FLORIDA HOUSE BILL 837: FLORIDA'S ATTEMPT AT TORT REFORM AND ITS LIKELY IMPENDING CONSTITUTIONAL CHALLENGES

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"Florida has been considered a judicial hellhole for far too long, and we are desperately in need of legal reform that brings [Florida] more in line with the rest of the country."
– Governor Ron DeSantis[1]

I. INTRODUCTION

March 24, 2023, proved to be a divisive day in Florida tort litigation. On this day, Governor Ron DeSantis signed into effect House Bill 837 ("HB 837"), a sweeping tort reform aimed at decreasing frivolous lawsuits and hampering the "predatory practices" of a select group of Florida plaintiffs' attorneys.[2] The lead up to the passage of this Bill turned Florida's tort litigation industry on its head, as plaintiffs' counsel across the state quickly filed complaints on their pre-suit matters to enjoy the benefits of the then-current rules before the new laws took effect.[3] As a result, in March of 2023, Florida's e-filing portal broke nearly every record possible with 280,122 cases filed in a single month.[4] This number was an incredible 126.9% *higher* than the previous record, set in

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1. *Governor Ron DeSantis Signs Comprehensive Legal Reforms into Law*, EXEC. OFF. GOVERNOR (Mar. 24, 2023), https://www.flgov.com/eog/news/press/2023/governor-ron-desantis-signs-comprehensive-legal-reforms-law/ [hereinafter *DeSantis Press Release*].

2. *Id.*

3. Larry Burkhalter et al., *Florida's Tort Reform: Pivotal Changes and Impact on Litigation*, WEINBERG WHEELER HUDGINS GUNN & DIAL (Mar. 29, 2023), https://www.wwhgd.com/insights/news/Floridas-Tort-Reform-Pivotal-Changes-and-Impact-on-Litigation.

4. Patrick R. Fargason, *Comprehensive Tort Reform Spurs Record Filings*, FLA. BAR (Apr. 6, 2023), https://www.floridabar.org/the-florida-bar-news/comprehensive-tort-reform-spurs-record-filings/.

May of 2021.[5] A response of this magnitude begs an explanation for why the changes to existing tort law were necessary in the first place.

Part II outlines tort litigation in Florida prior to HB 837. Part III highlights the changes HB 837 caused to statutes of limitation, comparative fault, bad faith claims, and medical bills. Then, Part IV discusses the four possible constitutional challenges HB 837 may face. Part V dives deeper into the constitutional challenges of substantive due process, equal protection, separation of powers, and single-subject requirement. Finally, Part VI analyzes the outcomes of each of these types of challenges as applied to HB 837 and Part VII proposes a solution.

II. THE CLIMATE OF FLORIDA TORT LITIGATION PRIOR TO FLORIDA HOUSE BILL 837

Governor DeSantis and Florida's Legislature promulgated HB 837 with the intention of targeting the "cottage industry of litigation"[6] in Florida.[7] In essence, Governor DeSantis was understood to be referring to Florida's legal industry dealing with plaintiff personal injury claims. This industry was said to be targeted for two main purposes: (1) an attempt to make Florida increasingly business friendly;[8] and (2) a hope that lowering costs for insurance companies could indirectly lead to cost savings in Florida households.[9]

Florida has long been known as an overly litigious state. The state's plaintiff friendly practices, which drive its high rate of filings, have consistently earned it a spot atop the infamous American Tort Reform Foundation's "Judicial Hellholes" report, an

5. *Id.*

6. Jim Saunders, *DeSantis and Florida's Legislative Leaders Will Pursue Limits on Lawsuits*, WUSF NEWS (Feb. 14, 2023, 4:35 PM), https://wusfnews.wusf.usf.edu/politics-issues/2023-02-14/desantis-legislative-leaders-pursue-limits-lawsuits.

7. A cottage industry is one that is earmarked by an unorganized nature, ease of entry, and small operations. *See Cottage Industry*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/cottage%20industry (last visited Feb. 14, 2025).

8. *DeSantis, Legislative Leaders Back Lawsuit Limits*, OCALA GAZETTE (Feb. 17, 2023), https://www.ocalagazette.com/desantis-legislative-leaders-back-lawsuit-limits/.

9. *See* Josh Cascio, *Gov. DeSantis Calls for Legal Reforms to Be Focal Point in Upcoming Legislative Session*, FOX 13 NEWS (Feb. 15, 2023, 6:32 PM), https://www.fox13news.com/news/gov-desantis-prepares-floridians-for-a-week-of-cottage-industry-of-litigation.

annual analysis that documents abuse of the civil justice system.[10] Further, in 2019, Florida's legal climate was ranked forty-sixth in a national survey released by the U.S. Chamber Institute for Legal Reform and the Florida Chamber of Commerce for many of the same reasons.[11] The results of the survey became increasingly alarming as they revealed that 89% of respondents said that a state's legal environment is likely to impact their company's

10. *Congrats, Florida, for Litigious 'Hellhole' Status*, TCPALM (Dec. 27, 2017, 4:00 AM), https://www.tcpalm.com/story/opinion/readers/2017/12/27/congrats-florida-litigious-hellhole-status/970345001/; *Florida Legislature on Judicial Hellholes Watch List*, AM. TORT REFORM ASS'N (Dec. 6, 2022), https://www.atra.org/2022/12/06/florida-legislature-on-judicial-hellholes-watch-list/.

11. *Survey Ranks Florida's Lawsuit Climate Among Nation's Worst*, FLA. CHAMBER COM. (Sept. 18, 2019), https://www.flchamber.com/2019-florida-lawsuit-climate-ranks-46/ [hereinafter *Florida Chamber of Commerce Press Release*].

decision on where to expand or relocate, alerting Governor DeSantis to act.[12]

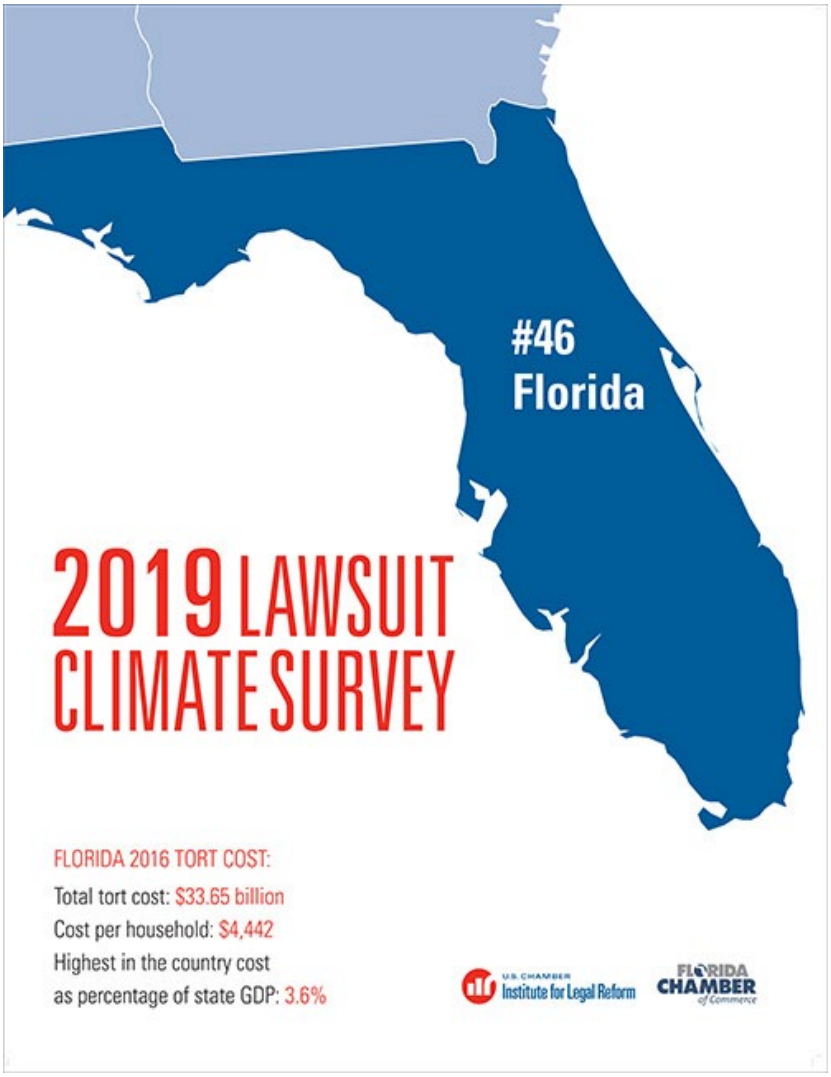

Figure 1. 2019 Lawsuit Climate Survey[13]

Businesses have become apprehensive to avail themselves in litigious states because it has proven to be costly, sometimes so costly that it is not worth an investment in the jurisdiction.[14] While

12. *Id.*
13. *Id.*
14. *Cf.* Robert Macoviak, *Another One Bites the Dust: Home Insurance Companies Exiting Florida*, OYER MACOVIAK & ASSOCS., https://www.oyerinsurance.com/another-

it is difficult to calculate exactly how many negligence cases are currently active in the state of Florida, an analysis of average injuries per year proves informative. In the five years between 2018 and 2023, Florida averaged 389,162 motor vehicle accidents per year, in which an average of 246,036 injuries were reported.[15] In the five years between 2017 and 2022, an average of 74,461 hospitalizations were reported per year for accidental falls in Florida.[16] Further, the state maintains an annual average of 3,177 medical malpractice cases, with the most recent numbers for 2022–2023 coming in at 3,463.[17] Eventually, the sheer number of claims and lawsuits begins to severely eat away at the bottom line of any company when attorney's fees and costly damage awards begin to enter the calculation.

Insurance companies that cover their insured's attorney fees, as well as self-insured companies responsible for their own attorney fees, can expect to pay upwards of $275 per hour to protect their interests in any given case.[18] From there, the insurance company, or self-insured company, must make the strategic decision of whether to settle the case or face a potentially high verdict at trial. As of 2009, the average personal injury verdict in Florida was estimated to be $1,819,751 (with a median of $122,674), with the plaintiff winning approximately 61% of the time that a case went to trial.[19] This number is expected to have grown exponentially as Florida juries award large verdicts at

home-insurance-company-leaving-florida/ (last visited Feb. 14, 2025) (discussing well-known home insurance companies reducing operations or leaving Florida entirely due in part to litigation costs).

15. *Traffic Crash Reports Crash Dashboard*, FLA. HIGHWAY SAFETY & MOTOR VEHICLES, https://www.flhsmv.gov/traffic-crash-reports/crash-dashboard/ (last visited Feb. 14, 2025) (select appropriate year from dropdown).

16. *Hospitalizations from Non-Fatal Unintentional Falls*, FLHEALTHCHARTS, https://www.flhealthcharts.gov/ChartsDashboards/rdPage.aspx?rdReport=NonVitalIndGrp.TenYrsRpt&cid=716 (last visited Feb. 14, 2025) (averages manually calculated).

17. *Florida's Real Medical Malpractice Problem: Bad Doctors and Insurance Companies not the Legal System*, PUB. CITIZEN 4 (Sept. 2002), https://www.citizen.org/wp-content/uploads/flareport.pdf; FLA. DEP'T OF HEALTH, ANNUAL REPORT AND LONG-RANGE PLAN, FISCAL YEAR 2022–23, at 71 (2023).

18. According to a recent study conducted by the Florida Bar, 85% of respondent attorneys reported their hourly rate being over $275, while 54% listed an hourly rate of over $350. Mark D. Killian, *Bar Survey Examines Wages, Profitability, and Hourly Rates*, FLA. BAR (Nov. 7, 2022), https://www.floridabar.org/the-florida-bar-news/bar-survey-examines-wages-profitability-and-hourly-billing/.

