle does not preclude a finding of bad faith. [FN16] The absence of an offer to settle is merely one factor to be considered in the totality of circumstances. Where liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely, an insurer has an affirmative duty to initiate settlement negotiations.

Any question about the possible outcome of a settlement effort should be resolved in favor of the insured, with the

insurer having the burden of showing not only that there was no real possibility of settlement within policy limits, but also that the insured was without the ability to contribute to whatever settlement figure that the parties *could* have reached.

Bad faith lawsuits are an occupational hazard. There is nothing that really can be done to avoid the occurrence. Nevertheless, a carrier can maximize its chances of prevailing through appropriate claims handling practices. Unfortunately, however, insurance companies continue to set themselves up for bad faith liability. Think "bad faith" the moment the claim is received. Handle the claim in a prompt, reasonable fashion. Defensive claims handling is the key.

[FNa1]. ***Rutledge R. Liles*** *received his B.A. (1964) from Florida State University and his J.D. (1966) from the University of Florida College of Law. He is a board certified civil trial lawyer with more than 36 years of experience. He has served as president of both the Jacksonville Bar Association and The Florida Bar and is a fellow in the American College of Trial Lawyers and the American Bar Foundation.*

A version of this article previously appeared in the November 2002 issue of Harris-Martin's COLUMNS-Mold *(www.harrismartin.com). Reprinted with permission.*

[FN1]. STEPHEN S. ASHLEY, BAD FAITH ACTIONS LIABILITY AND DAMAGES § 7.26 (2d ed. 1998).

[FN2]. FLA. STAT. § 624.155(1)(b)(1); *see also* FLA. STD. JURY INSTR. (Civ.) 3.1.

[FN3]. *See generally* Roger C. Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies by Statute*, 26 U. MICH. J.L. REF. (Fall 1992).

[FN4]. *Id.* at 8.

[FN5]. *Baxter v. Royal Indem. Co.*, 285 So. 2d 652 (Fla. 1st D.C.A. 1973), *cert. discharged*, 317 So. 2d 725 (Fla. 1975).

[FN6]. *See Auto Mut. Indem. Co. v. Shaw*, 184 So. 852 (1938).

[FN7]. *Government Employees Ins. Co. v. Grounds*, 332 So. 2d 13 (Fla. 1976); *Swamy v. Caduceus Self Ins. Fund, Inc.*, 648 So. 2d 758 (Fla. 1st D.C.A. 1995); *see also* R. KEETON AND A. WIDISS, INSURANCE LAW.

[FN8]. *Id.*

[FN9]. *Nationwide Property and Casualty Ins. Co. v. King*, 568 So. 2d 990 (Fla. 4th D.C.A. 1990).

[FN10]. *DeLaune v. Liberty Mutual Ins. Co.*, 314 So. 2d 601 (Fla. 4th D.C.A. 1975).

[FN11]. *Talat Enterprises, Inc. v. Aetna Casualty & Surety Co.*, 952 F. Supp. 773 (M.D. Fla. 1996).

[FN12]. *Thomas v. Lumbermans Mutual Casualty Co.*, 424 So. 2d 36 (Fla. 3d D.C.A. 1983).

[FN13]. *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783 (Fla. 1980); *Auto Mutual Indemnity Co. v. Shaw*, 134 Fla. 815, 184 So. 852 (Fla. 1938).

[FN14]. *Hartford Accident & Indemnity Co. v. Mathis*, 511 So. 2d 601 (Fla. 4th D.C.A. 1987), *cert. denied*, 518 So. 2d 1275 (Fla. 1987); *DeLaune v. Liberty Mutual Ins. Co.*, 314 So. 2d 601, 603 (Fla. 4th D.C.A. 1975).

[FN15]. *Hartford Accident and Indemnity Company v. Mathis*, 511 So. 2d 601 (Fla. 4th D.C.A. 1987), *cert. denied*, 518 So. 2d 1275 (Fla. 1987).

[FN16]. *Powell v. Prudential Property & Casualty*, 584 So. 2d 12 (Fla. 3d D.C.A. 1991).

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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 Judiciary Committee

BILL:	SB 568
INTRODUCER:	Judiciary Committee
SUBJECT:	Open Government Sunset Review/Court Records Related to Court Monitors
DATE:	February 21, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Treadwell/Maclure	Maclure	JU	**Pre-meeting**
2.			GO	
3.			RC	
4.				
5.				
6.				

I. Summary:

This bill is the result of the Judiciary Committee's Open Government Sunset Review of the public-records exemptions for orders appointing nonemergency and emergency court monitors, monitors' reports, and orders finding no probable cause in guardianship proceedings. These public-records exemptions stand repealed on October 2, 2011, unless reenacted by the Legislature.

The bill retains the exemptions and makes organizational changes for clarity. The bill also removes the confidential status of court orders appointing nonemergency court monitors and makes these orders exempt rather than confidential and exempt. In addition, the bill eliminates a reference to "court determinations" in the public-records exemption relating to determinations and orders finding no probable cause for further court action.

This bill substantially amends section 774.1076, Florida Statutes.

II. Present Situation:

Florida Public-Records Law

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public-records law in 1892.[1] One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level:

[1] Sections 1390, 1391 F.S. (Rev. 1892).

> Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.[2]

Consistent with this constitutional provision, Florida's Public-Records Act provides that, unless specifically exempted, all public records must be made available for public inspection and copying.[3]

The term "public records" is broadly defined to mean:

> all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.[4]

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency[5] in connection with official business which are used to "perpetuate, communicate, or formalize knowledge of some type."[6] Unless made exempt, all such materials are open for public inspection as soon as they become records.[7]

Only the Legislature is authorized to create exemptions to open-government requirements.[8] Exemptions must be created by general law, which must specifically state the public necessity justifying the exemption.[9] Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.[10] A bill enacting an exemption or substantially amending an existing exemption[11] may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[12]

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[2] FLA. CONST. art. I, s. 24(a).
[3] Section 119.07, F.S.
[4] Section 119.011(12), F.S.
[5] The word "agency" is defined in s. 119.011(2), F.S., to mean "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."
[6] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).
[7] *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984).
[8] FLA. CONST. art. I, s. 24(c).
[9] *Id.*
[10] *Id.*
[11] Pursuant to s. 119.15(4)(b), F.S., an existing exemption is substantially amended if the exemption is expanded to cover additional records or information.
[12] FLA. CONST. art. I, s. 24(c).

There is a difference between records that the Legislature makes exempt from public inspection and those that it makes exempt and confidential.[13] If the Legislature makes a record exempt and confidential, the information may not be released by an agency to anyone other than to the persons or entities designated in the statute.[14] If a record is simply made exempt from disclosure requirements, the exemption does not prohibit the showing of such information at the discretion of the agency holding it.[15]

Public Access to Court Records

Although Florida courts have consistently held that the judiciary is not considered an "agency" for purposes of the Public-Records Act,[16] the Florida Supreme Court has found that "both civil and criminal proceedings in Florida are public events" and that it will "adhere to the well established common law right of access to court proceedings and records."[17] Furthermore, there is a constitutional guarantee of access to judicial records established in the Florida Constitution.[18] This constitutional provision provides for public access to judicial records, except for those records expressly exempted by the Florida Constitution, Florida law in effect on July 1, 1993, court rules in effect on November 3, 1992, or by future acts of the Legislature in accordance with the Constitution.[19]

Open Government Sunset Review Act

The Open Government Sunset Review Act provides for the systematic review of exemptions from the Public-Records Act on a five-year cycle ending October 2 of the fifth year following the enactment or substantial amendment of an exemption.[20] Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.[21] Under the Open Government Sunset Review Act, an exemption may be created, revised, or retained only if it serves an identifiable public purpose and it is no broader than necessary to meet the public purpose it serves. [22] An identifiable public purpose is served if the exemption meets one of three specified purposes and the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An exemption meets the statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;

[13] *WFTV, Inc. v. School Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004).
[14] *Id.*
[15] *Id.* at 54.
[16] *Times Publishing Co. v. Ake*, 660 So. 2d 255 (Fla. 1995) (holding that the judiciary, as a coequal branch of government, is not an "agency" subject to control by another coequal branch of government).
[17] *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113, 116 (Fla. 1988).
[18] FLA. CONST. art. I, s. 24.
[19] *Id.*
[20] Section 119.15(3), F.S.
[21] Section 119.15(5)(a), F.S.
[22] Section 119.15(6)(b), F.S.

- Protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize the safety of such individuals; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.[23]

The act also requires consideration of the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?[24]

Guardianship

The intent of the Florida Guardianship Law in ch. 744, F.S., is to provide the least restrictive means necessary to provide assistance to a person who is not fully capable of acting on his or her own behalf.[25] A guardianship is:

> a trust relationship of the most sacred character, in which one person, called a "guardian," acts for another, called the "ward," whom the law regards as incapable of managing his own affairs.[26]

Any person may file, under oath, a petition for determination of incapacity alleging that a person is incapacitated. After a petition for determination of incapacity has been filed, a court must appoint an examining committee comprised of three health care professionals to examine and report the condition of the alleged incapacitated person.[27] If the examining committee determines that the alleged incapacitated person is not incapacitated, the court must dismiss the petition for determination of incapacity.[28] If the examining committee determines that the alleged incapacitated person is incapacitated, the court must hold a hearing on the petition. If after a hearing the court determines that a person is incapacitated, the court must also find that alternatives to guardianship were considered and that no alternatives to guardianship will sufficiently address the problems of the incapacitated person and appoint a guardian.[29]

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[23] *Id.*
[24] Section 119.15(6)(a), F.S.
[25] Section 744.1012, F.S.
[26] 28 FLA. JUR. 2D *Guardian and Ward* s. 1 (2004).
[27] Section 744.331(3), F.S.
[28] Section 744.331(4), F.S.
[29] *See* s. 744.331(6)(b) and (f), F.S.

Authority of a Guardian

An order appointing a guardian must prescribe the specific powers and duties of the guardian and the delegable rights that have been removed from the ward.[30] The order must preserve an incapacitated person's right to make decisions to the extent that he or she is able to do so.[31] A guardian is empowered with the authority to protect the assets of the ward and to use the ward's property to provide for his or her care.[32] Some of the guardians' powers may only be exercised with court approval.[33]

Court Monitoring in Guardianship Cases

Court monitoring is a mechanism "courts can use to review a guardian's activities, assess the well-being of the ward, and ensure that the ward's assets are being protected."[34] Court monitoring is necessary because often after a person is declared incapacitated no one exists to bring concerns about the ward to the attention of the court.[35] According to the Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, "there is a need for greater oversight [of guardians], to protect individuals who are subject to guardianship."[36]

Nonemergency Court Monitors

Court monitors may be appointed by a court upon inquiry by an interested person or upon its own motion. However, a family or any person with a personal interest in the proceedings may not serve as a monitor.[37] The order appointing the monitor must be served upon the guardian, the ward, and any other person determined by the court.

