



Judiciary Committee

Wednesday, January 25, 2012

2:00 PM

404 HOB

Meeting Packet

REVISED

**Dean Cannon
Speaker**

**William Snyder
Chair**

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Judiciary Committee

Start Date and Time: Wednesday, January 25, 2012 02:00 pm
End Date and Time: Wednesday, January 25, 2012 04:00 pm
Location: 404 HOB
Duration: 2.00 hrs

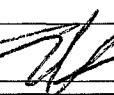
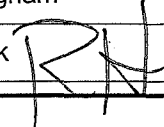
Consideration of the following bill(s):

CS/HB 31 Protest Activities by Criminal Justice Subcommittee, Rooney
CS/HB 135 Costs of Prosecution, Investigation, and Representation by Justice Appropriations Subcommittee,
Ray
HB 215 Video Voyeurism by Young
CS/HB 385 Health Care by Civil Justice Subcommittee, Gaetz, Renuart
CS/HB 483 Uniform Commercial Code by Civil Justice Subcommittee, Passidomo
HB 733 Probate by Kiar
HB 917 Jurisdiction of the Courts by Bileca
HB 1355 Protection of Vulnerable Persons by Dorworth

NOTICE FINALIZED on 01/23/2012 16:16 by Jones.Missy

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 31 Protest Activities
SPONSOR(S): Criminal Justice Subcommittee; Rooney and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 632

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	11 Y, 3 N, As CS	Smith	Cunningham
2) Judiciary Committee		Smith	Havlicak  

SUMMARY ANALYSIS

Florida law currently contains a number of provisions that make it unlawful to incite riots, breach the peace, and disturb lawful assemblies. For example, s. 871.01, F.S., makes it unlawful for a person to:

- Willfully interrupt or disturb any lawful assembly, including schools and assemblies gathered for the worship of God.
- Willfully interrupt or disturb a group of people who are assembled to acknowledge the death of a person with a "military funeral honors detail" as defined by 10 U.S.C. s. 1491.

The bill expands current law targeting funeral disturbances by prohibiting a wider scope of conduct in a broader range of instances. Specifically, the bill makes it a first degree misdemeanor to knowingly engage in protest activities or knowingly cause protest activities to occur:

- Within 500 feet of the property line of any location where a funeral, burial, or memorial service is being conducted,
- During or within 1 hour before or 1 hour after the conducting of the funeral, burial, or memorial service.

The bill defines "protest activities" as "any action, including picketing, that is undertaken with the intent to interrupt or disturb a funeral, burial, or memorial service."

The distinction between s. 871.01, F.S., and the bill's provisions are subtle but significant. Section 871.01, F.S., prohibits a person from acting with the intention to interrupt or disturb an assembly *and that does in fact significantly disturb the assembly*. The bill prohibits "any action...that is undertaken with the intent to interrupt or disturb" a funeral, burial, or memorial service under the specified conditions, regardless of whether those actions *do in fact cause* such a disturbance.

The bill may have a fiscal impact on county jails in that it creates a new first degree misdemeanor offense.

The bill is effective October 1, 2012.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Florida law currently contains a number of provisions that make it unlawful to incite riots, breach the peace, and disturb lawful assemblies. A summary of these statutes follows.

Section 877.03, F.S.

Section 877.03, F.S., relates to breach of the peace and disorderly conduct. The statute makes it a second degree misdemeanor¹ for a person to commit acts that:

- Corrupt public morals;
- Outrage the sense of public decency;
- Affect the peace and quiet of persons who may witness them;
- Engage in brawling or fighting; or
- Engage in such conduct as to constitute a breach of peace or disorderly conduct.

Courts have narrowed the construction of this language to prohibit speech that constitutes “fighting words”² or words that “inflict injury or tend to incite immediate breach of peace.”³

Section 870.01, F.S.

Section 870.01, F.S., makes it a first degree misdemeanor⁴ for a person to commit an affray. The statute also makes it a third degree felony⁵ for a person to riot, or incite or encourage a riot. Although the terms “affray” and “riot” are not defined, the courts have upheld the statute against vagueness challenges.⁶

Section 870.02, F.S.

Section 870.02, F.S., relates to unlawful assemblies. The statute makes it a second degree misdemeanor for three or more persons to meet together to commit a breach of the peace,⁷ or to do any other unlawful act.

Section 871.01, F.S.

Section 871.01(1), F.S., makes it a second degree misdemeanor to willfully interrupt or disturb any lawful assembly, including schools and assemblies gathered for the worship of God. The Florida Supreme Court upheld this statute against First Amendment and overbreadth challenges.⁸

In 2006, in response to various groups creating public disturbances at high profile military funerals, subsection (2) was added to s. 871.01, F.S.⁹ Section 871.01(2), F.S., makes it a first degree misdemeanor for a person to willfully interrupt or disturb a group of people who are assembled to acknowledge the death of a person with a “military funeral honors detail” as defined by 10 U.S.C. s. 1491. A military honors detail includes the presence of two uniformed members of the armed forces, the playing of Taps, the folding of the United States flag and its presentation to the family.¹⁰

¹ A second degree misdemeanor is punishable by up to 60 days in county jail and a \$500 fine. Sections 775.082 and 775.083, F.S.

² *Macon v. State*, 854 So.2d 834, 837 (Fla. 5th DCA 2003).

³ *United States v. Lyons*, 403 F.3d 1248, 1254 (11th Cir. 2005).

⁴ A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Sections 775.082 and 775.083, F.S.

⁵ A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

⁶ *See D.L.B. v. State*, 707 So.2d 844, 845 (Fla. 2d DCA 1998) (finding that statute sufficiently defines “affray,” given that “readily available dictionaries define “affray” as a public fight or brawl”); *State v. Beasley*, 317 So.2d 750, 753 (Fla. 1975) (upholding Section 870.01(2), F.S., as constitutional upon the Court’s authoritative, limiting construction).

⁷ Breach of the peace is described in s. 877.03, F.S.

⁸ *S.H.B. v. State*, 355 So.2d 1176 (Fla. 1978).

⁹ Chapter 2006-264, L.O.F. *Also see*, Florida House of Representatives Staff Analysis, House Bill 7127 (2006).

¹⁰ 10 U.S.C. s. 1491.

Although s. 871.01, F.S., does not define the phrase “interrupt or disturb,” the Supreme Court of Florida has described the phrase as follows:

[A] person must have deliberately acted to create a disturbance...the person must have acted with the intention that his behavior impede the successful functioning of the assembly or with reckless disregard of the effect of his behavior; additionally, the acts complained of must be such that a reasonable person would expect them to be disruptive and the acts must, in fact, significantly disturb the assembly.¹¹

Effect of the Bill

The bill creates s. 871.015, F.S., which targets conduct that takes place within a specified time and distance of a funeral, burial, or memorial service. The bill expands current law targeting funeral disturbances by prohibiting a *wider scope of conduct* in a *broader range of instances*.

The bill makes it a first degree misdemeanor to knowingly engage in protest activities or knowingly cause protest activities to occur:

- Within 500 feet of the property line of any location,¹²
- During or within 1 hour before or 1 hour after the conducting of a funeral, burial, or memorial service at that place.

Definitions:

- The bill defines “protest activities” as “any action, including picketing, that is undertaken with the intent to interrupt or disturb a funeral, burial, or memorial service.”
- The bill defines the phrase “funeral, burial, or memorial service” as “any service offered or provided in connection with the final disposition, memorialization, interment, entombment, or inurnment of human remains or cremated human remains.”

The distinction between s. 871.01, F.S., and the bill’s provisions are subtle but significant. Section 871.01, F.S., prohibits a person from acting with the intention to interrupt or disturb an assembly *and that does in fact significantly disturb the assembly*. The bill prohibits “any action...that is undertaken with the intent to interrupt or disturb” a funeral, burial, or memorial service under the specified conditions, regardless of whether those actions *do in fact cause* such a disturbance.

B. SECTION DIRECTORY:

Section 1. Creates s. 871.015, F.S., relating to unlawful protests.

Section 2. Provides that the act shall take effect October 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

¹¹ *S.H.B. v. State*, 355 So.2d 1176, 1178 (Fla. 1977) (finding “[t]hese elements are inherent in the statute as drafted.”).

¹² Including but not limited to a residence, cemetery, funeral home, or house of worship.

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

The bill may have a fiscal impact on county jails in that it creates a new first degree misdemeanor offense.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

The First Amendment of the U.S. Constitution

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”¹³

The First Amendment protects not only verbal speech, but also *expressive conduct* such as picketing.¹⁴

Snyder v. Phelps

A recent U.S. Supreme Court case addressed the First Amendment’s relation to funeral protests. In March 2006, Westboro Baptist Church demonstrated near the funeral of Marine Lance Cpl. Matthew Snyder, who was killed in Iraq. The demonstration included the display of signs reading “Thank God for Dead Soldiers,” took place within 200-300 feet of the funeral procession, and concluded before the funeral began. Cpl. Snyder’s father subsequently sued Westboro under state tort law, including a claim for intentional infliction of emotional distress. The jury found in favor of Snyder and awarded damages. On appeal, the U.S. Supreme Court found that the First Amendment protected Westboro’s speech because, among other reasons, the speech took place in a public forum and the content was a matter of public concern. The Court also noted that even though the speech in this case was protected, even protected speech “may be subject to reasonable *time, place, or manner* restrictions that are *consistent with the standards announced in this Court’s precedents*.”¹⁵

¹³ Amendment I, United States Constitution (emphasis added).

¹⁴ See *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

¹⁵ *Snyder v. Phelps*, 131 S.Ct. 1207, 1218 (2011) (emphasis added).

It is important to note that the *Snyder* case did not involve the Court reviewing the constitutionality of a state statute regulating picketing.¹⁶ Rather, the Court addressed *whether the First Amendment was a defense to a state tort claim* for intentional infliction of emotional distress, which is a separate issue. Thus, when examining the constitutionality of a statute that regulates protest activities, it is important to examine whether the statute conforms to U.S. Supreme Court precedent.

Court Precedent

Content-Based vs. Content-Neutral Restrictions

It is a fundamental constitutional principle that debate, particularly on issues of public concern, should not be inhibited by the government.¹⁷ Therefore, the most important question regarding the First Amendment issues of the bill is *whether the government is prohibiting speech based on disfavored content*.¹⁸ Such “content-based” regulations are presumptively suspect and are subject to strict scrutiny by the court.¹⁹

On the other hand, the government *may* restrict speech through time, place, and manner regulations that are *justified without reference to the content of the speech*.²⁰ The Eighth Circuit Court of Appeals has found both a city ordinance²¹ and a state statute²² prohibiting protest activities within a certain time and distance of a funeral content-neutral.

Content neutral restrictions are subject to intermediate scrutiny by the court.²³ Under intermediate scrutiny, the court looks at the relationship, or “fit,” between the *end* and the *means* of the statute. In other words, the restrictions of the statute must be *narrowly tailored* to achieve a *significant state interest*.²⁴ Additionally, the statute must leave open “ample alternative channels” for the restricted speech.²⁵

- A *significant state interest* is grounded in the state’s traditionally broad police powers.²⁶ Courts have found a state has a significant interest in protecting its citizens from disruption during events associated with a funeral or burial service,²⁷ and in public safety concerns resulting from disruptions of the public order.²⁸ Additionally, citizens have a recognized interest in avoiding unwanted speech, including in confrontational settings.²⁹
- A statute is *narrowly tailored* to a significant state interest if it does not burden substantially more speech than necessary to achieve the state’s goal.³⁰ To be narrowly tailored in this context, the statute does *not* have to be the least restrictive means available.³¹
- In the context of a statute regulating picketing in residential areas, the U.S. Supreme Court found there were *ample alternative channels* when: “Protestors have not been barred from the residential neighborhoods. They may enter such neighborhoods, alone or in groups, even marching.... They may go door-to-door to proselytize their views. They may distribute literature

¹⁶ *Id.* (“Maryland’s law, however, was not in effect at the time of the events at issue here, so we have no occasion to consider how it might apply to facts such as those before us, or whether it or other similar regulations are constitutional.”).

¹⁷ *Id.* at 1215 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

¹⁸ See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

¹⁹ See *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 658 (1994).

²⁰ See *Ward*, 491 U.S. at 791 (emphasis added; internal quotations omitted); *Snyder*, 131 S.Ct. at 1218.

²¹ *Phelps-Roper v. City of Manchester, Mo.*, 658 F.3d 813, 816 (8th Cir. 2011).

²² *Phelps-Roper v. Nixon*, 545 F.3d 685, 691 (8th Cir. 2008).

²³ See *Turner Broad.*, 512 U.S. at 642.

²⁴ *Ward*, 491 U.S. at 791.

²⁵ *Id.*

²⁶ See *Hill v. Colorado*, 530 U.S. 703, 715 (2000).

²⁷ *Phelps-Roper v. Taft*, 523 F.Supp.2d 612, 618 (N.D. Ohio 2007) *aff’d in part sub nom. Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008).

²⁸ *Christian Knights of Ku Klux Klan Invisible Empire, Inc. v. Dist. of Columbia*, 972 F.2d 365, 372 (D.C. Cir. 1992) (citing *Mosley*, 408 U.S. at 98).

²⁹ *Hill* at 716-17.

³⁰ See *Turner Broad.*, 512 U.S. at 662.

³¹ *Id.* See also *Hill*, 530 U.S. at 726.

in this manner ... or through the mails. They may contact residents by telephone, short of harassment.”³²

The bill limits the definition of “protest activities” as actions “undertaken with the intent to interrupt or disturb a funeral, burial, or memorial service.” The Sixth Circuit U.S. Court of Appeals found a statute was narrowly tailored that described protest activities as “any action that is disruptive or undertaken to disrupt or disturb a funeral or burial service.”³³ The court noted that the language limited “protest activities” to those *directed* at a particular funeral.³⁴ Furthermore, the Eighth Circuit U.S. Court of Appeals found that a statute that did *not* contain such language was likely *not* narrowly tailored for injunction purposes.³⁵

The bill establishes a 500 foot fixed buffer zone around funeral locations. Buffer zones are potentially too broad, and therefore not narrowly tailored, if they restrict too much protected speech. Criteria include the reference point that the buffer zone surrounds, and the size of the buffer zone itself. The nature of the bill’s buffer zone likely conforms to U.S. Supreme Court precedent. A U.S. District Court in 2007 held an Ohio statute’s 300 feet “fixed” buffer zone surrounding funeral locations constitutional, but held the “floating buffer zone” surrounding funeral *processions* unconstitutional because it was not narrowly tailored.³⁶ That holding conforms to a prior Supreme Court case addressing buffer zones.³⁷ Additionally, courts have found the *size* of the buffer zone itself to be context-specific.³⁸

Finally, the bill addresses the competing interests of funeral protestors and funeral attendees in a specific location. It is therefore important to carefully define the nature of those interests. The First Amendment protects expressive conduct such as picketing, and affords the highest protection to speech based on matters of public concern, or “political speech.”³⁹ On the other hand, citizens also have a recognized interest not to be forced to hear unwanted speech.⁴⁰ Protecting citizens from hearing unwanted speech is referred to as the “captive audience” doctrine.⁴¹ To illustrate the point, there is a difference between someone holding a sign displaying an offensive message, where the burden falls on offended viewers to “avoid further bombardment of their sensibilities simply by averting their eyes,”⁴² and forcing citizens to “undertake Herculean efforts to escape the cacophony of political protests.”⁴³ The Court has held that in some cases, funeral attendees are not a “captive audience” to protest speech.⁴⁴ In other cases, courts have held that forcing a funeral attendee to choose between attending a funeral and hearing the unwanted protest communication effectively makes the attendees a “captive audience.”⁴⁵ The Court noted in *Snyder v. Phelps* that the captive audience doctrine has been applied “only sparingly.”⁴⁶

³² *Frisby v. Schultz*, 487 U.S. 474, 484 (1988).

³³ *Phelps-Roper v. Strickland*, 539 F.3d 356, 368 (6th Cir. 2008).

³⁴ *Id.* (citing *Frisby v. Schultz*, 487 U.S. 474 (1988)).

³⁵ *Nixon*, 545 F.3d 685, 693 (finding statute likely not narrowly tailored “[b]ecause the Missouri statute does not contain any such [narrowing] provisions”).

³⁶ *Phelps-Roper v. Taft*, 523 F.Supp.2d at 620 (N.D. Ohio 2007) (“statute not narrowly tailored, in that it burdens substantially more speech than necessary to serve the State of Ohio’s interest protecting its citizens from disruption during the events associated with a funeral or burial service”).

³⁷ *See Schenck v. Pro-Choice Network Of W. New York*, 519 U.S. 357, 377 (1997) (finding that injunction imposing floating buffer zones of 15 feet from people and vehicles entering and leaving clinics were not narrowly tailored).

³⁸ *See Madsen*, 512 U.S. at 772; *Strickland*, 539 F.3d at 368.

³⁹ *See Snyder*, 131 S.Ct. at 1215.

⁴⁰ *See Hill*, 530 U.S. at 716-17.

⁴¹ *Snyder*, 131 S.Ct. at 1220.

⁴² *Hill* at 716 (internal quotations omitted).

⁴³ *Id.* (quoting *Madsen*, 512 U.S. at 772-73).

⁴⁴ *Snyder*, 131 S.Ct. at 1220 (finding mourner was not a captive audience to protest speech when protestors stayed 1,000 feet away from the funeral location, mourner could only see the tops of the signs when driving to the funeral, and there was no indication that the picketing in any way interfered with the funeral service itself.”).

⁴⁵ *See Phelps-Roper v. Strickland*, 539 F.3d 356, 362 (6th Cir. 2008); *McQueary v. Stumbo*, 453 F.Supp.2d 975, 992 (E.D. Ky. 2006). *But compare Phelps-Roper v. Nixon*, 545 F.3d 685 (8th Cir. 2008).

⁴⁶ *Snyder*, 131 S.Ct. at 1220.

Overbreadth Doctrine of the First Amendment

*Even if a statute legitimately prohibits some speech, if it also prohibits a substantial amount of protected speech in relation to its legitimate sweep it may be unconstitutionally overbroad.*⁴⁷

This overbreadth doctrine permits an individual whose own speech or conduct may be prohibited to challenge an enactment facially "because it also threatens others not before the court-- those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid."⁴⁸ The doctrine contemplates the pragmatic judicial assumption that an overbroad statute will have a chilling effect on protected expression.⁴⁹ Invalidation for overbreadth is "strong medicine that is not to be casually employed."⁵⁰ The overbreadth must be "real" and "substantial."⁵¹

A July 2010 Michigan case provides a relevant example of overbreadth. In that case, a Michigan couple was part of a vehicle funeral procession in their van. The van had for years openly displayed various messages critical of U.S. policy and President Bush. The couple was arrested and held in jail for 24 hours under Michigan's funeral protest law which made it illegal, in pertinent part, to engage in conduct that will "adversely affect" a funeral or funeral procession.⁵² The U.S. District Court found that those parts of the statute were likely unconstitutional under the overbreadth doctrine of the First Amendment.⁵³

Vagueness Doctrine of the Fourteenth Amendment

A statute is unconstitutional under the vagueness doctrine if an ordinary person of average intelligence would not be put on notice as to what conduct is prohibited by the statute. Additionally, vague statutes invite arbitrary and discriminatory enforcement.⁵⁴ It should be noted that when a statute is challenged as having a chilling effect on constitutionally protected speech due to vagueness, courts have held that a more stringent vagueness test should apply.⁵⁵

The bill may be vulnerable to a vagueness challenge if a law enforcement officer would not understand what constitutes prohibited protest activity as it is defined. When considering this issue it should be noted that the Florida Supreme Court has upheld s. 871.01, F.S., against a vagueness challenge as to the meaning of the phrase "interrupt or disturb."⁵⁶ That phrase is used in the bill, although it should be noted that the bill would *not* require an actual disturbance to take place as in the Florida Supreme Court's definition in *S.H.B v. State*.

The bill may also be vulnerable to a vagueness challenge if an ordinary person of average intelligence would not understand what type of conduct would be deemed conduct "undertaken with the intent to interrupt or disturb a funeral, burial, or memorial service."

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

⁴⁷ *United States v. Williams*, 553 U.S. 285, 292 (2008).

⁴⁸ *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

⁴⁹ *Sult v. State*, 906 So.2d 1013 (Fla. 2005) (citations omitted).

⁵⁰ *Williams* at 293 (internal quotations omitted).

⁵¹ *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

⁵² Mich. Comp. Laws Ann. s. 750.167d.

⁵³ *Lowden v. County of Clare*, 709 F.Supp.2d 540, 563 (E.D. Mich. 2010) (finding "the interaction of the 500 foot buffer zone and the "adversely affects" language is particularly problematic given the broad scope of expressive activity restricted in such a large space").

⁵⁴ *Sult v. State*, 906 So.2d 1013 (Fla. 2005).

⁵⁵ *Village. Of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982).

⁵⁶ *See S.H.B. v. State*, 355 So.2d 1176, 1178 (Fla. 1977).

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On November 15, 2011, the Criminal Justice Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment clarifies the meaning of "protest activities," defines the phrase "funerals, burials, and memorial services," and makes the bill applicable to all funerals.

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

CS/HB 31

2012

1 A bill to be entitled
 2 An act relating to protest activities; creating s.
 3 871.015, F.S.; providing definitions; prohibiting
 4 engaging in protest activities within a specified
 5 distance of the property line of the location of a
 6 funeral, burial, or memorial service; providing
 7 criminal penalties; providing an effective date.

8
 9 Be It Enacted by the Legislature of the State of Florida:

10
 11 Section 1. Section 871.015, Florida Statutes, is created
 12 to read:

13 871.015 Unlawful protests.-

14 (1) As used in this section, the term:

15 (a) "Funeral, burial, or memorial service" means any
 16 service offered or provided in connection with the final
 17 disposition, memorialization, interment, entombment, or
 18 inurnment of human remains or cremated human remains.

19 (b) "Protest activities" means any action, including
 20 picketing, that is undertaken with the intent to interrupt or
 21 disturb a funeral, burial, or memorial service.

22 (2) A person may not knowingly engage in protest
 23 activities or knowingly cause protest activities to occur within
 24 500 feet of the property line of any residence, cemetery,
 25 funeral home, house of worship, or other location during or
 26 within 1 hour before or 1 hour after the conducting of a
 27 funeral, burial, or memorial service at that place.

28 (3) A person who violates this section commits a

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2012

29 | misdemeanor of the first degree, punishable as provided in s.
30 | 775.082 or s. 775.083.

31 | Section 2. This act shall take effect October 1, 2012.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 135 Costs of Prosecution, Investigation, and Representation

SPONSOR(S): Justice Appropriations Subcommittee; Ray and others

TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 210

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 2 N	Krol	Cunningham
2) Justice Appropriations Subcommittee	10 Y, 2 N, As CS	McAuliffe	Jones Darity
3) Judiciary Committee		Krol TK	Havlicak RH

SUMMARY ANALYSIS

Currently, convicted persons are liable for costs of prosecution, as well as costs of representation. These costs may be imposed at a rate of \$50 in misdemeanor or criminal traffic offense cases and \$100 in felony criminal cases. The court may set a higher amount upon showing of sufficient proof of higher fees or costs incurred.

The bill makes defendants whose charges are dismissed by the court after the successful completion of a misdemeanor or felony pretrial substance abuse education and treatment intervention program or treatment-based drug court liable for payment of costs of prosecution and costs of representation.

The bill adds the costs of prosecution and representation to the list of costs a clerk of the court is allowed to withhold from the return of a cash bond posted on behalf of a criminal defendant.

The bill also requires:

- The clerk of the court to collect and dispense cost payments in any case, regardless of whether the case takes place before the judge in open court or in any other manner.
- The costs of prosecution and investigation to be assessed from juveniles who have been adjudicated delinquent or have adjudication of delinquency withheld.

This bill appears to have a positive fiscal impact on state attorneys and public defenders. However, the impact is indeterminate because the number of affected offenders and their ultimate level of payment is unknown.

This bill is effective July 1, 2012.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Costs of Prosecution

Section 938.27, F.S., provides that convicted persons¹ are liable for payment of the costs of prosecution, including any investigative costs incurred by a law enforcement agency, fire department, the Department of Financial Services, or the Office of Financial Regulation of the Financial Services Commission.²

Costs of prosecution may be imposed at the rate of \$50 in misdemeanor or criminal traffic offense cases and \$100 in felony criminal cases unless the prosecutor proves that costs are higher in the particular case before the court.³ The costs of prosecution are deposited into the State Attorneys Revenue Trust Fund.⁴

The clerk of the court (clerk) collects and dispenses cost of prosecution payments in every case.⁵

Costs of Representation

Section 938.29, F.S., provides that convicted persons⁶ are liable for payment of the \$50 public defender application fee under s. 27.52(1)(b), F.S.,⁷ and attorney's fees and costs if he or she received assistance from the public defender's office, a special assistant public defender, the office of criminal conflict and civil regional counsel, or a private conflict attorney, or who has received due process services after being found indigent for costs.⁸

Costs of representation may be imposed at the rate of \$50 in misdemeanor or criminal traffic offense cases and \$100 in felony criminal cases.⁹ The court may set a higher amount upon showing of sufficient proof of higher fees or costs incurred.¹⁰ The costs of representation are deposited into the Indigent Criminal Defense Trust Fund.¹¹

The court may order payment of the assessed application fee and attorney's fees and costs as a condition of probation, of suspension of sentence, or of withholding the imposition of sentence.¹² The clerk within the county where the defendant was tried or received services from a public defender is responsible for enforcing, satisfying, compromising, settling, subordinating, releasing or otherwise disposing of any debt or lien imposed.¹³

¹ Conviction, for the purposes of costs of prosecution, includes a determination of guilt, or of violation of probation or community control, which is a result of a plea, trial, or violation proceeding, regardless of whether adjudication is withheld. Section 937.27(1), F.S.

