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INTRODUCTION

Editorial Board

The 2015-2016 school year represents the tenth anniversary of the reestablishment of The Florida A&M University College of Law and the tenth anniversary of The Florida A&M University Law Review. To honor this milestone, the 2015-2016 Editorial Board dedicates Volume 10, Issue 2 to FAMU College of Law’s alumni, students, and faculty. Each article in this edition is authored by an alumnus or current student. We hope you enjoy the 2015-2016 Student Showcase.
# IS GENERAL NEGLIGENCE THE NEW EXCEPTION TO THE FLORIDA IMPACT RULE?

*Stephan Krejci*

## INTRODUCTION

A man watched his sister die in front of him as a result of a car accident, but he could not get relief because Kansas subscribes to the impact rule.\(^1\) Developers cut into a private burial plot, but the family could not bring a negligent infliction of emotional distress (NIED) claim because Georgia follows the impact rule.\(^2\) A mother had to abort

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## INTRODUCTION

A man watched his sister die in front of him as a result of a car accident, but he could not get relief because Kansas subscribes to the impact rule.\(^1\) Developers cut into a private burial plot, but the family could not bring a negligent infliction of emotional distress (NIED) claim because Georgia follows the impact rule.\(^2\) A mother had to abort

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her pregnancy because of her doctor’s negligence, but she could not get relief because of the Kansas impact rule. Florida subscribes to the impact rule too, but the Florida impact rule would not bar any of the above claims.

The impact rule is an ancient torts doctrine that precludes recovery for emotional distress unless the victim has been physically impacted by the tortfeasor and the emotional distress grew out of that physical impact. The first enunciation of this rule is found in the Victorian Railways case. In this case, a gatekeeper invited a coach, which was transporting a pregnant woman, to cross train tracks. The coach was nearly struck by a train and the pregnant woman/mother suffered a miscarriage from the shock. In the ensuing litigation, she was denied relief because “damage arising from shock or fright, without impact, was too remote to sustain the action.” With this, the impact rule was created.

American courts widely adopted the impact rule and it persists in a handful of states to this day. Courts give several reasons for denying such NIED claims and these reasons fall into three broad categories: judicial efficiency, evidence concerns, and foreseeability. Judicial efficiency concerns the flood of litigation that will result if claims for emotional damages could go forward. How would courts sort meritorious claims from frivolous claims? Evidence concerns deal with proving the damages. How should a court distinguish a sensitive person from someone with a tougher constitution? And when some emotional harm can be acknowledged, how can it be valued by a

7. Id.
8. Id.
9. Id.
10. See id.
11. Robert J. Rhee, A Principled Solution for Negligent Infliction of Emotional Distress Claims, 36 ARIZ. ST. J. 805, 815 (2004); see infra Part II.
12. Rhee, supra note 11, at 814.
Foreseeability protects a tortfeasor from injuries that he could not have reasonably expected to result from his actions. However, when there is no physical contact, how can a person know to adjust their behavior to avoid liability?15

This paper proposes that Florida abrogate the impact rule and switch to using a general negligence approach for NIED claims. First, this paper gives an overview of the current state of the Florida impact rule, its exceptions, and why the rule exists. This overview shows that the policy benefits that justify the impact rule do not flow from the rule itself. Next, this paper discusses the impact rules as they stand in the four other states that still cling to them. Comparison of these jurisdictions with Florida reveals that Florida’s impact rule is the least restrictive, appearing more like a general negligence analysis. With this background in mind, discussion of Kentucky’s recent abrogation of the impact rule and Tennessee’s overruling of the physical manifestation rule shows that foreseeability is the true core of the impact rule. Lastly, analysis of impact rule cases under a general negligence approach shows Florida already functionally uses general negligence principles in NIED claims. Thus, there is no loss in abrogating the impact rule because Florida is functionally already there.

I. Florida’s Impact Rule

Florida is one of five remaining states that adheres to the impact rule.16 Of these states, Florida’s rule is the most complex and the most unlike the original impact rule.17 To begin, an impact is only required in negligence actions where the plaintiff is suing for emotional distress.18 However, an impact is not required if the victim can prove his emotional injury with some type of physical manifestation.19 These cases are called direct victim cases.20 Direct victims are harmed by the tortfeasor’s negligent conduct and the victim brings suit for the resulting emotional harm.21 Bystander cases stand in contrast to direct victim cases, in which a close family member perceives the injury of

15. See id.
16. See infra Part II.
17. See Willis, 967 So. 2d at 850.
18. Id.
19. Id.
21. See id.
another person. In a bystander case, this close family member witnessing the injury is the plaintiff in the NIED claim. Lastly, the impact rule does not apply in cases where the NIED claim is supported by facts showing some other freestanding tort. In Florida, a freestanding tort occurs when the defendant should have foreseen the potential for emotional damage because of the underlying tortious conduct. Usually, this exception pops up in special relationship situations, such as doctor-patient or attorney-client. This section gives an overview of the Florida impact rule as it developed in parts: the direct victim cases, the bystander cases, and the freestanding tort cases.