A court monitor has the authority to investigate, seek information, examine documents, and interview the ward. The court monitor's findings must be reported to the court, and if it appears from the monitor's report that further action by the court is necessary to protect the ward's interests, the court must hold a hearing with notice and enter any order necessary to protect the ward.[38] A monitor may receive a reasonable fee paid from the property of the ward for his or her services.[39] If the court determines that a motion to appoint a court monitor was made in bad faith, the court may assess the costs of the proceeding, including attorney's fees, against the movant.[40]

[30] Section 744.344(1), F.S.
[31] Section 744.344(2), F.S.
[32] *See* ss. 744.361(4) and 744.444, F.S.
[33] Section 744.441, F.S.
[34] Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, *Guardianship Monitoring in Florida: Fulfilling the Court's Duty to Protect Ward*, 13 (2003).
[35] *Id.*
[36] *Id.* at 4.
[37] Section 744.107(1), F.S.
[38] Section 744.107(3), F.S. These actions include amending the plan, requiring an accounting, ordering production of assets, freezing assets, suspending a guardian, or initiating proceedings to remove a guardian.
[39] Section 744.107(4), F.S. A full-time state, county, or municipal employee or officer cannot be paid a fee for services as a court monitor.
[40] *Id.*

Emergency Court Monitors

Upon inquiry of an interested party or its own volition, the court may appoint a court monitor on an emergency basis without providing notice to the guardian, the ward, or other interested parties.[41] The court must specifically find that:

- There appears to be imminent danger that the physical or mental health or safety of the ward will be seriously impaired; or
- The ward's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken.[42]

Within 15 days after the entry of the order appointing the monitor, the monitor must file his or her report of findings and recommendations to the court. The court reviews the report and determines whether there is probable cause to take further action to protect the ward.[43] If the court finds probable cause, it must issue an order to show cause to the guardian or other respondent including the specific facts constituting the conduct charged and requiring the respondent to appear before the court to address the allegations.[44] Following the show-cause hearing, the court may impose sanctions on the respondent and take any other action necessary to protect the ward.[45]

Identical to the provisions governing nonemergency court monitors, an emergency court monitor may receive a reasonable fee paid from the property of the ward for his or her services.[46] If the court determines that a motion to appoint an emergency court monitor was made in bad faith, the court may assess the costs of the proceeding, including attorney's fees, against the movant.[47]

Court-Records Exemptions Relating to Court Monitors

In conjunction with the creation of the court monitor system in guardianship proceedings, the Legislature created exemptions from public access to judicial records related to court monitors in guardianship proceedings. Under these public-records exemptions, any order of a court appointing a nonemergency court monitor is confidential and exempt from public disclosure.[48] Similarly, the reports of an appointed court monitor relating to the medical condition, financial affairs, or mental health of the ward are confidential and exempt from public disclosure.[49] The public may access these records as determined by the court or upon demonstration of good cause to review the records. This exemption expires, and the public may access these records, if a court makes a finding of probable cause for further court action after consideration of the court

[41] Section 744.1075(1)(a), F.S.
[42] *Id.*
[43] Section 744.1075(3), F.S.
[44] Section 744.1075(4)(a), F.S.
[45] Section 744.1075(4)(c), F.S. These actions include: entering a judgment of contempt; ordering an accounting; freezing assets; referring the case to local law enforcement agencies or the state attorney; filing an abuse, neglect, or exploitation complaint with the Department of Children and Families; or initiating proceedings to remove the guardian.
[46] Section 744.1075(5), F.S. A full-time state, county, or municipal employee or officer cannot be paid a fee for services as an emergency court monitor.
[47] *Id.*
[48] Section 744.1076(1)(a), F.S. The companion exemption for emergency court monitors contained in s. 744.1076(2)(a), F.S., is only "exempt" rather than "confidential and exempt."
[49] Section 744.1076(1)(b), F.S.

monitor's report.[50] However, information in the report that is otherwise made confidential or exempt by law retains its confidential or exempt status.

In the emergency court monitor context, a similar public-records exemption exists in Florida law. Any order of a court appointing an emergency court monitor is exempt from public disclosure.[51] Similarly, the reports of an appointed court monitor relating to the medical condition, financial affairs, or mental health of the ward are confidential and exempt from public disclosure.[52] The public may access these records as determined by the court or upon demonstration of good cause to review the records. This exemption expires, and the public may access these records, if a court makes a finding of probable cause for further court action after consideration of the court monitor's report.[53] However, information in the report that is otherwise made confidential or exempt by law retains its confidential or exempt status.

Court determinations relating to a finding of no probable cause and court orders finding no probable cause in the nonemergency and emergency court monitor contexts are also confidential and exempt from public disclosure.[54] However, the court may allow access to these determinations and orders upon a showing of good cause.