² Section 938.27(1), F.S.

³ Section 938.27(8), F.S.

⁴ *Id.*

⁵ Section 938.27(6), F.S.

⁶ Conviction, for the purposes of costs of representation, includes a determination of guilt, or of violation of probation or community control, which is a result of a plea, trial, or violation proceeding, regardless of whether adjudication is withheld. Section 937.29(1)(a), F.S.

⁷ Section 27.52(1), F.S., provides that a person seeking the appointment of a public defender under s. 27.51, F.S., based upon an inability to pay, must apply to the clerk of the court for a determination of indigent status.

⁸ Section 938.29(1)(a), F.S.

⁹ This includes proceedings in which the underlying offense was a violation of probation or community control. Section 938.29(1), F.S.

¹⁰ *Id.*

¹¹ Section 27.562, F.S.

¹² Section 938.29(1)(c), F.S.

¹³ Section 938.29(3), F.S.

Pretrial Intervention Programs

Defendants charged with certain offenses may be eligible for pretrial intervention programs, such as misdemeanor or felony pretrial substance abuse education and treatment intervention¹⁴ or treatment-based drug court.¹⁵ Defendants who successfully complete these programs have the charges against them dismissed by the court.¹⁶ Because the charges are dismissed by the court, these defendants are not liable for the payment of costs of prosecution or representation.

Effect of the Bill

The bill makes defendants liable for the payment of costs of prosecution, including investigative costs, and costs of representation when charges are dismissed by the court after successfully completing a misdemeanor or felony pretrial substance abuse education and treatment intervention program or treatment-based drug court.

The bill requires the clerk to collect and dispense cost of prosecution payments in any case regardless of whether the disposition of the case takes place before the judge in open court or in any other manner provided by law.

Cash Bonds

Section 903.286, F.S., authorizes the clerk to withhold the return of a cash bond posted on behalf of a criminal defendant by a person other than a bail bond agent¹⁷ to pay the following:

- Court fees,
- Court costs, and
- Criminal penalties.

If sufficient funds are not available to pay the above costs, the clerk must immediately obtain payment from the defendant or enroll the defendant in a payment plan pursuant to s. 28.246, F.S.¹⁸

All cash bond forms must prominently display a notice explaining that all funds are subject to forfeiture and withholding by the clerk for the payment of the above costs on behalf of the criminal defendant regardless of who posted the funds.¹⁹

Effect of the Bill

The bill adds the "costs of prosecution, costs of representation"²⁰ to the list of costs a clerk is allowed to withhold from the return of a cash bond posted on behalf of a criminal defendant by a person other than a bail bond agent. If sufficient funds are not available to pay such costs, the bill requires the clerk to obtain payment from a defendant or require the defendant to enroll in a payment plan. The bill also requires the cash bond form to include a notice that the costs of prosecution and representation are funds that are subject to forfeiture and withholding.

Delinquency Cases

Currently, juveniles who are adjudicated delinquent or have had adjudication of delinquency withheld are not required to pay the costs of prosecution.

¹⁴ Sections 948.16 and 948.08(6), F.S., respectively.

¹⁵ Section 948.08(6), F.S. *See* s. 397.334, F.S.

¹⁶ Sections 948.16(2) and 948.08(6)(c), F.S.

¹⁷ Licensed pursuant to ch. 648, F.S.

¹⁸ Section 903.286(1), F.S.

¹⁹ Section 903.286(2), F.S.

²⁰ As provided by s. 27.52, F.S.

Effect of the Bill

The bill requires that costs of prosecution and investigation²¹ be assessed against juveniles who have been adjudicated delinquent or have adjudication of delinquency withheld.

B. SECTION DIRECTORY:

Section 1. Amends s. 903.286, F.S., relating to return of cash bond; requirement to withhold unpaid fines, fees, court costs; cash bond forms.

Section 2. Amends s. 938.27, F.S., relating to judgment for costs on conviction.

Section 3. Amends s. 938.29, F.S., relating to legal assistance; lien for payment of attorney's fees or costs.

Section 4. Amends s. 985.032, F.S., relating to legal representation for delinquency cases.

Section 5. Provides an effective date of July 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill appears to have a positive impact on state attorneys and public defenders for the following reasons:

- 1) The clerk is required to collect and dispense cost payments in any case, regardless of whether the disposition of the case takes place before the judge in open court or in any other manner provided by law. This may result in more costs of prosecution being collected and paid to state attorneys.
- 2) The costs of prosecution will be assessed against juveniles who have been adjudicated delinquent or have adjudication of delinquency withheld. This will likely result in a positive fiscal impact on state attorneys as these costs were not assessed in these specific cases in the past.
- 3) The costs of prosecution and representation are allowed to be withheld by the clerk from the return of a cash bond posted on behalf of a criminal defendant by a person other than a bail bond agent. This will likely result in a positive fiscal impact for state attorneys and public defenders as the cost of prosecution and representation will be deducted from any cash bonds posted on behalf of a criminal defendant.
- 4) The costs of prosecution and representation will be assessed against defendants who successfully complete pretrial intervention programs. This will likely result in a positive fiscal impact for state attorneys and public defenders as these costs were not assessed in these specific cases in the past.

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

²¹ As provided in s. 938.27, F.S.

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Defendants who successfully complete pretrial intervention programs and juveniles who have been adjudicated delinquent or have adjudication of delinquency withheld will now be assessed costs of prosecution and representation.

D. FISCAL COMMENTS:

This bill appears to have a positive fiscal impact on state attorneys and public defenders. However, the impact is indeterminate because the number of affected offenders and their ultimate level of payment is unknown.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

The bill makes defendants liable for the payment of costs of prosecution, including investigative costs, and costs of representation when charges are dismissed by the court after successfully completing a misdemeanor or felony pretrial substance abuse education and treatment intervention program or treatment-based drug court. Article I, Section 19 of the Florida Constitution states that a person charged with a crime cannot be compelled to pay costs before a judgment of conviction becomes final. However, this does not prohibit a defendant from entering into an agreement to pay costs of prosecution in return for the dismissal of his or her charges after the successful completion of a misdemeanor or felony pretrial substance abuse education and treatment intervention program or treatment-based drug court.²²

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

Section 1 of the bill allows the clerk to withhold costs of representation "as provided by s. 27.52, F.S.," from the return of a cash bond. Section 27.52, F.S., only references the \$50 application fee for court-appointed counsel. If the intent was to include all costs of representation, such as attorney's fees, the reference should be changed to s. 938.29, F.S.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On November 16, 2011, the Justice Appropriation Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment deleted the provision in the bill prohibiting the court from converting prosecution and investigation costs into community service in lieu of the financial obligation.

²² Sections 948.16(1)(a), F.S., and 948.08(6)(a), F.S.

1 A bill to be entitled
 2 An act relating to costs of prosecution,
 3 investigation, and representation; amending s.
 4 903.286, F.S.; providing for the withholding of unpaid
 5 costs of prosecution and representation from the
 6 return of a cash bond posted on behalf of a criminal
 7 defendant; requiring a notice on bond forms of such
 8 possible withholding; amending s. 938.27, F.S.;
 9 providing liability for the cost of prosecution and
 10 investigation for persons whose cases are disposed of
 11 under specified provisions; clarifying the types of
 12 cases that are subject to the collection and
 13 dispensing of cost payments by the clerk of the court;
 14 amending s. 938.29, F.S.; providing liability for
 15 attorney's fees and costs for persons whose cases are
 16 disposed of under specified provisions; amending s.
 17 985.032, F.S.; providing for assessment of costs of
 18 prosecution against a juvenile who has been
 19 adjudicated delinquent or has adjudication of
 20 delinquency withheld; providing an effective date.

21
 22 Be It Enacted by the Legislature of the State of Florida:

23
 24 Section 1. Section 903.286, Florida Statutes, is amended
 25 to read:

26 903.286 Return of cash bond; requirement to withhold
 27 unpaid fines, fees, court costs; cash bond forms.—

28 (1) Notwithstanding s. 903.31(2), the clerk of the court

29 shall withhold from the return of a cash bond posted on behalf
 30 of a criminal defendant by a person other than a bail bond agent
 31 licensed pursuant to chapter 648 sufficient funds to pay any
 32 unpaid costs of prosecution, costs of representation as provided
 33 by s. 27.52, court fees, court costs, and criminal penalties. If
 34 sufficient funds are not available to pay all unpaid costs of
 35 prosecution, costs of representation as provided by s. 27.52,
 36 court fees, court costs, and criminal penalties, the clerk of
 37 the court shall immediately obtain payment from the defendant or
 38 enroll the defendant in a payment plan pursuant to s. 28.246.

39 (2) All cash bond forms used in conjunction with the
 40 requirements of s. 903.09 must prominently display a notice
 41 explaining that all funds are subject to forfeiture and
 42 withholding by the clerk of the court for the payment of costs
 43 of prosecution, costs of representation as provided by s. 27.52,
 44 court fees, court costs, and criminal penalties on behalf of the
 45 criminal defendant regardless of who posted the funds.

46 Section 2. Subsections (1) and (6) of section 938.27,
 47 Florida Statutes, are amended to read:

48 938.27 Judgment for costs of prosecution and investigation
 49 ~~on conviction.~~—

50 (1) In all criminal and violation-of-probation or
 51 community-control cases, convicted persons and persons whose
 52 cases are disposed of pursuant to s. 948.08(6)(c) or s.
 53 948.16(2) are liable for payment of the costs of prosecution,
 54 including investigative costs incurred by law enforcement
 55 agencies, by fire departments for arson investigations, and by
 56 investigations of the Department of Financial Services or the

57 Office of Financial Regulation of the Financial Services
 58 Commission, if requested by such agencies. The court shall
 59 include these costs in every judgment rendered against the
 60 convicted person. For purposes of this section, "convicted"
 61 means a determination of guilt, or of violation of probation or
 62 community control, which is a result of a plea, trial, or
 63 violation proceeding, regardless of whether adjudication is
 64 withheld.

65 (6) The clerk of the court shall collect and dispense cost
 66 payments in any case regardless of whether the disposition of
 67 the case takes place before the judge in open court or in any
 68 other manner provided by law.

69 Section 3. Paragraph (a) of subsection (1) of section
 70 938.29, Florida Statutes, is amended to read:

71 938.29 Legal assistance; lien for payment of attorney's
 72 fees or costs.—

73 (1)(a) A defendant who is convicted of a criminal act or a
 74 violation of probation or community control or whose case is
 75 disposed of pursuant to s. 948.08(6)(c) or s. 948.16(2) and who
 76 has received the assistance of the public defender's office, a
 77 special assistant public defender, the office of criminal
 78 conflict and civil regional counsel, or a private conflict
 79 attorney, or who has received due process services after being
 80 found indigent for costs under s. 27.52, shall be liable for
 81 payment of the assessed application fee under s. 27.52 and
 82 attorney's fees and costs. Attorney's fees and costs shall be
 83 set in all cases at no less than \$50 per case when a misdemeanor
 84 or criminal traffic offense is charged and no less than \$100 per

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85 case when a felony offense is charged, including a proceeding in
 86 which the underlying offense is a violation of probation or
 87 community control. The court may set a higher amount upon a
 88 showing of sufficient proof of higher fees or costs incurred.
 89 For purposes of this section, "convicted" means a determination
 90 of guilt, or of violation of probation or community control,
 91 which is a result of a plea, trial, or violation proceeding,
 92 regardless of whether adjudication is withheld. The court shall
 93 include these fees and costs in every judgment rendered against
 94 the convicted person.

95 Section 4. Section 985.032, Florida Statutes, is amended
 96 to read:

97 985.032 Legal representation for delinquency cases.-

98 (1) For cases arising under this chapter, the state
 99 attorney shall represent the state.

100 (2) A juvenile who has been adjudicated delinquent or has
 101 adjudication of delinquency withheld shall be assessed costs of
 102 prosecution as provided in s. 938.27.

103 Section 5. This act shall take effect July 1, 2012.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 215 Video Voyeurism
SPONSOR(S): Young and others
TIED BILLS: None IDEN./SIM. BILLS: SB 436

Table with 4 columns: REFERENCE, ACTION, ANALYST, STAFF DIRECTOR or BUDGET/POLICY CHIEF. Rows include Criminal Justice Subcommittee, Justice Appropriations Subcommittee, and Judiciary Committee.

SUMMARY ANALYSIS

Section 810.145, F.S., establishes crimes related to video voyeurism. Currently, first-time violations of "video voyeurism," "video voyeurism dissemination," and "commercial video voyeurism dissemination" are 1st degree misdemeanors. Second or subsequent violations are 3rd degree felonies.

Section 810.145(8)(a), F.S., specifies that video voyeurism is a 3rd degree felony if committed by certain persons and the victim was a child less than 16 years of age or a student. However, a violation of subsection (8)(a) by a person who has previously been convicted of any violation of s. 810.145, F.S., is a 2nd degree felony.

The bill increases the penalties associated with video voyeurism offenses. The penalty for a first-time violation of "video voyeurism," "video voyeurism dissemination," or "commercial video voyeurism dissemination" is increased from a 1st degree misdemeanor to a 3rd degree felony. The penalty for a second or subsequent violation is increased from a 3rd degree felony to a 2nd degree felony.

The bill also increases the penalty for violations of subsection (8)(a) of the statute from a 3rd degree felony to a 2nd degree felony. A violation of subsection (8)(a) by persons who have previously been convicted or adjudicated delinquent for any violation of s. 810.145, F.S., remains a 2nd degree felony, but the bill ranks such offense in Level 6 of the Offense Severity Ranking Chart.

The bill amends the definition of the phrase "place and time when a person has a reasonable expectation of privacy," which is used throughout the video voyeurism statute, to specify that such locations include "residential dwellings."

The Criminal Justice Impact Conference met December 14, 2011, and determined this bill will have an insignificant impact on the state prison beds because of the low volume of offenses addressed in this bill. The bill may have a minimal positive jail bed impact on local governments to the extent that those who commit first-time violations of "video voyeurism," "video voyeurism dissemination," or "commercial video voyeurism dissemination" will be subject to a state prison sentence rather than a county jail sentence.

The bill is effective July 1, 2012.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Voyeurism and Video Voyeurism

Section 810.14, F.S., establishes the crime of voyeurism. This section provides that the offense of voyeurism is committed when a person, having lewd, lascivious, or indecent intent, secretly observes another person when he or she is in a dwelling,¹ structure,² or conveyance³ that provides a reasonable expectation of privacy.⁴ The offense is a 1st degree misdemeanor⁵ but becomes a 3rd degree felony⁶ if the person violating the section and has two or more prior convictions for the offense.⁷

In 2004, the Legislature created s. 810.145, F.S., to distinguish video voyeurism from the existing crime of voyeurism.⁸ A person commits the offense of video voyeurism if that person:

- For his or her own amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading or abusing another person, intentionally uses or installs an imaging device to secretly view, broadcast, or record a person, without that person's knowledge and consent, who is dressing, undressing, or privately exposing the body, at a place and time when that person has a reasonable expectation of privacy;
- For the amusement, entertainment, sexual arousal, gratification, or profit of another, or on behalf of another, intentionally permits the use or installation of an imaging device to secretly view, broadcast, or record a person, without that person's knowledge and consent, who is dressing, undressing, or privately exposing the body, at a place and time when that person has a reasonable expectation of privacy; or
- For the amusement, entertainment, sexual arousal, gratification, or profit of oneself or another, or on behalf of oneself or another, intentionally uses an imaging device to secretly view, broadcast, or record under or through the clothing being worn by another person, without that person's knowledge and consent, for the purpose of viewing the body of, or the undergarments worn by, that person.⁹

For purposes of video voyeurism, the phrase "place and time when a person has a reasonable expectation of privacy" is defined as:

¹ Section 810.011(2), F.S., defines the term "dwelling" as a building or conveyance of any kind, including any attached porch, whether such building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the curtilage thereof. However, during the time of a state of emergency declared by executive order or proclamation of the Governor under ch. 252, F.S., and within the area covered by such executive order or proclamation and for purposes of ss. 810.02 and 810.08, F.S., only, the term includes such portions or remnants thereof as exist at the original site, regardless of absence of a wall or roof.

² Section 810.011(1), F.S., defines the term "structure" as a building of any kind, either temporary or permanent, which has a roof over it, together with the curtilage thereof. However, during the time of a state of emergency declared by executive order or proclamation of the Governor under ch. 252, F.S., and within the area covered by such executive order or proclamation and for purposes of ss. 810.02 and 810.08, F.S., only, the term means a building of any kind or such portions or remnants thereof as exist at the original site, regardless of absence of a wall or roof.

³ Section 810.011(3), F.S., defines the term "conveyance" as any motor vehicle, ship, vessel, railroad vehicle or car, trailer, aircraft, or sleeping car; and "to enter a conveyance" includes taking apart any portion of the conveyance. However, during the time of a state of emergency declared by executive order or proclamation of the Governor under ch. 252, F.S., and within the area covered by such executive order or proclamation and for purposes of ss. 810.02 and 810.08, F.S., only, the term "conveyance" means a motor vehicle, ship, vessel, railroad vehicle or car, trailer, aircraft, or sleeping car or such portions thereof as exist.

⁴ Section 810.14(1), F.S.

⁵ A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Sections 775.082 and 775.083, F.S.

⁶ A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

⁷ Section 810.14(2) and (3), F.S.

⁸ Chapter 2004-39, L.O.F.

⁹ Section 810.145(2), F.S.

A place and time when a reasonable person would believe that he or she could fully disrobe in privacy, without being concerned that the person's undressing was being viewed, recorded, or broadcasted by another, including, but not limited to, the interior of a bathroom, changing room, fitting room, dressing room, or tanning booth.¹⁰

Section 810.145, F.S., also includes offenses of "video voyeurism dissemination" and "commercial video voyeurism dissemination." Video voyeurism dissemination occurs when a person knows or has reason to believe that an image was created as a result of video voyeurism and intentionally disseminates, distributes, or transfers the image to another person for the purpose of amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading or abusing another person.¹¹ Commercial video voyeurism dissemination occurs when a person:

- Knows or has reason to believe that an image was created as a result of video voyeurism and sells the image for consideration to another person; or
- Creates the image using video voyeurism and disseminates, distributes, or transfers the image to another person for that person to sell the image to others.¹²

A first-time violation of "video voyeurism," "video voyeurism dissemination," or "commercial video voyeurism dissemination" is a 1st degree misdemeanor, punishable by a term of imprisonment not exceeding one year and a fine of not more than \$1,000.¹³ A second or subsequent violation is a 3rd degree felony, punishable by imprisonment for up to five years and a fine of not more than \$5,000.¹⁴

Section 810.145(8)(a), F.S., enhances the penalty for video voyeurism to a 3rd degree felony for persons:

- Who are 18 years of age or older and who are responsible for the welfare of a child younger than 16 years of age, regardless of whether the person knows or has reason to know the age of the child, who commit video voyeurism against that child;
- Who are 18 years of age or older and who are employed at a private school,¹⁵ a school,¹⁶ or a voluntary prekindergarten education program,¹⁷ who commit video voyeurism against a student of the private school, school, or voluntary prekindergarten education program; or
- Who are 24 years of age or older who commit video voyeurism against a child younger than 16 years of age, regardless of whether the person knows or has reason to know the age of the child.¹⁸

Section 810.145(8)(b), F.S., makes it a 2nd degree felony if a person violates s. 810.145(8)(a), F.S., and that person has previously been convicted or adjudicated delinquent for any violation of s. 810.145, F.S. Because this offense is not currently ranked in the Criminal Punishment Code "offense severity ranking chart,"¹⁹ it defaults to a Level 4 ranking, which equates to 22 sentencing points.²⁰

¹⁰ Section 810.145(1)(c), F.S.

¹¹ Section 810.145(3), F.S.

¹² Section 810.145(4), F.S.

¹³ Section 810.145(6), F.S.

¹⁴ Section 810.145(7), F.S.

¹⁵ As defined in s. 1002.01, F.S.

¹⁶ As defined in s. 1003.01, F.S.

¹⁷ As described in s. 1002.53(3)(a), (b), or (c), F.S.

¹⁸ Section 810.145(8)(a), F.S.

¹⁹ The Criminal Punishment Code applies to sentencing for felony offenses committed on or after October 1, 1998. Criminal offenses are ranked in the "offense severity ranking chart" from level one (least severe) to level ten (most severe) and are assigned points based on the severity of the offense as determined by the legislature. If an offense is not listed in the ranking chart, it defaults to a ranking based on the degree of the felony. A defendant's sentence is calculated based on points assigned for factors including: the offense for which the defendant is being sentenced; injury to the victim; additional offenses that the defendant committed at the time of the primary offense; the defendant's prior record; and other aggravating factors. The points are added in order to determine the "lowest permissible sentence" for the offense. Sections 921.0022 and 921.0024, F.S.

²⁰ Sections 921.0023, and 921.0024(1)(a), F.S.

The statute provides exceptions for the above-described criminal penalties to ensure that the statute does not criminalize legitimate law enforcement surveillance, security systems if a notice is posted, and video surveillance devices that are clearly and immediately obvious.²¹ There is also an exception for providers of electronic communication services and providers of remote computing services.²²

Effect of the Bill

The bill increases the penalties associated with all of the above-described video voyeurism offenses. In regards to violations of “video voyeurism,” “video voyeurism dissemination,” and “commercial video voyeurism dissemination”:

- The penalty for a first-time violation is increased from a 1st degree misdemeanor to a 3rd degree felony.
- The penalty for a second or subsequent violation of is increased from a 3rd degree felony to a 2nd degree felony, which is punishable by imprisonment for up to fifteen years and a fine of not more than \$10,000.²³

The penalty for first-time violations of subsection (8)(a) of the statute is increased from a 3rd degree felony to a 2nd degree felony. Violations of s. 810.145(8)(b), F.S., remain 2nd degree felonies, but the bill ranks such offense in Level 6 of the Criminal Punishment Code offense severity ranking chart, which equates to 36 sentencing points.²⁴

The bill also amends the definition of the phrase “place and time when a person has a reasonable expectation of privacy” to specify that such locations include “residential dwellings.”

B. SECTION DIRECTORY:

Section 1. Amends s. 810.145, F.S., relating to video voyeurism.

Section 2. Amends s. 921.0022, F.S., relating to Criminal Punishment Code; offense severity ranking chart.

Section 3. Provides an effective date of July 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

The Criminal Justice Impact Conference met December 14, 2011, and determined this bill will have an insignificant impact on the state prison system because of the low volume of offenses addressed in this bill.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

²¹ Section 810.145(5), F.S.

²² *Id.*

²³ Sections 775.082 and 775.083, F.S.

²⁴ Section 921.0024(1)(a), F.S.

2. Expenditures:

The bill increases the penalty for first-time violations of s. 810.145(2), (3), and (4), F.S., from a 1st degree misdemeanor to a 3rd degree felony. This may have a positive fiscal impact on local governments to the extent that those who commit first-time violations of s. 810.145(2), (3), and (4), F.S., will be subject to a state prison sentence rather than a county jail sentence.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill is effective July 1, 2012. Generally, bills that create or enhance criminal penalties are effective October 1 in an effort to provide adequate notice to those impacted by the bill (e.g., law enforcement, state attorneys, public defenders, clerks of court, etc.).

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

1 A bill to be entitled
 2 An act relating to video voyeurism; amending s.
 3 810.145, F.S.; revising the definition of the term
 4 "place and time when a person has a reasonable
 5 expectation of privacy" to include the interior of a
 6 residential dwelling; increasing the classification of
 7 specified video voyeurism offenses; amending s.
 8 921.0022, F.S.; ranking a violation of s.
 9 810.145(8)(b), F.S., above its default value for
 10 purposes of the offense severity ranking chart of the
 11 Criminal Punishment Code; providing an effective date.

12
 13 Be It Enacted by the Legislature of the State of Florida:

14
 15 Section 1. Paragraph (c) of subsection (1) and subsections
 16 (6), (7), and (8) of section 810.145, Florida Statutes, are
 17 amended to read:

18 810.145 Video voyeurism.—

19 (1) As used in this section, the term:

20 (c) "Place and time when a person has a reasonable
 21 expectation of privacy" means a place and time when a reasonable
 22 person would believe that he or she could fully disrobe in
 23 privacy, without being concerned that the person's undressing
 24 was being viewed, recorded, or broadcasted by another,
 25 including, but not limited to, the interior of a residential
 26 dwelling, bathroom, changing room, fitting room, dressing room,
 27 or tanning booth.

28 (6) Except as provided in subsections (7) and (8), a

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29 person who violates this section commits a felony ~~misdemeanor~~ of
 30 the third ~~first~~ degree, punishable as provided in s. 775.082, ~~or~~
 31 s. 775.083, or s. 775.084.