19. Ronald V. Miller, Jr., *Average Personal Injury Verdict in Florida: Settlements and Jury Awards in Florida*, LAWSUIT INFO. CTR. (June 24, 2009), https://www.lawsuit-information-center.com/average_personal_injury_verdic_2.html.

record pace amid the rising cost of medical treatment and cultural shifts that perpetuate a mistrust of large businesses.[20] In fact, according to a study conducted by the U.S. Chamber of Commerce, from 2010 to 2019, Florida ranked as the highest state in the country for awarding "nuclear verdicts" (an award in excess of $10 million) per capita at 1.059 nuclear verdicts per 100,000 people, with over 24% of cases arising from a car accident.[21]

Facing these unfavorable conditions, companies tend to pass the losses they suffer in tort litigation on to their customers. For insurance companies, this means charging their insureds higher premiums and, for self-insured companies, the increase is expressed in the final cost charged for a good or service.[22] Nationwide, it is estimated that the average American pays more than $760 per year in "tort tax," or inflation in the price of products directly associated with tort litigation.[23] This "tort tax" is astronomically higher in Florida with an estimated "tort cost per household" of $4,442, the highest in the nation "as [a] percentage of state GDP."[24] Much of Florida's tort cost per household emanates from high insurance premiums, as the average Floridian pays 58% more than the average cost of car insurance nationwide at $345 per month for full coverage.[25] In addition to the higher cost

20. A recent study by Verdict Search revealed a 300% increase in the frequency of verdicts in excess of $20 million from 2001 to 2020. Vanessa Orr, *Social Inflation Influencing Lawsuits, Verdict Amounts*, S. FLA. HOSP. NEWS & HEALTHCARE REP. (Jan. 1, 2022), https://southfloridahospitalnews.com/social-inflation-influencing-lawsuits-verdict-amounts/.

21. *U.S. Chamber of Commerce Report Reveals Which States Issue the Largest Verdicts*, ENJURIS, https://www.enjuris.com/blog/news/states-with-highest-verdicts/ (last visited Feb. 14, 2025).

22. *See* Loretta Worters, *Litigation Is Driving Up U.S. Commercial Auto Insurance Costs, Study Finds*, INS. INFO. INST. (Feb. 8, 2022), https://www.iii.org/press-release/litigation-is-driving-up-us-commercial-auto-insurance-costs-study-finds-020822.

23. *Phantom Damages and the Trial Bar's Efforts to Game the System*, AM. TORT REFORM FOUND., https://www.judicialhellholes.org/phantom-damages-and-the-trial-bars-efforts-to-game-the-system/ (last visited Feb. 14, 2025).

24. *Florida Chamber of Commerce Press Release*, *supra* note 11.

25. Natalie Todoroff, *Average Cost of Car Insurance in Florida in 2025*, BANKRATE, https://www.bankrate.com/insurance/car/average-cost-of-car-insurance-in-florida/#methodology (Feb. 6, 2025). In this estimation, Bankrate defined full coverage in each state as having the following policy limits: $100,000 bodily injury liability per person; $300,000 bodily injury liability per accident; $50,000 property damage liability per accident; $100,000 uninsured motorist bodily injury per person; $300,000 uninsured motorist bodily injury per accident; $500 collision deductible; and $500 comprehensive deductible. *Id.* To determine minimum coverage limits, Bankrate used minimum coverage that meets each state's requirements. *Id.*

for full coverage, the average price for minimum coverage in Florida is approximately 48% more than the national average.[26]

Unfortunately, the data illustrates that the high prices of Florida's insurance premiums on even minimum coverage negatively impacted the number of insured drivers on its roads. As of 2019, Florida had the sixth highest percentage of uninsured motorists on the road at a staggering 20.4%.[27] These numbers pose a grave risk for Florida citizens utilizing the state's roadways and create a great financial hardship for those families forced to bear the cost of higher insurance rates and, ultimately, a higher cost of living; two findings that greatly frustrated Florida's Legislature and motivated the creation of HB 837.[28]

III. HOW DID HB 837 CHANGE THE LAW?

This latest Florida tort reform, spurred by HB 837, substantially changed many of the intricacies of general negligence litigation in the state. In order to properly understand the true magnitude of the changes that HB 837 brought, it is integral to analyze where the law was prior to its passage and how the Bill will impact negligence actions moving forward. Though the changes brought about by the passage of HB 837 are not limited to those discussed below, the topics discussed in this Article are the most contentious and the most likely to face constitutional challenge in the near future.

A. Statute of Limitations for General Negligence

Prior to HB 837, the statute of limitations in Florida for general negligence cases was four years.[29] Thus, a claimant had four years from the date of the subject incident to commence litigation with a complaint before the claim became barred. These statutes aid potential defendants by limiting the amount of time in which a claimant can bring a claim. They also aid claimants by

26. *Id.*

27. *Facts + Statistics: Uninsured Motorists*, INS. INFO. INST., https://www.iii.org/fact-statistic/facts-statistics-uninsured-motorists/ (last visited Feb. 14, 2025) (select "View Archived Tables").

28. *See DeSantis Press Release*, *supra* note 1 ("For too long Florida families have shouldered the hidden cost of lawsuit abuse as Florida's litigation environment has cost jobs and driven up the cost of goods and services.").

29. FLA. STAT. § 95.11(3)(a) (2018).

setting a predefined time period to seek treatment and gather evidence to meet their eventual burden of proof prior to bringing a claim.[30] With the passage of HB 837, the statute of limitations in a general negligence matter is now limited to two years in Florida.[31] However, the limitations period for other types of claims, such as products liability and medical malpractice, remain unchanged by the Bill from their previous standards.[32] Because the statute of limitations on a products liability case remains at four years, some argue that there will be an increase in negligence suits improperly cast as products liability (or other causes of action), in order to enjoy a longer statutory period.[33]

Interestingly, this reduction from four to two years appears to be made to spite the practice of personal injury law in general, regardless of a distinction between plaintiff or defense counsel. Defense attorneys were accused of drawing out litigation in order to bill their clients for more hours worked, while the plaintiff bar was said to be prolonging the litigation process in order to leverage a higher settlement offer.[34] The overall purpose of this change in statute of limitations was to shorten the lengthy timelines of personal injury litigation in the state in order to obtain quick and fair judgments for plaintiffs on their claims.[35] In their statements on the passage of HB 837, members of the Florida Legislature expressed their hope that this measure would provide much needed changes to Florida's "arduous civil system," allow for valid claims to move forward more quickly, and "shorten the time people toil away in civil court."[36] This change also had business friendly results in further limiting liability to tortfeasors by barring claims after two years.

30. *See* KEVIN M. LEWIS, CONG. RSCH. SERV., LSB10390, WHEN DOES THE CLOCK START TICKING? CONSIDERATIONS WHEN DRAFTING STATUTES OF LIMITATIONS 1, 3 (2020) (discussing how statutes of limitations mitigate issues with stale evidence).

31. FLA. STAT. § 95.11(4)(a) (2023).

32. *See* Traci McKee & Andrew Jackson, *Florida Tort Reform: Three Key Changes*, AM. BAR ASS'N (Apr. 26, 2023), https://www.americanbar.org/groups/litigation/resources/newsletters/mass-torts/florida-tort-reform-three-key-changes; § 95.11(3)(d), (5)(c).

33. McKee & Jackson, *supra* note 32.

34. *See DeSantis Press Release*, *supra* note 1.

35. *See id.* ("'When a horrible accident or incident occurs and people suffer a loss, they should be compensated quickly and fairly,' said Senate President Kathleen Passidomo.").

36. *Id.*

B. Comparative Fault

HB 837 also had the effect of changing Florida's fault apportionment standard that had been in place for nearly fifty years, since 1973.[37] In the years preceding the 1973 change, Florida operated on the contributory negligence standard set out in 1886 by *Louisville and Nashville Railroad Co. v. Yniestra.*[38] Under this fault apportionment scheme, a plaintiff was unable to obtain redress for their injuries when they were found by the fact finder to have contributed to their injury by a lack of due care.[39] In other words, a plaintiff was unable to recover damages when they were found to be even slightly at fault (e.g., 1% at fault) in the subject event.

After multiple failed attempts by the Florida Legislature to cure the inequities caused by this contributory negligence apportionment scheme, the Supreme Court of Florida's decision in *Hoffman v. Jones* presented two groundbreaking findings: (1) a fault apportionment scheme for the state can be dictated by either the state legislature or the court; and (2) contributory negligence was no longer a viable option.[40] The *Hoffman* court placed Florida on the pure comparative negligence standard, a standard by which the fact finder determines a percentage of fault for each party involved, and the plaintiff's damages award is reduced by the percentage of fault the jury apportioned to the plaintiff.[41] Thus, for example, "if [a] defendant was just 1% to blame for an accident, [the plaintiff] could receive compensation for [only] 1% of [their] losses."[42] In *Hoffman*, the Supreme Court of Florida recognized that a fault apportionment scheme was a judicially created principle; thus, it could be modified by either the legislature or the court.[43] In 1986, the Florida Legislature followed suit by codifying

37. Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973).

38. 21 Fla. 700, 728 (1886) *invalidated by Hoffman,* 280 So. 2d at 438. It is widely believed that the origins of contributory negligence arose out of the English case of *Butterfield v. Forrester*. *Hoffman*, 280 So. 2d at 434.

39. *See Hoffman*, 280 So. 2d at 434; Christy Bieber & Mike Cetera, *What Is Contributory Negligence? Definition & Examples*, FORBES, https://www.forbes.com/advisor/legal/personal-injury/contributory-negligence/ (July 30, 2024, 8:40 AM).

40. 280 So. 2d at 434, 437–38.

41. *Id.* at 438.

42. Todd A. Strong, *Comparative Fault vs Contributory Negligence: What's the Difference?*, STRONG L. (Oct. 31, 2023), https://www.stronglawoffices.com/comparative-fault-vs-contributory-negligence-whats-the-difference/.

43. *Hoffman*, 280 So. 2d at 434.

Florida's pivot to pure comparative negligence in the 1986 Tort Reform and Insurance Act.[44]

HB 837 placed Florida on a modified comparative negligence standard, a modern twist on the pure comparative negligence scheme that takes a step back toward the principles of contributory negligence. The modified comparative negligence approach is now the prevailing approach for fault apportionment in the United States, as Florida joins thirty-four other states in employing it.[45] Under Florida's new modified comparative negligence rule, a fact finder must still attribute a percentage of fault to the parties, but where a plaintiff is found to be more than 50% at fault, they are barred from recovery.[46] As would be expected, this change was welcomed with praise by the state's civil defense attorneys, while being met with criticism from the plaintiff's bar as being far too harsh and arbitrary, as there is no set formula, and the difference of 1% could potentially cost a plaintiff millions of dollars.[47] Defense attorneys have touted statistics from other comparative negligence jurisdictions that show a jury is less likely to find a plaintiff more than 51% at fault for the underlying event, which ensures that the plaintiff can recover to some extent.[48] However, this argument sounds eerily similar to the argument in support of contributory negligence rebuked in *Hoffman*. There, the Florida Supreme Court

44. JUDICIARY COMM. & CIV. JUST. SUBCOMM. STAFF, FINAL BILL ANALYSIS, H.B. 2023-837, Reg. Sess., at 4 (Fla. 2023).

45. *Id.* at 5.

46. *See* FLA. STAT. § 768.81(6) (2023) ("[A]ny party found to be greater than 50 percent at fault for his or her own harm may not recover any damages.").

47. *See HB 837: Florida Introduces Modified Comparative Negligence and New Law on Medical Damages Presentation to a Jury*, ZINOBER DIANA & MONTEVERDE P.A. (Apr. 13, 2023), https://www.zinoberdiana.com/hb-837-florida-introduces-modified-comparative-negligence-and-new-law-on-medical-damages-presentation-to-a-jury/ (praising HB 837 for aligning Florida's tort system with other jurisdictions and addressing inflated medical damages); Joanne I. Nachio et al., *Florida Passes Tort Reform: What You Need to Know*, MARSHALL DENNEHEY (Mar. 27, 2023), https://marshalldennehey.com/articles/florida-passes-tort-reform-what-you-need-know/ (praising HB 837 for adopting modified comparative negligence and promoting fairness by reducing claims from predominantly at-fault plaintiffs). *But see Statement from Florida Justice Association (FJA) President Curry Pajcic Regarding the Passage of HB 837 by the Florida Senate*, FLA. JUST. ASS'N (Mar. 23, 2023), https://www.myfja.org/statement-from-florida-justice-association-fja-president-curry-pajcic-regarding-the-passage-of-hb-837-by-the-florida-senate/ (criticizing HB 837 as "rights-grabbing legislation" that limits accountability and weakens access to justice for Floridians).