In its statement of public necessity accompanying the creation of these exemptions, the Legislature recognized that:

> release of the exempt order [appointing court monitors] would produce undue harm to the ward. In many instances, a court monitor is appointed to investigate allegations that may rise to the level of physical neglect or abuse or financial exploitation. When such allegations are involved, if the order of appointment is public, the target of the investigation may be made aware of the investigation before the investigation is even underway, raising the risk of concealment of evidence, intimidation of witnesses, or retaliation against the reporter. The Legislature finds that public disclosure of the exempt order would hinder the ability of the monitor to conduct an accurate investigation if evidence has been concealed and witnesses have been intimidated.[55]

With regard to the reports of court monitors, the Legislature recognized that release of these reports would produce undue harm to the ward and hinder the investigation of the monitor. In addition, the Legislature stated that the reports may contain sensitive, personal information that, if released, could cause harm or embarrassment to the ward or his or her family.

The Legislature concluded that it is a public necessity that court determinations relating to a finding of no probable cause and court orders finding no probable cause must be made confidential and exempt because unfounded allegations against a guardian could be damaging to

[50] Section 744.1076(1)(c), F.S.
[51] Section 744.1076(2)(a), F.S.
[52] Section 744.1076(2)(b), F.S.
[53] Section 744.1076(2)(c), F.S.
[54] Section 744. 1076(3), F.S.
[55] Laws of Fla. 2006-129, s. 2.

the reputation of the guardian and cause undue embarrassment as well as could invade the guardian's privacy.[56]

The public-records exemptions will stand repealed on October 2, 2011, unless reviewed and reenacted by the Legislature under the Open Government Sunset Review Act.

Judiciary Committee's Open Government Sunset Review

During its review of these public-records exemptions under the Open Government Sunset Review Act, the professional staff of the Judiciary Committee interviewed judges, guardianship practitioners, clerks of court, the Florida Department of Elder Affairs, The Florida Bar, and other interested parties to gauge the utility of the exemptions. Senate professional staff also reviewed guardianship files in which a court monitor had been appointed. As a result of the interviews and file review, Senate professional staff recommended that the Legislature retain the public-records exemptions established in s. 744.1076, F.S., which make orders appointing nonemergency and emergency court monitors, reports of those monitors, and findings of no probable cause exempt or confidential and exempt from public disclosure.[57] Senate professional staff concluded that, in addition to protecting the ward from the disclosure of information of a sensitive, personal nature, the exemptions also protect a guardian from unwarranted damage to his or her reputation. Furthermore, these exemptions are arguably necessary for the administration of the court monitor process.[58]

Senate professional staff also recommended that the Legislature consider reorganizing the exemptions for clarity and providing that the order appointing a nonemergency court monitor be "exempt" only rather than "confidential and exempt." This change would make the exemption consistent with the current public-records exemption for orders appointing emergency court monitors and would allow nonemergency court monitors to share the order as necessary during their investigation.

Senate professional staff also recommended that the Legislature consider deleting the reference to "court determinations relating to a finding of no probable cause" in the public-records exemption relating to determinations and orders finding no probable cause. In practice, the probable cause determination is reduced to a written order. Therefore, the exemption could provide that an "order finding no probable cause" is confidential and exempt from public disclosure.

III. Effect of Proposed Changes:

This bill is the result of the Judiciary Committee's Open Government Sunset Review of the public-records exemptions for certain court records relating to court monitors in guardianship proceedings found in s. 744.1076, F.S. These public-records exemptions stand repealed on October 2, 2011, unless reenacted by the Legislature.

[56] *Id.*
[57] Materials gathered for this Open Government Sunset Review are on file with the Senate Committee on Judiciary.
[58] A public-records exemption must, among other criteria, protect information of a sensitive, personal nature or be necessary for the effective administration of a program. Section 119.15(6)(b), F.S.

The bill retains the exemptions and makes organizational changes to the statute for clarity. The bill removes the confidential status of court orders appointing nonemergency court monitors for consistency and to allow nonemergency court monitors to share the order with others as necessary to aid in the monitor's investigation. However, under the bill, these orders would retain their current exempt status.

Additionally, the bill removes a reference to "court determinations relating to a finding of no probable cause" in the public-records exemption relating to determinations and orders finding no probable cause because, in practice, the probable cause determination is typically contained in a written order included in the guardianship file. In effect, the bill simplifies the exemption by clearly stating that any order finding no probable cause will be confidential and exempt from public disclosure.

The bill provides an effective date of October 1, 2011.

Other Potential Implications:

If the Legislature chooses not to retain the public-records exemptions for orders and reports of court monitors, the exemptions will expire on October 2, 2011. Absent the exemptions, certain sensitive information pertaining to the guardian or the ward may be available to the public, and the court monitor's investigation may be impeded by the disclosure of the order appointing the court monitor.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill retains the existing public-records exemptions. This bill complies with the requirement of article I, section 24 of the Florida Constitution that the Legislature address public-records exemptions in legislation separate from substantive law changes.

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. Additional Information:

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

None.

B. Amendments:

None.

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 Judiciary Committee

BILL:	SB 570
INTRODUCER:	Judiciary Committee
SUBJECT:	Open Government Sunset Review/Interference with Custody
DATE:	February 21, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Daniell/Maclure	Maclure	JU	**Pre-meeting**
2.			GO	
3.			RC	
4.				
5.				
6.				

I. Summary:

This bill is the result of the Judiciary Committee's Open Government Sunset Review of a public-records exemption for information submitted to the sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody. The exemption will expire on October 2, 2011, unless saved from repeal through reenactment by the Legislature.