32 (7) A person who violates this section and who has
 33 previously been convicted of or adjudicated delinquent for any
 34 violation of this section commits a felony of the second ~~third~~
 35 degree, punishable as provided in s. 775.082, s. 775.083, or s.
 36 775.084.

37 (8)(a) A person who is:

38 1. Eighteen years of age or older who is responsible for
 39 the welfare of a child younger than 16 years of age, regardless
 40 of whether the person knows or has reason to know the age of the
 41 child, and who commits an offense under this section against
 42 that child;

43 2. Eighteen years of age or older who is employed at a
 44 private school as defined in s. 1002.01; a school as defined in
 45 s. 1003.01; or a voluntary prekindergarten education program as
 46 described in s. 1002.53(3)(a), (b), or (c) and who commits an
 47 offense under this section against a student of the private
 48 school, school, or voluntary prekindergarten education program;
 49 or

50 3. Twenty-four years of age or older who commits an
 51 offense under this section against a child younger than 16 years
 52 of age, regardless of whether the person knows or has reason to
 53 know the age of the child

54
 55 commits a felony of the second ~~third~~ degree, punishable as
 56 provided in s. 775.082, s. 775.083, or s. 775.084.

57 (b) A person who violates this subsection and who has
 58 previously been convicted of or adjudicated delinquent for any
 59 violation of this section commits a felony of the second degree,
 60 punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

61 Section 2. Paragraph (f) of subsection (3) of section
 62 921.0022, Florida Statutes, is amended to read:

63 921.0022 Criminal Punishment Code; offense severity
 64 ranking chart.—

65 (3) OFFENSE SEVERITY RANKING CHART

66 (f) LEVEL 6

67

Florida Statute	Felony Degree	Description
316.193(2) (b)	3rd	Felony DUI, 4th or subsequent conviction.
499.0051(3)	2nd	Knowing forgery of pedigree papers.
499.0051(4)	2nd	Knowing purchase or receipt of prescription drug from unauthorized person.
499.0051(5)	2nd	Knowing sale or transfer of prescription drug to unauthorized person.

72

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73	775.0875 (1)	3rd	Taking firearm from law enforcement officer.
74	784.021 (1) (a)	3rd	Aggravated assault; deadly weapon without intent to kill.
75	784.021 (1) (b)	3rd	Aggravated assault; intent to commit felony.
76	784.041	3rd	Felony battery; domestic battery by strangulation.
77	784.048 (3)	3rd	Aggravated stalking; credible threat.
78	784.048 (5)	3rd	Aggravated stalking of person under 16.
79	784.07 (2) (c)	2nd	Aggravated assault on law enforcement officer.
80	784.074 (1) (b)	2nd	Aggravated assault on sexually violent predators facility staff.
81	784.08 (2) (b)	2nd	Aggravated assault on a person 65 years of age or older.

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82	784.081(2)	2nd	Aggravated assault on specified official or employee.
83	784.082(2)	2nd	Aggravated assault by detained person on visitor or other detainee.
84	784.083(2)	2nd	Aggravated assault on code inspector.
85	787.02(2)	3rd	False imprisonment; restraining with purpose other than those in s. 787.01.
86	790.115(2)(d)	2nd	Discharging firearm or weapon on school property.
87	790.161(2)	2nd	Make, possess, or throw destructive device with intent to do bodily harm or damage property.
88	790.164(1)	2nd	False report of deadly explosive, weapon of mass destruction, or act of arson or violence to state property.

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89	790.19	2nd	Shooting or throwing deadly missiles into dwellings, vessels, or vehicles.
90	794.011(8)(a)	3rd	Solicitation of minor to participate in sexual activity by custodial adult.
91	794.05(1)	2nd	Unlawful sexual activity with specified minor.
92	800.04(5)(d)	3rd	Lewd or lascivious molestation; victim 12 years of age or older but less than 16 years; offender less than 18 years.
93	800.04(6)(b)	2nd	Lewd or lascivious conduct; offender 18 years of age or older.
94	806.031(2)	2nd	Arson resulting in great bodily harm to firefighter or any other person.
95	810.02(3)(c)	2nd	Burglary of occupied structure; unarmed; no assault or battery.

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96	<u>810.145(8)(b)</u>	<u>2nd</u>	<u>Video voyeurism; certain minor victims; 2nd or subsequent offense.</u>
97	812.014(2)(b)1.	2nd	Property stolen \$20,000 or more, but less than \$100,000, grand theft in 2nd degree.
98	812.014(6)	2nd	Theft; property stolen \$3,000 or more; coordination of others.
99	812.015(9)(a)	2nd	Retail theft; property stolen \$300 or more; second or subsequent conviction.
100	812.015(9)(b)	2nd	Retail theft; property stolen \$3,000 or more; coordination of others.
101	812.13(2)(c)	2nd	Robbery, no firearm or other weapon (strong-arm robbery).
102	817.034(4)(a)1.	1st	Communications fraud, value greater than \$50,000.
	817.4821(5)	2nd	Possess cloning paraphernalia

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with intent to create cloned
cellular telephones.

103

825.102(1) 3rd Abuse of an elderly person or
disabled adult.

104

825.102(3)(c) 3rd Neglect of an elderly person or
disabled adult.

105

825.1025(3) 3rd Lewd or lascivious molestation
of an elderly person or
disabled adult.

106

825.103(2)(c) 3rd Exploiting an elderly person or
disabled adult and property is
valued at less than \$20,000.

107

827.03(1) 3rd Abuse of a child.

108

827.03(3)(c) 3rd Neglect of a child.

109

827.071(2) & (3) 2nd Use or induce a child in a
sexual performance, or promote
or direct such performance.

110

836.05 2nd Threats; extortion.

111

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112	836.10	2nd	Written threats to kill or do bodily injury.
113	843.12	3rd	Aids or assists person to escape.
114	847.011	3rd	Distributing, offering to distribute, or possessing with intent to distribute obscene materials depicting minors.
115	847.012	3rd	Knowingly using a minor in the production of materials harmful to minors.
116	847.0135(2)	3rd	Facilitates sexual conduct of or with a minor or the visual depiction of such conduct.
117	914.23	2nd	Retaliation against a witness, victim, or informant, with bodily injury.
	944.35(3)(a)2.	3rd	Committing malicious battery upon or inflicting cruel or inhuman treatment on an inmate or offender on community

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			supervision, resulting in great bodily harm.
118			
	944.40	2nd	Escapes.
119			
	944.46	3rd	Harboring, concealing, aiding escaped prisoners.
120			
	944.47(1)(a)5.	2nd	Introduction of contraband (firearm, weapon, or explosive) into correctional facility.
121			
	951.22(1)	3rd	Intoxicating drug, firearm, or weapon introduced into county facility.
122			
123	Section 3.		This act shall take effect July 1, 2012.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 385 Sovereign Immunity
SPONSOR(S): Civil Justice Subcommittee; Gaetz; Renuart and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 614

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	10 Y, 2 N, As CS	Bond	Bond
2) Judiciary Committee		Bond <i>MB</i>	Havlicak <i>RH</i>
3) Government Operations Appropriations Subcommittee			
4) Health & Human Services Committee			

SUMMARY ANALYSIS

A physician on duty in a hospital emergency room or trauma center is required by federal and state law to evaluate any individual who presents himself or herself as needing medical treatment, and provide emergency medical treatment, regardless of whether the individual pays or has the ability to pay for such services. This bill makes legislative findings declaring that these physicians are agents of the government performing a government duty.

Sovereign immunity is a legal concept that protects governments from being sued without their consent. The protection is often extended to government contractors performing governmental functions. This bill provides that a physician working in a hospital emergency room or trauma center is an agent of the state protected by sovereign immunity. A physician may elect to opt out of sovereign immunity, and may later opt back in. A physician covered by the sovereign immunity protection is required to reimburse the state for claims and costs up to the sovereign immunity limits, and the failure to reimburse the state is grounds for discipline against the medical license.

This bill does not appear to have a fiscal impact on local governments. This bill has an unknown potential negative fiscal impact on state government expenditures.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background - In General

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

Background - Mandated Emergency Medical Treatment

Under current law, certain health care providers are obligated under state and federal law to provide emergency services.

Section 395.1041(3)(a), F.S., requires every general hospital which has an emergency department to provide emergency services and care for any emergency medical condition when:

- Any person requests emergency services and care; or
- Emergency services and care are requested on behalf of a person by an emergency medical services provider who is rendering care to or transporting the person; or by another hospital when such hospital is seeking a medically necessary transfer.

Section 395.1041(3)(f), F.S., requires emergency services and care to be provided regardless of whether the patient is insured or otherwise able to pay for services.

Section 401.45, F.S.(1), F.S. provides that a licensed basic life support service, advanced life support service, or air ambulance service may not deny needed prehospital treatment or transport for an emergency medical condition to any person.

Similarly, federal law requires hospitals to provide a "medical screening evaluation" regardless of an individual's ability to pay.¹

Background - Liability Laws Related to Emergency Medical Treatment

A health care practitioner providing mandated emergency medical treatment is not liable for civil damages related to such services unless the injured patient can show that the practitioner acted with "a reckless disregard for the consequences so as to affect the life or health of another."²

An award of noneconomic damages³ related to medical malpractice caused by a medical practitioner providing emergency services and care is limited to \$150,000 per claimant and \$300,000 per incident.⁴ There is no limit on the corresponding economic damages.

¹ 42 U.S.C. s. 1395dd., which reads at subsection (a):

In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this subchapter) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1) of this section) exists.

² Section 768.13(2)(b), F.S.

³ Noneconomic damages are often referred to as "pain and suffering."

⁴ Section 766.118(4), F.S.

Background - Sovereign Immunity

Sovereign Immunity is a "doctrine which precludes bringing suit against the government without its consent."⁵ The Florida Constitution recognizes that the concept of sovereign immunity applies to the state⁶, although the state may waive its immunity through an enactment of general law.⁷ Sovereign immunity extends to all subdivisions of the state, including counties and school boards.

In 1973, the Legislature enacted s. 768.28, F.S., a partial waiver of sovereign immunity, allowing individuals to sue state government and its subdivisions. According to subsection (1), individuals may sue the government under circumstances where a private person "would be liable to the claimant, in accordance with the general laws of [the] state"

Section 768.28(5), F.S., imposes a \$200,000 limit on the government's liability to a single person, and a \$300,000 total limit on liability for claims arising out of a single incident. These limits have been upheld as constitutional.⁸ The limit applies to the total of economic and noneconomic damages.

An injured party may obtain a judgment in excess of the statutory limits, but cannot enforce payment above the limit. The Legislature may, by general law, provide for payment in excess of the statutory cap by virtue of a claims bill.⁹ The courts have explained:

Even if he is able to obtain a judgment against the Department of Transportation in excess of the settlement amount and goes to the legislature to seek a claims bill with the judgment in hand, this does not mean that the liability of the Department has been conclusively established. The legislature will still conduct its own independent hearing to determine whether public funds would be expended, much like a non jury trial. After all this, the legislature, in its discretion, may still decline to grant him any relief.¹⁰

Section 768.28(9)(b)2., F.S., defines the term "officer, employee, or agent" (which are the persons to whom sovereign immunity applies). Several identified groups are included in the definition, including health care providers when providing contract services pursuant to s. 766.1115, F.S. That section provides that certain health care providers who contract with the state are considered agents of the state, and thus entitled to the protection of sovereign immunity.

Florida law provides that a number of persons who perform public services are agents of the state and thus covered by sovereign immunity, including:

- Persons or organizations providing shelter space without compensation during an emergency.¹¹
- A health care entity providing services as part of a school nurse services contract.¹²
- Members of the Florida Health Services Corps who provide medical care to indigent persons in medically underserved areas.¹³
- A person under contract to review materials, make site visits or provide expert testimony regarding complaints or applications received by the Department of Health or the Department of Business and Professional Regulation.¹⁴

⁵ Blacks Law Dictionary, at 1396 (6th ed. 1990).

⁶ Article X, s. 13, Fla.Const.

⁷ See generally Gerald T. Wetherington and Donald I. Pollock, *Tort Suits Against Government Entities in Florida*, 44 U.Fla.L.Rev. 1 (1992).

⁸ *Berek v. Metropolitan Dade County*, 422 So.2d 838 (Fla. 1982); *Cauley v. City of Jacksonville*, 403 So.2d 379 (Fla. 1981).

⁹ See generally D. Stephen Kahn, *Legislative Claim Bills: A Practical Guide to a Potent(ial) Remedy*, FLA.B.J. 8 (April 1988).

¹⁰ *Gerard v. Dept. of Transportation*, 472 So.2d 1170 (Fla. 1985).

¹¹ Section 252.51, F.S.

¹² Section 381.0056(10), F.S.

¹³ Section 381.0302(11), F.S.

¹⁴ Sections 455.221(3) and 456.009(3), F.S.

- A business contracted with by the Department of Business and Professional Regulation under the Management Privatization Act.¹⁵
- Physicians retained by the Florida State Boxing Commission.¹⁶
- Health care providers under contract to provide uncompensated care to indigent state residents.¹⁷
- Health care providers or vendors under contract with the Department of Corrections to provide inmate care.¹⁸
- An operator, dispatcher, or other person or entity providing security or maintenance for rail services in the South Florida Rail Corridor, under contract with the Tri-County Commuter Rail Authority or the Department of Transportation.¹⁹
- Professional firms that provide monitoring and inspection services of work required for state roadway, bridge or other transportation facility projects.²⁰
- A provider or vendor under contract with the Department of Juvenile Justice to provide juvenile and family services.²¹
- Health care practitioners under contract with state universities to provide medical services to student athletes.²²
- A not-for-profit college or university that owns or operates an accredited medical school or any of its employees or agents that have agreed in an affiliation agreement or other contract to provide patient services as agents of a teaching hospital which is owned or operated by the state, a county, a municipality, a public health trust, a special taxing district, any other governmental entity having health care responsibilities, or a not-for-profit entity that operates such facilities as an agent of that governmental entity under a lease or other contract.²³

Effect of Bill - Sovereign Immunity

This bill amends s. 768.28, F.S., to provide that an emergency health care provider compelled to provide medical services in an emergency room is an agent of the state and thus entitled to sovereign immunity protection. The term "emergency health care provider" is defined by the bill to include only physicians who are licensed under ch. 458 or 459, F.S. Those chapters regulate physicians and osteopathic physicians, respectively.

The sovereign immunity law applies to a person who is an "officer, employee or agent" of the state. This bill amends the definition of an officer, employee or agent of the state to include any person who is an emergency health care provider providing emergency health care mandated by ss. 395.1041 or 401.45, F.S.

¹⁵ Section 455.32(4), F.S.

¹⁶ Section 548.046(1), F.S.

¹⁷ Section 768.28(9)(b), F.S.

¹⁸ Section 768.28(10)(a), F.S.

¹⁹ Section 768.28(10)(d), F.S.

²⁰ Section 768.28(10)(e), F.S.

²¹ Section 768.28(11)(a), F.S.

²² Section 768.28(12)(a), F.S.

²³ Section 768.28(10)(f), F.S.

The bill allows a health care provider to opt out of sovereign immunity protection, and allows a provider who has opted out to opt back in. Notice must be given to the Department of Health, and is effective upon receipt by the department.

The bill defines, and thus limits the protections of the bill, to "emergency medical services", which is

[A]ll screenings, examinations, and evaluations by a physician, hospital, or other person or entity acting pursuant to obligations imposed by s. 395.1041 or s. 401.45, and the care, treatment, surgery, or other medical services provided to relieve or eliminate the emergency medical condition, including all medical services to eliminate the likelihood that the emergency medical condition will deteriorate or recur without further medical attention within a reasonable period of time.

Effect of Bill - Repayment

The bill also requires a covered emergency health care provider to assume financial duties related to any claim. Initially, an injured person would seek payment from the state. The bill requires the physician to reimburse the state for judgments, settlement costs and all other liabilities incurred by the state. Repayment is limited to the statutory sovereign immunity limits (\$200,000 per person, and a total of \$300,000 for all claims related to a single incident). The failure of a physician to timely repay the state is grounds for emergency suspension of the medical license. The Department of Health must suspend the license if the physician is more than 30 days delinquent. The bill allows the department to negotiate a payment plan with a physician in lieu of full payment.

Effective Date

The bill is effective upon becoming law, and applies to causes of action that accrue on or after that date.

B. SECTION DIRECTORY:

Section 1 provides legislative findings.

Section 2 amends s. 768.28, F.S., regarding sovereign immunity for emergency health care workers.

Section 3 provides an effective date of upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

Unknown likely negative fiscal impact on state expenditures. See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may lower the cost to physicians for obtaining medical malpractice insurance coverage, and may lower possible recoveries by persons injured due to medical malpractice.

D. FISCAL COMMENTS:

State government will incur costs to investigate and cover the claims for health care providers providing services in an emergency room or trauma center in Florida. The state agency or division responsible for such claims is the Division of Risk Management in the Department of Financial Services. Although the bill requires responsible physicians to reimburse the state up to a limit, it is possible that state government may incur losses for uncollectible reimbursements.²⁴ The potential uncollectible amount cannot be reliably estimated.²⁵

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

Article 1, s. 21, Fla. Const., provides that the "courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." The Florida Supreme Court has in the past found that this provision limits the ability of the Legislature to amend tort law. In the leading case, the Florida Supreme Court first explained the constitutional limitation on the ability of the Legislature to abolish a civil cause of action:

We hold, therefore, that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. s. 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.²⁶

The courts have shown inconsistent treatment of this provision. Some caps on damages have been found unconstitutional,²⁷ but more recently others have been found constitutional.²⁸ The creation of an alternative recovery system has been found constitutional.²⁹

²⁴ Situations that may lead to state financial loss include death, bankruptcy or insolvency of a physician. It is also possible that the claim plus claims handling expense could exceed the reimbursement limit.

²⁵ In reviewing similar bills in the past: In 2011 DFS estimated the potential loss as "UNKNOWN" (See analysis of 2011 HB 623 dated 2/22/2011) with little comment. In 2010 DFS estimated the potential loss at \$34.5 million, but that version of the bill required the state to pay all claims handling expenses (See Senate bill analysis of 2010 SB 1474 dated 3/22/2010).

²⁶ *Kluger v. White*, 281 So.2d 1, 4 (Fla. 1973).

²⁷ A \$450,000 cap on noneconomic damages applicable to all tort cases is unconstitutional. *Smith v. Dept. of Ins.*, 507 So.2d 1080 (Fla. 1987); but see, *Adams by and through Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 906 (Mo. 1992) ("We doubt the wisdom of a rule of law that limits the legislature's ability to respond statutorily to changing societal concerns or correct previous policy positions upon receipt of better information.")

²⁸ Statutory caps on non-economic damages in medical malpractice actions at s. 766.118, F.S., are constitutional. *Estate of McCall ex rel. McCall v. U.S.*, 642 F.3d 944 (11th Cir. 2011); *M.D. v. U.S.*, 745 F.Supp.2d 1274 (Fla. M.D. 2010).

²⁹ *Lasky v. State Farm Ins. Co.*, 296 So.2d 9 (Fla. 1974)(automobile no-fault insurance law); *Mahoney v. Sears, Roebuck & Co.*, 440 So.2d 1285 (Fla. 1983)(workers compensation law).

B. RULE-MAKING AUTHORITY:

The bill does not provide any new rulemaking authority. The Department of Health will have to amend rules relating to disciplinary actions to account for the changes made by this bill, which changes can be made within existing authority.³⁰

C. DRAFTING ISSUES OR OTHER COMMENTS:

In calendar year 2010, there were 8,119,010 emergency room visits in the state.³¹ Also in 2010, there were 2,520 medical malpractice claims closed by medical malpractice insurance carriers, of which 318 (12.6%) were identified as having occurred in an emergency room setting.³²

A 2007 study by the Senate Committee on Health Regulation regarding the availability of physicians to work in emergency rooms found:

[I]n general, physicians are reluctant to provide emergency on-call coverage due to the negative impact on their lifestyle, the perceived hostile medical malpractice climate, and the inability to obtain adequate compensation for services rendered. All of these reasons are disincentives to assuming liability for treating emergency patients previously unknown to the physician.³³

The bill requires a covered emergency health care provider to reimburse the state for judgments, settlement costs and all other liabilities incurred by the state. It is unclear whether an emergency health care provider will have grounds or a means by which to object to defense strategies, settlements, or unreasonable costs.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On December 7, 2011, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment created a means for a physician to opt out of sovereign immunity, and to opt back in. The amendment also changed the "relating to" clause of the title. This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

³⁰ Department of Health, Bill Analysis, Economic Statement and Fiscal Note, dated December 7, 2011.

³¹ <http://www.floridahealthfinder.gov/researchers/OrderData/order-note.aspx#emergency> accessed November 30, 2011.

³² *Florida Office of Insurance Regulation, 2011 Annual Report – October 1, 2011, Medical Malpractice Financial Information Closed Claim Database and Rate Filings*, at page 44. Note that settlements or judgments against uninsured practitioners would not be reflected here and there is no known means to determine claims experience of uninsured practitioners.

³³ Senate interim report 2008-138, at page 1.

1 A bill to be entitled
 2 An act relating to health care; providing legislative
 3 findings and intent; amending s. 768.28, F.S.;
 4 providing sovereign immunity to emergency health care
 5 providers acting pursuant to obligations imposed by
 6 specified statutes; providing an exception; providing
 7 that emergency health care providers are agents of the
 8 state and requiring them to indemnify the state up to
 9 the specified liability limits; providing for
 10 sanctions against emergency health care providers who
 11 fail to comply with indemnification obligations;
 12 providing definitions; providing that an emergency
 13 medical provider may elect to not be an agent of the
 14 state; providing for revocation of such election;
 15 providing that elections and revocations are effective
 16 upon receipt by the Department of Health; providing
 17 applicability; providing an effective date.

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

20
 21 Section 1. Legislative findings and intent.-
 22 (1) The Legislature finds and declares it to be of vital
 23 importance that emergency services and care be provided by
 24 hospitals, physicians, and emergency medical services providers
 25 to every person in need of such care. The Legislature finds that
 26 providers of emergency services and care are critical elements
 27 in responding to disaster and emergency situations that may
 28 affect local communities, the state, and the country. The

29 Legislature recognizes the importance of maintaining a viable
 30 system of providing for the emergency medical needs of the
 31 state's residents and visitors. The Legislature and the Federal
 32 Government have required such providers of emergency medical
 33 services and care to provide emergency services and care to all
 34 persons who present themselves to hospitals seeking such care.

35 (2) The Legislature has further mandated that emergency
 36 medical treatment may not be denied by emergency medical
 37 services providers to persons who have or are likely to have an
 38 emergency medical condition. Such governmental requirements have
 39 imposed a unilateral obligation for providers of emergency
 40 services and care to provide services to all persons seeking
 41 emergency care without ensuring payment or other consideration
 42 for provision of such care. The Legislature also recognizes that
 43 providers of emergency services and care provide a significant
 44 amount of uncompensated emergency medical care in furtherance of
 45 such governmental interest.

46 (3) The Legislature finds that a significant proportion of
 47 the residents of this state who are uninsured or are Medicaid or
 48 Medicare recipients are unable to access needed health care on
 49 an elective basis because health care providers fear the
 50 increased risk of medical malpractice liability. The Legislature
 51 finds that such patients, in order to obtain medical care, are
 52 frequently forced to seek care through providers of emergency
 53 medical services and care.

54 (4) The Legislature finds that providers of emergency
 55 medical services and care in this state have reported
 56 significant problems with respect to the affordability of

57 professional liability insurance, which is more expensive in
 58 this state than the national average. The Legislature further
 59 finds that a significant number of specialist physicians have
 60 resigned from serving on hospital staffs or have otherwise
 61 declined to provide on-call coverage to hospital emergency
 62 departments due to the increased exposure to medical malpractice
 63 liability created by treating such emergency department
 64 patients, thereby creating a void that has an adverse effect on
 65 emergency patient care.

66 (5) It is the intent of the Legislature that hospitals,
 67 emergency medical services providers, and physicians be able to
 68 ensure that patients who may need emergency medical treatment
 69 and who present themselves to hospitals for emergency medical
 70 services and care have access to such needed services.

71 Section 2. Subsection (9) of section 768.28, Florida
 72 Statutes, is amended to read:

73 768.28 Waiver of sovereign immunity in tort actions;
 74 recovery limits; limitation on attorney fees; statute of
 75 limitations; exclusions; indemnification; risk management
 76 programs.—

77 (9) (a) No officer, employee, or agent of the state or of
 78 any of its subdivisions shall be held personally liable in tort
 79 or named as a party defendant in any action for any injury or
 80 damage suffered as a result of any act, event, or omission of
 81 action in the scope of her or his employment or function, unless
 82 such officer, employee, or agent acted in bad faith or with
 83 malicious purpose or in a manner exhibiting wanton and willful
 84 disregard of human rights, safety, or property. However, such

85 officer, employee, or agent shall be considered an adverse
 86 witness in a tort action for any injury or damage suffered as a
 87 result of any act, event, or omission of action in the scope of
 88 her or his employment or function. The exclusive remedy for
 89 injury or damage suffered as a result of an act, event, or
 90 omission of an officer, employee, or agent of the state or any
 91 of its subdivisions or constitutional officers shall be by
 92 action against the governmental entity, or the head of such
 93 entity in her or his official capacity, or the constitutional
 94 officer of which the officer, employee, or agent is an employee,
 95 unless such act or omission was committed in bad faith or with
 96 malicious purpose or in a manner exhibiting wanton and willful
 97 disregard of human rights, safety, or property. The state or its
 98 subdivisions shall not be liable in tort for the acts or
 99 omissions of an officer, employee, or agent committed while
 100 acting outside the course and scope of her or his employment or
 101 committed in bad faith or with malicious purpose or in a manner
 102 exhibiting wanton and willful disregard of human rights, safety,
 103 or property.