48. Jessica Zelitt & Kevin McKendry, *Deeper Dive into HB 837 – Potential Effects, Challenges of Wide-Ranging Florida Tort Reform Bill*, ADAMS & REESE LLP (May 24, 2023), https://www.adamsandreese.com/news-knowledge/florida-tort-reform-deeper-dive-hb-837 (citing Eli K. Best & John J. Donohue III, *Jury Nullification in Modified Comparative Negligence Regimes*, 79 U. CHI. L. REV. 945, 962 (2012)).

proclaimed: "There is something basically wrong with a rule of law that is so contrary to the settled convictions of the lay community that laymen will almost always refuse to enforce it."[49]

C. Bad Faith Claims

Floridians have long enjoyed protection under Florida's "bad faith" law which "allows an insured person or someone who has been injured by an insured person to recover damages from an insurer for failing to settle a claim in good faith when the insurer could and should have done so."[50] On a basic level, this cause of action is properly utilized when a claimant presents an offer to settle an active claim to an insurer who denies the offer, allowing the plaintiff to later settle the claim or obtain a verdict above the insured's policy limits.[51] Its purpose is to expedite fair settlements while protecting both the insured and the claimant from abuses stemming from the insurer's superior position.[52]

"The Florida Supreme Court [first] recognized a common law action for" the bad faith of an insurer "as early as 1938" out of a recognition of an insurance contract's "'unique institutional role' in modern society."[53] The insurer/insured relationship has come to be recognized as one that is fiduciary in nature because of the level of control that the insurer enjoys under an ordinary liability policy.[54] In said policies, the insurer retains the right to control every aspect of litigation, from negotiation to ultimate decision making on the resolution of the claim, justified by the fact that they will be paying the claim to the extent of the insured's policy limits.[55] In exchange, the insured's role becomes limited to cooperation throughout the

49. Hoffman v. Jones, 280 So. 2d 431, 437 (Fla. 1973) (quoting Frank E. Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135, 151 (1958)).

50. FLA. S. REP. NO. 2012-132, at 1 (2011).

51. *See* FLA. STAT. § 624.155 (1)(b)(1), (8) (2019) (allowing third parties to recover damages for the insurer's failure to settle which provides such third parties with bargaining power to negotiate a later settlement with the insurer); Harvey v. Geico Gen. Ins. Co., 259 So. 3d 1 *passim* (Fla. 2018) (allowing a claimant to recover an excess judgment above policy limits after the insurer failed to settle in good faith).

52. *See* Rutledge R. Liles, *Florida Insurance Bad Faith Law: Protecting Businesses and You*, FLA. BAR J., Mar. 2011, at 9, 10.

53. *Id.* at 9 (quoting State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 58 (Fla. 1995)).

54. *Id.* at 9–10 (quoting Baxter v. Royal Indem. Co., 285 So. 2d 652, 655 (Fla. 1st Dist. Ct. App. 1973)).

55. *See id.*

resolution of the dispute.[56] Because the insured loses their autonomy in litigation strategy, they become protected by a fiduciary duty owed to them by their insurer.[57] Thus, in Florida, the relationship between the insurer and insured mirrors that between attorney and client since "the insurer owes a duty to refrain from acting solely on the basis of its own interest in the settlement of claims."[58] The Florida Legislature then recognized a statutory cause of action for bad faith claims against an insurer in 1982, with the passage of Fla. Stat. § 624.155.[59]

After nearly eighty years of recognition, the bad faith cause of action came under heavy fire in the early 2010s as defense attorneys began to see an uptick in bad faith claims.[60] This surge in bad faith claims was alleged by members of the defense bar to be the work of abusive practices of plaintiff attorneys known as "bad faith traps" or "bad faith set-ups."[61] In these alleged schemes, plaintiff attorneys were said to have manufactured bad faith claims by either: (1) setting "arbitrary and unrealistic" deadlines for acceptance of the offer; or (2) sending "settlement offers containing unreasonable terms" that made compliance difficult (e.g., in a case with two or more claimants, sending a demand for policy limits on behalf of each).[62]

The purpose of these tactics was to place the insurer in a near-impossible situation in which they would be forced to either acquiesce to the plaintiff's rigid demands/timeframe or bear the risk of the plaintiff obtaining a judgment in excess of the insured's policy limits, thus opening the door for a bad faith case.[63] If an insurer refused the plaintiff's demand, the plaintiff could then seek a judgment in excess of the insured's policy limits, and either the insured or the plaintiff would have the ability to sue the defendant insurer for the entirety of the judgment, including attorney's fees.[64] Thus, these cases created a windfall for both the plaintiff and the

56. *Id.* at 10.
57. *Id.*
58. *Id.* (citing *Baxter*, 285 So. 2d at 655).
59. *Id.*
60. *See* Gwynne A. Young & Johanna W. Clark, *The Good Faith, Bad Faith, and Ugly Set-Up of Insurance Claims Settlement*, FLA. BAR J., Feb. 2011, at 9, 10.
61. *Id.*; Jessica S. Zelitt, *Florida HB 837: A Political Stunt or Legitimate Civil Justice Reform?*, 47 AM. J. TRIAL ADVOC. 65, 84 (2023).
62. Liles, *supra* note 52, at 10.
63. Barry Zalma, *How to Recognize an Attempted Bad Faith Set Up*, ZALMA ON INS. (May 6, 2021), https://zalma.com/blog/bad-faith-set-ups/.
64. *Id.*

insured, as a once limited policy becomes unlimited.[65] The following excerpt from *Berges v. Infinity Insurance Co.* illustrates a successfully executed bad faith claim:

> [T]he $20,000 [policy] purchased by the insured has been converted into insurance which will pay $1,893,066 to cover the claims plus $616,200 for attorney fees plus interest. It also worked well for the insured, who paid for $20,000 of insurance and was given by the majority's opinion the benefit of more than $2.5 million of insurance.[66]

In drafting HB 837, the Florida Legislature sought to maintain the balance of protecting its constituents from abusive practices of insurance companies in the settlement of claims while protecting Florida businesses from excessive legal exposure.[67] To accomplish this goal, they did not eliminate the bad faith right of action but merely revised it in order to inhibit bad faith "set-ups."[68] This effort is seen most clearly in four pertinent revisions.

The revision first codifies the well-settled common law principle that negligence alone is insufficient to constitute bad faith.[69] Thus, the negligence of an insurer in denying a claimant's demand or assessing their case is not enough to bring a bad faith action in Florida; HB 837 requires a higher level of culpability. The second establishes a safe harbor period that allows an insurer to avoid bad faith liability if the insurer tenders the policy limits or the amount demanded by the claimant within ninety days after receiving actual notice of the claim, accompanied by sufficient notice.[70] This was extended from a previous thirty-day window and is arguably one of the most important provisions of HB 837 regarding bad faith, as it allows an insurer to fully investigate a claim before making a decision to settle that could cost hundreds of thousands, if not millions, of dollars. The third requires both the insured and claimant "to act in good faith [when] furnishing information about the claim, making demands of the insurer,

65. *See* Young & Clark, *supra* note 60, at 12 (citing Berges v. Infinity Ins. Co., 896 So. 2d 665, 685–86 (Fla. 2005) (Wells, J., dissenting)).

66. *Berges*, 896 So. 2d at 685–86.

67. *See DeSantis Press Release*, *supra* note 1.

68. H.B. 837, 2023 Fla. Leg., Reg. Sess. (Fla. 2023).

69. Zelitt & McKendry, *supra* note 48 (citing Harvey v. Geico Gen. Ins. Co., 259 So. 3d 1, 9 (Fla. 2018)).

70. JUDICIARY COMM. & CIV. JUST. SUBCOMM. STAFF, FINAL BILL ANALYSIS, H.B. 2023-837, Reg. Sess., at 15–16 (Fla. 2023); *see* FLA. STAT. § 624.155(4)(a) (2023).

setting deadlines, and attempting to settle the claim."[71] This provision is essential to the elimination of bad faith traps and facilitating efficient settlements, as it punishes those attorneys on both sides of the aisle who employ unfair tactics while leaving the ethical attorneys largely unaffected. The fourth limits an insurer's bad faith liability in cases where multiple claimants arise out of a single cause of action when the insurer either files an interpleader action or makes the entire amount of the policy limits available to arbitration between the claimants within ninety days after receiving notice of the competing claims.[72] Thus, the insurer is no longer faced with an impossible decision when met with multiple valid claims and limited by the extent of the insured's policy.

D. Medical Bills/Letters of Protection

In a standard negligence case, it is the province of the jury to determine the amount of damages that the plaintiff is entitled to, a task that inevitably includes an analysis of the plaintiff's medical bills resulting from treatment stemming from the subject incident.[73] Generally, a plaintiff may recover compensatory damages for economic harms, such as past and future damages, as well as for non-economic harms, such as pain and suffering.[74] Juries often struggle to quantify past and future economic damages due to the lack of universal pricing standards of medical procedures and their reliance on a plaintiff's medical bills.[75] Thus, a large disparity in damage awards for similarly situated plaintiffs can exist depending on the medical provider from which they sought treatment, and how much said provider charged for the procedure in question.

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71. JUDICIARY COMM. & CIV. JUST. SUBCOMM. STAFF, FINAL BILL ANALYSIS, H.B. 2023-837, Reg. Sess., at 16 (Fla. 2023); § 624.155(4)(b)(1).

72. JUDICIARY COMM. & CIV. JUST. SUBCOMM. STAFF, FINAL BILL ANALYSIS, H.B. 2023-837, Reg. Sess., at 16 (Fla. 2023); *see* § 624.155(6)(a)–(b).

73. JUDICIARY COMM. & CIV. JUST. SUBCOMM. STAFF, FINAL BILL ANALYSIS, H.B. 2023-837, Reg. Sess., at 6 (Fla. 2023); *see* Francis-Harbin v. Sensormatic Elecs., LLC, 254 So. 3d 523, 526 (Fla. 3d Dist. Ct. App. 2018).

74. JUDICIARY COMM. & CIV. JUST. SUBCOMM. STAFF, FINAL BILL ANALYSIS, H.B. 2023-837, Reg. Sess., at 3 (Fla. 2023); *see* MCI WordCom Network Servs., Inc. v. Mastec, Inc., 995 So. 2d 221, 223 (Fla. 2008).

75. JUDICIARY COMM. & CIV. JUST. SUBCOMM. STAFF, FINAL BILL ANALYSIS, H.B. 2023-837, Reg. Sess., at 6 (Fla. 2023); *see* State Farm Mut. Auto. Ins. Co. v. Harmon, 237 So. 3d 423, 425 (Fla. 5th Dist. Ct. App. 2018).