Currently, the exemption protects from disclosure the current address and telephone number of a person who takes a minor child or incompetent person because the person is a victim of domestic violence or believes that taking the minor child or incompetent person is necessary to protect the child or incompetent person. The bill retains the exemption by deleting language providing for the scheduled repeal of the exemption.

This bill substantially amends section 787.03, Florida Statutes.

II. Present Situation:

Florida Public-Records Law

Florida has a long history of providing public access to government records. The Legislature enacted the first public-records law in 1892.[1] In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional

[1] Sections 1390, 1391, F.S. (Rev. 1892).

level.[2] Article I, section 24 of the Florida Constitution guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.

The Public-Records Act[3] specifies conditions under which public access must be provided to records of the executive branch and other agencies. Unless specifically exempted, all agency[4] records are available for public inspection. Section 119.011(12), F.S., defines the term "public records" very broadly to include "all documents, ... tapes, photographs, films, sounds recordings … made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." Unless made exempt, all such materials are open for public inspection at the moment they become records.[5]

Only the Legislature is authorized to create exemptions to open-government requirements. Exemptions must be created by general law, and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption or substantially amending an existing exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[6]

Records may be identified as either exempt from public inspection or exempt and confidential. If the Legislature makes a record exempt and confidential, the information may not be released by an agency to anyone other than to the persons or entities designated in the statute.[7] If a record is simply made exempt from public inspection, the exemption does not prohibit the showing of such information at the discretion of the agency holding it.[8]

Open Government Sunset Review Act

The Open Government Sunset Review Act[9] provides for the systematic review of exemptions from the Public-Records Act in the fifth year after the exemption's enactment. By June 1 of each year, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year. The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.[10] An identifiable public purpose is served if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An identifiable public purpose is served if the exemption:

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[2] FLA. CONST. art. I, s. 24.
[3] Chapter 119, F.S.
[4] An agency includes any state, county, or municipal officer, department, or other separate unit of government that is created or established by law, as well as any other public or private agency or person acting on behalf of any public agency. Section 119.011(2), F.S.
[5] *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984).
[6] FLA. CONST. art. I, s. 24(c).
[7] *WFTV, Inc. v. School Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004).
[8] *Id*. at 54.
[9] Section 119.15, F.S.
[10] Section 119.15(6)(b), F.S.

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or combination of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.[11]

The act also requires the Legislature, as part of the review process, to consider the following six questions that go to the scope, public purpose, and necessity of the exemption:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?[12]

Interference with Custody

The Legislature in 1974 created the offense of interference with custody. Today, there are two variations to the offense. Under one provision, it is a third-degree felony for any person – without legal authority – to knowingly or recklessly take a minor or any incompetent person from the custody of his or her parent, a guardian, a public agency in charge of the child or incompetent person, or any other lawful custodian.[13] Under the second provision, it is a third-degree felony – in the absence of a court order determining custody or visitation rights – for a parent, stepparent, legal guardian, or relative who has custody of a minor or incompetent person to take or conceal the minor or incompetent person with a malicious intent to deprive another person of his or her right to custody.[14]

The statute prescribes three defenses to the offense of interference with custody:

[11] *Id*.
[12] Section 119.15(6)(a), F.S.
[13] Section 787.03(1), F.S.
[14] Section 787.03(2), F.S.

> (a) The defendant had reasonable cause to believe that his or her action was necessary to preserve the minor or the incompetent person from danger to his or her welfare.
>
> (b) The defendant was the victim of an act of domestic violence or had reasonable cause to believe that he or she was about to become the victim of an act of domestic violence as defined in s. 741.28, [F.S.,] and the defendant had reasonable cause to believe that the action was necessary in order for the defendant to escape from, or protect himself or herself from, the domestic violence or to preserve the minor or incompetent person from exposure to the domestic violence.
>
> (c) The minor or incompetent person was taken away at his or her own instigation without enticement and without purpose to commit a criminal offense with or against the minor or incompetent person, and the defendant establishes that it was reasonable to rely on the instigating acts of the minor or incompetent person.[15]

Distinct from the three defenses, the statute further specifies that the statute does not apply:

> in cases in which a person having a legal right to custody of a minor or incompetent person is the victim of any act of domestic violence, has reasonable cause to believe he or she is about to become the victim of any act of domestic violence . . . or believes that his or her action was necessary to preserve the minor or the incompetent person from danger to his or her welfare and seeks shelter from such acts or possible acts and takes with him or her the minor or incompetent person.[16]

To avail himself or herself of this exception, a person who takes a minor or incompetent person must comply with each of the following requirements:

- Within 10 days of the taking, make a report to the sheriff or state attorney for the county in which the minor or incompetent person resided. The report must include the name of the person taking the minor or incompetent person, the current address and telephone number of the person and the minor or incompetent person, and the reasons the minor or incompetent person was taken.
- Within a reasonable time of the taking, commence a custody proceeding consistent with the federal Parental Kidnapping Prevention Act[17] or the Uniform Child Custody Jurisdiction and Enforcement Act.[18]
- Inform the sheriff or state attorney of any address or telephone number changes for the person and the minor or incompetent person.[19]

[15] Section 787.03(4)(a)-(c), F.S.
[16] Section 787.03(6)(a), F.S.
[17] 28 U.S.C. s. 1738A.
[18] Sections 61.501-61.542, F.S.
[19] Section 787.03(6)(b), F.S.