104 (b) As used in this subsection, the term:

- 105 1. "Employee" includes any volunteer firefighter.
- 106 2. "Officer, employee, or agent" includes, but is not
 107 limited to:7

- 108 a. Any health care provider when providing services
 109 pursuant to s. 766.1115; any member of the Florida Health
 110 Services Corps, as defined in s. 381.0302, who provides
 111 uncompensated care to medically indigent persons referred by the
 112 Department of Health; any nonprofit independent college or

113 university located and chartered in this state which owns or
 114 operates an accredited medical school, and its employees or
 115 agents, when providing patient services pursuant to paragraph
 116 (10)(f); and any public defender or her or his employee or
 117 agent, including, among others, an assistant public defender and
 118 an investigator.

119 b. Any emergency health care provider acting pursuant to
 120 obligations imposed by s. 395.1041 or s. 401.45, except for
 121 persons or entities that are otherwise covered under this
 122 section.

123 (c)1. Emergency health care providers are agents of the
 124 state and shall indemnify the state for any judgments,
 125 settlement costs, or other liabilities incurred, only up to the
 126 liability limits in subsection (5).

127 2. Any emergency health care provider who is licensed by
 128 the state and who fails to indemnify the state after reasonable
 129 notice and written demand to do so is subject to an emergency
 130 suspension order of the regulating authority having jurisdiction
 131 over the licensee.

132 3. The Department of Health shall issue an emergency order
 133 suspending the license of any licensee under its jurisdiction or
 134 any licensee of a regulatory board within the Department of
 135 Health who fails to comply within 30 days after receipt by the
 136 department of a notice from the Division of Risk Management of
 137 the Department of Financial Services that the licensee has
 138 failed to satisfy her or his obligation to indemnify the state
 139 or enter into a repayment agreement with the state for costs
 140 under this subsection. The terms of such agreement must provide

141 assurance of repayment of the obligation which is satisfactory
 142 to the state. For licensees within the Division of Medical
 143 Quality Assurance of the Department of Health, failure to comply
 144 with this paragraph constitutes grounds for disciplinary action
 145 under each respective practice act and under s. 456.072(1)(k).

146 4. As used in this subsection, the term:

147 a. "Emergency health care provider" means a physician
 148 licensed under chapter 458 or chapter 459.

149 b. "Emergency medical services" means all screenings,
 150 examinations, and evaluations by a physician, hospital, or other
 151 person or entity acting pursuant to obligations imposed by s.
 152 395.1041 or s. 401.45, and the care, treatment, surgery, or
 153 other medical services provided to relieve or eliminate the
 154 emergency medical condition, including all medical services to
 155 eliminate the likelihood that the emergency medical condition
 156 will deteriorate or recur without further medical attention
 157 within a reasonable period of time.

158 5. An emergency health care provider may affirmatively
 159 elect in writing not to be considered an agent of the state by
 160 submitting a form to that effect to the Department of Health. An
 161 emergency health care provider who makes such election may
 162 revoke the election by submitting a form revoking the election.
 163 An election or revocation is effective upon filing with the
 164 department. Any emergency health care provider who declines the
 165 status conferred by sub-subparagraph b. shall not be considered
 166 an agent of the state.

167 (d)-(e) For purposes of the waiver of sovereign immunity
 168 only, a member of the Florida National Guard is not acting

169 within the scope of state employment when performing duty under
 170 the provisions of Title 10 or Title 32 of the United States Code
 171 or other applicable federal law; and neither the state nor any
 172 individual may be named in any action under this chapter arising
 173 from the performance of such federal duty.

174 (e) ~~(d)~~ The employing agency of a law enforcement officer
 175 as defined in s. 943.10 is not liable for injury, death, or
 176 property damage effected or caused by a person fleeing from a
 177 law enforcement officer in a motor vehicle if:

178 1. The pursuit is conducted in a manner that does not
 179 involve conduct by the officer which is so reckless or wanting
 180 in care as to constitute disregard of human life, human rights,
 181 safety, or the property of another;

182 2. At the time the law enforcement officer initiates the
 183 pursuit, the officer reasonably believes that the person fleeing
 184 has committed a forcible felony as defined in s. 776.08; and

185 3. The pursuit is conducted by the officer pursuant to a
 186 written policy governing high-speed pursuit adopted by the
 187 employing agency. The policy must contain specific procedures
 188 concerning the proper method to initiate and terminate high-
 189 speed pursuit. The law enforcement officer must have received
 190 instructional training from the employing agency on the written
 191 policy governing high-speed pursuit.

192 Section 3. This act shall take effect upon becoming a law,
 193 and shall apply to any cause of action accruing on or after that
 194 date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 483 Uniform Commercial Code
SPONSOR(S): Civil Justice Subcommittee; Passidomo
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1090

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	14 Y, 0 N, As CS	Caridad	Bond
2) Insurance & Banking Subcommittee	14 Y, 0 N	Read	Cooper
3) Judiciary Committee		Caridad DC	Havlicak RH

SUMMARY ANALYSIS

The Uniform Commercial Code (UCC) is a set of uniform laws regulating various business transactions and trade. The drafts of the code are developed by the Uniform Law Commission (Commission), a group of scholars and business representatives. The term "uniform" refers to how the separate states of the Union have separately enacted the various parts of the Uniform Commercial Code in laws that are uniform to one another.

Article 9 of the UCC governs secured transactions of personal property. In 1998, Article 9 was substantially revised and adopted by all states. In Florida, it is codified in Ch. 679, F.S. In 2010, the Commission drafted and adopted amendments to Article 9. The 2010 amendments modify Article 9 to address filing issues and other matters that have arisen since the 1998 revision.

The bill adopts the 2010 amendments to Article 9. The most significant revision to Ch. 679, F.S., is changes governing the name of a debtor for purposes of filing a financing statement. The bill also provides the following changes:

- Makes minor revisions to s. 679.3071, F.S., relating to the location of debtors;
- Modifies provisions relating to guidelines for the continued perfection of security interests that were perfected according to the law of another jurisdiction;
- Provides rules for transition to the proposed version of Article 9; and
- Makes numerous stylistic and grammatical changes.

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

The effective date of the bill is July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The Uniform Commercial Code (UCC) is a set of uniform laws regulating various business transactions and trade. The drafts of the code are developed by the Uniform Law Commissioners (ULC), who are members of the National Conference of Commissioners on Uniform State Laws, a group of scholars and business representatives. "Conference members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical."¹

Participation in the Conference is not limited to lawyers since "stakeholder" meetings are held, where the opinions of all groups concerned with a particular area can be heard.² Every state, the District of Columbia, Puerto Rico and the U.S. Virgin Islands is assessed a specific amount for the maintenance of the ULC based upon state population. Florida's assessment for 2009-2010 is \$96,700.³

Article 9 of the UCC governs secured transactions in personal property. A secured transaction is a "business arrangement by which a buyer or borrower gives collateral to the seller or lender to guarantee payment of an obligation."⁴ In 1998, Article 9 was substantially revised and adopted by all states and U.S. territories except Puerto Rico where it is currently being considered. In 2010, the Commission drafted and adopted amendments to Article 9.

The 2010 amendments to Article 9 modify the existing statute to respond to filing issues and address other matters that have arisen in practice following passage of the 1998 version of Article 9. The Article 9 amendments have been adopted in Connecticut, Indiana, Minnesota, Nebraska, Nevada, North Dakota, Rhode Island, Texas, and Washington. They are also currently being considered in a number of other states and U.S. territories.⁵

Issues Concerning Filing

Identifying the Debtor

The purpose of the UCC filing system is to give notice to creditors and other interested parties that there is a valid, perfected security interest in property of the debtor.⁶ A security interest is a "property interest created by agreement or by operation of law to secure performance of an obligation" (i.e. payment of a debt).⁷ An individual or entity files a financial statement to notify third parties — typically prospective buyers and lenders — of a secured party's security interest in goods or real property. Financing statements are indexed under the name of the debtor; therefore, an individual looking for a specific financing statement will search for it under the debtor's name.

¹ [http://www.nccusl.org/Narrative.aspx?title=About the ULC](http://www.nccusl.org/Narrative.aspx?title=About%20the%20ULC) (last visited Jan. 23, 2012).

² See *2011 Commission Annual Report*, p.3, available at: <http://www.uniformlaws.org/Narrative.aspx?title=Publications> (follow "2011 Annual Report" hyperlink) (last visited Jan. 23, 2012).

³ *2009 Annual Report of the Florida Commissioners to the National Conference on Uniform State Laws, January 2010*, p. 4; the report was prepared by the Office of Legislative Services for submission to the Governor and both houses of the Legislature through their respective presiding officers.

⁴ Black's Law Dictionary (9th ed. 2009).

⁵ [http://www.nccusl.org/Act.aspx?title=UCC Article 9 Amendments \(2010\)](http://www.nccusl.org/Act.aspx?title=UCC%20Article%209%20Amendments%20(2010)) (last visited Jan. 21, 2012) (legislation has been introduced and is pending in Washington D.C., Kentucky, Massachusetts, Oklahoma, and Puerto Rico).

⁶ See *Matter of Glasco, Inc.*, 642 F.2d 793, 795 (5th Cir. 1981).

⁷ Black's Law Dictionary (9th ed. 2009).

Section 679.5031(1), F.S., explains what constitutes the debtor's name for purposes of a financing statement where the debtor is a registered organization,⁸ a decedent's estate, or a trust or trustee acting regarding property in trust. Under current law, a financing statement sufficiently provides the name of a debtor that is a registered organization if it provides the name as indicated on the public record of the jurisdiction where the debtor organized. If the debtor is a decedent's estate, the financing statement must provide the decedent's name and indicate that the debtor is an estate. If the debtor is a trust or trustee acting regarding property in trust, the financing statement must:

- Provide the name for the trust in its organic record or, if no name is specified, the settlor's name and additional information to distinguish the debtor from other trusts with one or more of the same settlors; and
- Indicate in the debtor's name or otherwise that the debtor is a trust or trustee acting for trust property.

In other cases, if the debtor has a name, current law requires the financing statement to provide the debtor's individual or organizational name. If the debtor does not have a name, it must provide the names of the partners, members, associates, or other persons comprising the debtor.

The bill revises standards regarding the name of a debtor to be provided on a financing statement. If the debtor is a registered organization, the financing statement sufficiently provides the name of the debtor where it lists the name of the registered organization provided on the most recent public organic record⁹ filed or issued by the registered organization's jurisdiction of organization. This also applies to a registered organization that holds collateral in trust.

Where the collateral is being administered by a personal representative of a decedent, the financing statement is sufficient if it provides the name of the decedent as the debtor and indicates that the collateral is being administered by a personal representative. The name of the decedent indicated on the order appointing the personal representative of the decedent, which was issued by a court having jurisdiction over the collateral, is sufficient as the name of the decedent.

If the collateral is held in a trust that is not a registered organization, the financing statement must indicate the name specified in the organic record of the trust and that the collateral is held in trust. If the organic record does not specify a name, the financing statement must indicate the name of the settlor or testator, additional information sufficient to distinguish the trust from other trusts that may have the same settlors or testator, and an indication that the collateral is held in a trust.

The bill also provides standards regarding the name of an individual debtor to be provided on a financing statement. If the debtor is an individual, the financing statement must provide the name on

⁸ Current law provides that a registered organization is "an organization organized solely under the law of a single state or the United States and as to which the state or the United States must maintain a public record showing the organization to have been organized." Section 679.1021(1)(qqq), F.S. The bill revises the definition to include a business trust that is formed or organized in a state where the public organic record of a business trust must be filed with such state.

⁹ The bill replaces all references to the "public record" with the "public organic record." It further creates a new definition for the term, as "public record" is not currently defined under the statute. The bill defines "public organic record" as:

[A] record that is available to the public for inspection and that is:

1. A record consisting of the record initially filed with or issued by a state or the United States to form or organize an organization and any record filed with or issued by the state or the United States that amends or restates the initial record;
2. An organic record of a business trust consisting of the record initially filed with a state and any record filed with the state that amends or restates the initial record, if a statute of the state governing business trusts requires that the record be filed with the state; or
3. A record consisting of legislation enacted by the Legislature of a state or the Congress of the United States that forms or organizes an organization, any record amending the legislation, and any record filed with or issued by the state or the United States that amends or restates the name of the organization.

the debtor's driver's license if the license has not on its face expired. If the state has issued a non-driver's identification card in lieu of a driver's license, the name provided on the identification card may be used with the same effect as a driver's license name. If the state has issued to an individual more than one driver's license or more than one identification card, the most recent driver's license or identification card applies.

If the debtor does not have a driver's license or identification card, the financing statement must provide either the individual name of the debtor (i.e. whatever the debtor's name is under current law) or the debtor's surname and first personal name.

In other cases, if the debtor does not have a name, the financing statement must include the name of partners, members, associates, or others comprising the debtor. The names must be provided in a manner so that each name provided would be sufficient if the person named was the debtor.

The bill also defines the term "name of the settlor or testator" as follows:

- If the settlor is a registered organization, the name of the registered organization indicated on the public organic record filed with or issued or enacted by the registered organization's jurisdiction of organization; or
- In other cases, the name of the settlor or testator indicated in the trust's organic record.

Claim Concerning Inaccurate or Wrongfully Filed Record

Current law authorizes the debtor to file a correction statement: a claim that a financing statement filed against it was in fact unauthorized.¹⁰ While this filing has no legal effect on the underlying claim, it does put in the public record the debtor's claim that the financing statement was wrongfully filed.

The bill revises current law in two ways. First, the filing is no longer called a "correction statement," but is instead referred to as an "information statement." Second, the bill authorizes the secured party of record to also file an information statement if the secured party believes that an amendment to its financing statement was not authorized. The change addresses concerns of secured parties that an amendment to a different financing statement may be inadvertently filed on the secured party's financing statement because the amendment contains an error when referring to the file number of the financing statement to be amended. It is important to note that the secured party has no duty to file an information statement, even if it is aware of the unauthorized filing.

Perfection of Security Interests

"Perfection of a security interest gives constructive notice to the world of the claim or interest of the one asserting it."¹¹ Article 9 provides guidelines for the continued perfection of security interests that have been perfected according to the law of another jurisdiction.¹² Generally, a security interest perfected according to another jurisdiction, or state's law is not automatically "unperfected." Current law provides that a security interest perfected by filing continues for four months after the jurisdiction in which the debtor is located changes. However, this temporary period of perfection applies only with respect to collateral owned by the debtor at the time of the change. Even if the security interest attaches to after-acquired collateral, there is currently no perfection with respect to such new collateral unless and until the secured party perfects pursuant to the law of the new jurisdiction.

The bill provides the filer perfection for four months in collateral acquired post-move. A similar change is made with respect to a new debtor that is a successor by merger. The new rule provides for temporary perfection in collateral owned by the successor before the merger or collateral acquired by the successor within four months after the merger.

¹⁰ Section 679.518, F.S.

¹¹ *Bay Co. Sheriff's Office v. Tyndall Fed. Credit Union*, 738 So.2d 456, 458 (Fla. 1st DCA 1999).

¹² Section 679.3161, F.S.

The bill also provides various minor and stylistic changes to provisions affecting perfection of security interests.

Control of Electronic Chattel Paper

Current law provides that control of electronic chattel paper is the functional equivalent of possession of tangible chattel paper. "Chattel paper" is a record or records that show both a monetary obligation and a security interest in specific goods.¹³ "Electronic chattel paper" is "chattel paper evidenced by a record or records consisting of information stored in an electronic medium."¹⁴ Current law provides that a secured party has control of electronic chattel paper if the record comprising the chattel paper are created, stored and assigned according to six requirements.¹⁵

The bill provides a general test for establishing when a secured party has control of electronic chattel paper. Specifically, a party has control of electronic chattel paper "if a system employed for evidencing the transfer of interests in the chattel paper reliably establishes the secured party as the person to which the chattel paper was assigned." The bill also provides a safe harbor test that if satisfied, establishes control under the aforementioned general test. The safe harbor test is consistent with the original six requirements in current law.

Other Changes

The bill also makes the following changes to Article 9:

- Modifies the definitions of the terms "authenticate," "certificate of title," "jurisdiction of organization," and "registered organization;" and creates a definition for "public organic record."
- Makes minor revisions to s. 679.3071, F.S., relating to the location of debtors;
- Makes minor revisions to provisions governing priority of security interests;
- Makes minor revisions to provisions relating to the information that must be included in a financing statement;
- Provides additional rules regarding the enforceability of contractual provisions restricting the assignment of receivables;
- Provides various clarifying and conforming revisions to current law, and provides rules for transition to the proposed version of Article 9.
- Directs the Division of Statutory Revision to replace the phrase "this act" throughout the bill with the assigned chapter number of the act;
- Makes numerous stylistic and grammatical changes.

B. SECTION DIRECTORY:

Section 1 amends s. 679.1021, F.S., relating to definitions.

Section 2 amends s. 679.1051, F.S., relating to control of electronic chattel paper.

Section 3 amends s. 679.3071, F.S., relating to the location of the debtor.

Section 4 amends s. 679.3111, F.S., relating to the perfection of security interests in property subject to certain statutes, regulations, and treaties.

Section 5 amends s. 679.3161, F.S., relating to perfection of security interests following a change in governing law.

Section 6 amends s. 679.3171, F.S., relating to interests that take propriety over or take free of security interest or agricultural lien.

¹³ Section 679.1021(1)(k), F.S.

¹⁴ Section 679.1021(1)(ee), F.S.

¹⁵ See s. 679.1051, F.S.

Section 7 amends s. 679.326, F.S., relating to priority of security interests created by new debtor.

Section 8 amends s. 679.4061, F.S., relating to discharge of account debtor.

Section 9 amends s. 679.4081, F.S., relating to restrictions on assignment of promissory notes.

Section 10 amends s. 679.5021, F.S., relating to the contents of a financing statement.

Section 11 amends s. 679.5031, F.S., relating to name of debtor and secured party.

Section 12 amends s. 679.5071, F.S., relating to the effect of certain events on effectiveness of financing statement.

Section 13 amends s. 679.515, F.S., relating to the duration and effectiveness of financing statement.

Section 14 amends s. 679.516, F.S., relating to what constitutes filing.

Section 15 amends s. 679.518, F.S., relating to claim concerning inaccurate or wrongly filed record.

Section 16 amends s. 679.607 relating to collection and enforcement by secured party.

Section 17 creates ss. 679.801, 679.802, 679.803, 679.804, 679.805, 679.806, 679.807, and 679.808, F.S., to provide guidelines for transition.

Section 18 amends s. 680.1031, F.S., relating to definitions.

Section 19 provides a directive to the Division of Statutory Revision.

Section 20 provides an effective date of July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

The effective date of the bill is July 1, 2013. This is consistent with the Commission's proposed amendments to Article 9. According to the Commission, the 2013 effective date is intended to allow states to adopt the amendments uniformly so the Article 9 revisions will become operative simultaneously thereby avoiding confusion with respect to interstate transactions.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On Nov. 16, 2011, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Directs the Division of Statutory Revision to replace the phrase "this act" throughout the bill with the assigned chapter number of the act;
- Corrects numerous minor errors, including reference errors, so that the bill is consistent with the 2010, Article 9 amendments;

The analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

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A bill to be entitled
An act relating to the Uniform Commercial Code;
revising and providing provisions of the Uniform
Commercial Code relating to secured transactions to
conform to the revised Article 9 of the Uniform
Commercial Code as prepared by the National Conference
of Commissioners on Uniform State Laws; amending s.
679.1021, F.S.; revising and providing definitions;
amending s. 679.1051, F.S.; revising provisions
relating to control of electronic chattel paper;
amending s. 679.3071, F.S.; revising provisions
relating to the location of debtors; amending s.
679.3111, F.S.; making editorial changes; amending s.
679.3161, F.S.; providing rules that apply to certain
collateral to which a security interest attaches;
providing rules relating to certain financing
statements; amending s. 679.3171, F.S.; revising
provisions relating to interests that take priority
over or take free of a security interest or
agricultural lien; amending s. 679.326, F.S.; revising
priority of security interests created by a new
debtor; amending ss. 679.4061 and 679.4081, F.S.;
revising application; amending s. 679.5021, F.S.;
revising when a record of a mortgage satisfying the
requirements of chapter 697 is effective as a filing
statement; amending s. 679.5031, F.S.; revising when a
financing statement sufficiently provides the name of
the debtor; amending s. 679.5071, F.S.; revising the

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

29 effect of certain events on the effectiveness of a
 30 financing statement; amending s. 679.515, F.S.;
 31 revising the duration and effectiveness of a financing
 32 statement; amending s. 679.516, F.S.; revising
 33 instances when filing does not occur with respect to a
 34 record that a filing office refuses to accept;
 35 amending s. 679.518, F.S.; revising requirements for
 36 claims concerning an inaccurate or wrongfully filed
 37 record; amending s. 679.607, F.S.; revising recording
 38 requirements for the enforcement of mortgages
 39 nonjudicially outside this state; creating part VIII
 40 of chapter 679, F.S., relating to transition from
 41 prior law under the chapter to law under the chapter
 42 as amended by this act; creating s. 679.801, F.S.;
 43 providing scope of application and limitations;
 44 creating s. 679.802, F.S.; providing that security
 45 interests perfected under prior law that also satisfy
 46 the requirements for perfection under this act remain
 47 effective; creating s. 679.803, F.S.; providing that
 48 security interests unperfected under prior law but
 49 that satisfy the requirements for perfection under
 50 this act will become effective July 1, 2013; creating
 51 s. 679.804, F.S.; providing when financing statements
 52 effective under prior law in a different jurisdiction
 53 remain effective; creating s. 679.805, F.S.; requiring
 54 the recording of a financing statement in lieu of a
 55 continuation statement under certain conditions;
 56 providing for the continuation of the effectiveness of

57 a financing statement filed before the effective date
 58 of this act under certain conditions; creating s.
 59 679.806, F.S.; providing requirements for the
 60 amendment of financing statements filed before the
 61 effective date of this act; providing requirements for
 62 financing statements prior to amendment; creating s.
 63 679.807, F.S.; providing person entitled to file
 64 initial financing statement or continuation statement;
 65 creating s. 679.808, F.S.; providing priority of
 66 conflicting claims to collateral; amending s.
 67 680.1031, F.S.; conforming a cross-reference;
 68 providing a directive to the Division of Statutory
 69 Revision; providing an effective date.

70

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

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73 Section 1. Paragraphs (ooo) through (aaaa) of subsection
 74 (1) of section 679.1021, Florida Statutes, are redesignated as
 75 paragraphs (ppp) through (bbbb), respectively, a new paragraph
 76 (ooo) is added to that subsection, and present paragraphs (g),
 77 (j), (xx), and (qqq) of subsection (1) of that section are
 78 amended to read:

79 679.1021 Definitions and index of definitions.—

80 (1) In this chapter, the term:

81 (g) "Authenticate" means:

82 1. To sign; or

83 2. ~~To execute or otherwise adopt a symbol, or encrypt or~~
 84 ~~similarly process a record in whole or in part,~~ With the present

85 ~~intent of the authenticating person to identify the person and~~
 86 adopt or accept a record, to attach to or logically associate
 87 with the record an electronic sound, symbol, or process.

88 (j) "Certificate of title" means a certificate of title
 89 with respect to which a statute provides for the security
 90 interest in question to be indicated on the certificate as a
 91 condition or result of the security interest's obtaining
 92 priority over the rights of a lien creditor with respect to the
 93 collateral. The term includes another record maintained as an
 94 alternative to a certificate of title by the governmental unit
 95 that issues certificates of title if a statute permits the
 96 security interest in question to be indicated on the record as a
 97 condition or result of the security interest's obtaining
 98 priority over the rights of a lien creditor with respect to the
 99 collateral.

100 (xx) "Jurisdiction of organization," with respect to a
 101 registered organization, means the jurisdiction under whose law
 102 the organization is formed or organized.

103 (ooo) "Public organic record" means a record that is
 104 available to the public for inspection and that is:

105 1. A record consisting of the record initially filed with
 106 or issued by a state or the United States to form or organize an
 107 organization and any record filed with or issued by the state or
 108 the United States that amends or restates the initial record;

109 2. An organic record of a business trust consisting of the
 110 record initially filed with a state and any record filed with
 111 the state that amends or restates the initial record, if a
 112 statute of the state governing business trusts requires that the

113 record be filed with the state; or

114 3. A record consisting of legislation enacted by the
 115 Legislature of a state or the Congress of the United States that
 116 forms or organizes an organization, any record amending the
 117 legislation, and any record filed with or issued by the state or
 118 the United States that amends or restates the name of the
 119 organization.