In the drafting stage of HB 837, the Florida Legislature identified three main issues of concern in the trends of medical damages admissibility. First, the amount paid by the plaintiff, or the plaintiff's health insurer, and accepted by the medical provider, bore little resemblance to the amount charged on the provider's invoice, potentially leading to an award of inflated economic and non-economic damages.[76] Second, pursuant to Florida's collateral source rule,[77] a plaintiff could previously present the full amount of their medical bills to the jury, even if the bill was paid for by the plaintiff's health insurance or another source.[78] Third, agreements called "letters of protection"[79] allowed

76. JUDICIARY COMM. & CIV. JUST. SUBCOMM. STAFF, FINAL BILL ANALYSIS, H.B. 2023-837, Reg. Sess., at 6 (Fla. 2023).

77. Under Florida law, a "collateral source" was any payment made to a claimant or on a claimant's behalf. *See id.* At common law, a court was prohibited from either reducing the damages awarded to a plaintiff by the amount received through collateral sources or allowing evidence of said collateral sources to be introduced, out of fear that they may prejudice the damage amount. *Id.* at 7. The Florida Legislature reworked the collateral source rule in 1986 through the Tort Reform and Insurance Act ("Act") by requiring a court to reduce the amount of damages awarded to a plaintiff by the amount provided by all collateral sources, except in cases where subrogation or reimbursement rights existed; however, evidence of the collateral sources remained inadmissible to the jury, and any deduction from the judgment would occur in a post-trial action. *Id.* at 7–8. Because evidence of the collateral sources remained inadmissible, the rule remained heavily criticized for allowing the jury to consider inaccurate damage totals, which potentially influenced their determination of future medical costs and non-economic damages, categories that were not subject to judicial set-off based upon collateral sources. *Id.*

78. McKee & Jackson, *supra* note 32.

79. Prior to the enactment of HB 837, letters of protection had become a contentious subject in Florida tort litigation. *See* JUDICIARY COMM. & CIV. JUST. SUBCOMM. STAFF, FINAL BILL ANALYSIS, H.B. 2023-837, Reg. Sess., at 8 (Fla. 2023). These letters were criticized for enabling inflated awards for medical damages and offering protection from post-judgment set offs, as Florida courts were unable to reduce an award for unpaid medical bills under Section 768.76. *Id.* The letter of protection found support from the Florida Supreme Court in *Worley v. Central Florida Young Men's Christian Ass'n, Inc.*, where the court held that a referral relationship between an attorney and a physician was protected by attorney-client privilege. 228 So. 3d 18, 24 (Fla. 2017) ("Even in cases where a plaintiff's medical bills appear to be inflated for the purposes of litigation, we do not believe that engaging in costly and time-consuming discovery to uncover a 'cozy agreement' between the law firm and a treating physician is the appropriate response."). Eventually, two competing opinions formed regarding the letter of protection, each equally polarizing. Plaintiffs argued that the letters of protection were necessary to allow victims access to adequate treatment options while protecting the victims from an undue financial burden. *What Is a Letter of Protection in a Florida an [sic] Uninsured Motorist Claim?*, FRIEDMAN RODMAN FRANK & ESTRADA P.A. (Aug. 30, 2020), https://www.southfloridapersonalinjurylawyers-blog.com/what-is-a-letter-of-protection-in-a-florida-an-uninsured-motorist-claim/. Defendants, typically insurers, argued that it gave the treating physicians a stake in the litigation, thus creating a possible bias perpetuating overexaggerated diagnoses and estimations of future treatment. Megan J. Nelson, *Florida Tort Reform: The Impact of House Bill 837 on Health Care Litigation*, MARSHALL DENNEHEY (May 1, 2024), https://marshalldennehey.com/articles/florida-tort-reform-impact-house-bill-837-health-care-litigation/.

for a plaintiff and a healthcare provider to defer payment for treatment until after the litigation was settled, when the provider could be paid directly from the proceeds of the suit.[80]

In essence, HB 837 addressed all three cited concerns and heightened the transparency of actual damages presented to the jury by taking actions such as eliminating the collateral source rule and weakening the infamous "letter of protection."[81] In the words of the American Bar Association ("ABA"), "[t]he new law regulates the evidence admissible to prove the amount of a plaintiff's damages for past or future medical care to more closely reflect the actual amounts paid or allowed for the medical expenses and services."[82] First, the Bill created heightened restrictions regarding what type of evidence was admissible to the fact finder to prove damages for past and future treatment.[83] These provisions were included to narrow the gap between the stated cost of medical treatment and the final negotiated payment, thus perpetuating fair damage awards that reflect the actual cost to the plaintiff.[84] Second, it created mandatory disclosures for plaintiffs when utilizing a letter of protection in their treatment.[85] These disclosures furthered the goal of allowing the jury to operate with all material facts regarding the treatment of the plaintiff and any possible biases in the treating physician's medical opinions or testimony emanating from having a financial stake in the

80. McKee & Jackson, *supra* note 32.

81. *Id.*

82. *Id.*

83. *See* JUDICIARY COMM. & CIV. JUST. SUBCOMM. STAFF, FINAL BILL ANALYSIS, H.B. 2023-837, Reg. Sess., at 10 (Fla. 2023). Restrictions for evidence of past treatment included two main categories, one for medical bills already paid and one for bills that remained unpaid at the time of the trial. *Id.* HB 837 disallowed evidence of past charges in excess of the amount already paid and accepted as final for the treatment, while also setting limits on the amount that could be presented to the jury for past unpaid medical bills by comparing them to the standard reimbursement rates for Medicare, Medicaid, or other health insurance coverage. *Id.* The Bill also put limitations in place for the amount of future damages presented to the jury by restricting the plaintiff to procedures that were medically necessary and within reason when compared to plaintiff's healthcare, Medicare, or Medicaid coverage. *Id.* at 11.

84. *See id.* at 11–12.

85. *See id.* Under HB 837, a plaintiff is still able to seek treatment under a letter of protection, but certain information must be disclosed in discovery, such as a copy of the letter, all billing information (including factoring information where applicable), whether the plaintiff had health insurance at the time of the agreement, and any referral information. *Id.* The Bill also allowed for the financial relationship between doctors and plaintiff attorneys to become discoverable. *Id.* at 12. Thus, a jury would be able to account for potential bias in a treating physician's testimony where large financial relationships exist between attorney and medical provider.

litigation.[86] Third, it created additional protections for defendants by prohibiting an award for economic damages that is inflated above what was admissible to the fact finder.[87] This provision is intended to protect against juries being persuaded into nuclear verdicts when those decisions are found to be unsupported by the evidence presented to them.

IV. NECESSARY CHANGE AND ITS ACCOMPANYING POSSIBLE CONSTITUTIONAL CHALLENGES

For better or worse, consistent attacks on Florida's previous form of tort litigation prompted change. Tort reform had been a perennial topic in Florida congressional sessions, but efforts consistently stalled out in the drafting stage as focuses tended to shift with changing gubernatorial administrations.[88] When Governor Ron DeSantis began his tenure in 2019,[89] he took a particular interest in tort reform as a way to make Florida more business friendly, leading to the momentum that ultimately prompted the passing of HB 837.[90] Specifically, Governor DeSantis took action in December of 2022, with a Republican supermajority in both the State House of Representatives and Senate.[91] The Bill was passed only a few months later, on March 24, 2023.[92]

Inherently, as a law with such sweeping change taking effect, HB 837 is likely to be challenged by its opposition.[93] This is

86. *See id.* at 11–12.

87. *See id.* at 12.

88. *Tort Reform Movement Gains Momentum in Florida*, TEAGUE INS. (May 19, 2023), https://www.teagueins.com/2023/05/19/tort-reform-movement-gains-momentum-in-florida/.

89. *Ron DeSantis*, BALLOTPEDIA, https://ballotpedia.org/Ron_DeSantis (last visited Feb. 14, 2025).

90. Jim Saunders, *DeSantis and Florida's Legislative Leaders Will Pursue Limits on Lawsuits*, WUSF NEWS (Feb. 14, 2023, 4:35 PM), https://wusfnews.wusf.usf.edu/politics-issues/2023-02-14/desantis-legislative-leaders-pursue-limits-lawsuits ("Florida's current tort climate is one of the top challenges facing businesses in every industry and every corner of our state.").

91. Vinci Jorgensen & Kent Willis, *Florida Tort Reform – A Historical Game Changer*, GEN RE (Apr. 3, 2023), https://www.genre.com/us/knowledge/publications/2023/april/florida-tort-reform-a-historical-game-changer-en.

92. *DeSantis Press Release*, *supra* note 1.

93. It is important to note that Florida has an illustrious history of tort reforms, with the most recent being the third movement within the past fifty years. In 1986, Florida passed a tort reform with similar intentions to HB 837, to address the rising cost and decreasing availability of insurance. *See* Pamela Burch Fort et al., *Florida's Tort Reform: Response to a Persistent Problem*, 14 FLA. ST. U. L. REV. 505, 505 (1986). Another reform came in 1999, when Governor Jeb Bush signed House Bill 775 as an attempt to make Florida

completely natural in an adversarial system. In the case of HB 837, its challenges are likely to come via alleged violations of both the Federal and Florida Constitutions. However, many of the overlapping constitutional provisions governing these topics are interpreted in the same way, irrespective of their "state" or "federal" status.[94] The following Part will analyze the bases for constitutional challenges to Florida's tort reform, spurred through the passage of HB 837. The four angles from which a challenge is likely to come are: (1) an alleged substantive due process violation; (2) an alleged Equal Protection Clause violation; (3) an alleged separation of powers violation; or (4) an alleged violation of Florida's constitutional single-subject requirement.

Due process violations are one of the most common challenges to legislation.[95] There are two forms of due process violations that are recognized in our system of jurisprudence: (1) substantive due process and (2) procedural due process.[96] A challenge sounding in a substantive due process violation involves either the deprivation of a fundamental right or legislation that is arbitrary or capricious in nature.[97] Examples of HB 837 provisions that could be challenged under the deprivation of a fundamental right include the right of access to the courts of Florida due to restrictions on statutes of limitations, or the right to recovery under Florida's new fault apportionment scheme of modified comparative negligence. Even if a court were to find that the changes brought by HB 837 do not affect fundamental rights, a plaintiff would still be able to argue those changes were the result of arbitrary or capricious

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a more business friendly state by making changes to subjects such as joint and several liability, structured settlements, the collateral source rule, and noneconomic damages. *See* Walter G. Latimer, *Florida Tort Reform–1999*, FLA. BAR J., Nov. 1999, at 56, 56. Each of these reforms were attacked adamantly by their opponents after their passage based upon issues that were constitutional in nature. *See generally* Smith v. Dep't of Ins., 507 So. 2d 1080 (Fla. 1987) (per curiam) (challenging the 1986 reform); Enter. Leasing Co. S. Cent. v. Hughes, 833 So. 2d 832, 834 (Fla. 1st Dist. Ct. App. 2002) (challenging the 1999 reform).

94. *E.g.*, Estate of McCall v. United States, 134 So. 3d 894, 921 (Fla. 2014) (Pariente, J., concurring) (explaining the rational basis test in Florida is "based on precedent from the United States Supreme Court").

95. City of Lauderhill v. Rhames, 864 So. 2d 432, 437 (Fla. 4th Dist. Ct. App. 2003).

96. *See* Lawrence Alexander, *The Relationship Between Procedural Due Process and Substantive Constitutional Rights*, 39 U. FLA. L. REV. 323, 323–24 (1987).

97. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 663–64 (2015) (explaining that substantive due process protects fundamental rights); Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923) (outlining that arbitrary legislation is a violation of the Fourteenth Amendment).

legislation, albeit a standard far more deferential to the state legislature.

Allegations of equal protection violations regularly accompany those of substantive due process violations because they have long been held to be analyzed by the same test.[98] The main difference between the two is that while a due process analysis asks if a plaintiff was deprived of a fundamental right, an equal protection analysis determines whether there was disparate treatment or impact between various groups of people.[99] An equal protection challenge to HB 837 would likely question the arbitrary nature of the modified comparative fault scheme. The legal theory behind such an assertion is that the scheme creates a disparate impact among similarly situated citizens based upon an arbitrary classification of a jury's attribution of fault.[100] After all, the declaration of an amorphous and ambiguous "1% of fault" could be the difference between some form of recovery for a plaintiff and nothing at all. The argument would be that, because there is no formal calculation for a jury to follow in a standard jury instruction, the law perpetuates an inequitable system where some plaintiffs are able to recover damages upon their claim, while others are not.

A challenge involving a separation of powers claim centers around the legislature's improper invasion into the role of the judiciary by dictating procedural methods of legal matters.[101] These claims are rooted in the structure of Florida governance as proclaimed in Article II, Section 3 of the Florida Constitution, where each of the three branches retains ultimate and exclusive autonomy over their respective role.[102] Pursuant to this structure, the judiciary has been entrusted with the complete authority over procedural laws (e.g., the operations of a lawsuit).[103] Conversely, the legislature has retained broad discretion over substantive laws (e.g., the laws that create the right to bring a lawsuit).[104] A

98. State v. Robinson, 873 So. 2d 1205, 1214 (Fla. 2004).

99. Jackson v. State, 191 So. 3d 423, 426 (Fla. 2016).

100. *Id.*

101. Barnett v. Antonacci, 122 So. 3d 400, 404–05 (Fla. 4th Dist. Ct. App. 2013).

102. *See* FLA. CONST. art. II, § 3.