Public-Records Exemption for Interference with Custody

Under an accompanying public-records exemption, the current address and telephone number of the person taking the minor or incompetent person, as well as the address and telephone number of the minor or incompetent person, contained in the report made to the sheriff or state attorney, are confidential and exempt from public disclosure.[20] As originally enacted in 2000, this exemption applied to "information provided" to a sheriff or state attorney as part of the report filed within 10 days of taking a "child." Under the original broader wording, the public-records exemption captured not only the name and address information, but also the reasons the child was taken.[21] The public-records exemption was scheduled for repeal on October 2, 2005. An Open Government Sunset Review of this exemption, conducted during the 2004-2005 interim legislative period, recommended that the Legislature narrow the exemption to exclude the reason the child was taken.[22]

During the 2005 Regular Session, the Legislature reenacted the public-records exemption and saved it from then-imminent repeal. The Legislature, consistent with the Open Government Sunset Review report, also narrowed the exemption, removing the reason the child was taken from the protection from public disclosure afforded by the public-records exemption.[23]

The process of reviewing the public-records exemption during the 2004-2005 interim drew attention to a number of statutory inconsistencies and ambiguities in the underlying interference-with-custody offense, as well as with respect to interplay between the offense and the public-records exemption. As a consequence, the 2005 legislation reenacted the public-records exemption for one year only – scheduling it for repeal again on October 2, 2006. Further, the legislation provided for the repeal of the entire interference-with-custody statute on that date unless it was reviewed and saved from repeal through reenactment.[24] During the 2006 Regular Session, the Legislature passed House Bill 7113, reenacting and expanding the public-records exemption for interference with custody.[25]

The public-records exemption for interference with custody is again scheduled for repeal on October 2, 2011, unless saved from repeal through reenactment by the Legislature. In reviewing the public-records exemption under the Open Government Sunset Review Act, Senate professional staff of the Judiciary Committee found that there is a public necessity in continuing to keep confidential and exempt certain information relating to a person who takes a minor child or incompetent person because he or she is the victim of domestic violence, or believes he or she is about to become a victim of domestic violence, or in order to maintain the safety of the minor or incompetent person. In order to gauge how this exemption functions and its importance, professional staff sent questionnaires to interested parties, including the Florida Prosecuting

[20] Section 787.03(6)(c), F.S.
[21] See s. 787.03(6)(c), F.S. (2000).
[22] Comm. on Judiciary, The Florida Senate, *Review of Public Records Exemption for Certain Sheriff and State Attorney Records Relating to Interference with Custody, s. 787.03, F.S.* (Interim Report 2005-217) (Nov. 2004), *available at* http://www.flsenate.gov/data/Publications/2005/Senate/reports/interim_reports/pdf/2005-217ju.pdf (last visited Aug. 31, 2010).
[23] Chapter 2005-89, Laws of Fla.
[24] See s. 787.03(7), F.S. (2005); s. 1, ch. 2005-89, L.O.F.
[25] Chapter 2006-115, Laws of Fla.

Attorneys Association, the Florida Sheriffs Association, and the Florida Coalition Against Domestic Violence. Responses from the questionnaire indicated that the exemption is necessary to provide protection to victims of domestic violence, as well as a minor child or incompetent person who may also be in danger.[26] Based on the questionnaire responses, this public-records exemption appears to serve a public purpose by maintaining the safety of the person taking the minor or incompetent person, as well as the minor or incompetent person, by protecting their location and phone number. The Open Government Sunset Review Act provides that one of the identifiable public purposes for retaining an exemption is protecting sensitive information about an individual, the release of which would jeopardize the safety of that individual.[27]

Professional staff of the Committee on Judiciary recommends that the Legislature reenact the public-records exemption established in paragraph (c) of s. 787.03(6), F.S., which makes specified information submitted to the sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody exempt from disclosure.

III. Effect of Proposed Changes:

This bill is the result of the Judiciary Committee's Open Government Sunset Review of a public-records exemption for information submitted to the sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody. Currently, the exemption protects from disclosure the current address and telephone number of a person who takes a minor child or incompetent person because the person is a victim of domestic violence or believes that taking the minor child or incompetent person is necessary to protect the child or incompetent person. This exemption will expire on October 2, 2011, unless saved from repeal through reenactment by the Legislature.

This bill retains the public-records exemption related to the interference with custody statute by deleting language providing for the scheduled repeal of the exemption.

This bill provides an effective date of October 1, 2011.

Other Potential Implications:

If the Legislature chooses not to retain the public-records exemption for interference with custody, the exemption will expire on October 2, 2011. Absent the exemption, the address and telephone number of the person fleeing with a minor child or incompetent person due to domestic violence would be public and accessible by the person who is alleged to have created the safety threat.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

[26] Materials gathered for this Open Government Sunset Review are on file with the Senate Committee on Judiciary.
[27] Section 119.15(6)(b)2., F.S.

B. Public Records/Open Meetings Issues:

This bill retains the public-records exemption for specified information submitted to the sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody. This bill appears to comply with the requirements of article I, section 24 of the Florida Constitution that public-records exemptions be addressed in legislation separate from substantive law changes.