120 ~~(rrr) (ccc)~~ "Registered organization" means an organization
 121 formed or organized solely under the law of a single state or
 122 the United States by the filing of a public organic record with,
 123 the issuance of a public organic record by, or the enactment of
 124 legislation by ~~and as to which~~ the state or the United States
 125 ~~must maintain a public record showing the organization to have~~
 126 ~~been organized.~~ The term includes a business trust that is
 127 formed or organized under the law of a single state if a statute
 128 of the state governing business trusts requires that the
 129 business trust's organic record be filed with the state.

130 Section 2. Section 679.1051, Florida Statutes, is amended
 131 to read:

132 679.1051 Control of electronic chattel paper.—

133 (1) A secured party has control of electronic chattel
 134 paper if a system employed for evidencing the transfer of
 135 interests in the chattel paper reliably establishes the secured
 136 party as the person to which the chattel paper was assigned.

137 (2) A system satisfies subsection (1), and a secured party
 138 has control of electronic chattel paper, if the record or
 139 records comprising the chattel paper are created, stored, and
 140 assigned in such a manner that:

141 (a)~~(1)~~ A single authoritative copy of the record or
 142 records exists which is unique, identifiable and, except as
 143 otherwise provided in paragraphs (d), (e), and (f) ~~subsections~~
 144 ~~(4), (5), and (6)~~, unalterable;

145 (b)~~(2)~~ The authoritative copy identifies the secured party
 146 as the assignee of the record or records;

147 (c)~~(3)~~ The authoritative copy is communicated to and
 148 maintained by the secured party or its designated custodian;

149 (d)~~(4)~~ Copies or amendments ~~revisions~~ that add or change
 150 an identified assignee of the authoritative copy can be made
 151 only with the consent ~~participation~~ of the secured party;

152 (e)~~(5)~~ Each copy of the authoritative copy and any copy of
 153 a copy is readily identifiable as a copy that is not the
 154 authoritative copy; and

155 (f)~~(6)~~ Any amendment ~~revision~~ of the authoritative copy is
 156 readily identifiable as ~~an~~ authorized or unauthorized ~~revision~~.

157 Section 3. Subsection (6) of section 679.3071, Florida
 158 Statutes, is amended to read:

159 679.3071 Location of debtor.—

160 (6) Except as otherwise provided in subsection (9), a
 161 registered organization that is organized under the law of the
 162 United States and a branch or agency of a bank that is not
 163 organized under the law of the United States or a state are
 164 located:

165 (a) In the state that the law of the United States
 166 designates, if the law designates a state of location;

167 (b) In the state that the registered organization, branch,
 168 or agency designates, if the law of the United States authorizes

169 the registered organization, branch, or agency to designate its
 170 state of location, including by designating its main office,
 171 home office, or other comparable office; or

172 (c) In the District of Columbia, if neither paragraph (a)
 173 nor paragraph (b) applies.

174 Section 4. Paragraph (c) of subsection (1) of section
 175 679.3111, Florida Statutes, is amended to read:

176 679.3111 Perfection of security interests in property
 177 subject to certain statutes, regulations, and treaties.-

178 (1) Except as otherwise provided in subsection (4), the
 179 filing of a financing statement is not necessary or effective to
 180 perfect a security interest in property subject to:

181 (c) A ~~certificate of title~~ statute of another jurisdiction
 182 which provides for a security interest to be indicated on a the
 183 certificate of title as a condition or result of the security
 184 interest's obtaining priority over the rights of a lien creditor
 185 with respect to the property.

186 Section 5. Subsections (8) and (9) are added to section
 187 679.3161, Florida Statutes, to read:

188 679.3161 Effect Continued~~perfection of security interest~~
 189 ~~following~~ change in governing law.-

190 (8) The following rules apply to collateral to which a
 191 security interest attaches within 4 months after the debtor
 192 changes its location to another jurisdiction:

193 (a) A financing statement filed before the change of the
 194 debtor's location pursuant to the law of the jurisdiction
 195 designated in s. 679.3011(1) or s. 679.3051(3) is effective to
 196 perfect a security interest in the collateral if the financing

197 statement would have been effective to perfect a security
 198 interest in the collateral if the debtor had not changed its
 199 location.

200 (b) If a security interest that is perfected by a
 201 financing statement that is effective under paragraph (a)
 202 becomes perfected under the law of the other jurisdiction before
 203 the earlier of the time the financing statement would have
 204 become ineffective under the law of the jurisdiction designated
 205 in s. 679.3011(1) or s. 679.3051(3) or the expiration of the 4-
 206 month period, it remains perfected thereafter. If the security
 207 interest does not become perfected under the law of the other
 208 jurisdiction before the earlier time or event, it becomes
 209 unperfected and is deemed never to have been perfected as
 210 against a purchaser of the collateral for value.

211 (9) If a financing statement naming an original debtor is
 212 filed pursuant to the law of the jurisdiction designated in s.
 213 679.3011(1) or s. 679.3051(3) and the new debtor is located in
 214 another jurisdiction, the following rules apply:

215 (a) The financing statement is effective to perfect a
 216 security interest in collateral in which the new debtor has or
 217 acquires rights before or within 4 months after the new debtor
 218 becomes bound under s. 679.2031(4), if the financing statement
 219 would have been effective to perfect a security interest in the
 220 collateral if the collateral had been acquired by the original
 221 debtor.

222 (b) A security interest that is perfected by the financing
 223 statement and that becomes perfected under the law of the other
 224 jurisdiction before the earlier of the expiration of the 4-month

225 period or the time the financing statement would have become
 226 ineffective under the law of the jurisdiction designated in s.
 227 679.3011(1) or s. 679.3051(3) remains perfected thereafter. A
 228 security interest that is perfected by the financing statement
 229 but that does not become perfected under the law of the other
 230 jurisdiction before the earlier time or event becomes
 231 unperfected and is deemed never to have been perfected as
 232 against a purchaser of the collateral for value.

233 Section 6. Subsections (2) and (4) of section 679.3171,
 234 Florida Statutes, are amended to read:

235 679.3171 Interests that take priority over or take free of
 236 security interest or agricultural lien.—

237 (2) Except as otherwise provided in subsection (5), a
 238 buyer, other than a secured party, of tangible chattel paper,
 239 tangible documents, goods, instruments, or a certificated
 240 security ~~certificate~~ takes free of a security interest or
 241 agricultural lien if the buyer gives value and receives delivery
 242 of the collateral without knowledge of the security interest or
 243 agricultural lien and before it is perfected.

244 (4) A licensee of a general intangible or a buyer, other
 245 than a secured party, of collateral accounts, ~~electronic chattel~~
 246 ~~paper, electronic documents, general intangibles, or investment~~
 247 ~~property~~ other than tangible chattel paper, tangible documents,
 248 goods, instruments, or a certificated security takes free of a
 249 security interest if the licensee or buyer gives value without
 250 knowledge of the security interest and before it is perfected.

251 Section 7. Section 679.326, Florida Statutes, is amended
 252 to read:

253 679.326 Priority of security interests created by new
 254 debtor.—

255 (1) Subject to subsection (2), a security interest that is
 256 created by a new debtor in collateral in which the new debtor
 257 has or acquires rights and ~~which is~~ perfected by a filed
 258 financing statement that would be ineffective to perfect the
 259 security interest but for the application of s. 679.508 or ss.
 260 679.508 and 679.3161(9) (a) is effective solely under s. 679.508
 261 ~~in collateral in which a new debtor has or acquires rights is~~
 262 subordinate to a security interest in the same collateral which
 263 is perfected other than by such a filed financing statement ~~that~~
 264 ~~is effective solely under s. 679.508.~~

265 (2) The other provisions of this part determine the
 266 priority among conflicting security interests in the same
 267 collateral perfected by filed financing statements described in
 268 subsection (1) that are effective solely under s. 679.508.
 269 However, if the security agreements to which a new debtor became
 270 bound as debtor were not entered into by the same original
 271 debtor, the conflicting security interests rank according to
 272 priority in time of the new debtor's having become bound.

273 Section 8. Subsection (5) of section 679.4061, Florida
 274 Statutes, is amended to read:

275 679.4061 Discharge of account debtor; notification of
 276 assignment; identification and proof of assignment; restrictions
 277 on assignment of accounts, chattel paper, payment intangibles,
 278 and promissory notes ineffective.—

279 (5) Subsection (4) does not apply to the sale of a payment
 280 intangible or promissory note, other than a sale pursuant to a

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281 disposition under s. 679.610 or an acceptance of collateral
 282 under s. 679.620.

283 Section 9. Subsection (2) of section 679.4081, Florida
 284 Statutes, is amended to read:

285 679.4081 Restrictions on assignment of promissory notes,
 286 health-care-insurance receivables, and certain general
 287 intangibles ineffective.—

288 (2) Subsection (1) applies to a security interest in a
 289 payment intangible or promissory note only if the security
 290 interest arises out of a sale of the payment intangible or
 291 promissory note, other than a sale pursuant to a disposition
 292 under s. 679.610 or an acceptance of collateral under s.
 293 679.620.

294 Section 10. Subsection (3) of section 679.5021, Florida
 295 Statutes, is amended to read:

296 679.5021 Contents of financing statement; record of
 297 mortgage as financing statement; time of filing financing
 298 statement.—

299 (3) A record of a mortgage satisfying the requirements of
 300 chapter 697 is effective, from the date of recording, as a
 301 financing statement filed as a fixture filing or as a financing
 302 statement covering as-extracted collateral or timber to be cut
 303 only if:

304 (a) The record of a mortgage indicates the goods or
 305 accounts that it covers;

306 (b) The goods are or are to become fixtures related to the
 307 real property described in the record of a mortgage or the
 308 collateral is related to the real property described in the

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309 mortgage and is as-extracted collateral or timber to be cut;

310 (c) The record of a mortgage satisfies ~~complies with~~ the
 311 requirements for a financing statement in this section,
 312 although:

313 1. The record of a mortgage need not indicate ~~other than~~
 314 ~~an indication~~ that it is to be filed in the real property
 315 records; and

316 2. The record of a mortgage sufficiently provides the name
 317 of a debtor who is an individual if it provides the individual
 318 name of the debtor or the surname and first personal name of the
 319 debtor, even if the debtor is an individual to whom s.

320 679.5031(1)(d) or (e) applies; and

321 (d) The record of a mortgage is recorded as required by
 322 chapter 697.

323 Section 11. Subsections (1) and (2) of section 679.5031,
 324 Florida Statutes, are amended, and subsections (6), (7), and (8)
 325 are added to that section, to read:

326 679.5031 Name of debtor and secured party.-

327 (1) A financing statement sufficiently provides the name
 328 of the debtor:

329 (a) Except as otherwise provided in paragraph (c), if the
 330 debtor is a registered organization or the collateral is held in
 331 a trust that is a registered organization, only if the financing
 332 statement provides the name that is stated to be the registered
 333 organization's name ~~of the debtor indicated~~ on the public
 334 organic record most recently filed with or issued or enacted by
 335 ~~of the registered organization's debtor's~~ jurisdiction of
 336 organization that purports to state, amend, or restate the

337 registered organization's name ~~which shows the debtor to have~~
 338 ~~been organized;~~

339 (b) Subject to subsection (6), if the collateral is being
 340 administered by the personal representative of a decedent debtor
 341 ~~is a decedent's estate,~~ only if the financing statement
 342 provides, as the name of the debtor, the name of the decedent
 343 and, in a separate part of the financing statement, indicates
 344 that the collateral is being administered by a personal
 345 representative debtor is an estate;

346 (c) If the collateral debtor is held in a trust that is
 347 not a registered organization ~~or a trustee acting with respect~~
 348 ~~to property held in trust,~~ only if the financing statement:

349 1. Provides, as the name of the debtor:

350 a. If the organic record of the trust specifies a name, ~~if~~
 351 ~~any,~~ specified for the trust, ~~the in its organic documents or,~~
 352 ~~if no name so is specified;~~ or

353 b. If the organic record of the trust does not specify a
 354 name for the trust, ~~provides~~ the name of the settlor or testator
 355 ~~and additional information sufficient to distinguish a debtor~~
 356 ~~from other trusts having one or more of the same settlors;~~ and

357 2. In a separate part of the financing statement:

358 a. If the name is provided in accordance with sub-
 359 subparagraph 1.a., indicates, ~~in the debtor's name or otherwise,~~
 360 that the collateral debtor is held in a trust ~~or is a trustee~~
 361 ~~acting with respect to property held in trust;~~ or

362 b. If the name is provided in accordance with sub-
 363 subparagraph 1.b., provides additional information sufficient to
 364 distinguish the trust from other trusts having one or more of

365 the same settlors or the same testator and indicates that the
 366 collateral is held in a trust, unless the additional information
 367 so indicates;

368 (d) Subject to subsection (7), if the debtor is an
 369 individual to whom this state has issued a driver license that
 370 has not expired or to whom the agency of this state that issues
 371 driver licenses has issued, in lieu of a driver license, a
 372 personal identification card that has not expired, only if the
 373 financing statement provides the name of the individual that is
 374 indicated on the driver license or personal identification card;

375 (e) If the debtor is an individual to whom paragraph (d)
 376 does not apply, only if the financing statement provides the
 377 individual name of the debtor or the surname and first personal
 378 name of the debtor; and

379 (f)~~(d)~~ In other cases:

380 1. If the debtor has a name, only if it provides the
 381 ~~individual or~~ organizational name of the debtor; and

382 2. If the debtor does not have a name, only if it provides
 383 the names of the partners, members, associates, or other persons
 384 comprising the debtor, in a manner that each name provided would
 385 be sufficient if the person named were the debtor.

386 (2) A financing statement that provides the name of the
 387 debtor in accordance with subsection (1) is not rendered
 388 ineffective by the absence of:

389 (a) A trade name or other name of the debtor; or

390 (b) Unless required under subparagraph (1)(f)2. ~~(1)(d)2.~~,
 391 names of partners, members, associates, or other persons
 392 comprising the debtor.

393 (6) The name of the decedent indicated on the order
 394 appointing the personal representative of the decedent issued by
 395 the court having jurisdiction over the collateral is sufficient
 396 as the name of the decedent under paragraph (1)(b).

397 (7) If this state has issued to an individual more than
 398 one driver license or, if none, more than one identification
 399 card, of a kind described in paragraph (1)(d), the driver
 400 license or identification card, as applicable, that was issued
 401 most recently is the one to which paragraph (1)(d) refers.

402 (8) As used in this section, the term "name of the settlor
 403 or testator" means:

404 (a) If the settlor is a registered organization, the name
 405 of the registered organization indicated on the public organic
 406 record filed with or issued or enacted by the registered
 407 organization's jurisdiction of organization; or

408 (b) In other cases, the name of the settlor or testator
 409 indicated in the trust's organic record.

410 Section 12. Subsection (3) of section 679.5071, Florida
 411 Statutes, is amended to read:

412 679.5071 Effect of certain events on effectiveness of
 413 financing statement.—

414 (3) If the a debtor so changes its name that a filed
 415 financing statement provides for a debtor becomes insufficient
 416 as the name of the debtor under s. 679.5031(1) so that the
 417 financing statement becomes seriously misleading under the
 418 standard set forth in s. 679.5061:

419 (a) The financing statement is effective to perfect a
 420 security interest in collateral acquired by the debtor before,

421 or within 4 months after, the filed financing statement becomes
 422 seriously misleading ~~change~~; and

423 (b) The financing statement is not effective to perfect a
 424 security interest in collateral acquired by the debtor more than
 425 4 months after the filed financing statement becomes seriously
 426 misleading ~~change~~, unless an amendment to the financing
 427 statement which renders the financing statement not seriously
 428 misleading is filed within 4 months after that event ~~the change~~.

429 Section 13. Subsection (6) of section 679.515, Florida
 430 Statutes, is amended to read:

431 679.515 Duration and effectiveness of financing statement;
 432 effect of lapsed financing statement.—

433 (6) If a debtor is a transmitting utility and a filed
 434 initial financing statement so indicates, the financing
 435 statement is effective until a termination statement is filed.

436 Section 14. Subsection (2) of section 679.516, Florida
 437 Statutes, is amended to read:

438 679.516 What constitutes filing; effectiveness of filing.—

439 (2) Filing does not occur with respect to a record that a
 440 filing office refuses to accept because:

441 (a) The record is not communicated by a method or medium
 442 of communication authorized by the filing office;

443 (b) An amount equal to or greater than the applicable
 444 processing fee is not tendered;

445 (c) The filing office is unable to index the record
 446 because:

447 1. In the case of an initial financing statement, the
 448 record does not provide an organization's name or, if an

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449 individual, the individual's last name and first name;
 450 2. In the case of an amendment or information ~~correction~~
 451 statement, the record:
 452 a. Does not correctly identify the initial financing
 453 statement as required by s. 679.512 or s. 679.518, as
 454 applicable; or
 455 b. Identifies an initial financing statement the
 456 effectiveness of which has lapsed under s. 679.515;
 457 3. In the case of an initial financing statement that
 458 provides the name of a debtor identified as an individual or an
 459 amendment that provides a name of a debtor identified as an
 460 individual which was not previously provided in the financing
 461 statement to which the record relates, the record does not
 462 identify the debtor's surname ~~last name~~ and first personal name;
 463 or
 464 4. In the case of a record filed or recorded in the filing
 465 office described in s. 679.5011(1)(a), the record does not
 466 provide a sufficient description of the real property to which
 467 it relates;
 468 (d) In the case of an initial financing statement or an
 469 amendment that adds a secured party of record, the record does
 470 not provide an organization's name or, if an individual, the
 471 individual's last name and first name and mailing address for
 472 the secured party of record;
 473 (e) In the case of an initial financing statement or an
 474 amendment that provides a name of a debtor which was not
 475 previously provided in the financing statement to which the
 476 amendment relates, the record does not:

477 1. Provide a mailing address for the debtor; or
 478 2. Indicate whether the name provided as the name of the
 479 debtor is the name of an individual or an organization; ~~or~~
 480 ~~3. If the financing statement indicates that the debtor is~~
 481 ~~an organization, provide:~~
 482 ~~a. A type of organization for the debtor;~~
 483 ~~b. A jurisdiction of organization for the debtor; or~~
 484 ~~c. An organizational identification number for the debtor~~
 485 ~~or indicate that the debtor has none;~~
 486 (f) In the case of an assignment reflected in an initial
 487 financing statement under s. 679.514(1) or an amendment filed
 488 under s. 679.514(2), the record does not provide an
 489 organization's name or, if an individual, the individual's last
 490 name and first name and mailing address for the assignee;
 491 (g) In the case of a continuation statement, the record is
 492 not filed within the 6-month period prescribed by s. 679.515(4);
 493 (h) In the case of an initial financing statement or an
 494 amendment, which amendment requires the inclusion of a
 495 collateral statement but the record does not provide any, the
 496 record does not provide a statement of collateral; or
 497 (i) The record does not include the notation required by
 498 s. 201.22 indicating that the excise tax required by chapter 201
 499 had been paid or is not required.
 500 Section 15. Section 679.518, Florida Statutes, is amended
 501 to read:
 502 679.518 Claim concerning inaccurate or wrongfully filed
 503 record.—
 504 (1) A person may file in the filing office an information

505 ~~a correction~~ statement with respect to a record indexed there
 506 under the person's name if the person believes that the record
 507 is inaccurate or was wrongfully filed.

508 (2) An information ~~A correction~~ statement under subsection
 509 (1) must:

510 (a) Identify the record to which it relates by the file
 511 number assigned to the initial financing statement, the debtor,
 512 and the secured party of record to which the record relates;

513 (b) Indicate that it is an information ~~a correction~~
 514 statement; and

515 (c) Provide the basis for the person's belief that the
 516 record is inaccurate and indicate the manner in which the person
 517 believes the record should be amended to cure any inaccuracy or
 518 provide the basis for the person's belief that the record was
 519 wrongfully filed.

520 (3) A person may file in the filing office an information
 521 statement with respect to a record filed there if the person is
 522 a secured party of record with respect to the financing
 523 statement to which the record relates and believes that the
 524 person that filed the record was not entitled to do so under s.
 525 679.509(3).

526 (4) An information statement under subsection (3) must:

527 (a) Identify the record to which it relates by file number
 528 assigned to the initial financing statement to which the record
 529 relates;

530 (b) Indicate that it is an information statement; and

531 (c) Provide the basis for the person's belief that the
 532 record is inaccurate and indicate the manner in which the person

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533 believes the record should be amended to cure any inaccuracy or
 534 provide the basis for the person's belief that the record was
 535 wrongfully filed.

536 (5)~~(3)~~ The filing of an information ~~a correction~~ statement
 537 does not affect the effectiveness of an initial financing
 538 statement or other filed record.

539 Section 16. Subsection (2) of section 679.607, Florida
 540 Statutes, is amended to read:

541 679.607 Collection and enforcement by secured party.—

542 (2) If necessary to enable a secured party to exercise
 543 under paragraph (1)(c) the right of a debtor to enforce a
 544 mortgage nonjudicially outside this state, the secured party may
 545 record in the office in which a record of the mortgage is
 546 recorded:

547 (a) A copy of the security agreement that creates or
 548 provides for a security interest in the obligation secured by
 549 the mortgage; and

550 (b) The secured party's sworn affidavit in recordable form
 551 stating that:

552 1. A default has occurred with respect to the obligation
 553 secured by the mortgage; and

554 2. The secured party is entitled to enforce the mortgage
 555 nonjudicially outside this state.

556 Section 17. Part VIII of chapter 679, Florida Statutes,
 557 consisting of sections 679.801, 679.802, 679.803, 679.804,
 558 679.805, 679.806, 679.807, and 679.808, Florida Statutes, is
 559 created to read:

560 679.801 Saving clause.—

561 (1) Except as otherwise provided in this part, this part
 562 applies to a transaction or lien within its scope, even if the
 563 transaction or lien was entered into or created before July 1,
 564 2013.

565 (2) The amendments to this chapter by this act do not
 566 affect an action, case, or proceeding commenced before July 1,
 567 2013.

568 679.802 Security interest perfected before effective
 569 date.—

570 (1) A security interest that is a perfected security
 571 interest immediately before July 1, 2013, is a perfected
 572 security interest under this chapter, as amended by this act, on
 573 July 1, 2013, if the applicable requirements for attachment and
 574 perfection under this chapter, as amended by this act, are
 575 satisfied without further action.

576 (2) Except as otherwise provided in s. 679.804, if a
 577 security interest is a perfected security interest immediately
 578 before July 1, 2013, but the applicable requirements for
 579 perfection under this chapter, as amended by this act, are not
 580 satisfied on July 1, 2013, the security interest remains
 581 perfected thereafter only if the applicable requirements for
 582 perfection under this chapter, as amended by this act, are
 583 satisfied no later than July 1, 2014.

584 679.803 Security interest unperfected before effective
 585 date.—A security interest that is an unperfected security
 586 interest immediately before July 1, 2013, becomes a perfected
 587 security interest:

588 (1) Without further action, on July 1, 2013, if the

589 applicable requirements for perfection under this chapter, as
 590 amended by this act, are satisfied before or at that time; or

591 (2) When the applicable requirements for perfection are
 592 satisfied if the requirements are satisfied after that time.

593 679.804 Effectiveness of action taken before effective
 594 date.-

595 (1) The filing of a financing statement before July 1,
 596 2013, is effective to perfect a security interest to the extent
 597 the filing would satisfy the applicable requirements for
 598 perfection under this chapter, as amended by this act.

599 (2) The amendments to this chapter by this act do not
 600 render ineffective an effective financing statement that was
 601 filed before July 1, 2013, and satisfies the applicable
 602 requirements for perfection under the law of the jurisdiction
 603 governing perfection as provided in this chapter as it existed
 604 before July 1, 2013. However, except as otherwise provided in
 605 subsections (3) and (4) and s. 679.805, the financing statement
 606 ceases to be effective:

607 (a) If the financing statement is filed in this state, at
 608 the time the financing statement would have ceased to be
 609 effective had this act not taken effect; or

610 (b) If the financing statement is filed in another
 611 jurisdiction, at the earlier of:

612 1. The time the financing statement would have ceased to
 613 be effective under the law of that jurisdiction; or

614 2. By June 30, 2018.

615 (3) The filing of a continuation statement on or after
 616 July 1, 2013, does not continue the effectiveness of the

617 financing statement filed before July 1, 2013. However, on the
 618 timely filing of a continuation statement on or after July 1,
 619 2013, and in accordance with the law of the jurisdiction
 620 governing perfection as provided in this chapter, as amended by
 621 this act, the effectiveness of a financing statement filed in
 622 the same office in that jurisdiction before July 1, 2013,
 623 continues for the period provided by the law of that
 624 jurisdiction.

625 (4) Subparagraph (2)(b)2., applies to a financing
 626 statement that was filed before July 1, 2013, against a
 627 transmitting utility and satisfies the applicable requirements
 628 for perfection under the law of the jurisdiction governing
 629 perfection as provided in this chapter as it existed before July
 630 1, 2013, only to the extent that this chapter, as amended by
 631 this act, provides that the law of a jurisdiction other than the
 632 jurisdiction in which the financing statement is filed governs
 633 perfection of a security interest in collateral covered by the
 634 financing statement.