103. *See id.* art. V, § 2. "The rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the substantive law that defines the specific right or duties themselves." *Procedural Law*, BLACK'S LAW DICTIONARY (12th ed. 2024).

104. *See* FLA. CONST. art. III, § 1. "The part of the law that creates, defines, and regulates the rights, duties, and powers of parties." *Substantive Law*, BLACK'S LAW DICTIONARY (12th ed. 2024).

constitutional challenge of HB 837 may arise from an assertion that the legislature overstepped its Article II role and created laws that were procedural in nature, not substantive, thus necessitating a declaration of unconstitutionality.

Lastly, enumerated in Article III, Section 6, of the Florida Constitution is Florida's single-subject requirement, another popular target for constitutional challenges of Florida legislation.[105] This requirement mandates that "[e]very law shall embrace but one subject and matter properly connected therewith."[106] The single-subject rule was created "to prevent 'log-rolling' legislation" and surprise provisions that are unintentionally adopted and carelessly applied in ways that were not originally intended.[107] A future challenger of HB 837 could include a claim that it violates Florida's single-subject requirement because it is far too overbroad. Potential arguments could include that HB 837 involves multiple unrelated subjects, such as the payment of attorney's fees, causes of action for third-party bad faith resulting from a contractual relationship, statute of limitations, mandatory disclosures of contractual agreements between patients and their treating physicians, and civil liability from third-party criminal acts.[108]

V. LEGAL STANDARD OF POTENTIAL CONSTITUTIONAL CHALLENGES TO HB 837

When bringing a constitutional challenge upon an existing law, the challenger faces an uphill battle. Florida caselaw presents a history of deference to the language of a statute, as the judiciary refuses to substitute its judgment for that of the state legislature.[109] To prove successful on appeal in Florida, a

105. *See, e.g.*, Smith v. Dep't of Ins., 507 So. 2d 1080, 1084 (Fla. 1987) (per curiam) (holding that a challenged portion of the Tort Reform and Insurance Act of 1986, dealing in both tort and contract law, did not violate Florida's single-subject requirement).

106. FLA. CONST. art. III, § 6.

107. Enter. Leasing Co. S. Cent. v. Hughes, 833 So. 2d 832, 834 (Fla. 1st Dist. Ct. App. 2002) (quoting State v. Canova, 94 So. 2d 181, 184 (Fla. 1957)).

108. *See generally* JUDICIARY COMM. & CIV. JUST. SUBCOMM. STAFF, FINAL BILL ANALYSIS, H.B. 2023-837, Reg. Sess., at 4 (Fla. 2023). HB 837 also allows for a landlord to escape liability for "negligent security allegations" following criminal activity on the property, so long as certain security provisions and certifications are met. *Id.*

109. Hamilton v. State, 366 So. 2d 8, 10 (Fla. 1978) ("The Legislature has a great deal of discretion in determining what measures are necessary for the public's protection, and this Court will not, and may not, substitute its judgment for that of the Legislature insofar as the wisdom or policy of the act is concerned.") (citations omitted); *see also* State v. Rife, 789

challenger begins against the presumption that all laws are constitutional.[110] From there, the challenger faces the burden of proving their theory of the unconstitutionality of the statute beyond a reasonable doubt.[111] This Part focuses upon the legal standard by which a court would analyze the aforementioned potential constitutional challenges to HB 837 based upon the existing body of both Florida and federal constitutional caselaw.

A. Challenges Based Upon Substantive Due Process Violations

Due process has been a cornerstone in Western culture dating back to the signing of the Magna Carta in 1354, the first reference of the phrase in the context of Anglo-American law.[112] A person's right to due process in the federal system of American law originates from the Fifth Amendment of the Federal Constitution, ratified in 1791,[113] and the Fourteenth Amendment, which extended the protections of the Fifth Amendment to state systems in 1868.[114] Though it is rarely defined consistently, the right to due process of law goes by many colorful definitions, such as protecting rights that are "fundamental to our scheme of ordered liberty," or whether a particular right is "deeply rooted in this Nation's history and tradition."[115] After developing an extensive body of caselaw spanning over 100 years recognizing due process, Florida adopted its own Due Process Clause in 1998.[116] Though Florida adopted its own right of due process in its state constitution, it has been consistently interpreted in the same fashion as that of its federal counterpart:

So. 2d 288, 292 (Fla. 2001); Sch. Bd. of Palm Beach Cnty. v. Survivors Charter Sch., Inc., 3 So. 3d 1220, 1228 (Fla. 2009).

110. Chi. Title Ins. Co. v. Butler, 770 So. 2d 1210, 1214 (Fla. 2000).

111. *Enter. Leasing Co.*, 833 So. 2d at 834 (citing *Chi. Title Ins. Co.*, 770 So. 2d at 1214–15).

112. *Magna Carta: Muse and Mentor*, LIB. CONG., https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/due-process-of-law.html (last visited Feb. 14, 2025).

113. U.S. CONST. amend. V; *Fifth Amendment*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/law/legal-and-political-magazines/fifth-amendment (last visited Feb. 14, 2025).

114. U.S. CONST. amend. XIV, § 1; *see also Landmark Legislation: The Fourteenth Amendment*, U.S. SENATE, https://www.senate.gov/about/origins-foundations/senate-and-constitution/14th-amendment.htm (last visited Feb. 14, 2025).

115. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 238 (2022) (quoting Timbs v. Indiana, 586 U.S. 146, 150 (2019)).

116. FLA. CONST. art. I, § 9.

> No one disputes that the Florida rational basis test is "based on precedent from the United States Supreme Court." The due process provisions of the Florida and federal constitutions from which the rational basis tests derive use virtually identical language, the two tests are stated the same way, and, in *Belk–James* and *McKnight*, the Florida Supreme Court used the same test and the same analysis to resolve challenges brought under both federal and Florida substantive due process. The two different constitutional provisions establish one, identical rational basis test.[117]

As discussed above, within the right to due process, there are two separate categories: substantive and procedural due process. "A rule of procedure prescribes the method or order by which a party enforces substantive rights or obtains redress for their invasion. Substantive law creates those rights."[118] Thus, the first step in a due process analysis is to determine whether the particular provision is being challenged upon procedural or substantive grounds.

If the provision is being challenged upon substantive grounds, one must determine if the claim involves the deprivation of a fundamental right, as this will determine the level of judicial scrutiny that a reviewing court will apply.[119] Where the statute involves a fundamental right, a court is required to apply a "strict scrutiny" standard; that is, the court must determine whether the statute was narrowly tailored to further a compelling state interest.[120] Alternatively, where a fundamental right is not at issue, the reviewing court must apply a "rational basis" review, meaning that the challenging party bears the burden of showing that the statute does not bear a rational relationship to a legitimate state interest.[121]

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117. Silvio Membreno & Fla. Ass'n of Vendors v. City of Hialeah, 188 So. 3d 13, 20 (Fla. 3d Dist. Ct. App. 2016) (footnotes omitted) (citations omitted).

118. Mil. Park Fire Control Tax Dist. No. 4 v. DeMarois, 407 So. 2d 1020, 1021 (Fla. 4th Dist. Ct. App. 1981).

119. Jackson v. State, 191 So. 3d 423, 428 (Fla. 2016) ("Analyzing a substantive due process claim begins with a 'careful description of the asserted right.'" (quoting Reno v. Flores, 507 U.S. 292, 302 (1993))).

120. Fla. Dep't of Child. & Fams. v. F.L., 880 So. 2d 602, 607 (Fla. 2004) (citing Beagle v. Beagle, 678 So. 2d 1271, 1276 (Fla. 1996)).

121. City of Fort Lauderdale v. Dhar, 185 So. 3d 1232, 1235 (Fla. 2016) (citing Level 3 Commc'ns, LLC v. Jacobs, 841 So. 2d 447, 454 (Fla. 2003)).

B. Challenges Based Upon Equal Protection Clause Violations

Constitutional challenges arising out of equal protection violations are often utilized in the same cases as allegations of due process violations because their constitutionality is measured by similar tests. In fact, the method used to analyze a substantive due process claim and an equal protection claim is "virtually identical."[122] As with its due process counterpart, the concept of equal protection is enumerated in both the Federal and Florida Constitutions.[123] In Florida, "the constitutional right of equal protection of the laws means that everyone is entitled to stand before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burden as are imposed upon others in a like situation."[124]

To obtain strict scrutiny analysis under equal protection, the challenged provision must involve a suspect class.[125] The process of how a class of individuals becomes suspect remains unclear due to the Federal Equal Protection Clause's brevity;[126] however, a body of caselaw has emanated from Justice Stone's famed reference to "discrete and insular minorities."[127] From there, three common characteristics have been found to be shared amongst members of various suspect classes: "(1) immutable characteristics; (2) historical disadvantage; and (3) relative lack of political representation."[128] Only four suspect classes have even been acknowledged by the U.S. Supreme Court: race, national

122. State v. Robinson, 873 So. 2d 1205, 1214 (Fla. 2004) (quoting *In re* Wood, 866 F.2d 1367, 1371 (11th Cir. 1989)).

123. *See* U.S. CONST. amend. XIV, § 1; FLA. CONST. art. I, § 2.

124. Est. of McCall v. United States, 134 So. 3d 894, 901 (Fla. 2014) (quoting Caldwell v. Mann, 26 So. 2d 788, 790 (Fla. 1946)).

125. Westerheide v. State, 831 So. 2d 93, 110 (Fla. 2002) (citing Mitchell v. Moore, 786 So. 2d 521, 527 (Fla. 2001)).

126. It is important to note that when conducting an analysis to determine if a suspect class is involved, the text of Florida's Equal Protection Clause offers more protections than that of its federal counterpart, making it a more attractive option for challengers. *Compare* U.S. CONST. amend. XIV, § 1, *with* FLA. CONST. art. I, § 2. However, Florida courts are still instructed to conduct the equal protection analysis in accordance with federal interpretations. Sasso v. Ram Prop. Mgmt., 431 So. 2d 204, 221 (Fla. 1st Dist. Ct. App. 1983) ("[W]e will nevertheless follow federal guidelines to aid our initial task of identifying the criteria for determining whether a class may be considered suspect, since it was the intention of the framers that our clause operate in a manner similar to that of its federal prototype." (citing Bailey v. Ponce de Leon Port Auth., 398 So. 2d 812, 814 (Fla. 1981))).

127. *See, e.g.*, *Sasso*, 431 So. 2d at 221 (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

128. *Id.* (citations omitted).

origin, alienage, and, most recently, religion.[129] Additionally, only gender has been given quasi-suspect class status, an acknowledgement that a certain class is found to be deserving of heightened judicial scrutiny, but does not garner the same judicial attention awarded to other true suspect classes.[130] If no suspect classification is found in the analysis of the statute, "the statute need only bear a reasonable relationship to a legitimate state interest."[131] It is not enough that the effects of the statute result in some sort of inequity to a defined set of people.[132] Due to the difficulty of obtaining suspect class status, most equal protection cases will fall under this category of challenging a statute based upon arbitrary and capricious design or application, otherwise known as rational basis review, a standard that is deferential to the state legislature.

C. Challenges Based Upon Separation of Powers Grounds

Article II, Section 3, of the Florida Constitution sets forth the principal that Florida should employ a tripartite system of governance.[133] This system is to consist of the state legislative, executive, and judicial branches, each prohibited from exercising "any powers appertaining to either of the other branches unless expressly provided [in the constitution]."[134] Under this system, the Florida Supreme Court has been entrusted with the absolute authority to "adopt rules for the practice and procedure in all courts,"[135] while the "Legislature is empowered to enact substantive law."[136] Thus, determining whether a statute is procedural or substantive in nature is necessary for deciding whether the legislature overstepped its constitutional role. The controlling test for whether a challenged statute is procedural or

129. Graham v. Richardson, 403 U.S. 365, 371–72 (1971) ("[T]he Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." (footnotes omitted)); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 525 (2022).

130. *Sasso*, 431 So. 2d at 222.

131. Jackson v. State, 191 So. 3d 423, 426 (Fla. 2016) (quoting *In re* Est. of Greenberg, 390 So. 2d 40, 42 (Fla. 1980), *overruled by* Shriners Hosps. for Crippled Child. v. Zrillic, 563 So. 2d 64 (Fla. 1990)).