A. Direct Victim Cases

Florida direct victim plaintiffs are directly harmed by the defendant’s negligence. In these cases, a garden-variety negligence action is the main cause of action available. Crane v. Loftin and Gilliam v. Stewart are good starting points for an overview of the direct victim cases. Both of these cases show rather mechanical applications of the impact rule under facts that would probably survive the rule’s application today. In Crane, a woman drove her car across a railroad crossing and was struck by a negligently operated train. She was not physically hit because she leapt from the car in the nick of time, but she suffered from “fright and mental anguish.” The driver could not get relief for this distress because she was not physically impacted. Without an impact, the court could not causally tie her emotional distress to the train.

22. Zell, 665 So. 2d at 1054.
23. Id.
25. Id.
28. Crane v. Loftin, 70 So. 2d 574, 575-76 (Fla. 1954).
30. See Crane, 70 So. 2d at 575-56; Stewart, 271 So. 2d at 466.
31. Crane, 70 So. 2d at 576.
32. Id.
33. Id.
34. See id. In 1954, the driver could have gotten relief if she could have shown gross negligence or intent, as such conduct was never contemplated by the impact rule. See id.
even though relief is denied, there is no discussion of any potential psychological harm, such as post-traumatic stress disorder or some type of anxiety.\textsuperscript{35} Gilliam further exposes the harsh nature of the impact rule as the plaintiff did have a physical injury, just not an impact.\textsuperscript{36} In Gilliam, an elderly woman suffered a heart attack when a car struck her home.\textsuperscript{37} She was not physically hit by the car, but heard the crash, ran out the backdoor to assist, and then returned to bed due to chest pains.\textsuperscript{38} The existence of a physically diagnosable injury, which a medical expert could tie to the car colliding with the house, went uncompensated because of the impact rule.\textsuperscript{39}

\textit{Hagan v. Coca-Cola Bottling Co.} broadened the definition of an impact when faced with a food contamination problem.\textsuperscript{40} In Hagan, a consumer discovered what appeared to be a used condom in her bottle of Coke while drinking from it.\textsuperscript{41} The plaintiff in Hagan actually ingested some of the contaminated soda and filed an NIED claim due to her fear of contracting HIV.\textsuperscript{42} These facts forced the court to reconsider a question it addressed in \textit{Doyle v. Pillsbury Co.} with dicta.\textsuperscript{43} There, a woman saw an insect floating in a can of peas, jumped back in alarm, and fell over a chair.\textsuperscript{44} In Doyle, the court denied relief because the consumer had not actually ingested the peas.\textsuperscript{45} However, the court questioned the operation of the impact rule since ingestion of contaminated food provides a concrete connection for causation, particularly one that is foreseeable to the defendant.\textsuperscript{46} Hagan gave this dicta some

\begin{itemize}
\item \textsuperscript{35} See id.
\item \textsuperscript{36} Gilliam, 271 So. 2d at 466.
\item \textsuperscript{37} Id.
\item \textsuperscript{38} Id.
\item \textsuperscript{39} Gilliam, 291 So. 2d at 595. Gilliam is noteworthy in Florida’s impact rule history because the Fourth DCA actually rejected the impact rule. However, the Florida Supreme Court reversed this decision. Id. The reversal of the lower court’s ruling in Gilliam is quite brief and cites to the lower court’s opinion for the facts and dissent of the appellate judge for the reasoning. Id. at 595. The other apparent effect of this reversal is the Fourth DCA generating harsher impact rule case law than other DCA’s. See, e.g., Thomas v. OB/GYN Specialists of Palm Beaches, Inc., 889 So. 2d 971, 972 (Fla. Dist. Ct. App. 2004) (denying relief because stillbirth was not defined in Tanner despite the impact to the mother during the course of treatment). Ironically, Gilliam reaffirmed Florida’s adherence to the impact rule, but after subsequent decisions, the case would no longer be barred by the rule because the homeowner had physical manifestations of her mental injury. See Willis, 967 So. 2d at 850.
\item \textsuperscript{40} Hagan v. Coca-Cola Bottling Co., 804 So. 2d 1234, 1236 (Fla. 2001).
\item \textsuperscript{41} Id.
\item \textsuperscript{42} Id. at 1235.
\item \textsuperscript{43} See id. at 1238.
\item \textsuperscript{44} Doyle v. Pillsbury Co., 476 So. 2d 1271, 1272 (Fla. 1985).
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id.
\end{itemize}
concrete facts from which to work. Thus, the plaintiff could satisfy the impact requirement because she actually ingested the contaminated food.