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:

In order to gain the exception provided in statute for a person fleeing domestic violence or seeking to protect a minor or incompetent person from harm, the person must file a report on their whereabouts with the sheriff or state attorney within 10 days after taking the minor or incompetent person. Some survey respondents expressed concern that the 10-day period was too long. One sheriff explained that law enforcement may spend several days investigating the disappearance of the minor or incompetent person without the benefit of knowing that the minor or incompetent person is safe and in the company of a person having legal custody of the minor or incompetent person. However, according to a representative of an organization that advocates on behalf of domestic violence victims, the 10-day period should not be reduced because a person fleeing domestic violence often needs that amount of time to find a safe place to stay and file the report.[28]

[28] E-mail from Nina Zollo, Florida Coalition Against Domestic Violence, to professional staff of the Judiciary Committee (Sept. 7, 2010) (on file with the Senate Committee on Judiciary).

VIII. Additional Information:

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

None.

B. Amendments:

None.

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 Judiciary Committee

BILL:	SB 572
INTRODUCER:	Judiciary Committee
SUBJECT:	Open Government Sunset Review/Statewide Public Guardianship Office
DATE:	February 21, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Maclure	JU	**Pre-meeting**
2.			GO	
3.			RC	
4.				
5.				
6.				

I. Summary:

The bill saves from repeal the public-records exemption under section 744.7042(6), Florida Statutes, for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office. The exemption currently is scheduled for repeal on October 2, 2011, unless retained by the Legislature following a review under the Open Government Sunset Review Act.

This bill repeals section 2 of chapter 2006-179, Laws of Florida.

II. Present Situation:

Florida's Public-Records Laws

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.

Section 24(a), art. I, of the State Constitution, provides that:

> Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically

> made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

The Public-Records Act is contained in chapter 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record[1] must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency[2] records are to be available for public inspection.

The Florida Supreme Court has interpreted the definition of "public record" to encompass all materials made or received by an agency in connection with official business which are "intended to perpetuate, communicate, or formalize knowledge."[3] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[4]

Only the Legislature is authorized to create exemptions from open government requirements.[5] Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.[6] A bill enacting an exemption may not contain other substantive provisions, although it may contain multiple exemptions relating to one subject.[7]

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.[8] If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[9]

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[1] Section 119.011(12), F.S., defines "public records" to include "all documents, papers, letters, maps, books, tapes, photographs, film, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."

[2] Section 119.011(2), F.S., defines "agency" as "any state, county, district, authority, or municipal officer, department, division, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."

[3] *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.,* 379 So. 2d 633, 640 (Fla. 1980).

[4] *Wait v. Florida Power & Light Company,* 372 So. 2d 420 (Fla. 1979).

[5] Article I, s. 24(c) of the State Constitution.

[6] *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation,* 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation,* 724 So. 2d 567 (Fla. 1999).

[7] Article I, s. 24(c) of the State Constitution.

[8] Attorney General Opinion 85-62, August 1, 1985.

[9] *Williams v. City of Minneola,* 575 So. 2d 683, 687 (Fla. 5th DCA), *review denied,* 589 So. 2d 289 (Fla. 1991).

Open Government Sunset Review Act

The Open Government Sunset Review Act[10] provides for the systematic review of an exemption from the Public-Records Act in the fifth year after its enactment.[11] The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.[12] An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.[13] An exemption meets the statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.[14]

The act also requires the Legislature to consider six questions that go to the scope, public purpose, and necessity of the exemption.[15]

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.[16] If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created,[17] then a public necessity statement and a two-thirds vote for passage are not required.

[10] Section 119.15, F.S.
[11] Section 119.15(4)(b), F.S., provides that an existing exemption may be considered a substantially amended exemption if the exemption is expanded to cover additional records. As with a new exemption, a substantially amended exemption is also subject to the five-year review.
[12] Section 119.15(6)(b), F.S.
[13] *Id*.
[14] *Id.*
[15] Section 119.15(6)(a), F.S.
[16] Article I, s. 24(c) of the State Constitution.
[17] An example of an exception to a public-records exemption would be allowing another agency access to confidential or exempt records.

Guardianship

In 2006, the Florida Legislature significantly revised guardianship laws.[18] A guardian is a court-appointed surrogate decision-maker to make personal or financial decisions for a minor or for an adult with mental or physical disabilities. Section 744.102(4), F.S., defines "guardian" to mean a person who has been appointed by the court to act on behalf of a ward's person or property or both. A ward is defined as a person for whom a guardian has been appointed.[19]

The Statewide Public Guardianship Office appoints local public guardian offices, as required by s. 744.703, F.S., to provide guardianship services when persons do not have adequate income or assets to afford a private guardian and there is no willing relative or friend to serve. The Statewide Public Guardianship Office annually registers professional guardians[20] and reviews and approves instruction and training for professional guardians.[21] The Statewide Public Guardianship Office has authority to administer the Joining Forces for Public Guardianship grant program.[22]

Public-Records Exemption for Donors' Identifying Information

The Legislature created public-records exemption for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office. Section 744.7082(6), F.S., provides that the identity of a donor or a prospective donor of money or property to the direct-support organization who wishes to remain anonymous, as well as all information identifying the donor or prospective donor, is confidential and exempt from the public-records law.

The Foundation for Indigent Guardianship (FIG or foundation) serves as the direct-support organization for the Statewide Public Guardianship Office and was incorporated in December 2005.[23] The foundation is a not-for-profit corporation that is 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.[24]

The foundation is operated by a board of directors that meets monthly. The foundation has established the State of Florida Public Guardianship Pooled Special Needs Trust. The trust is marketed by the foundation, and the trust is the foundation's primary vehicle for fundraising. The foundation retains funds it receives upon the death of a beneficiary of the trust.