635 (5) A financing statement that includes a financing
 636 statement filed before July 1, 2013, or a continuation statement
 637 filed on or after July 1, 2013, is effective only to the extent
 638 that it satisfies the requirements of part V, as amended by this
 639 act, for an initial financing statement. A financing statement
 640 that indicates that the debtor is a decedent's estate indicates
 641 that the collateral is being administered by a personal
 642 representative within the meaning of s. 679.5031(1)(b), as
 643 amended by this act. A financing statement that indicates that
 644 the debtor is a trust or is a trustee acting with respect to

645 property held in trust indicates that the collateral is held in
 646 a trust within the meaning of s. 679.5031(1)(c), as amended by
 647 this act.

648 679.805 When initial financing statement suffices to
 649 continue effectiveness of financing statement.-

650 (1) The filing of an initial financing statement in the
 651 office specified in s. 679.5011 continues the effectiveness of a
 652 financing statement filed before July 1, 2013, if:

653 (a) The filing of an initial financing statement in that
 654 office would be effective to perfect a security interest under
 655 this chapter, as amended by this act;

656 (b) The financing statement filed before July 1, 2013, was
 657 filed in an office in another state; and

658 (c) The initial financing statement satisfies subsection
 659 (3).

660 (2) The filing of an initial financing statement under
 661 subsection (1) continues the effectiveness of the financing
 662 statement filed before July 1, 2013, if:

663 (a) The initial financing statement is filed before July
 664 1, 2013, for the period provided in s. 679.515, as it existed
 665 before its amendment by this act, with respect to an initial
 666 financing statement; and

667 (b) The initial financing statement is filed on or after
 668 July 1, 2013, for the period provided in s. 679.515, as amended
 669 by this act, with respect to an initial financing statement.

670 (3) To be effective for purposes of subsection (1), an
 671 initial financing statement must:

672 (a) Satisfy the requirements of part IV, as amended by

673 this act, for an initial financing statement;

674 (b) Identify the financing statement filed before July 1,
 675 2013, by indicating the office in which the financing statement
 676 was filed and providing the dates of filing and file numbers, if
 677 any, of the financing statement and of the most recent
 678 continuation statement filed with respect to the financing
 679 statement; and

680 (c) Indicate that the financing statement filed before
 681 July 1, 2013, remains effective.

682 679.806 Amendment of financing statement filed before July
 683 1, 2013.—

684 (1) On or after July 1, 2013, a person may add or delete
 685 collateral covered by, continue or terminate the effectiveness
 686 of, or otherwise amend the information provided in, a financing
 687 statement only filed before July 1, 2013, in accordance with the
 688 law of the jurisdiction governing perfection as provided in this
 689 chapter, as amended by this act. However, the effectiveness of a
 690 financing statement filed before July 1, 2013, also may be
 691 terminated in accordance with the law of the jurisdiction in
 692 which the financing statement is filed.

693 (2) Except as otherwise provided in subsection (3), if the
 694 law of this state governs perfection of a security interest, the
 695 information in a financing statement filed before July 1, 2013,
 696 may be amended after July 1, 2013, only if:

697 (a) The financing statement filed before July 1, 2013, and
 698 an amendment are filed in the office specified in s. 679.5011;

699 (b) An amendment is filed in the office specified in s.
 700 679.5011 concurrently with, or after the filing in that office

701 of, an initial financing statement that satisfies s. 679.805(3);

702 or

703 (c) An initial financing statement that provides the
 704 information as amended and satisfies s. 679.805(3) is filed in
 705 the office specified in s. 679.5011.

706 (3) If the law of this state governs perfection of a
 707 security interest, the effectiveness of a financing statement
 708 filed before July 1, 2013, may be continued only under s.
 709 679.804(3) and (5) or s. 679.805.

710 (4) Whether or not the law of this state governs
 711 perfection of a security interest, the effectiveness of a
 712 financing statement filed in this state before July 1, 2013, may
 713 be terminated on or after July 1, 2013, by filing a termination
 714 statement in the office in which the financing statement filed
 715 before July 1, 2013, is filed, unless an initial financing
 716 statement that satisfies s. 679.805(3) has been filed in the
 717 office specified by the law of the jurisdiction governing
 718 perfection as provided in this chapter, as amended by this act,
 719 as the office in which to file a financing statement.

720 679.807 Person entitled to file initial financing
 721 statement or continuation statement.-A person may file an
 722 initial financing statement or a continuation statement under
 723 this part if:

724 (1) The secured party of record authorizes the filing; and

725 (2) The filing is necessary under this part:

726 (a) To continue the effectiveness of a financing statement
 727 filed before July 1, 2013; or

728 (b) To perfect or continue the perfection of a security

729 interest.

730 679.808 Priority.—This part and the amendments to this
 731 chapter made by this act determine the priority of conflicting
 732 claims to collateral. However, if the relative priorities of the
 733 claims were established before July 1, 2013, this chapter as it
 734 existed before July 1, 2013, determines priority.

735 Section 18. Paragraph (m) of subsection (3) of section
 736 680.1031, Florida Statutes, is amended to read:

737 680.1031 Definitions and index of definitions.—

738 (3) The following definitions in other chapters of this
 739 code apply to this chapter:

740 (m) "Pursuant to a commitment," s. 679.1021(1)(ppp)
 741 ~~679.1021(1)(ooo).~~

742 Section 19. The Division of Statutory Revision is directed
 743 to replace the phrase "this act" wherever it occurs in sections
 744 679.801, 679.802, 679.803, 679.804, 679.805, 679.806, 679.807,
 745 and 679.808, Florida Statutes, with the assigned chapter number
 746 of this act.

747 Section 20. This act shall take effect July 1, 2013.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 733 Probate
SPONSOR(S): Kiar
TIED BILLS: None IDEN./SIM. BILLS: SB 988

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	15 Y, 0 N	Caridad	Bond
2) Judiciary Committee		Caridad DC	Havlicak RH

SUMMARY ANALYSIS

The Florida Constitution provides a homestead exemption for certain property owned by "natural persons." The exemption protects the property owner and the property owner's family from creditors and financial misfortune. It also restricts the property owner's ability to devise homestead property to anyone other than the surviving spouse or dependent children.

The bill:

- Revises the definition for "protected homestead" to provide that real property owned in tenancy by the entirety or in joint tenancy with right of survivorship is not protected homestead;
- Clarifies language in ss. 2 and 14 of chapter 2011-183, Laws of Florida, relating to a surviving spouse's elective share;
- Clarifies the time period in which an attorney-in-fact or guardian must file a petition for authority to make an election to take a tenancy in common interest in a homestead; and
- Bars inheritance through intestate succession of a natural or adoptive parent from or through a child for whom their parental rights have previously been terminated.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Probate is the process for marshalling the assets of a deceased person, paying debts, and distributing property to heirs. If the deceased left a valid will, the estate is "testate", and the assets are distributed according to the will. If the deceased did not leave a valid will, the estate is "intestate," and the assets are distributed according to statute. There are two significant exceptions to these general rules. Exempt property and homestead property transfer to certain surviving dependents before such property is subject to being sold to pay creditors; in addition, the elective share provisions may provide a different inheritance for a surviving spouse than the spouse would otherwise receive by operation of the will and of probate law.

Protected Homestead

Homestead is a house, outbuildings and adjoining land owned and occupied by a person or a family as a residence.¹ Article X, s. 4(a)(1) of the Florida Constitution provides a homestead exemption for certain property owned by "natural persons." The exemption protects the property owner and the property owner's family from creditors and financial misfortune. It also restricts the property owner's ability to devise homestead property to anyone other than the surviving spouse or dependent children. However, the constitution provides that this constraint does not apply to property held in tenancy by the entireties² or if the property owner is unmarried and has no minor children.

Section 731.201(33), F.S., defines "protected homestead" as:

[T]he property described in s. 4(a)(1), Art. X of the State Constitution on which at the death of the owner the exemption inures to the owner's surviving spouse or heirs under s. 4(b), Art. X of the State Constitution. For purposes of the code, real property owned as tenants by the entirety is not protected homestead.

Case law provides that homestead owned by the decedent and another individual in joint tenancy with rights of survivorship is not subject to the restrictions on devise.³

The term "protected homestead" is found in the following statutory sections:

- Section 409.9101 – Recovery of payments made on behalf of Medicaid-eligible persons (Medicaid Estate Recovery Act);
- Section 731.201 – General definitions (The Florida Probate Code);
- Section 732.2045 – Exclusions and overlapping application;
- Section 732.402 – Exempt property;
- Section 732.403 – Family allowance;
- Section 733.607 – Possession of estate;
- Section 733.608 – General power of personal representative;
- Section 733.617 – Compensation of personal representative;
- Section 733.6171 – Compensation of attorney for the personal representative; and
- Section 733.817 – Apportionment of estate taxes.

¹ Black's Law Dictionary (9th ed. 2009).

² A tenancy by the entireties is a form of real estate ownership that may only be held by a legally married couple. Upon the death of one spouse, full ownership of the property immediately vests in the other spouse by operation of law. Tenancy by the entireties is presumed if the deed simply identifies the owners as "husband and wife." See Black's Law Dictionary (9th ed. 2009).

³ See *Ostyn v. Olympic*, 455 So.2d 1137 (Fla. 2d DCA 1984); see also *Marger v. De Rosa*, 57 So.3d 866 (Fla. 2d DCA 2011).

The following statutes specifically reference Article X, section 4 for situations where the owner has died, but the term “homestead” is not qualified by the word “protected.”

- Section 732.227 – Homestead Defined (Florida Uniform Disposition of Community Property Rights at Death Act);
- Section 732.401 – Descent of Homestead;
- Section 732.401 – Devise of Homestead; and
- Section 739.203 – Disclaimer of rights of property held as tenancy by the entirety.

The Florida Supreme Court has recognized that various types of real estate ownership may qualify for homestead protection and in 1941 stated:

The Constitution limits the homestead land area that may be exempted, but it does not define or limit the estates in land to which homestead exemption may apply; therefore, in the absence of controlling provisions or principals of law to the contrary, the exemptions allowed by section 1, article 10 [now Article X, Section 4], may attach to any estate in land owned by the head of a family residing in this state, whether it is a freehold or less estate, if the land does not exceed the designated area and it is in fact the family home place. When the estate or interest of the owner in the homestead land terminates, the homestead exemption of such owner therein necessarily ceases.⁴

An owner’s interest in tenancy by the entireties or joint tenancy with rights of survivorship may qualify for the protection against creditor’s claims during the lifetime of the owners, and may also be subject to restrictions on the alienation of homestead during the owners’ lifetime.

This bill clarifies that homestead property owned by the decedent in either a joint tenancy with rights of survivorship or tenancy by the entireties is not protected homestead as the decedent’s interest in the homestead property terminates at death. The bill will not change the current law but is rather designed to eliminate any confusion caused by the omission of the reference to homestead property in a joint tenancy with rights of survivorship in the exemptions from definition of “protected homestead.”

Descent of Homestead

Current law at s. 732.401(1) and (2), F.S., addresses descent (transfer of property to descendants) of homestead property where no devise is allowed. The statute provides:

(1) [T]he homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent’s death per stirpes.

(2) In lieu of a life estate under subsection (1), the surviving spouse may elect to take an undivided one-half interest in the homestead as a tenant in common, with the remaining undivided one-half interest vesting in the decedent’s descendants in being at the time of the decedent’s death, per stirpes.

The right of election pursuant to s. 732.401(2), F.S., may be exercised by 1) the surviving spouse or 2) with court approval, by an attorney in fact or guardian of the property of the surviving spouse. Before approving the election, the court shall determine that the election is in the best interests of the surviving spouse during the spouse’s probable lifetime. The statute provides several requirements and guidelines for the right of election:

⁴ *Coleman v. Williams*, 200 So. 207 (Fla. 1941).

- The election must be made within 6 months after the decedent's death and during the surviving spouse's lifetime;
- A petition by an attorney or guardian of the property for approval to make the election tolls the time for making the election until 6 months after the decedent's death or 30 days after the rendition of an order authorizing the election, whichever occurs last;
- Once made, the election is irrevocable;
- The election must be made by filing a notice of election containing the legal description of the homestead property for recording in the official record books of the county or counties where the homestead property is located. The statute contains language to include in the notice.

The bill eliminates the provision tolling the time for making the election where a petition by an attorney or guardian of the property for approval to make the election is filed. Instead, the petition for approval to make the election must be filed within 6 months after the decedent's death and during the surviving spouse's lifetime. In addition, if the petition is timely filed, the time for making the election must be extended for at least 30 days after the rendition of the order allowing the election.

Termination of Parental Rights

A court may terminate parental rights where a party files a petition for termination of parental rights; certain requirements, such as providing notice to relevant parties, are met; and the court's order specifies one of the grounds for termination listed in s. 39.806, F.S. Currently, there is no provision prohibiting a parent whose parental rights have been terminated from later inheriting through intestate succession. The bill creates s. 732.1081, F.S., barring inheritance through intestate succession of a natural or adoptive parent from or through a child for whom their parental rights have previously been terminated.

Other Changes

In 2011, the Florida Legislature amended Florida Statutes s. 732.201, F.S., to increase the intestate share of the surviving spouse in certain circumstances. Section 14, ch. 2011-183, provides that "[e]xcept as otherwise expressly provided in this act, this act shall take effect upon becoming a law and shall apply to all proceedings pending before such date and all cases commenced on or after the effective date." Section 2, ch. 2011-183 provides for an effective date of October 1, 2011 for the changes to s. 732.201, F.S. However, the language of s. 2 does not address the application of the amended statutes to estates pending or filed on or after October 1, 2011 for decedent's dying before October 1, 2011.

The bill clarifies language in ss. 2 and 14 of chapter 2011-183, Laws of Florida, relating to a surviving spouse's elective share. Specifically, the bill provides that s. 2 of the act applies only to the estates of decedents dying on or after October 1, 2011.

B. SECTION DIRECTORY:

Section 1 amends s. 731.201, F.S., relating to definitions.

Section 2 amends s. 732.102, F.S., relating to spouse's share of intestate estate.

Section 3 amends s. 732.401, F.S., relating to descent of homestead.

Section 4 creates s. 732.1081, F.S., relating to termination of parental rights.

Section 5 provides that the act shall take effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

Under some circumstances, retroactive application of civil legislation may violate the state constitution by impairing a vested right, creating a new obligation, or imposing a new penalty.⁵ Courts apply a two-pronged test to determine whether retroactive application of a statute violates the constitution. "First, the Court must ascertain whether the Legislature intended for the statute to apply retroactively. Second, if such an intent is clearly expressed, the Court must determine whether retroactive application would violate any constitutional principles."⁶

The bill provides that amendments to s. 732.102, F.S., apply only to the estates of decedents dying on or after October 1, 2011. It appears that this provision preserves an existing right and therefore does not implicate the constitution.

B. RULE-MAKING AUTHORITY:

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

⁵ See *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 61 (Fla.1995)

⁶ *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So.3d 873, 877 (Fla. 2010)

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

1 A bill to be entitled
 2 An act relating to probate; amending s. 731.201, F.S.;
 3 excluding real property owned in tenancy by the
 4 entireties or in joint tenancy with rights of
 5 survivorship from the definition of the term
 6 "protected homestead"; clarifying the application of
 7 amendments to s. 732.102, F.S., made by chapter 2011-
 8 183, Laws of Florida, relating to a spouse's share of
 9 an intestate estate; amending s. 732.401, F.S.;
 10 revising the period of time during which an attorney
 11 in fact or guardian of the property of a surviving
 12 spouse may petition for approval to elect to take a
 13 one-half interest in the decedent's homestead;
 14 specifying the minimum duration of an extension of
 15 time; creating s. 732.1081, F.S.; barring inheritance
 16 rights of a natural or adoptive parent whose parental
 17 rights have been previously terminated pursuant to
 18 law; providing for application of the act; providing
 19 effective dates.

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

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 23 Section 1. Effective July 1, 2012, and applicable to
 24 proceedings pending before or commenced on or after July 1,
 25 2012, subsection (33) of section 731.201, Florida Statutes, is
 26 amended to read:

27 731.201 General definitions.—Subject to additional
 28 definitions in subsequent chapters that are applicable to

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29 specific chapters or parts, and unless the context otherwise
 30 requires, in this code, in s. 409.9101, and in chapters 736,
 31 738, 739, and 744, the term:

32 (33) "Protected homestead" means the property described in
 33 s. 4(a)(1), Art. X of the State Constitution on which at the
 34 death of the owner the exemption inures to the owner's surviving
 35 spouse or heirs under s. 4(b), Art. X of the State Constitution.
 36 For purposes of the code, real property owned in tenancy by the
 37 entireties or in joint tenancy with rights of survivorship ~~as~~
 38 ~~tenants by the entirety~~ is not protected homestead.

39 Section 2. Notwithstanding section 2 or section 14 of
 40 chapter 2011-183, Laws of Florida, the amendments to section
 41 732.102, Florida Statutes, made by section 2 of that act apply
 42 only to the estates of decedents dying on or after October 1,
 43 2011.

44 Section 3. Effective July 1, 2012, and applicable only to
 45 estates of persons dying on or after July 1, 2012, section
 46 732.401, Florida Statutes, is amended to read:

47 732.401 Descent of homestead.—

48 (1) If not devised as authorized by law and the
 49 constitution, the homestead shall descend in the same manner as
 50 other intestate property; but if the decedent is survived by a
 51 spouse and one or more descendants, the surviving spouse shall
 52 take a life estate in the homestead, with a vested remainder to
 53 the descendants in being at the time of the decedent's death per
 54 stirpes.

55 (2) In lieu of a life estate under subsection (1), the
 56 surviving spouse may elect to take an undivided one-half

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57 | interest in the homestead as a tenant in common, with the
 58 | remaining undivided one-half interest vesting in the decedent's
 59 | descendants in being at the time of the decedent's death, per
 60 | stirpes.

61 | (a) The right of election may be exercised:

- 62 | 1. By the surviving spouse; or
- 63 | 2. With the approval of a court having jurisdiction of the
 64 | real property, by an attorney in fact or guardian of the
 65 | property of the surviving spouse. Before approving the election,
 66 | the court shall determine that the election is in the best
 67 | interests of the surviving spouse during the spouse's probable
 68 | lifetime.

69 | (b) The election must be made within 6 months after the
 70 | decedent's death and during the surviving spouse's lifetime. The
 71 | time for making the election may not be extended except as
 72 | provided in paragraph (c).

73 | (c) A petition by an attorney in fact or by a guardian of
 74 | the property of the surviving spouse for approval to make the
 75 | election must be filed within 6 months after the decedent's
 76 | death and during the surviving spouse's lifetime. If the
 77 | petition is timely filed, the time for making the election shall
 78 | be extended for at least 30 days after the rendition of the
 79 | order allowing the election ~~tells the time for making the~~
 80 | ~~election until 6 months after the decedent's death or 30 days~~
 81 | ~~after the rendition of an order authorizing the election,~~
 82 | ~~whichever occurs last.~~

83 | (d) Once made, the election is irrevocable.

84 | (e) The election shall be made by filing a notice of

85 | election containing the legal description of the homestead
86 | property for recording in the official record books of the
87 | county or counties where the homestead property is located. The
88 | notice must be in substantially the following form:

89 |
90 | ELECTION OF SURVIVING SPOUSE
91 | TO TAKE A ONE-HALF INTEREST OF
92 | DECEDENT'S INTEREST IN
93 | HOMESTEAD PROPERTY

94 |
95 | STATE OF.....

96 | COUNTY OF.....

97 | 1. The decedent,, died on
98 | On the date of the decedent's death, The decedent was married to
99 |, who survived the decedent.

100 | 2. At the time of the decedent's death, the decedent owned
101 | an interest in real property that the affiant believes to be
102 | homestead property described in s. 4, Article X of the State
103 | Constitution, which ~~that~~ real property being in County,
104 | Florida, and described as: ...(description of homestead
105 | property)....

106 | 3. Affiant elects to take one-half of decedent's interest
107 | in the homestead as a tenant in common in lieu of a life estate.

108 | 4. If affiant is not the surviving spouse, affiant is the
109 | surviving spouse's attorney in fact or guardian of the property,
110 | and an order has been rendered by a court having jurisdiction of
111 | the real property authorizing the undersigned to make this
112 | election.

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.....
...(Affiant)...

Sworn to (or affirmed) and subscribed before me this day of
...(month)...., ...(year)...., by ...(affiant)...

...(Signature of Notary Public-State of Florida)...

...(Print, Type, or Stamp Commissioned Name of Notary Public)...

Personally Known OR Produced Identification
...(Type of Identification Produced)...

(3) Unless and until an election is made under subsection
(2), expenses relating to the ownership of the homestead shall
be allocated between the surviving spouse, as life tenant, and
the decedent's descendants, as remaindermen, in accordance with
chapter 738. If an election is made, expenses relating to the
ownership of the homestead shall be allocated between the
surviving spouse and the descendants as tenants in common in
proportion to their respective shares, effective as of the date
the election is filed for recording.

(4) If the surviving spouse's life estate created in
subsection (1) is disclaimed pursuant to chapter 739, the
interests of the decedent's descendants may not be divested.

(5) This section does not apply to property that the
decedent owned in tenancy by the entirety or in joint tenancy
with rights of survivorship.

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141 Section 4. Effective July 1, 2012, and applicable only to
 142 estates of persons dying on or after July 1, 2012, section
 143 732.1081, Florida Statutes, is created to read:

144 732.1081 Termination of parental rights.—For the purpose
 145 of intestate succession by a natural or adoptive parent, a
 146 natural or adoptive parent is barred from inheriting from or
 147 through a child if the natural or adoptive parent's parental
 148 rights were terminated pursuant to chapter 39 prior to the death
 149 of the child, and the natural or adoptive parent shall be
 150 treated as if the parent predeceased the child.

151 Section 5. Except as otherwise expressly provided in this
 152 act, this act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 917 Jurisdiction of the Courts
SPONSOR(S): Bileca
TIED BILLS: None **IDEN./SIM. BILLS:** SB 486

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	14 Y, 0 N	Caridad	Bond
2) Judiciary Committee		Caridad DC	Havlicak RN

SUMMARY ANALYSIS

The ability of a court to assert personal jurisdiction over a nonresident is subject to the constitutional requirements of the Due Process Clause of the Fourteenth Amendment and a state's long-arm statute.

Florida's choice-of-law statute provides that a contract will be enforced by the courts of this state where Florida law has been designated as the governing law in the agreement and the transaction is valued at no less than \$250,000. The forum-selection statute grants courts jurisdiction to hear cases relating to any contracts that have been made pursuant to Florida's choice-of-law statute.

The bill revises Florida's long-arm, choice-of-law, and forum-selection statutes, as well as provisions of the Enforcement of Foreign Judgment Act and the International Commercial Arbitration Act to:

- Provide that courts may assert personal jurisdiction over a nonresident who enters into a contract that complies with choice-of-law statute.
- Delete language that prevents the enforcement of a choice-of-law provision in a contract where each party is a nonresident.
- Delete language from the Enforcement of Foreign Judgment Act, regarding the definition of "foreign judgment," to clarify that the statute applies to a court order from a U.S. territory (i.e. Puerto Rico), not merely to a court order from one of the 50 states.
- Correct cross references in the International Commercial Arbitration Act to conform with the UNCITRAL Model Law on Commercial Arbitration.

The bill may have an indeterminate fiscal impact on state courts. This bill does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Personal Jurisdiction

The ability of a court to assert personal jurisdiction over a nonresident is subject to the constitutional requirements of the Due Process Clause of the Fourteenth Amendment.¹ The test for determining whether a court is able to assert personal jurisdiction over a nonresident is whether the nonresident has "minimum contacts" in the forum so that the commencement of a proceeding against said individual will not "offend traditional notions of fair play and substantial justice."² The principal inquiry is whether the nonresident's conduct and connection with the forum state would lead him or her to believe that they could "reasonably anticipate being haled into court."³

Florida Long-Arm Statute

The second limitation on a court's ability to assert personal jurisdiction is derived from a state's long-arm statute. Such statutes can be drafted broadly⁴ to reach the maximum bounds of the Due Process Clause or narrowly by enumerating specific acts or activities that would allow for a court to assume personal jurisdiction in a particular case. Florida's statute falls in the latter category.

In *Venetian Salami Co. v. J.S. Parthenais*, the Florida Supreme Court described the relationship between Florida's long-arm statute and the due process requirements of the Fourteenth Amendment as follows:

By enacting section 48.193, the legislature has determined the requisite basis for obtaining jurisdiction over nonresident defendants as far as Florida is concerned. It has not specifically addressed whether the federal constitutional requirement of minimum contacts has been met. As a practical matter, it could not do so because each case will depend upon the facts.⁵

Therefore, two inquiries must be satisfied in determining a court's ability to assert personal jurisdiction over a nonresident: 1) whether there is a jurisdictional basis under the Florida long-arm statute to assert personal jurisdiction; and 2) if so, whether the necessary minimum contacts exist to satisfy due process requirements.⁶

Important Court Rulings

In *Jetbroadband WV, LC v. Mastec North America, Inc.*, the court held that by promulgating ss. 685.101 and 685.102, F.S., the legislature created a separate jurisdictional basis for asserting personal jurisdiction over a nonresident that was outside the ambit of the long-arm statute.⁷ In that case, the court declared that the nonresident defendant was subject to the jurisdiction of Florida's courts by virtue

¹ U.S. Const. amend. XIV, s. 2 ("No state shall . . . deprive any person of life, liberty, or property without due process of law . . ."); see *International Shoe Co. v. Washington, Office of Unemployment Comp. and Placement*, 326 U.S. 310, 316 (1945).