The Hagan holding had two effects on the Florida impact rule. First, the court construed ingestion of contaminated food as an impact. While this leap in construction is not without its logic as contaminated food does literally impact the person eating it, it is nevertheless not a case envisioned in the classic Gilliam version of the rule. Second, the court did not require any physical manifestation of the emotional injury. These two modifications to the impact rule were acceptable in this case because a manufacturer of food products should be able to foresee a person becoming ill if they ingest contaminated food. Even if that harm is purely emotional, the emotional harm that potentially flows from eating contaminated food is easily understood. The experience is common to lawyers and laypersons alike. Keep in mind the foreseeability analysis here as it plays a critical role in the other types of impact rule cases in Florida.

The latest in the line of direct victim cases is Willis v. Gami Golden Glades, LLC. In Willis, a guest at a hotel asked a security guard for assistance in parking her car because the lot was dark and unfamiliar, and she feared for her safety. The guard refused to help or even watch as she parked. While getting out of her car, a robber put a gun to her head. The assailant took her purse and then patted her down after removing articles of her clothing. After this traumatic event, the gunman stole her car and drove off. The hotel guest collected herself and again asked the security guard for help, who

47. See Hagan, 804 So. 2d at 1239.
48. Id. at 1241.
49. Id.
50. See id. But see Gilliam, 291 So. 2d at 595.
51. Hagan, 804 So. 2d at 1241.
52. Id.
53. See id.
54. See id. The advance of medical knowledge no doubt hurts the impact rule as well, as courts no longer are doubtful of injuries that are not physical in nature. See Kevin C. Klein & G. Nicole Hininger, Mitigation of Psychological Damages: An Economic Analysis of the Avoidable Consequences Doctrine and Its Applicability to Emotional Distress Injuries, 29 Okla. City U. L. Rev. 405, 426 (2004).
55. Willis, 967 So. 2d at 848.
56. Id.
57. Id. at 849.
58. Id.
59. Id.
pretended as if he had not seen her earlier. The hotel office personnel also refused any assistance, so she went to her room and spent the night in sleepless agony. Doctors later diagnosed her with anxiety, depression, and post-traumatic stress disorder, for which there are some physical symptoms. The court resolved this case by holding the impact of the gun to her temple and the pat down she endured was more than enough.

*Willis* is a milestone in Florida jurisprudence for a number of reasons. For purposes of the direct victim cases, the impact served a function of form and not substance. While the gun being placed to the hotel guest’s head is certainly a traumatic experience, there is no doubt that the psychological trauma that the “impact” produced is the harm at issue, not any harm flowing from a physical injury. This holding leaves one wondering what would have happened in this case absent the gun actually touching the hotel guest and the pat down. However, this is where direct victim cases stand in Florida. The impact need only be minimal, and it does not need to physically cause the emotional injury. As discussed below, these physical manifestations of an emotional injury obviate the need for an impact completely.

**B. Bystander Cases**

Bystander cases are those in which the plaintiff witnesses harm being done to a third party by the defendant and sues for the resulting emotional distress. Bystander cases began carving out exceptions earlier than the direct victim line, with the first major case being *Champion v. Gray*. In *Champion*, a mother heard a car crash. She