132. *Id.* (citing Acton v. Fort Lauderdale Hosp., 440 So. 2d 1282, 1284 (Fla. 1983)).

133. FLA. CONST. art. II, § 3.

134. *Id.*

135. *Id.* art. V, § 2; Massey v. David, 979 So. 2d 931, 936 (Fla. 2008).

136. *Massey*, 979 So. 2d at 936 (citing Allen v. Butterworth, 756 So. 2d 52, 59 (Fla. 2000)).

substantive was set forth in *Haven Federal Savings & Loan Ass'n* v. *Kirian* and reaffirmed in *Massey v. David*:

> Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property. On the other hand, practice and procedure "encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof." It is the method of conducting litigation involving rights and corresponding defenses.[137]

Despite the court's decisive language that creates an apparent bright line rule, it has since acknowledged that the distinction between procedural and substantive law is not so simple.[138] Instead, the distinction is one that is nuanced and is one that can affect the whole or a singular part of a statute:

> Of course, statutes at times may not appear to fall exclusively into either a procedural or substantive classification. We have held that where a statute contains some procedural aspects, but those provisions are so intimately intertwined with the substantive rights created by the statute, that statute will not impermissibly intrude on the practice and procedure of the courts in a constitutional sense, causing a constitutional challenge to fail. If a statute is clearly substantive and "operates in an area of legitimate legislative concern," this Court will not hold that it constitutes an unconstitutional encroachment on the judicial branch. However, where a statute does *not* basically convey substantive rights, the procedural aspects of the statute cannot be deemed "incidental," and that statute is unconstitutional. Moreover, where this Court has promulgated rules that relate to practice and procedure, and a statute provides a contrary practice or procedure, the statute is unconstitutional to the extent of the conflict. Finally, where a statute has some substantive aspects, but the procedural requirements of the statute conflict with or interfere with the

137. *Id.* at 936–37 (emphasis omitted) (quoting Haven Fed. Sav. & Loan Ass'n v. Kirian, 579 So. 2d 730, 732 (Fla. 1991)).

138. *Id.* at 944.

> procedural mechanisms of the court system, those requirements are unconstitutional.[139]

This well-defined body of caselaw appears to give the legislature a fair amount of latitude in dictating procedural laws as necessary to effectuate a substantive objective. The main issues arise, in a constitutional sense, when either the legislation has little to no substantive effect on its face or the procedural aspects of an otherwise permissible statute conflict with existing judicially defined rules governing the topic.[140] In these cases, the procedural power of the judiciary reigns supreme as the provisions at issue are declared unconstitutional to the extent that they are problematic.[141] Thus, a challenging party will likely either: (1) attack the provision as being procedural altogether; or (2) attempt to associate existing procedural rules with those created by the provision so as to reveal a conflict.

It is important to note, however, that the separation of powers doctrine is not absolute. Article V, Section 2, of Florida's Constitution sets out one limitation for the court's procedural rulemaking authority to place a check on the power of the judiciary.[142] Under that provision, "[r]ules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature,"[143] meaning that the state legislature can create procedural law with enough momentum.

D. Challenges Based Upon Violation of the Constitutional Single-Subject Requirement

As stated above, Article III, Section 6, of Florida's Constitution requires that "[e]very law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title."[144] One of the leading cases on the single-subject requirement in the context of tort reform is *Smith v. Department of Insurance.*[145] In that case, the Florida Supreme Court proclaimed the test for this type of constitutional challenge:

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139. *Id.* at 937 (citations omitted).
140. *Id.*
141. *Id.*
142. *See* FLA. CONST. art. V, § 2.
143. *Id.*
144. *Id.* art. III, § 6.
145. 507 So. 2d 1080, 1087 (Fla. 1987) (per curiam).

> The test to determine whether legislation meets the single-subject requirement is based on common sense. It requires examining the act to determine if the provisions "are fairly and naturally germane to the subject of the act, or are such as are necessary incidents to or tend to make effective or promote the objects and purposes of legislation included in the subject."[146]

In a single-subject challenge, the court has historically "taken a broad view of [the] legislative restriction"[147] because "in that process there [is] an opportunity for legislative debate and public hearing,"[148] making the creation of logrolling legislation more difficult. Accordingly, it held that "the subject of an act 'may be as broad as the Legislature chooses as long as the matters included in the act have a natural or logical connection.'"[149] In all, the single-subject requirement has been interpreted to create a safeguard against a particular subset of legislative action, as opposed to creating a necessary checkpoint that critiques every new statute crossing the house floor, perpetuating a deferential standard.[150]

VI. ARGUMENT

The following Part details how each of these respective constitutional arguments will be employed in an attack upon individual provisions of HB 837. While it is possible that a potential challenger could utilize all four arguments set out below in a single suit, they must first meet the standing requirements of proving that they have a concrete and particularized injury that is caused by a particular provision and that their injury can be resolved by the challenged provision being held to be unconstitutional.

146. *Id.* (quoting State v. Canova, 94 So. 2d 181, 184 (Fla. 1957)).

147. *Id.* at 1085 (emphasis omitted) (quoting Fine v. Firestone, 448 So. 2d 984, 988 (Fla. 1984)).

148. *Id.* (citing *Fine*, 448 So. 2d at 989).

149. *Id.* (quoting Chenoweth v. Kemp, 396 So. 2d 1122, 1124 (Fla. 1981)).

150. *Id.* ("The purpose of the constitutional prohibition against a plurality of subjects in a single legislative act is to prevent a single enactment from becoming a 'cloak' for dissimilar legislation having no necessary or appropriate connection with the subject matter." (quoting State v. Lee, 356 So. 2d 276, 282 (Fla. 1978))).

A. Substantive Due Process/Equal Protection Clause Challenges

In analyzing the strength of a substantive due process or equal protection claim, the first inquiry is to determine whether the particular statute involves a fundamental right or a suspect class of people, as this will set the course for the court's analysis.[151] When the challenged statute involves either a fundamental right or a suspect class, the power of the judiciary is at its maximum, thus warranting a heightened level of scrutiny in analyzing a statute, otherwise known as strict scrutiny.[152] Conversely, the power of the judiciary is at its lowest ebb when dealing with statutes lacking a defined suspect class, or involving such non-fundamental topics as business or economic regulation, necessitating a rational basis review.[153]

A fundamental right arises from and "is explicitly guaranteed by the [F]ederal or Florida Constitution."[154] As stated previously, the most likely theory behind a due process challenge to HB 837 would be that the Bill restricts access to the courts of Florida. Article I, Section 21, of the Florida Constitution states: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."[155] Thus, the right of access to the courts and the right to redress for injuries sustained appears to be a fundamental right, warranting strict scrutiny. However, the Supreme Court of Florida recognized the overbreadth of what could be included under "access to the courts," and subsequently created a test to determine when that right has been abrogated in the case of *Kluger v. White*.[156] Under *Kluger*, a provision must first deprive a claimant of a right of action entirely, leaving no ability to recover in a court of law.[157] Once it is determined that the statute abrogates a claimant's right of action, *Kluger* sets out the following test:

151. Silvio Membreno & Fla. Ass'n of Vendors v. City of Hialeah, 188 So. 3d 13, 21 (Fla. 3d Dist. Ct. App. 2016).

152. *Id.* at 21–22.

153. *Id.* at 22.

154. State v. J.P., 907 So. 2d 1101, 1109 (Fla. 2004).

155. FLA. CONST. art. I, § 21.

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

157. *Id.* In *Kluger*, a claimant was barred from bringing a claim for damages caused by a negligent driver. *Id.* at 2. The Florida statute in question set a minimum property damage threshold of $550 when a claimant lacked property damage coverage. *Id.* The court invalidated the statute for denying the "right of access to the courts." *Id.* at 4.

> [W]here 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. § 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.[158]

The potential challenges facing HB 837 are unlikely to meet the *Kluger* test in any material way, as the statute did not eliminate previously existing causes of action; it only provided additional restrictions and further narrowed existing statutes of limitations. For example, HB 837 did not deprive a plaintiff the right to bring a third-party bad faith claim, but it instituted several protective measures such as establishing a good-faith requirement among claimants in furnishing information and creating a ninety-day "safe harbor" provision for insurers to tender policy limits or meet demands.[159] Further, the pivot to a modified comparative negligence scheme did not bar an action for negligence entirely; instead, it barred *recovery* when a plaintiff is found to be over 50% at fault by a neutral fact finder.[160] Because the challenged provisions of HB 837 will not meet the test created in *Kluger*, it is likely that a reviewing court will not find that the provisions of HB 837 deprived plaintiffs of a right of access to the courts of Florida within the definition of this fundamental right.

In addition to the challenged provisions being unlikely to be declared as interfering with a fundamental right, the challenged provisions are also unlikely to be found to address a suspect class in the equal protection context. As mentioned previously, three shared characteristics have been found among the recognized suspect classes: "(1) immutable characteristics; (2) historical disadvantage; and (3) relative lack of political representation."[161] The suspect classes that are currently recognized are race,

158. *Id.*
159. *See* H.B. 837, 2023 Leg., Reg. Sess. (Fla. 2023); Zelitt & McKendry, *supra* note 48.
160. Fla. H.B. 837.
161. Sasso v. Ram Prop. Mgmt., 431 So. 2d 204, 221 (Fla. 1st Dist. Ct. App. 1983) (citations omitted).

national origin, alienage, and religion.[162] Additionally, gender has been classified as a quasi-suspect class.[163] A constitutional challenge of HB 837 would be unlikely to garner strict scrutiny in an equal protection analysis because the statute is facially neutral toward any defined class of people.[164] The most appropriate way to label the class of people affected by HB 837 would be "plaintiffs" or "claimants," because they share no other attribute than an attempt to bring a claim based in negligence. This group would lack any of the three standard characteristics of a suspect class, as there would be no discernable characteristics, historical disadvantage, or lack of political representation.

The potential challenges to HB 837 will likely be most akin to those expressed in *Smith v. Department of Insurance*, where the court applied a rational basis test to both the appellant's due process and equal protection challenges against the Tort Reform and Insurance Act of 1986.[165] There, the court found that no suspect class or fundamental right was implicated in regulatory requirements on commercial insurance policies and mandatory discounts or rebates to insureds; however, the noneconomic losses cap was held unconstitutional.[166]

B. Analysis of Government Objectives

Irrespective of whether a reviewing court were to apply strict scrutiny or rational basis review, an analysis of the intent of the Florida Legislature in passing HB 837 is necessary. As mentioned previously, both Governor DeSantis and members of the Florida Legislature proclaimed that the benefits of this Bill would be two-fold.[167] First, HB 837 was passed to create more affordable

162. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 525 (2022).

163. *Sasso*, 431 So. 2d at 222. Quasi-suspect classes fail one of the three shared characteristics, but still "deserves[e] . . . heightened judicial scrutiny." *Id.*

164. In *Washington v. Davis*, the Supreme Court acknowledged that a facially neutral statute could still be found to be discriminatory by being applied invidiously against a suspect classification. 426 U.S. 229, 241 (1976). However, disparate impact alone was held to be insufficient when lacking evidence of discriminatory intent. *Id.* at 240. Thus, if brought, this argument would likely fail because the parties asserting this discriminatory claim would be hard-pressed to find suspect classification or the discriminatory intent upon said suspect classification to accompany any assertions of disparate impact.

165. *See* Smith v. Dep't of Ins., 507 So. 2d 1080, 1091 (Fla. 1987) (per curiam).

166. *Id.* at 1095.

167. *See DeSantis Press Release*, *supra* note 1.

insurance premiums for the citizens of Florida.[168] This protects both the financial and physical health of Florida families, as it has the effect of increasing disposable income of Florida households and decreasing the number of uninsured drivers on Florida roads, creating a stronger likelihood that victims of tortious action will be able to obtain redress. Second, the Bill was aimed at making Florida's legal climate more hospitable to businesses by decreasing the threat of litigation and the cost of commercial liability insurance.[169] Another unspoken government objective in passing HB 837 was to provide relief to Florida's civil docket, a system that has been backed up dating back to the COVID-19 pandemic, by encouraging quicker settlements.[170] However, at this juncture, that sentiment appears to be incorrect, as the passage of HB 837 has created some of the busiest dockets in state history.[171]

C. Rational Basis Review

If a reviewing court were to apply rational basis review in accordance with Florida precedent, the challenged HB 837 provisions would likely pass constitutional analysis by bearing a rational relationship to a legitimate government interest.