² *International Shoe*, 326 U.S. at 316.

³ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (quoting *World-Wide Volkswagen Co. v. Woodson*, 444 U.S. 286, 297 (1980)).

⁴ An example of a broad long-arm statute can be found in Cal. Civil Code s. 410.10 (2011), which states: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

⁵ *Venetian Salami Co. v. J.S. Parthenais*, 554 So.2d 499, 500 (Fla. 1989).

⁶ *Jetbroadband WV, LLC v. Mastec North America, Inc.*, 13 So.3d 159, 161 (Fla. 3rd DCA 2009).

⁷ *Id.*

of the forum-selection clause that designated Florida as the appropriate venue to commence an action or proceeding regarding a dispute arising from the parties' agreement.⁸

The court distinguished its ruling from an earlier Florida Supreme Court case, *McRae v. J.D./M.D., Inc.*, that was decided 12 years earlier. There, the court refused to enforce a forum-selection clause and denied jurisdiction on the grounds that there was no jurisdictional basis for doing so under the 1987 version of the long-arm statute.⁹ At the time of the decision, Florida's choice-of-law and forum selection statutes had not been enacted.¹⁰ In *Jetbroadband*, the court explained that, due to passage of the choice-of-law and forum selection statutes, Florida courts were now equipped with the jurisdictional authority to hear cases involving forum-selection clauses that designate Florida as the venue of choice for a proceeding.¹¹

Florida Choice-of-Law Statute

The choice-of-law statute provides that a court may enforce a contract where Florida law is designated as the governing law in the agreement and the transaction is valued at no less than \$250,000.¹² The statute further provides that such contracts will be enforced if: "1) the contract bears a substantial or reasonable relation to Florida, or 2) at least one of the parties is either a resident or citizen of Florida (if a person), or is incorporated or organized under the laws of Florida or maintains a place of business in Florida (if a business)."¹³

As presently drafted, the choice-of-law statute is unclear regarding whether a substantial relationship is required between the agreement, parties, and Florida. For instance, s. 685.101(1), F.S, provides that:

[A]ny contract, agreement or undertaking . . . may, to the extent permitted under the United States Constitution, agree that the law of this state will govern such contract, agreement or undertaking . . . whether or not [it] bears any relation to this state.

In contrast, s. 685.101(2), F.S, provides that:

[T]his section does not apply to any contract, agreement, or undertaking regarding any transaction which does not bear a substantial or reasonable relation to the state in which every party is either or a combination of [a nonresident of this state or incorporated or organized under the laws of another state.]

In sum, s. 685.101(1), F.S., appears to require no substantial connection between the subject matter of the agreement and Florida; however, in s. 685.101(2), F.S., the statute explicitly requires a connection between the parties and Florida.

Florida Forum-Selection Statute

The forum-selection statute, s. 685.102, F.S., grants courts jurisdiction to hear cases relating to a contract made pursuant to Florida's choice-of-law statute, or s. 685.101, F.S.

Regarding enforceability, the United States Supreme Court has held that such clauses should be upheld, unless it can be shown that its enforcement would be unreasonable or unjust, or that the clause was invalid as a result of fraud or overreaching.¹⁴ The Court has also held that the minimum contacts

⁸ *Id.* at 162-63.

⁹ *McRae v. J.D./M.D., Inc.* 511 So.2d 540, 542 (Fla. 1987).

¹⁰ Sections 685.101 and 685.102, F.S (the statutes were passed in 1989, two years after the court's decision in *McRae*).

¹¹ *Id.*

¹² *Id.*

¹³ *Jetbroadband*, 13 So. 3d at 162 (quoting Edward M. Mullins & Douglas J. Giuliano, Contractual Waiver of Personal Jurisdiction Under F.S. § 685.102: The Long-Arm Statute's Little-Known Cousin, 80-May Fla. B.J. 36, 37 (2006)).

¹⁴ *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

standard is met if a forum-selection clause exists that is “freely negotiated and is not unreasonable and unjust.”¹⁵

Effect of Bill

The bill provides that courts may assert personal jurisdiction over a nonresident who enters into a contract that complies with the choice-of-law statute, s. 685.102, F.S.¹⁶ As a result, a court may exercise personal jurisdiction in a case involving nonresidents if they enter into a contract where the parties agree to designate Florida law as governing the contract; thus, contractually agreeing to personal jurisdiction in this state.

The bill amends s. 685.101, F.S., to remove the limiting language requiring “a substantial or reasonable relation to Florida or [that] at least one of the parties be a resident of Florida or incorporated under its laws.”¹⁷ As a result, the deletion of the limitation appears to expand the jurisdiction of the courts of this state accordingly.

Other Changes

Florida Enforcement of Foreign Judgments Act

Article IV, clause 1 of the United States Constitution provides that “full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. . .”¹⁸ Accordingly, under the Florida Enforcement of Foreign Judgments Act (act), ss. 55.501-55.509, F.S., provide that a foreign judgment from a sister jurisdiction may be enforced in Florida upon being recorded in the office of the clerk of the circuit court of any county.¹⁹ Current law limits this to only apply to a judgment or order from “any other state.”

The definition does not contain any reference to territories or possessions of the United States entitled to full faith and credit under federal law (i.e. Puerto Rico).²⁰

In *Rodriguez v. Nasrallah*,²¹ a state court held that “[j]udgments of courts in Puerto Rico are entitled to full faith and credit in the same manner as judgments from courts of sister states.” As a result, the court permitted the enforcement of a Puerto Rican judgment in Florida.

The bill amends s. 55.502, F.S., to more succinctly define a foreign judgment as any “judgment, decree, or order of a court which is entitled to full faith and credit.” By removing from the definition of “foreign judgment” reference to orders from the 50 states, it allows for the judgments, orders, and decrees from U.S. territories, such as Puerto Rico, to be recognized under the statute.

Florida International Commercial Arbitration Act

Chapter 2010-60, L.O.F., repealed statutes relating to international commercial arbitration and, in its place, adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (Model Law).

¹⁵ *Burger King*, 471 U.S. at 473 n. 14.

¹⁶ Several other jurisdictions have similar language in their respective long-arm statutes. MICH. COMP. LAWS s. 600.705 (2011); MONT. CODE ANN. s. 25-20-4(b)(1)(E) (2011); S.D. CODIFIED LAWS s. 15-7-2(5) (2011); TENN CODE ANN. s. 20-2-214 (2011) (“Entering into a contract for services to be rendered or for materials to be furnished in [this state] by such person.”).

¹⁷ *Jetbroadband*, 13 So.3d at 162.

¹⁸ U.S. Const. art. IV, cl.1.

¹⁹ Section 55.503, F.S. (2011).

²⁰ See 28 U.S.C. s. 1738 (2006) (“ . . . The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form . . .”).

²¹ See 659 So.2d 437, 439 (Fla. 1st DCA 1995).

Chapter 684, F.S., in accordance with the UNCITRAL Model Law applies to any international commercial arbitration subject to an agreement between the United States of America and any other country. Currently, two of the statutes contain clerical errors relating to cross-references. The bill amends ss. 684.0019 and 684.0026, F.S., to correct cross-references to conform the Florida International Commercial Arbitration Act to the UNCITRAL Model Law.

B. SECTION DIRECTORY:

Section 1 amends s. 48.193, F.S., relating to the jurisdiction of the courts.

Section 2 amends s. 55.502, F.S., relating to the definition of the term "foreign judgment."

Section 3 amends s. 684.0019, F.S., relating to conditions for granting interim measures.

Section 4 amends s. 684.0026, F.S., relating to recognition and enforcement.

Section 5 amends s. 685.101, F.S., relating to choice-of-law.

Section 6 amends s. 685.102, F.S., relating to jurisdiction.

Section 7 provides that the bill shall take effect on July 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill may have an indeterminate impact on courts' case load. According to the Office of the State Courts Administrator's 2012 Judicial Impact Statement, the bill may increase the number of contract actions filed in circuit court; however, it is unable to quantify to what extent.²²

²² Office of the State Court Administrator, 2012 Judicial Impact Statement for HB 917 (Dec. 30, 2011) (on file with the House Civil Justice Subcommittee).

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

With respect to choice-of-law conflicts, the United States Supreme Court held that “for a State’s substantive law to be selected in a constitutionally permissible manner, the State must have significant contact or a significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”²³ Accordingly, the removal of the requirement of “significant contacts” or “reasonable relationship” from a state’s choice-of-law statute could potentially trigger a due process challenge under the Fourteenth Amendment. However, in *Hague*, there was no contract provision whereby the parties agreed to be governed by a specific state’s law. Instead, the question before the Court was which state law applied in the absence of an agreement that designated any state’s law as governing. In addition, ss. 685.101 and 685.102, F.S., would continue to preserve existing language that limits the application of the statutes “to the extent permitted under the United States Constitution.”²⁴

The United States Supreme Court has explained that, in the commercial context, the minimum contacts standard is met if there is a forum-selection clause that it is “freely negotiated and is not unreasonable and unjust.”²⁵

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

²³ *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981).

²⁴ Sections 685.101 and 685.102, F.S.

²⁵ *Burger King*, 471 U.S. at 473, n. 14; *See also, Elandia International, Inc. v. Koy, et al.*, 690 F. Supp. 2d 1317, 1340 (S.D. Fla. 2010).

1 A bill to be entitled
 2 An act relating to the jurisdiction of the courts;
 3 amending s. 48.193, F.S.; including as an additional
 4 basis for subjecting a person to the jurisdiction of
 5 the courts of this state provisions which state that a
 6 person submits to the jurisdiction of the courts of
 7 this state by entering into a contract that designates
 8 the law of this state as the law governing the
 9 contract and that contains a provision by which such
 10 person agrees to submit to the jurisdiction of the
 11 courts of this state; amending s. 55.502, F.S.;
 12 revising the definition of the term "foreign judgment"
 13 for purposes of the Florida Enforcement of Foreign
 14 Judgments Act; amending s. 684.0019, F.S.; clarifying
 15 that an arbitral tribunal receiving a request for an
 16 interim measure to preserve evidence in a dispute
 17 governed by the Florida International Commercial
 18 Arbitration Act need consider only to the extent
 19 appropriate the potential harm that may occur if the
 20 measure is not awarded or the possibility that the
 21 requesting party will succeed on the merits of the
 22 claim; amending s. 684.0026, F.S.; correcting a cross-
 23 reference in the Florida International Commercial
 24 Arbitration Act; amending s. 685.101, F.S.; deleting a
 25 restriction on the jurisdiction of the courts of this
 26 state to transactions bearing a substantial relation
 27 to this state; revising application dates of
 28 provisions relating to the jurisdiction of the courts;

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29 amending s. 685.102, F.S.; revising application dates
 30 of provisions relating to the jurisdiction of the
 31 courts; providing an effective date.
 32

33 Be It Enacted by the Legislature of the State of Florida:
 34

35 Section 1. Subsection (1) of section 48.193, Florida
 36 Statutes, is amended to read:

37 48.193 Acts subjecting person to jurisdiction of courts of
 38 state.—

39 (1) Any person, whether or not a citizen or resident of
 40 this state, who personally or through an agent does any of the
 41 acts enumerated in this subsection thereby submits himself or
 42 herself and, if he or she is a natural person, his or her
 43 personal representative to the jurisdiction of the courts of
 44 this state for any cause of action arising from ~~the doing of~~ any
 45 of the following acts:

46 (a) Operating, conducting, engaging in, or carrying on a
 47 business or business venture in this state or having an office
 48 or agency in this state.

49 (b) Committing a tortious act within this state.

50 (c) Owning, using, possessing, or holding a mortgage or
 51 other lien on any real property within this state.

52 (d) Contracting to insure any person, property, or risk
 53 located within this state at the time of contracting.

54 (e) With respect to a proceeding for alimony, child
 55 support, or division of property in connection with an action to
 56 dissolve a marriage or with respect to an independent action for

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57 support of dependents, maintaining a matrimonial domicile in
 58 this state at the time of the commencement of this action or, if
 59 the defendant resided in this state preceding the commencement
 60 of the action, whether cohabiting during that time or not. This
 61 paragraph does not change the residency requirement for filing
 62 an action for dissolution of marriage.

63 (f) Causing injury to persons or property within this
 64 state arising out of an act or omission by the defendant outside
 65 this state, if, at or about the time of the injury, either:

66 1. The defendant was engaged in solicitation or service
 67 activities within this state; or

68 2. Products, materials, or things processed, serviced, or
 69 manufactured by the defendant anywhere were used or consumed
 70 within this state in the ordinary course of commerce, trade, or
 71 use.

72 (g) Breaching a contract in this state by failing to
 73 perform acts required by the contract to be performed in this
 74 state.

75 (h) With respect to a proceeding for paternity, engaging
 76 in the act of sexual intercourse within this state with respect
 77 to which a child may have been conceived.

78 (i) Entering into a contract that complies with s.
 79 685.102.

80 Section 2. Subsection (1) of section 55.502, Florida
 81 Statutes, is amended to read:

82 55.502 Construction of act.—

83 (1) As used in ss. 55.501-55.509, the term "foreign
 84 judgment" means any judgment, decree, or order of a court which

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85 ~~of any other state or of the United States if such judgment,~~
 86 ~~decree, or order~~ is entitled to full faith and credit in this
 87 state.

88 Section 3. Section 684.0019, Florida Statutes, is amended
 89 to read:

90 684.0019 Conditions for granting interim measures.—

91 (1) The party requesting an interim measure under s.
 92 684.0018 must satisfy the arbitral tribunal that:

93 (a) Harm not adequately reparable by an award of damages
 94 is likely to result if the measure is not ordered, and such harm
 95 substantially outweighs the harm that is likely to result to the
 96 party against whom the measure is directed if the measure is
 97 granted; and

98 (b) A reasonable possibility exists that the requesting
 99 party will succeed on the merits of the claim. The determination
 100 on this possibility does not affect the discretion of the
 101 arbitral tribunal in making any subsequent determination.

102 (2) With regard to a request for an interim measure under
 103 s. 684.0018(4) ~~s. 684.0018~~, the requirements in subsection (1)
 104 apply only to the extent the arbitral tribunal considers
 105 appropriate.

106 Section 4. Section 684.0026, Florida Statutes, is amended
 107 to read:

108 684.0026 Recognition and enforcement.—

109 (1) An interim measure issued by an arbitral tribunal
 110 shall be recognized as binding and, unless otherwise provided by
 111 the arbitral tribunal, enforced upon application to the
 112 competent court, irrespective of the country in which it was

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113 issued, subject to s. 684.0027 ~~s. 684.0019(1)~~.

114 (2) The party who is seeking or has obtained recognition
 115 or enforcement of an interim measure shall promptly inform the
 116 court of the termination, suspension, or modification of the
 117 interim measure.

118 (3) The court where recognition or enforcement is sought
 119 may, if it considers it proper, order the requesting party to
 120 provide appropriate security if the arbitral tribunal has not
 121 already made a determination with respect to security or if such
 122 a decision is necessary to protect the rights of third parties.

123 Section 5. Section 685.101, Florida Statutes, is amended
 124 to read:

125 685.101 Choice of law.—

126 (1) The parties to any contract, agreement, or
 127 undertaking, contingent or otherwise, in consideration of or
 128 relating to any obligation arising out of a transaction
 129 involving in the aggregate at least ~~not less than~~ \$250,000, the
 130 equivalent thereof in any foreign currency, or services or
 131 tangible or intangible property, or both, of equivalent value,
 132 including a transaction otherwise covered by s. 671.105(1), may,
 133 to the extent permitted under the United States Constitution,
 134 agree that the law of this state will govern such contract,
 135 agreement, or undertaking, the effect thereof and their rights
 136 and duties thereunder, in whole or in part, whether or not such
 137 contract, agreement, or undertaking bears any relation to this
 138 state.

139 (2) This section does not apply to any contract,
 140 agreement, or undertaking:

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141 ~~(a) Regarding any transaction which does not bear a~~
 142 ~~substantial or reasonable relation to this state in which every~~
 143 ~~party is either or a combination of:~~

144 ~~1. A resident and citizen of the United States, but not of~~
 145 ~~this state; or~~

146 ~~2. Incorporated or organized under the laws of another~~
 147 ~~state and does not maintain a place of business in this state;~~

148 (a) ~~(b)~~ For labor or employment;

149 (b) ~~(e)~~ Relating to any transaction for personal, family,
 150 or household purposes, unless such contract, agreement, or
 151 undertaking concerns a trust at least one trustee of which
 152 resides or transacts business as a trustee in this state, in
 153 which case this section applies;

154 (c) ~~(d)~~ To the extent provided to the contrary in s.
 155 671.105(2); or

156 (d) ~~(e)~~ To the extent such contract, agreement, or
 157 undertaking is otherwise covered or affected by s. 655.55.

158 (3) This section does not limit or deny the enforcement of
 159 any provision respecting choice of law in any other contract,
 160 agreement, or undertaking.

161 (4) This section applies to:

162 ~~(a)~~ contracts entered into on or after July 1, 2012 ~~June~~
 163 ~~27, 1989;~~ and

164 ~~(b)~~ ~~Contracts entered into prior to June 27, 1989, if an~~
 165 ~~action or proceeding relating to such contract is commenced on~~
 166 ~~or after June 27, 1989.~~

167 Section 6. Section 685.102, Florida Statutes, is amended
 168 to read:

169 685.102 Jurisdiction.—

170 (1) Notwithstanding any law that limits the right of a
 171 person to maintain an action or proceeding, any person may, to
 172 the extent permitted under the United States Constitution,
 173 maintain in this state an action or proceeding against any
 174 person or other entity residing or located outside this state,
 175 if the action or proceeding arises out of or relates to any
 176 contract, agreement, or undertaking for which a choice of the
 177 law of this state, in whole or in part, has been made consistent
 178 with ~~pursuant to~~ s. 685.101 and which contains a provision by
 179 which such person or other entity residing or located outside
 180 this state agrees to submit to the jurisdiction of the courts of
 181 this state.

182 (2) This section does not affect the jurisdiction of the
 183 courts of this state over any action or proceeding arising out
 184 of or relating to any other contract, agreement, or undertaking.

185 (3) This section applies to:

186 ~~(a)~~ contracts entered into on or after July 1, 2012 ~~June~~
 187 ~~27, 1989; and~~

188 ~~(b) Contracts entered into prior to June 27, 1989, if an~~
 189 ~~action or proceeding relating to such contract is commenced on~~
 190 ~~or after June 27, 1989.~~

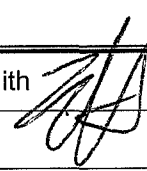
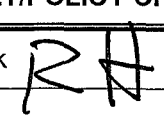
191 Section 7. This act shall take effect July 1, 2012.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1355 Protection of Vulnerable Persons

SPONSOR(S): Dorworth

TIED BILLS: None IDEN./SIM. BILLS: SB 1816

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Judiciary Committee		Smith 	Havlicak 
2) Health & Human Services Committee			
3) Education Committee			

SUMMARY ANALYSIS

The bill expands the instances where a person is required to report child abuse by mandating a person to report known child abuse by *any person*, not just child abuse by a caregiver.

The bill provides specific penalties for Florida educational institutions whose personnel fail to report certain child abuse taking place at the institution as defined.

The bill expands the scope of victims who are eligible to receive monetary relocation assistance to include a victim of sexual violence who reasonably fears for her or his safety.

The bill increases criminal penalties by reclassifying certain violations involving sexual conduct with minors.

The bill will have an indeterminate fiscal impact on state and local governments.

The bill takes effect October 1, 2012.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

A study conducted in 2008 indicated that an estimated 4% to 16% of children are physically abused each year in high-income nations including the United States. Additionally, as many as 15% of children are neglected, and up to 10% of girls and 5% of boys suffer severe sexual abuse. Although it is difficult to measure, researchers believe that as few as 1 in 10 of those instances of abuse are actually confirmed by social-service agencies.¹ Recent national events have centered on issues with adults failing to report known instances of ongoing child abuse.

Reporting Child Abuse

Current Situation

Section 39.201, F.S., requires a person to report certain known or suspected instances of child abuse. Specifically, the law mandates that a person report knowledge or suspicion of child abuse if the person knows, or has reasonable cause to suspect:

- A child is abused, abandoned, or neglected by a parent, legal custodian, caregiver, or other person responsible for the child's welfare²; or
- That a child is in need of supervision and care and has no parent, legal custodian, or responsible adult relative immediately known and available to provide supervision and care.

Section 39.201(2), F.S., prescribes the method of reporting child abuse. Instances of child abuse as described by s. 39.201(1), F.S., must be made "immediately to the department's³ central abuse hotline." If a person is required by s. 39.201, F.S., to report known or suspected child abuse and fails to do so, s. 39.205(1), F.S., makes it a first degree misdemeanor⁴ if the person knowingly or willfully failed to report, or knowingly or willfully prevented another person from reporting such abuse.

Effect of the Bill

Reporting Abuse by Any Person

The bill expands the instances where a person is required to report child abuse by mandating the reporting of known child abuse⁵ by *any person*, not just child abuse by a caregiver. The bill removes the definition for "other person responsible for the child's welfare" to conform.

Educational Institutions

The bill creates subsections 39.205(3) and (4), F.S.,⁶ which provide penalties for Florida educational institutions whose personnel fail to report certain child abuse taking place at the institution. The bill subjects the institution to a \$1 million fine for each failure to report, and the loss of all state funding for 2 years.⁷

Specifically, these penalties apply to:

¹ See Tiffany Sharples, *Most Child Abuse Goes Unreported*, Time Health, (Dec. 2, 2008), available at <http://www.time.com> (search "unreported child abuse" (last visited Jan. 19, 2012)).

² "Other person responsible for a child's welfare" includes many enumerated parties, including employees of a school or day care center. The definition exempts law enforcement officers and employees of municipal or county detention facilities acting in an official capacity, except as otherwise provided in the subsection. Section 39.01(47), F.S.

³ "Department" means the Department of Children and Family Services.

⁴ A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Sections 775.082 and 775.083, F.S.

⁵ As defined by s. 39.201, F.S.

⁶ Sections 39.205(3) and 39.205(4), F.S., already exist, but the bill rennumbers those sections.

⁷ "All state funding" includes the Florida Resident Access Grant Program.

- (1) Any Florida College System institution, state university, or nonpublic college, university, or school⁸ whose administrators, faculty, or staff knowingly and willfully fail to report, or knowingly and willfully prevent another from reporting known or suspected child abuse, abandonment, or neglect committed on the property of the institution, university, college, or school, or during an event or function sponsored by the institution, university, college, or school.
- (2) Any Florida College System institution, state university, or nonpublic college, university, or school⁹ whose law enforcement agency fails to transmit to prosecutorial authorities any report of known or suspected child abuse, abandonment, or neglect committed on the property of the institution, university, college, or school, or during an event or function sponsored by the institution, university, college, or school.

Relocation Assistance for Victims

Current Situation

Section 960.198, F.S., authorizes the Department of Legal Affairs (“DLA”) to award monetary payment to a victim of domestic violence in order to provide relocation assistance, under certain conditions. Specifically, the law authorizes DLA to award a victim of domestic violence who needs immediate assistance to escape from a domestic violence environment:

- a) A one-time payment not exceeding \$1,500 on any one claim; and
- b) A lifetime maximum of \$3,000.

Certain preconditions must be met before the department may grant an award:

- a) There must be proof that a domestic violence offense was committed;
- b) The domestic violence offense must be reported to the proper authorities;
- c) The victim’s need for assistance must be certified by a domestic violence center in Florida; and
- d) The center certification must assert that the victim is cooperating with law enforcement officials, if applicable, and must include documentation that the victim has developed a safety plan.

Effect of the Bill

The bill expands the scope of victims who are eligible to receive monetary relocation assistance from DLA to include a victim of sexual violence who reasonably fears for her or his safety. In accordance with this expansion, the bill revises the preconditions to receiving an award. The victim of sexual violence’s need for assistance could be certified by a rape crisis center, rather than only a domestic violence center.

Reclassification of Prostitution Crimes Involving Minors

Current Situation

Florida law presently prohibits conduct involving prostitution under chapter 796, F.S.

- *Causing a Minor to Become Involved With Prostitution.* Sections 796.03 and 796.035, F.S., prohibit a person from causing a minor to become involved in prostitution and other sexual activity. Specifically, under s. 796.03, F.S., it is a second degree felony¹⁰ for a person to procure for prostitution, or cause to be prostituted, any person who is under the age of 18.

Under s. 796.035, F.S., it is a first degree felony¹¹ for any parent, legal guardian, or other person having custody or control of a minor, to sell or otherwise transfer custody or control of such minor, or offer to sell or otherwise transfer custody of the minor with knowledge that the minor

⁸ As defined in ss. 1000.21 or 1005.02, F.S.

⁹ *Id.*

¹⁰ A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

¹¹ A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

will engage in prostitution, perform naked for compensation, or otherwise participate in the trade of sex trafficking as a consequence of the sale or transfer.