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60. *Id.*
61. *Willis*, 967 So. 2d at 849.
62. *Id.* These symptoms include sexual dysfunction, peripheral temperature changes, muscle tightening, and increased sweat gland activity. These symptoms are mentioned to show that the line between physical manifestation and purely psychic injuries is becoming quite blurred. However, some of the frivolous cases which will be mentioned later could no doubt point to similar symptoms. *See, e.g.*, Elliott v. Elliott, 58 So. 3d 878, 882 (Fla. Dist. Ct. App. 2011) (alleging stress, diabetes, and hair loss).
63. *Id.* at 851.
64. *See id.* at 850-51.
65. *See id.*
66. *See infra* Part IV. *Willis* also has some relevance to the freestanding tort exception found in Florida law, which will be discussed below. *Infra* Part II.C.
67. *See Willis*, 967 So. 2d at 850.
came running to the scene of the accident and, seeing her daughter’s dead body, died from shock on the spot.\textsuperscript{71} The mother was not physically impacted in any way, and she actually died from a heart attack.\textsuperscript{72} However, the causal connection of her death to the driver’s negligence was inescapable.\textsuperscript{73} This left the court the options of reaffirming the harsh results of \textit{Gilliam} or creating some type of exception to recognize the emotional distress of bystanders.\textsuperscript{74} In choosing the latter course, the court adopted a bystander test similar to the famous \textit{Dillon} rule.\textsuperscript{75} The bystander test announced in \textit{Champion} allows for an NIED claim to proceed when a person perceives the negligent injury of a close family member.\textsuperscript{76} Thus, the mother is a bystander because she heard the car crash and subsequently died upon seeing the injury to her daughter.\textsuperscript{77}

First, note the requirement of a physical injury. \textit{Champion} was an easy case in one sense, because dying is the ultimate injury; the court did not need to contend with the additional complexity of purely mental damages, such as depression or post-traumatic stress disorder.\textsuperscript{78} Second, the mother did not actually see the accident, she heard it.\textsuperscript{79} Thus, in announcing this holding, Florida received a broader bystander rule than it otherwise might have if the mother had seen the accident.\textsuperscript{80} Lastly, the court is clear to call this a factor test that is enveloped under the “guidepost” of foreseeability.\textsuperscript{81} The presence of all these factors does not necessarily mean that the defendant is under a duty, only that the defendant may foresee emotional harm.\textsuperscript{82}

\textsuperscript{70.} \textit{Id.} \textsuperscript{71.} \textit{Id.} \textsuperscript{72.} \textit{Id.} \textsuperscript{73.} \textit{See id.} \textsuperscript{74.} \textit{Id.} \textsuperscript{75.} \textit{Champion}, 478 So. 2d at 19. \textit{Dillon v. Legg} is the seminal bystander case based not on the zone of danger, but a close relationship with the direct victim. There, a bystander claim was allowed to go forward for a mother that watched her daughter die in a car accident because she was closely related to the victim, saw the accident, and was close to the scene of the accident. 441 P.2d 912, 920 (Cal. 1968). \textsuperscript{76.} \textit{Champion}, 478 So. 2d at 19. The distinction between bystander cases and direct victim cases is not as explicit as it is in other jurisdictions. \textsuperscript{77.} \textit{Id.} This test is distinguished from the zone of danger test, which is noted for its poor application to bystander cases where the bystander has no fear for his own safety. \textit{See, e.g., Vaillancourt v. Med. Ctr. Hosp. of Vermont, Inc., 425 A.2d 92, 95 (Vt. 1980) (showing the limitations to the zone of danger test as the only vehicle for bystander liability).} \textsuperscript{78.} \textit{See Champion}, 478 So. 2d at 18. \textsuperscript{79.} \textit{Id.} \textsuperscript{80.} \textit{See id.} at 19. \textsuperscript{81.} \textit{See id.} at 19-20. \textsuperscript{82.} \textit{See id.} at 20.
Zell v. Meek is the latest bystander case to leave its mark on the impact rule.\textsuperscript{83} Zell added to Champion by stretching the length of time between the injury and its physical manifestation.\textsuperscript{84} In Zell, a tenant picked up an unmarked package left on his doorstep.\textsuperscript{85} The package was a bomb that exploded and killed the tenant.\textsuperscript{86} His daughter had the misfortune of witnessing her father’s dying moments.\textsuperscript{87} Subsequent investigation revealed that the property manager had received bomb threats at this particular property in the past and made no warning to the family living there.\textsuperscript{88} Immediately after this incident, the daughter experienced purely psychological injuries: insomnia, depression, fear of loud noises, bad dreams, and short-term memory loss.\textsuperscript{89} Nine months later, she was diagnosed with a number of digestive ailments.\textsuperscript{90} A medical expert traced these ailments to the daughter’s anxious condition produced by the bombing.\textsuperscript{91} The Champion court did not face such a difficult causation issue since the mother died shortly after seeing her daughter.\textsuperscript{92} However, in this case, the nine-month interval forced the court to relax the short time requirement implicit in the Champion holding.\textsuperscript{93} In so doing, the court acknowledged any bright line time requirement would be arbitrary.\textsuperscript{94} The time between the physical manifestations of the injury and the incident is a factor bearing on causation, not the element of causation itself.\textsuperscript{95} Zell is not nearly as groundbreaking as Champion, then, as bystander actions were already permitted and physical symptoms of the injury are still required.\textsuperscript{96} If Zell is groundbreaking, it is due to the absence of language limiting its holding to bystander cases.\textsuperscript{97} Recall