The funds that the foundation raises supplement the budgets of the contracted public guardianship offices. In consultation with the Statewide Public Guardianship Office, the

[18] See ch. 2006-178, Laws of Fla.
[19] Section 744.102(22), F.S.
[20] Section 744.1083, F.S.
[21] Section 744.1085(3), F.S.
[22] See section 744.712, F.S., this grant program has not yet been funded.
[23] Department of Elderly Affairs Statewide Public Guardianship Office.
[24] Section 744.7082(1), F.S.

foundation awards one-time grants to the local public guardianship offices throughout the state upon its receipt of retained funds from the trust. The foundation also participates in other outreach activities, such as submitting articles for publication in local media and participating in local community events to raise awareness of the Statewide Public Guardianship Office.

Public-records exemptions for the identities of donors or prospective donors who desire anonymity are comparatively common under the Florida Statutes.[25] The exemption provided to the foundation, the direct support organization for the Statewide Public Guardianship Office, affects donors or prospective donors of the foundation who desire to remain anonymous. The confidentiality applies to any record revealing the identity of such donors. This exemption is scheduled to expire on October 2, 2011, unless saved from repeal by the Legislature after a review under the Open Government Sunset Review Act, which was conducted by the Committee on Judiciary during the 2010-2011 legislative interim period.

Research from the review demonstrates that the public-records exemption enables the foundation to effectively and efficiently administer its fundraising activities on behalf of the local public guardianship offices that contract with the Statewide Public Guardianship Office to provide guardianship services. To the extent that donors might be dissuaded from contributing to the foundation in the absence of the public-records exemption, the ability of the foundation to raise funds would be limited. The authorizing statute for the foundation as a direct-support organization for the Statewide Public Guardianship Office provides that one of the foundation's purposes is to raise funds and receive gifts and property.

It is possible that a future donor to the foundation might desire anonymity. If the public-records exemption was not in place and a donor requested anonymity, the foundation could be forced to forgo or postpone the donation and request a public-records exemption from the Legislature.

According to staff of the Statewide Public Guardianship Office, there has been one corporate donor providing funds to the foundation, and it has no documented requests for anonymity. The foundation has not been directly soliciting donors for contributions other than the marketing of the State of Florida Public Guardianship Pooled Special Needs Trust. The foundation's board is developing a policy for a process by which a donor may request anonymity.

The Statewide Public Guardianship Office has indicated in response to a questionnaire that the public-records exemption is needed to protect the identity of donors participating in the foundation's trust because if the anonymity of the donors cannot be guaranteed, an individual may choose to donate to a trust or other charity that is not subject to such disclosures. The Statewide Public Guardianship Office has stated that the foundation is in the process of adopting a plan to expand its fundraising efforts and that it would be in the foundation's best interest to be able to offer anonymity to those prospective donors who desire it. The Statewide Public Guardianship Office additionally has stated that future fundraising efforts may be hampered if the identities of its donors were made public.

[25] *See, e.g.*, Enterprise Florida, Inc. (s. 11.45(3)(i), F.S.); Cultural Endowment Program (s. 265.605(2), F.S.); Publicly owned house museum designated as a National Historic Landmark (s. 267.076, F.S.); direct-support organizations for University of West Florida (s. 267.1732(8), F.S.); direct-support organization for University of Florida (s. 267.1736, F.S.); Florida Tourism Industry Marketing Corporation (s. 288.1226(6), F.S.); direct-support organization for Office of Tourism, Trade and Economic Development (s. 288.12295, F.S.); and Florida Intergovernmental Relations Foundation (s. 288.809(4), F.S.).

Based on the research conducted as part of the Open Government Sunset Review, professional staff of the Committee on Judiciary recommends that the Legislature reenact the public-records exemption in s. 744.7082(6), F.S., which makes the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office exempt from disclosure. The exemption enables the foundation to effectively administer its programs, and thereby satisfies one of the recognized criteria for retaining an exemption as prescribed in the Open Government Sunset Review Act.[26]

III. Effect of Proposed Changes:

Section 744.7082(6), F.S., provides that the identity of a donor or a prospective donor of money or property to the direct-support organization affiliated with the Statewide Public Guardianship Office, who wishes to remain anonymous, as well as all information identifying the donor or prospective donor, is confidential and exempt from the public-records law. Under section 2 of chapter 2006-179, Laws of Florida, this public-records exemption is subject to the Open Government Sunset Review Act and will repeal on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill repeals section 2 of chapter 2006-179, Laws of Florida, and thus saves the public-records exemption from repeal under the Open Government Sunset Review Act.

The bill provides an effective date of October 1, 2011.

Other Potential Implications:

If the Legislature chooses not to retain the public-records exemption for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office, the exemption will expire on October 2, 2011. Without the exemption, the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office will become public.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill repeals section 2 of chapter 2006-179, Laws of Florida, and saves the public-records exemption under subsection 744.7042(6), F.S., for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office from repeal under the Open Government Sunset Review Act.

[26] Section 119.15(6)(b), F.S.

This legislation is not expanding the public records exemption under review to include more records; therefore, a two-thirds vote is not necessary.[27]

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. Additional Information:

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

None.

B. Amendments:

None.

[27] Article I, s. 24(c) of the State Constitution requires legislation creating a public-records exemption to pass by a two-thirds vote of each house in the Legislature.