A rational basis analysis for HB 837 would strongly resemble the review conducted in *Lasky v. State Farm Insurance Co.*, where the Florida Supreme Court held that Florida's no-fault insurance law and its accompanying medical expense requirements were rationally related to the accomplishment of several similar

168. *See id.*

169. *See id.*

170. "One study, in relevant part, provides evidence that settlement amounts are lower in jurisdictions with modified comparative negligence schemes than in those with pure comparative negligence schemes." Zelitt & McKendry, *supra* note 48.

171. As mentioned in the introduction to this Article, Florida's e-filing portal broke nearly every record possible with 280,122 cases filed in March of 2023. *See* Fargason, *supra* note 4. This left state courts in some of Florida's most populous counties, such as Hillsborough, being forced to institute a mandatory stay on the filing of new cases. Daren Dorminy, *Changes in Florida's Tort Landscape: Key Takeaways from the Tort Reform Bill*, MORAN KIDD (May 11, 2023), https://morankidd.com/resources/articles-seminars/changes-in-floridas-tort-landscape-key-takeaways-from-the-tort-reform-bill/. Further, these issues were not limited to state court. A study of the federal court dockets of all fifty states revealed that Florida led the United States in personal injury lawsuits per capita in 2023 with 1,237% more filings than the national average. *See* Mason Lawlor, *New Study Finds Florida Has the Most Personal Injury Cases Per Capita. Is New Bad Faith Law to Blame?*, ALM (July 18, 2023, 2:24 PM), https://www.law.com/dailybusinessreview/2023/07/18/new-study-finds-florida-has-the-most-personal-injury-cases-per-capita-is-new-bad-faith-law-to-blame/?slreturn=20231013173509.

government objectives.[172] In this case, the court recognized alleviating a congested court docket, a reduction in insurance premiums, and reducing the risk of unpaid or underpaid damages as permissible legislative objectives.[173] Because the court found a rational relationship between the legitimate objectives and the statute, it refused to question the methods by which the elected representatives chose to accomplish said objectives.[174] Thus, the provisions were held to be constitutional.[175]

As mentioned above, the analysis for an equal protection challenge would mirror that of an alleged substantive due process violation because "[t]he rational relationship test used to analyze a substantive due process claim is synonymous with the reasonableness analysis of an equal protection claim."[176]

Estate of McCall v. United States provides an informative example of a successful equal protection claim using rational basis review.[177] In that case, the Florida Supreme Court determined that a statutory cap on wrongful death noneconomic damages was a violation of both the Federal and Florida Equal Protection Clauses because the damage structure did not consider the number of claimants entitled to recovery.[178] In essence, the statute failed the rational basis test because it created "arbitrary and invidious discrimination between medical malpractice claimants" and bore no rational relationship to any legitimate government objective.[179] The stated government interest in *McCall* was that Florida faced a "medical malpractice crisis" and doctors were leaving the state or retiring due to high insurance rates.[180] However, the court dispelled that notion by proving that the number of medical professionals in Florida was actually increasing.[181] A case involving the challenged provisions above would likely be distinguished from *McCall* because many of the actions taken through HB 837 to combat Florida's latest liability insurance/tort crisis are supported by valid studies and commentary put forth by

172. 296 So. 2d 9, 17 (Fla. 1974).
173. *Id.* at 16.
174. *Id.* at 17.
175. *Id.*
176. State v. Robinson, 873 So. 2d 1205, 1214 (Fla. 2004) (citations omitted).
177. 134 So. 3d 894, 901 (Fla. 2014).
178. *Id.* (citing St. Mary's Hospital, Inc. v. Phillipe, 769 So. 2d 961, 972 (Fla. 2000)).
179. *Id.* at 905.
180. *Id.* at 907–09.
181. *Id.* at 909.

reputable entities such as the Florida Department of Highway Safety and Motor Vehicles,[182] the U.S. Chamber of Commerce,[183] the ABA,[184] and the Florida Bar,[185] all of which reveal a glaring need for insurance reform in order to ensure the physical and financial health of Florida citizens. Ultimately, these actions were enacted to create uniformity among Floridians from verdicts via damage regulating statutes to insurance rates through a reduction in litigation related costs, not to invidiously discriminate between claimants.

D. Strict Scrutiny[186]

If a reviewing court were to apply strict scrutiny to the challenged provisions of HB 837, it is uncertain that the Bill would pass constitutional muster, because a court would be apprehensive to label any of the legislature's objectives as either "compelling" or "narrowly tailored." The label of a "compelling interest" is accompanied by a higher burden than the "legitimate interest" burden required under rational basis review.[187] When proving a compelling interest, the "government 'must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.'"[188] Thus, not only must the interest exceed one that is merely legitimate, but it must also be

182. *Traffic Crash Reports Crash Dashboard*, *supra* note 15.

183. U.S. CHAMBER COM. INST. FOR LEGAL REFORM, NUCLEAR VERDICTS TRENDS, CAUSES, AND SOLUTIONS 15 (2022), https://instituteforlegalreform.com/research/nuclear-verdicts-trends-causes-and-solutions/.

184. McKee & Jackson, *supra* note 32.

185. Fargason, *supra* note 4.

186. It is important to note that strict scrutiny is rarely applied in the civil realm due to the highly contentious intrusion into the legislative sphere, but when it is, the case normally involves a person's right to privacy, a closely held Florida right. For example, in *Gainesville Woman Care, LLC v. State*, the Florida Supreme Court applied strict scrutiny to a mandatory delay law which forced a woman seeking an abortion to wait twenty-four hours before terminating her pregnancy. 210 So. 3d 1243, 1253, 1258–59 (Fla. 2017) (citing State v. J.P., 907 So. 2d 1101, 1109 (Fla. 2004)) ("This Court applies strict scrutiny to any law that implicates the fundamental right of privacy."); *see also* Miles v. City of Edgewater Police Dept., 190 So. 3d 171, 178 (Fla. 1st Dist. Ct. App. 2016) (utilizing strict scrutiny in analyzing a First Amendment challenge to a statute governing the payment of attorney's fees).

187. State v. J.P., 907 So. 2d 1101, 1133 (Fla. 2004) (Cantero, J., dissenting).

188. *Id.* at 1116–17 (majority opinion) (quoting Schleifer v. City of Charlottesville, 159 F.3d 843, 849 (4th Cir. 1998)).

supported by cognizable statistics that reflect its enormity.[189] Therefore, the two strongest arguments for a compelling state interest that could be supported by legitimate statistics would be: (1) the protection of Florida's business interests as it pertains to the generation of tax revenue and jobs for Florida citizens; or (2) an assertion that the challenged provisions of HB 837 were enacted to protect its citizens from uninsured drivers and ensure the timely payment of medical bills for those substantially harmed in tortious actions.

Further, presuming that the Florida Supreme Court were to find the government interests adequately "compelling" within the meaning of the law, the provisions of HB 837 would unlikely be declared narrowly tailored to meet those interests. To pass the narrowly tailored requirement, "there must be a sufficient nexus between the stated government interest and the classification created by the ordinance."[190] Thus, in an action challenging the constitutionality of Florida tort reform statutes, a strict scrutiny analysis would hinge upon "the nexus between the asserted interests and the means chosen, and whether this is the least restrictive alternative to achieve the goals."[191]

This is not the case for many of the objectives passed through HB 837. In fact, the existence of several alternatives suggests that HB 837 is not narrowly tailored, even if the interests furthered by its enactment were found to be compelling. These alternatives include the legislature imposing higher punishments on uninsured drivers to dissuade the uninsured from getting behind the wheel; Governor DeSantis implementing an antitrust investigation into the insurance companies that are active in Florida and taking corrective action to bring insurance premiums down; and the legislature designing generous tax breaks to large businesses to further their policy interests of being business friendly while avoiding tort reform all together.

E. Separation of Powers Challenges

"[A] statute which creates or modifies a procedural rule of this Court violates [A]rticle II, [S]ection 3, of the Florida Constitution, which prohibits one branch of government from exercising any

189. *Id.*
190. *Id.* at 1117 (quoting Nunez v. City of San Diego, 114 F.3d 935, 946 (9th Cir. 1997)).
191. *Id.*

powers appertaining to either of the other branches unless expressly permitted by the constitution."[192] The expected challenges to HB 837 based upon a violation of Article II, Section 3, are its statutes governing Florida's fault apportionment scheme and the admissibility of letters of protection and medical bills. This challenge would assert that both provisions are facially procedural in nature and conflict with existing judicially created rules on the matter.

With regard to Florida's fault apportionment scheme, HB 837's modified comparative negligence standard may be argued to be unconstitutional as an impermissible legislative invasion into the province of the court. After all, the modification of fault apportionment directly changes practices of jury deliberation and instruction, as well as determines the distribution of damages.[193] However, a separation of powers argument pertaining to HB 837's fault apportionment scheme would face two integral issues: (1) whether the existing Florida Supreme Court precedent allows the legislature to adjust the state's fault apportionment scheme; and (2) whether the challenged provisions fall within an exception allowing for legislative procedural rulemaking when the underlying statute is substantive in nature.

The existing precedent regarding the legislature's ability to influence fault apportionment largely emanates from the last landmark case on the matter in Florida, *Hoffman v. Jones*.[194] In *Hoffman*, the court acknowledged that "[l]egislative action could, of course, be taken" on the subject, however, it also made clear its ultimate authority to "reconsider an old and unsatisfactory court-made rule."[195] Further, it clarified that "[t]he rule that contributory negligence is an absolute bar to recovery was—as most tort law—a judicial creation."[196] In a challenge to HB 837's fault apportionment scheme, the defense bar is likely to take the *Hoffman* holding as a green light for the legislature to change Florida's standard from pure comparative negligence to modified comparative negligence. However, there is a far more plaintiff-friendly interpretation to *Hoffman*: that the court was declaring the procedural nature of fault apportionment in litigation and any

192. Abdool v. Bondi, 141 So. 3d 529, 538 (Fla. 2014).
193. Hoffman v. Jones, 280 So. 2d 431, 438–39 (Fla. 1973).
194. *Id.* at 435–36.
195. *Id.* at 436 (emphasis omitted) (quoting Gates v. Foley, 247 So. 2d 40, 43 (Fla. 1971)).
196. *Id.* at 434.

legislation to the contrary of the opinion would create a direct conflict with the role of the judiciary, a result expressly disallowed in *Massey*.[197] This argument would find great support in Florida's legislative history regarding fault apportionment, where the only changes in schemes have resulted from judicial opinions that were later codified, with no instances existing of the reverse.[198] This history would largely deflate the main defense-friendly argument to the Bill's constitutionality: that the fault apportionment provisions of HB 837 were substantive in nature, and thus any procedural elements of the provisions would be allowed under *Massey* as a way of furthering the substantive objective.

The other potential argument for a separation of powers challenge to HB 837 would come by way of its provisions regarding the admissibility of medical bills and letters of protection, for they appear to alter pre-existing standards of admissibility while creating new standards for discovery and mandatory disclosures. When compared to the accepted definitions of substantive laws and procedural laws in the separation of powers context, these changes appear to lend themselves to the traits of the latter.[199] As previously mentioned, the provisions of HB 837 that address the admissibility of medical bills and letters of protection had three main effects.[200] First, the Bill created heightened restrictions regarding what type of evidence was admissible to the fact finder to prove damages for past and future treatment. Second, it created mandatory disclosures for plaintiffs when utilizing a letter of

197. Massey v. David, 979 So. 2d 931, 937 (Fla. 2008) ("[W]here this Court has promulgated rules that relate to practice and procedure, and a statute provides a contrary practice or procedure, the statute is unconstitutional to the extent of the conflict.").