\begin{itemize}
\item \textsuperscript{83} Zell, 665 So. 2d at 1054.
\item \textsuperscript{84} Id.
\item \textsuperscript{85} Id. at 1049.
\item \textsuperscript{86} Id.
\item \textsuperscript{87} Id.
\item \textsuperscript{88} Id.
\item \textsuperscript{89} Zell, 665 So. 2d at 1049. This case would have presented a much more challenging question for the court if the claim would have been brought closer in time to the bombing. The injuries were squarely within the realm of the ad hoc exceptions the court had been creating up to this point due to the obvious credibility of the injury, but there were no physical symptoms yet. See id.
\item \textsuperscript{90} Id.
\item \textsuperscript{91} Id. at 1049-50.
\item \textsuperscript{92} See Champion, 478 So. 2d at 18.
\item \textsuperscript{93} See Zell, 665 So. 2d at 1053; Champion, 478 So. 2d at 20.
\item \textsuperscript{94} Zell, 665 So. 2d at 1052.
\item \textsuperscript{95} See id. at 1054.
\item \textsuperscript{96} See id.
\item \textsuperscript{97} See Julie H. Litcky-Rubin, So I Finally Understand the “Impact Rule” but Why Does It Still Exist?, Fl. A. B.J., April 2008, at 20, 24.
\end{itemize}
from *Champion* that its factor test does not necessarily bring liability but, rather, only bears on the existence of foreseeability.98 Florida does not clearly separate bystander cases from direct victim cases, so the physical manifestation requirement could potentially be applied to direct victim cases.99 The import of this lack of separation would allow direct victims to bring suit absent an impact, so long as they have physical symptoms to evidence the emotional trauma. This proposition received support in *Willis*, where the court disapproved of language in *Ruttger Hotel Corp. v. Wagner* that limited *Champion* to bystander cases.100

C. Freestanding Tort Cases

The freestanding tort exception is a limitation on the impact rule.101 When a freestanding tort is present in conduct that gives rise to an NIED claim, the impact rule has no application.102 Generally, a freestanding tort is one where the plaintiff would be able to sue on a cause of action other than a negligence claim without having to prove emotional damages to prevail.103 In Florida, when the facts support a freestanding tort, the impact rule does not apply because the tort other than the negligence claim creates foreseeability for the defendant.104

*Kush v. Lloyd* was the first case in this series.105 In *Kush*, a couple had a baby who had the misfortune of being born with genetic abnormalities.106 The couple wanted to have another child, but out of concern for his potential disabilities, they consulted a doctor.107 Their doctor misdiagnosed a genetic disorder and incorrectly told the parents that they could have children free of genetic defects.108 The parents conceived and gave birth to another baby with the same genetic abnor-

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101. *Kush*, 616 So. 2d at 422.
102. *Id.*
103. *See id.*
104. *See id.*
105. *Id.* at 417.
106. *Id.*
107. *Kush*, 616 So. 2d at 417
108. *Id.*
malities. In allowing for emotional damages, the court reasoned that freestanding torts, such as defamation and wrongful birth, stand apart from a negligence action, because these torts would lie even without the attendant emotional injury. The emotional damages would then be parasitic to the damages otherwise recoverable in the claim of wrongful birth against the doctor. This reasoning is buttressed by the availability of emotional damages in torts like defamation and invasion of privacy. In those actions, it is wholly foreseeable to the tortfeasor that emotional damages could result. Thus, the impact rule is not needed to prove foreseeability.

Such reasoning applied to Kush, because the tort of wrongful birth compensates the parents for the additional cost of rearing a handicapped child. The doctor is liable under such a theory because the parents might not have conceived had the doctor not been negligent. The parents in Kush had a cause of action for those damages not because they could prove negligence as to their emotional state, but because of the doctor’s actions giving rise to the wrongful birth claim. The emotional damages were parasitic to that cause of action.