- Forcing, Compelling, or Coercing Prostitution. Under s. 796.04, F.S, it is a third degree felony¹² for a person to force, compel, or coerce another to become a prostitute.
- Sex Trafficking. Under s. 796.045, F.S, it is a second degree felony¹³ for a person to recruit, entice, harbor, transport, provide, or obtain by any means a person, knowing that force, fraud, or coercion will be used to cause that person to engage in prostitution. It is a first degree felony¹⁴ if the offense is committed against a person under the age of 14 or if the offense results in death.
- Deriving Support from the Proceeds of Prostitution. Under s. 796.05, F.S., it is a third degree felony for a person who knows or has reasonable belief that another is engaged in prostitution to live or derive support or maintenance from what is believed to be the earnings or proceeds of such person's prostitution.
- Renting Space to be Used for Lewdness, Assignment, or Prostitution. Under s. 796.06, F.S., it is a second degree misdemeanor for the first violation, and a first degree misdemeanor for a subsequent violation, for a person to let or rent any place, structure, or part thereof, trailer or other conveyance with knowledge that it will be used for the purpose of lewdness, assignment, or prostitution.
- Definitions
 - "Assignment" means the making of any appointment or engagement for prostitution or lewdness, or any act in furtherance of such appointment or engagement.¹⁵
 - "Lewdness" means any indecent or obscene act.¹⁶
 - "Prostitution" means the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses.¹⁷
 - "Sexual activity" means oral, anal, or vaginal penetration by, or union with, the sexual organ of another; anal or vaginal penetration of another by any other object; or the handling or fondling of the sexual organ of another for the purpose of masturbation; however, the term does not include acts done for bona fide medical purposes.¹⁸

Effect of the Bill

The bill creates s. 796.036, F.S., which provides for reclassification of certain violations involving minors.¹⁹ Specifically, the bill provides for reclassification of violations "in which a minor engages in prostitution, lewdness, assignment, sexual conduct, or other conduct as defined in or prohibited [by chapter 796], but the minor is not the person charged with the violation." The bill provides for such reclassification as follows:

- A second degree misdemeanor becomes a first degree misdemeanor;
- A first degree misdemeanor becomes a third degree felony;
- A third degree felony becomes a second degree felony;
- A second degree felony becomes a first degree felony;

¹² A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

¹³ A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

¹⁴ A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

¹⁵ Section 796.07, F.S.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ The new section created by the bill specifically states it does not apply to violations of ss. 796.03 and 796.035, F.S., presumably because those sections already apply to prohibited conduct involving minors.

- A first degree felony becomes a life felony.

B. SECTION DIRECTORY:

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

Section 2. Amends s. 39.201, F.S., relating to mandatory reports of child abuse, abandonment, or neglect; mandatory reports of death; central abuse hotline.

Section 3. Amends s. 39.205, F.S., relating to penalties relating to reporting of child abuse, abandonment, or neglect.

Section 4. Amends s. 39.302, F.S., relating to protective investigations of institutional child abuse, abandonment, or neglect.

Section 5. Creates s. 796.036, F.S., relating to reclassification of violations involving minors.

Section 6. Amends s. 960.198, F.S., relating to relocation assistance for victims of domestic violence.

Section 7. Provides that the act shall take effect October 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

Relocation Assistance

The bill authorizes the Department of Legal Affairs (under the Office of the Attorney General) to award a monetary sum of \$1,500 to a victim of sexual violence once certain preconditions are met. Because the bill expands the scope of victims who are eligible for such an award, it will have a fiscal impact on the Department insofar as it will require additional funds to provide such additional awards. The amount of the impact will depend on the number of sexual violence victims who seek and are granted relocation assistance. According to the Department of Legal Affairs:

- The 2010 Crime in Florida Annual Report indicated that there were 9,885 Forcible Sex Offenses. It is unknown how many of these forcible sex victims may have qualified as a domestic violence victim, as well. It is unknown how many would have requested relocation assistance as a sexual violence victim.
- Revenues for the Crimes Compensation Trust Fund are derived from the collection of state and federal criminal assessments. The funds are used to run the Crimes Compensation Program. Crime victims serviced by this program include victims of assault, battery, homicide, sexual offenses, domestic violence, driving while intoxicated, hit and run, stalking, robbery, terrorism, kidnapping, arson, and all other violent crimes. Eligible expenses currently paid by the victims compensation program include medical/dental, mental health treatment, crime scene clean-up, funeral/burial, wage loss, loss of support, disability, forensic sexual assault examinations, property loss (for elderly and disabled adults only), and relocations expenses for victims of domestic violence. Since Fiscal Year 2005-06, the claims workload has increased by 19.3 percent and the dollars paid has increased by 40 percent. However, the Crimes Compensation Trust Fund has had declining revenue collections in that time.

- In Fiscal Year 2010-11, the Crimes Compensation Trust Fund collected \$21,493,324 in revenues a 14 percent decrease from the previous fiscal year. Any additional payments to victims could reduce payments to all other victims.

Educational Institutions

The bill provide penalties for Florida educational institutions whose personnel or law enforcement agencies fail to report certain child abuse taking place at the institution. The bill subjects the institution to a \$1 million fine for each failure to report, and the loss of all state funding for 2 years.

Prison Beds

The bill increases penalties for certain prostitution related criminal offenses. A request has been made to the Criminal Justice Impact Conference to provide an estimate of any fiscal impact on state prison beds.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

The bill increases penalties for certain prostitution related criminal offenses. It is unknown what impact this will have on local jail beds.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

The provisions of the bill addressing criminal provisions appear to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A

1 A bill to be entitled
2 An act relating to protection of vulnerable persons;
3 amending s. 39.01, F.S.; deleting the definition of
4 the term "other person responsible for a child's
5 welfare"; conforming provisions; amending s. 39.201,
6 F.S.; revising language concerning child abuse
7 reporting; amending s. 39.205, F.S.; requiring
8 specified educational institutions and their law
9 enforcement agencies to report known or suspected
10 child abuse, abandonment, or neglect in certain
11 circumstances; providing financial penalties for
12 violations; amending s. 39.302, F.S.; correcting a
13 cross-reference; creating s. 796.036, F.S.; providing
14 for upward reclassification of certain prostitution
15 offenses involving minors; amending s. 960.198, F.S.;
16 providing for relocation assistance for certain
17 victims of sexual violence; providing an effective
18 date.

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

21
22 Section 1. Subsections (48) through (76) of section 39.01,
23 Florida Statutes, are renumbered as subsections (47) through
24 (75), respectively, and present subsections (10) and (47) of
25 that section are amended to read:

26 39.01 Definitions.—When used in this chapter, unless the
27 context otherwise requires:

28 (10) "Caregiver" means the parent, legal custodian,

29 permanent guardian, adult household member, or other person
 30 responsible for a child's welfare as ~~defined in subsection (47).~~

31 ~~(47) "Other person responsible for a child's welfare"~~
 32 ~~includes the child's legal guardian or foster parent; an~~
 33 ~~employee of any school, public or private child day care center,~~
 34 ~~residential home, institution, facility, or agency; a law~~
 35 ~~enforcement officer employed in any facility, service, or~~
 36 ~~program for children that is operated or contracted by the~~
 37 ~~Department of Juvenile Justice; or any other person legally~~
 38 ~~responsible for the child's welfare in a residential setting;~~
 39 ~~and also includes an adult sitter or relative entrusted with a~~
 40 ~~child's care. For the purpose of departmental investigative~~
 41 ~~jurisdiction, this definition does not include the following~~
 42 ~~persons when they are acting in an official capacity: law~~
 43 ~~enforcement officers, except as otherwise provided in this~~
 44 ~~subsection; employees of municipal or county detention~~
 45 ~~facilities; or employees of the Department of Corrections.~~

46 Section 2. Paragraph (a) of subsection (1) and paragraph
 47 (a) of subsection (2) of section 39.201, Florida Statutes, are
 48 amended to read:

49 39.201 Mandatory reports of child abuse, abandonment, or
 50 neglect; mandatory reports of death; central abuse hotline.—

51 (1)(a) Any person who knows, or has reasonable cause to
 52 suspect, that a child is abused, abandoned, or neglected by any
 53 person ~~a parent, legal custodian, caregiver, or other person~~
 54 ~~responsible for the child's welfare, as defined in this chapter,~~
 55 or that a child is in need of supervision and care and has no
 56 parent, legal custodian, or responsible adult relative

57 | immediately known and available to provide supervision and care
 58 | shall report such knowledge or suspicion to the department in
 59 | the manner prescribed in subsection (2).

60 | (2) (a) Each report of known or suspected child abuse,
 61 | abandonment, or neglect by any person ~~a parent, legal custodian,~~
 62 | ~~caregiver, or other person responsible for the child's welfare~~
 63 | ~~as defined in this chapter~~, except those solely under s.
 64 | 827.04(3), and each report that a child is in need of
 65 | supervision and care and has no parent, legal custodian, or
 66 | responsible adult relative immediately known and available to
 67 | provide supervision and care shall be made immediately to the
 68 | department's central abuse hotline. Such reports may be made on
 69 | the single statewide toll-free telephone number or via fax or
 70 | web-based report. Personnel at the department's central abuse
 71 | hotline shall determine if the report received meets the
 72 | statutory definition of child abuse, abandonment, or neglect.
 73 | Any report meeting one of these definitions shall be accepted
 74 | for the protective investigation pursuant to part III of this
 75 | chapter.

76 | Section 3. Subsections (3) through (6) of section 39.205,
 77 | Florida Statutes, are renumbered as subsections (5) through (8),
 78 | respectively, and new subsections (3) and (4) are added to that
 79 | section to read:

80 | 39.205 Penalties relating to reporting of child abuse,
 81 | abandonment, or neglect.—

82 | (3) Any Florida College System institution, state
 83 | university, or nonpublic college, university, or school, as
 84 | defined in s. 1000.21 or s. 1005.02 whose administrators,

85 faculty, or staff knowingly and willfully fail to report known
 86 or suspected child abuse, abandonment, or neglect committed on
 87 the property of the institution, university, college, or school,
 88 or during an event or function sponsored by the institution,
 89 university, college, or school, or who knowingly and willfully
 90 prevent another person from doing so, shall be subject to fines
 91 of \$1 million for each such failure and the loss of all state
 92 funding, including the funds under the Florida Resident Access
 93 Grant Program, for a period of 2 years.

94 (4) Any Florida College System institution, state
 95 university, or nonpublic college, university, or school, as
 96 defined in s. 1000.21 or s. 1005.02 whose law enforcement agency
 97 fails to transmit to prosecutorial authorities any report of
 98 known or suspected child abuse, abandonment, or neglect
 99 committed on the property of the institution, university,
 100 college, or school, or during an event or function sponsored by
 101 the institution, university, college, or school, shall be
 102 subject to fines of \$1 million for each such failure and the
 103 loss of all state funding, including the funds under the Florida
 104 Resident Access Grant Program, for a period of 2 years.

105 Section 4. Subsection (1) of section 39.302, Florida
 106 Statutes, is amended to read:

107 39.302 Protective investigations of institutional child
 108 abuse, abandonment, or neglect.—

109 (1) The department shall conduct a child protective
 110 investigation of each report of institutional child abuse,
 111 abandonment, or neglect. Upon receipt of a report that alleges
 112 that an employee or agent of the department, or any other entity

113 or person covered by s. 39.01(33) ~~or (47)~~, acting in an official
 114 capacity, has committed an act of child abuse, abandonment, or
 115 neglect, the department shall initiate a child protective
 116 investigation within the timeframe established under s.
 117 39.201(5) and orally notify the appropriate state attorney, law
 118 enforcement agency, and licensing agency, which shall
 119 immediately conduct a joint investigation, unless independent
 120 investigations are more feasible. When conducting investigations
 121 onsite or having face-to-face interviews with the child,
 122 investigation visits shall be unannounced unless it is
 123 determined by the department or its agent that unannounced
 124 visits threaten the safety of the child. If a facility is exempt
 125 from licensing, the department shall inform the owner or
 126 operator of the facility of the report. Each agency conducting a
 127 joint investigation is entitled to full access to the
 128 information gathered by the department in the course of the
 129 investigation. A protective investigation must include an onsite
 130 visit of the child's place of residence. The department shall
 131 make a full written report to the state attorney within 3
 132 working days after making the oral report. A criminal
 133 investigation shall be coordinated, whenever possible, with the
 134 child protective investigation of the department. Any interested
 135 person who has information regarding the offenses described in
 136 this subsection may forward a statement to the state attorney as
 137 to whether prosecution is warranted and appropriate. Within 15
 138 days after the completion of the investigation, the state
 139 attorney shall report the findings to the department and shall
 140 include in the report a determination of whether or not

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2012

141 prosecution is justified and appropriate in view of the
 142 circumstances of the specific case.

143 Section 5. Section 796.036, Florida Statutes, is created
 144 to read:

145 796.036 Violations involving minors; reclassification.-

146 (1) The felony or misdemeanor degree of any violation of
 147 this chapter, other than s. 796.03 or s. 796.035, in which a
 148 minor engages in prostitution, lewdness, assignation, sexual
 149 conduct, or other conduct as defined in or prohibited by this
 150 chapter, but the minor is not the person charged with the
 151 violation, is reclassified as provided in this section.

152 (2) Offenses shall be reclassified as follows:

153 (a) A misdemeanor of the second degree is reclassified to
 154 a misdemeanor of the first degree.

155 (b) A misdemeanor of the first degree is reclassified to a
 156 felony of the third degree.

157 (c) A felony of the third degree is reclassified to a
 158 felony of the second degree.

159 (d) A felony of the second degree is reclassified to a
 160 felony of the first degree.

161 (e) A felony of the first degree is reclassified to a life
 162 felony.

163 Section 6. Section 960.198, Florida Statutes, is amended
 164 to read:

165 960.198 Relocation assistance for victims of domestic
 166 violence or sexual violence.-

167 (1) Notwithstanding the criteria set forth in s. 960.13
 168 for crime victim compensation awards, the department may award a

HB 1355

2012

169 one-time payment of up to \$1,500 on any one claim and a lifetime
 170 maximum of \$3,000 to a victim of domestic violence who needs
 171 immediate assistance to escape from a domestic violence
 172 environment or to a victim of sexual violence who reasonably
 173 fears for her or his safety.

174 (2) In order for an award to be granted to a victim for
 175 relocation assistance:

176 (a) There must be proof that a domestic violence or sexual
 177 violence offense was committed;

178 (b) The domestic violence or sexual violence offense must
 179 be reported to the proper authorities;

180 (c) The victim's need for assistance must be certified by
 181 a certified domestic violence center or a certified rape crisis
 182 center in this state; and

183 (d) The center certification must assert that the victim
 184 is cooperating with law enforcement officials, if applicable,
 185 and must include documentation that the victim has developed a
 186 safety plan.

187 Section 7. This act shall take effect October 1, 2012.



Judiciary Committee

Wednesday, January 25, 2012

2:00 PM

404 HOB

AMENDMENT PACKET

**Dean Cannon
Speaker**

**William Snyder
Chair**

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

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

1 Committee/Subcommittee hearing bill: Judiciary Committee
 2 Representative Ray offered the following:

Amendment (with title amendment)

5 Remove everything after the enacting clause and insert:

6 Section 1. Section 903.286, Florida Statutes, is amended
7 to read:

8 903.286 Return of cash bond; requirement to withhold
9 unpaid fines, fees, court costs; cash bond forms.-

10 (1) Notwithstanding s. 903.31(2), the clerk of the court
 11 shall withhold from the return of a cash bond posted on behalf
 12 of a criminal defendant by a person other than a bail bond agent
 13 licensed pursuant to chapter 648 sufficient funds to pay any
 14 unpaid costs of prosecution, costs of representation as provided
 15 by s. 27.52, court fees, court costs, and criminal penalties. If
 16 sufficient funds are not available to pay all unpaid costs of
 17 prosecution, costs of representation as provided by s. 27.52,
 18 court fees, court costs, and criminal penalties, the clerk of
 19 the court shall immediately obtain payment from the defendant or

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 135 (2012)

Amendment No. 1

20 enroll the defendant in a payment plan pursuant to s. 28.246.

21 (2) All cash bond forms used in conjunction with the
22 requirements of s. 903.09 must prominently display a notice
23 explaining that all funds are subject to forfeiture and
24 withholding by the clerk of the court for the payment of costs
25 of prosecution, costs of representation as provided by s. 27.52,
26 court fees, court costs, and criminal penalties on behalf of the
27 criminal defendant regardless of who posted the funds.

28 Section 2. Subsection (6) of section 938.27, Florida
29 Statutes, is amended to read:

30 938.27 Judgment for costs of prosecution and investigation
31 on conviction.—

32 (6) The clerk of the court shall collect and dispense cost
33 payments in any case regardless of whether the disposition of
34 the case takes place before the judge in open court or in any
35 other manner provided by law.

36 Section 3. Section 985.032, Florida Statutes, is amended
37 to read:

38 985.032 Legal representation for delinquency cases.—

39 (1) For cases arising under this chapter, the state
40 attorney shall represent the state.

41 (2) A juvenile who has been adjudicated delinquent or has
42 adjudication of delinquency withheld shall be assessed costs of
43 prosecution as provided in s. 938.27.

44 Section 4. This act shall take effect July 1, 2012.
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Amendment No. 1

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

Remove the entire title and insert:

An act relating to costs of prosecution, investigation, and representation; amending s. 903.286, F.S.; providing for the withholding of unpaid costs of prosecution and representation from the return of a cash bond posted on behalf of a criminal defendant; requiring a notice on bond forms of such possible withholding; amending s. 938.27, F.S.; clarifying the types of cases that are subject to the collection and dispensing of cost payments by the clerk of the court; amending s. 985.032, F.S.; providing for assessment of costs of prosecution against a juvenile who has been adjudicated delinquent or has adjudication of delinquency withheld; providing an effective date.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

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

1 Committee/Subcommittee hearing bill: Judiciary Committee
 2 Representative Gaetz offered the following:

Amendment (with title amendment)

Between lines 70 and 71, insert:

Section 2. Subsection (4) of section 766.102, Florida Statutes, is amended to read:

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

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

Amendment No. 1

19 (b) In an action for damages based on death or personal
20 injury which alleges that such death or injury resulted from the
21 failure of a health care provider to order, perform, or
22 administer supplemental diagnostic tests, the claimant has the
23 burden of proving by clear and convincing evidence that the
24 alleged actions of the health care provider represented a breach
25 of the prevailing professional standard of care.
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29 -----

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

31 Remove line 3 and insert:
32 findings and intent; amending s. 766.102, F.S.; establishing the
33 burden of proof that a claimant must meet in certain damage
34 claims against health care providers based on death or personal
35 injury; amending s. 768.28, F.S.;

36

Amendment No. 2

COMMITTEE/SUBCOMMITTEE ACTION

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

1 Committee/Subcommittee hearing bill: Judiciary Committee
2 Representative Gaetz offered the following:

3
4 **Amendment (with title amendment)**

5 Between lines 70 and 71, insert:

6 Section 2. Paragraph (b) of subsection (6) of section
7 766.106, Florida Statutes, is amended to read:

8 766.106 Notice before filing action for medical
9 negligence; presuit screening period; offers for admission of
10 liability and for arbitration; informal discovery; review.-

11 (6) INFORMAL DISCOVERY.-

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

15 1. Unsworn statements.-Any party may require other parties
16 to appear for the taking of an unsworn statement. Such
17 statements may be used only for the purpose of presuit screening
18 and are not discoverable or admissible in any civil action for
19 any purpose by any party. A party desiring to take the unsworn

Amendment No. 2

20 statement of any party must give reasonable notice in writing to
21 all parties. The notice must state the time and place for taking
22 the statement and the name and address of the party to be
23 examined. Unless otherwise impractical, the examination of any
24 party must be done at the same time by all other parties. Any
25 party may be represented by counsel at the taking of an unsworn
26 statement. An unsworn statement may be recorded electronically,
27 stenographically, or on videotape. The taking of unsworn
28 statements is subject to the provisions of the Florida Rules of
29 Civil Procedure and may be terminated for abuses.

30 2. Documents or things.—Any party may request discovery of
31 documents or things. The documents or things must be produced,
32 at the expense of the requesting party, within 20 days after the
33 date of receipt of the request. A party is required to produce
34 discoverable documents or things within that party's possession
35 or control. Medical records shall be produced as provided in s.
36 766.204.

37 3. Physical and mental examinations.—A prospective
38 defendant may require an injured claimant to appear for
39 examination by an appropriate health care provider. The
40 prospective defendant shall give reasonable notice in writing to
41 all parties as to the time and place for examination. Unless
42 otherwise impractical, a claimant is required to submit to only
43 one examination on behalf of all potential defendants. The
44 practicality of a single examination must be determined by the
45 nature of the claimant's condition, as it relates to the
46 liability of each prospective defendant. Such examination report
47 is available to the parties and their attorneys upon payment of

Amendment No. 2

48 the reasonable cost of reproduction and may be used only for the
49 purpose of presuit screening. Otherwise, such examination report
50 is confidential and exempt from the provisions of s. 119.07(1)
51 and s. 24(a), Art. I of the State Constitution.

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

56 5. Ex parte interviews of treating health care providers.—
57 A prospective defendant or his or her legal representative may
58 interview the claimant's treating health care providers without
59 the presence of the claimant or the claimant's legal
60 representative. A prospective defendant or his or her legal
61 representative that intends to interview a claimant's health
62 care providers must provide the claimant with notice of such
63 intent at least 10 days prior to the interview.

64 6.5. Unsworn statements of treating health care providers
65 ~~Medical information release. The claimant must execute a medical~~
66 ~~information release that allows~~ A prospective defendant or his
67 or her legal representative may also ~~to~~ take unsworn statements
68 of the claimant's treating health care providers ~~physicians~~. The
69 statements must be limited to those areas that are potentially
70 relevant to the claim of personal injury or wrongful death.
71 Subject to the procedural requirements of subparagraph 1., a
72 prospective defendant may take unsworn statements from a
73 claimant's treating physicians. Reasonable notice and
74 opportunity to be heard must be given to the claimant or the
75 claimant's legal representative before taking unsworn

Amendment No. 2

76 statements. The claimant or claimant's legal representative has
77 the right to attend the taking of such unsworn statements.

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

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Remove line 3 and insert:

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findings and intent; amending s. 766.106, F.S.; allowing a

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prospective medical malpractice defendant to interview a

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claimant's treating health care providers without the presence

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of the claimant or the claimant's legal representative;

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requiring a prospective defendant to provide 10 days' notice

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before such interviews; authorizing a prospective defendant to

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take unsworn statements of a claimant's health care providers;

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amending s. 768.28, F.S.;

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COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 385 (2012)

Amendment No. 3

COMMITTEE/SUBCOMMITTEE ACTION

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

1 Committee/Subcommittee hearing bill: Judiciary Committee
2 Representative Gaetz offered the following:

3
4 **Amendment**

5 Remove line 148 and insert:

6 licensed under chapter 458, chapter 459, or chapter 461, or a
7 dentist licensed under chapter 466.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

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

1 Committee/Subcommittee hearing bill: Judiciary Committee
2 Representative Dorworth offered the following:

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4 **Amendment (with title amendment)**

5 Remove lines 163-186 and insert:

6 Section 6. Subsection (3) is added to section 960.198,
7 Florida Statutes, to read:

8 960.198 Relocation assistance for victims of domestic
9 violence.—

10 (3) Relocation payments for a domestic violence claim
11 shall be denied if the department has previously approved or
12 paid out a sexual battery relocation claim under s. 960.199 to
13 the same victim regarding the same incident.

14 Section 7. Section 960.199 Florida Statutes, is created to
15 read:

16 960.199 Relocation assistance for victims of sexual
17 battery.--

18 (1) The department may award a one-time payment of up to
19 \$1,500 on any one claim and a lifetime maximum of \$3,000 to a

Amendment No. 1

20 victim of sexual battery as defined in s. 794.011 who needs
21 relocation assistance.

22 (2) In order for an award to be granted to a victim for
23 relocation assistance:

24 (a) There must be proof that a sexual battery offense was
25 committed;

26 (b) The sexual battery offense must be reported to the
27 proper authorities;

28 (c) The victim's need for assistance must be certified by a
29 certified rape crisis center in this state; and

30 (d) The center certification must assert that the victim is
31 cooperating with law enforcement officials, if applicable, and
32 must include documentation that the victim has developed a
33 safety plan.

34 (e) The act of sexual battery must be committed in the
35 victim's place of residence or in a location that would lead the
36 victim to reasonably fear for his or her continued safety in the
37 place of residence.

38 (3) Relocation payments for a sexual battery claim shall be
39 denied if the department has previously approved or paid out a
40 domestic violence relocation claim, under s. 960.198, to the
41 same victim regarding the same incident.

42 Section 8. There is appropriated for state fiscal year
43 2012-2013 to the Department of Legal Affairs/Attorney General
44 the sum of \$1,500,000 in nonrecurring funds from the General
45 Revenue Fund for the relocation of victims of sexual battery as
46 provided in s. 960.199.

Amendment No. 1

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

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Remove lines 15-17 and insert:

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offenses involving minors; amending s. 960.198, F.S.; providing

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for denial of relocation payment for a domestic violence claim

55

if the department has previously paid a sexual battery

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relocation claim to the same victim for the same incident;

57

creating s. 960.199, F.S.; providing for relocation assistance

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payments to victims of sexual battery; providing criteria;

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providing an appropriation; providing an effective