198. As established above, Florida has now adopted three separate fault apportionment schemes throughout its history. The first accepted scheme was contributory negligence, which was largely seen as a product of English common law and officially adopted in Florida via *Louisville & Nashville Railroad v. Yniestra*. 21 Fla. 700, 738 (1886). The second was a move to pure comparative negligence under *Hoffman*. 280 So. 2d at 438. This decision was later codified by the Florida Legislature in the 1986 Tort Reform and Insurance Act, nearly a decade and a half later. McKee & Jackson, *supra* note 32. The third was the recent change prompted by HB 837 in March of 2023, placing Florida under a modified comparative negligence regime. H.B. 837, 2023 Leg., Reg. Sess. (Fla. 2023). Thus, the scheme created by HB 837 is the first in Florida's history to be initiated by the state legislature.

199. *Massey*, 979 So. 2d at 936–37 ("*Substantive law* has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. . . . On the other hand, *practice and procedure* 'encompass the *course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights* or obtains redress for their invasion.'" (quoting Haven Fed. Sav. & Loan Ass'n v. Kirian, 579 So. 2d 730, 732 (Fla. 1991))).

200. *See supra* pt. III.D.

protection in their treatment. Third, it created additional protections for defendants that prohibited an award for economic damages that were inflated above what was admissible to the fact finder. When taken together, it appears clear that these provisions "may be described as the machinery of the judicial process as opposed to the product thereof."[201] In other words, they do not pertain to the substance and limits of a given right; instead, they set out procedural guidelines that dictate the methods of exercising a pre-existing substantive right.

This argument against legislative infringement into evidentiary principles also finds great support in caselaw. In *DeLisle v. Crane Co.*, the Florida Supreme Court takes a deep dive into the working relationship between the judiciary and the legislature in creating rules of evidence to be used in Florida courts.[202] In said opinion, Justice Quince states that the Florida Supreme Court and the Florida Legislature "worked in tandem for nearly" four decades for the express purpose of avoiding separation of powers challenges.[203] However, in 2000, the working relationship began to sour as the court struck down a series of evidentiary code provisions for having a blatantly procedural purpose.[204] The *DeLisle* court made their ultimate authority felt in the opinion by striking down a legislative attempt to place Florida on the *Daubert* standard for expert witness qualification.[205] Seven months later, the court pivoted to adopting the *Daubert* standard through *In re Amendments to Florida Evidence Code*; however, it began the opinion with its proclamation that the decision was made in accordance with its "exclusive rulemaking authority."[206] Given the protectionist climate of recent Florida Supreme Court decisions, a challenge based upon separation of powers grounds appears to be an avenue ripe for success.

In addition to the uphill constitutional battle ahead of them, the proponents of HB 837 would be without one of the most

201. *Massey*, 979 So. 2d at 937.

202. 258 So. 3d 1219, 1223–24 (Fla. 2018).

203. *Id.* "We therefore chose to adopt the rules, 'to avoid multiple appeals and confusion in the operation of the courts caused by assertions that portions of the evidence code are procedural and, therefore, unconstitutional because they had not been adopted by this Court under its rule-making authority.'" *Id.* at 1224 (quoting *In re* Fla. Evidence Code, 372 So. 2d 1369, 1369 (Fla.) (per curiam), *clarified by* 376 So. 2d 1161 (Fla. 1979) (per curiam)).

204. *Id.*

205. *Id.* at 1229.

206. 278 So. 3d 551, 551 (Fla. 2019) (per curiam).

powerful exceptions to the separation of powers argument. HB 837 would not fall within the Article V, Section 2, exception within Florida's Constitution that allows for the state legislature to repeal procedural rulemaking of the judiciary so long as it is done by a two-thirds vote of the membership of each house.[207] HB 837 passed with approximately 67% of the membership in the House of Representatives,[208] however, it narrowly missed the two-thirds requirement in the Senate with approximately 57.5% of the membership.[209]

F. Single-Subject Requirement Challenges

An analysis of applying the single-subject requirement to the constitutionality of HB 837 would likely mirror the one conducted in *Smith v. Department of Insurance*, where multiple provisions of the Tort Reform and Insurance Act of 1986 were challenged on the same grounds, and ultimately upheld due to the logical relationship between the topics.[210] In that case, the appellants specifically challenged the Act's use of legislation regarding insurance regulation, tort reform, and civil damage litigation together throughout Florida Statutes Chapter 86-160.[211] In particular, the challenged provisions were reduced to five basic areas. First, the Act "contain[ed] long-term insurance reform [that] . . . expand[ed] the authority of the Department of Insurance" and created an "excess profits law."[212] The second part involved a tort reform that dealt in topics such as "replac[ing] joint and several liability with proportional liability," restrictions in damages awards, and conveying additional rights to the courts in damage apportionment.[213] The third pertained to a temporary insurance reform that ended in 1987.[214] The fourth "create[d] a

207. FLA. CONST. art. V, § 2.

208. H.B. 837, 2023 Leg., Reg. Sess. (Fla. 2023), https://www.flsenate.gov/Session/Bill/2023/837/Vote/HouseVote_h00837e1036.PDF (last visited Feb. 14, 2025) (Yeas – 80, Nays – 31, Not Voting – 8).

209. S. 837, 2023 Leg., Reg. Sess. (Fla. 2023), https://www.flsenate.gov/Session/Bill/2023/837Vote/SenateVote_h00837e1003.PDF (last visited Feb. 14, 2025) (Yeas – 23, Nays – 15, Not Voting – 2).

210. 507 So. 2d 1080, 1083–84, 1095 (Fla. 1987) (per curiam).

211. *Id.* at 1083–84.

212. *Id.* at 1085–86 (citation omitted).

213. *Id.* at 1086 (citation omitted).

214. *Id.*

five-member task force to study tort reform and insurance law."[215] The fifth "modifie[d] financial responsibility requirements applicable to physicians."[216] The court found no issue with the challenged sections of the Act given the strong relationship that tort litigation and automobile insurance share.[217] In fact, the court agreed with the trial judge's statements that the concepts of liability insurance and tort law are inextricably intertwined.[218] Thus, because the topics were logically correlated, it was held to be permissible to pass legislation on them altogether.[219] By issuing this opinion, the court ultimately found a balance between allowing for legislative efficiency while remaining weary of logrolling legislation that is too efficient and all-encompassing.

Further, the five challenged areas of the Tort Reform and Insurance Act of 1986 used in *Smith* are quite similar to those provisions that would be expected to be challenged from HB 837, at least in subject matter, thus strengthening the argument that the provisions share a natural and logical connection. A challenger would likely argue that HB 837 involves multiple unrelated subjects, such as the payment of attorney's fees, causes of action for third-party bad faith resulting from a contractual relationship, statute of limitations, mandatory disclosures of contractual agreements between patients and their treating physicians, and civil liability from third-party criminal acts.[220] When taking those similarities into account, it is likely that a court would find that the single-subject requirement is not violated by HB 837's breadth.

A party defending the provisions of HB 837 under a single-subject challenge would have the advantage of the judiciary's historical deference to the legislature and the low bar needed for the statute to pass constitutional muster, that the "matters

215. *Id.* (citation omitted).

216. *Id.* (citation omitted).

217. *Id.* at 1085, 1087 ("Civil litigation does have an effect on insurance and there is no reasonable way that we can say they are not properly connected. We hold chapter 86–160 does not violate the single subject requirement.").

218. *Id.* at 1086–87 (citation omitted) ("[O]ver the years, the tort system as we now know it and liability insurance have grown together, the former having influenced and molded the nature of the latter. The availability of liability insurance has liberalized the law of torts, as well. Legal scholars have long commented on the relationship between the two.").

219. *Id.* at 1087.

220. *See* JUDICIARY COMM. & CIV. JUST. SUBCOMM. STAFF, FINAL BILL ANALYSIS, H.B. 2023-837, Reg. Sess., at 11–13, 17, 23 (Fla. 2023).

included in the act have a natural or logical connection."[221] Further, they would have the advantage of the court's specific acknowledgement that tort law and liability insurance have an illustrious history. In making that point, the party would likely cite to cases discussing the use of the single-subject requirement in the context of tort reform such as *Lee* and *Chenoweth*.[222] In *Lee*, the court upheld legislation with similar provisions as those discussed in *Smith*, approving of a comprehensive tort reform and liability insurance statute premised upon "a substantial increase in automobile insurance rates and related insurance problems."[223] In *Chenoweth*, the court expanded its approval to the inclusion of medical malpractice and insurance reform in the same statute premised upon the similar theory of a "natural or logical connection."[224] Taken together, when analyzing the precedent and judicial posture in the application of the single-subject requirement, a challenger appears to be unlikely to prevail in the context of HB 837.

VII. SOLUTION

As the analysis above sets forth, all four of the potential constitutional challenges to HB 837 (due process, equal protection, separation of powers, and the single-subject requirement) would be valid arguments, with some providing more opportunities for success than others.

The constitutional basis that would provide the greatest opportunity for repeal of certain provisions of HB 837 would be the separation of powers argument emanating from Article II, Section 3, of the Florida Constitution. In particular, the most pertinent provisions of HB 837 to this argument have been codified under

221. *Smith*, 507 So. 2d at 1085 (quoting Chenoweth v. Kemp, 396 So. 2d 1122, 1124 (Fla. 1981)).

222. State v. Lee, 356 So. 2d 276, 282 (Fla. 1978) (per curiam); *Chenoweth*, 396 So. 2d at 1124.

223. 356 So. 2d at 282.

224. 396 So. 2d at 1124 (quoting Bd. of Pub. Instruction v. Doran, 224 So. 2d 693, 699 (Fla. 1969)) ("While chapter 76-260 covers a broad range of statutory provisions dealing with medical malpractice and insurance, these provisions do relate to tort litigation and insurance reform, which have a natural or logical connection.").

Florida Statutes 768.0427[225] and 768.81(6).[226] Section 768.0427 sets the standards for the admissibility of evidence necessary to prove a plaintiff's medical bills and lists the requirements for mandatory disclosures necessary when treating under a letter of protection.[227] There is a strong argument that this statute creates procedural requirements and invades the province of the judiciary, rendering it unconstitutional. Section 768.81(6) adds a provision to Florida's existing fault apportionment scheme to place it on the modified comparative negligence standard.[228] This statute is problematic due to the direct conflict that it creates with the Florida Supreme Court's decision in *Hoffman v. Jones* to retain the power to dictate fault apportionment schemes.[229] These theories for unconstitutionality are not only in accordance with Florida precedent, but also in accordance with various other jurisdictions. For example, in *Best v. Taylor Machine Works*, the Supreme Court of Illinois invalidated a statute that mandated the unlimited disclosure of a plaintiff's medical records as it created "an irreconcilable conflict with the inherent authority of the judiciary."[230] Further, in *Johnson v. Rockwell Automation, Inc.*, the Supreme Court of Arkansas held that a non-party fault apportionment provision was unconstitutional pursuant to a separation of powers argument because it "effectively establishes a procedure that conflicts with our 'rules of pleadings, practice and procedure.'"[231] The strength of the constitutional arguments against these two challenged provisions necessitates immediate action on the part of the state legislature.

To resolve this conflict, I would propose that the Florida Legislature repeal both Section 768.0427 and Section 768.81(6) in order to avoid unfavorable precedent that further limits the Florida Legislature in drafting statutes with procedural aspects. This may appear to be a drastic measure, but a revision to the statute would be inappropriate given the context of the constitutional challenge. A successful challenge on separation of

225. FLA. STAT. § 768.0427 (2024) ("Admissibility of evidence to prove medical expenses in personal injury or wrongful death actions; disclosure of letters of protection; recovery of past and future medical expenses damages.").
226. *Id.* § 768.81(6) ("Greater Percentage of Fault.").
227. *Id.* § 768.0427.
228. *Id.* § 768.81(6).
229. 280 So. 2d 431, 434, 440 (Fla. 1973).
230. 689 N.E.2d 1057, 1092 (Ill. 1997).
231. 308 S.W.3d 135, 140 (Ark. 2009) (citation omitted).

powers grounds would essentially dictate that the legislature is disallowed from rulemaking on the topic. Thus, the opportunities for a successful revision around the problematic portions of Florida Statutes 768.0427 and 768.81(6) are limited, if not nonexistent. Taking this step would ensure that the power of the Florida Legislature remains at its current ebb in terms of procedural rule making.