Again, the common theme of foreseeability arises in the analysis to trump the impact rule. In freestanding tort cases, this happens because the tortfeasor can foresee the emotional damage that can result from the underlying tort. However, when an action comes within the freestanding tort exception, that case is now a freestanding tort, creating a whole new cause of action. Thus, after Kush, Florida
recognized a cause of action for wrongful birth outside the scope of negligence actions.\textsuperscript{122}

\textit{Tanner v. Hartog} presented a slightly different question when a doctor’s alleged negligence caused a baby to be stillborn.\textsuperscript{123} In \textit{Tanner}, doctors sent the mother to a hospital for testing and the next day her baby was stillborn.\textsuperscript{124} The mother and her husband asserted a claim of negligent stillbirth against the doctors.\textsuperscript{125} This question is somewhat different than \textit{Kush} for a couple of reasons. First, the baby was stillborn, so the wrongful birth cause of action created in \textit{Kush} was unavailable.\textsuperscript{126} Second, no cause of action for negligent stillbirth existed in Florida, so the parents here essentially brought a malpractice claim.\textsuperscript{127} This was not a problem in \textit{Kush}, because the tort of wrongful birth existed elsewhere, and that cause of action could be proven without a need to satisfy the impact rule.\textsuperscript{128} But since \textit{Tanner} is essentially a negligence action standing alone, it was a pure NIED claim.\textsuperscript{129} Therefore, the foreseeability of emotional harm needed to be proven through the element of duty, placing the impact rule squarely in the father’s path to relief.\textsuperscript{130}

In working through \textit{Tanner}, the court noted that some jurisdictions have disposed of this question by holding the doctor’s treatment of the fetus as an impact.\textsuperscript{131} In jurisdictions where the fetus is not considered a separate legal entity but instead a living tissue of the mother, any impact on the fetus is technically an impact on the mother.\textsuperscript{132} Thus, the mother is impacted and the impact rule is not an obstacle.\textsuperscript{133}

\begin{itemize}
\item \textsuperscript{122} See \textit{Kush}, 616 So. 2d at 423.
\item \textsuperscript{123} \textit{Tanner}, 696 So. 2d at 706. \textit{Tanner} has a more limited factual background because the appeal originated from the motion to dismiss stage. See \textit{id}. This appeal encompasses just the claim of the father and certifies a question to the Florida Supreme Court: “Does the law of this state support a cause of action for emotional damages of an expectant father and mother resulting from a stillbirth caused by the negligent act of another?” \textit{id}.
\item \textsuperscript{124} \textit{id}.
\item \textsuperscript{125} \textit{id}.
\item \textsuperscript{126} See \textit{Kush}, 616 So. 2d at 417, n.2. The wrongful birth cause of action compensates the parents for the cost of raising a child they otherwise would not have conceived. Although this is a rather chilling distinction to draw, the parents would not have incurred those costs in \textit{Tanner}, so their emotional distress damages stood alone. See \textit{Tanner}, 696 So. 2d at 708.
\item \textsuperscript{127} See \textit{Tanner}, 696 So. 2d at 708. The father is the only party present in the appeal because the impact portion of the impact rule was overcome by the impact on the mother through the delivery process. \textit{id} at 706.
\item \textsuperscript{128} See \textit{Kush}, 616 So. 2d at 422.
\item \textsuperscript{129} See \textit{Tanner}, 696 So. 2d at 707.
\item \textsuperscript{130} \textit{id}.
\item \textsuperscript{131} \textit{id}.
\item \textsuperscript{132} \textit{id}.
\item \textsuperscript{133} See \textit{id}.
\end{itemize}
The court rejected this escape route and adopted the reasoning in *Kush*. In doing so, the court created another new cause of action just as it did in *Kush*: negligent stillbirth. Now, instead of resorting to distorted constructions of an impact or creating an exception, the court places this tort outside the realm of general negligence actions with freestanding torts such as trespass and defamation. Since the foreseeability of emotional harm flows from the nature of the tort, a plaintiff need not overcome the impact rule in order to prevail.

However, it must be noted that even the *Kush* reasoning has its harsh limitations. In *Thomas*, a doctor negligently misdiagnosed and terminated a pregnancy. Thus, the parents could not point to a wrongful birth or a stillbirth. The father and husband brought an NIED claim. However, rather than analyze the claim for the presence of conduct which created foreseeability, which is the essence of the *Kush* analysis, the question turned on whether termination of the pregnancy was a stillbirth within the *Tanner* cause of action. Recognizing that *Tanner* created a new cause of action, the court could not fit the facts of this case into the definition of a stillbirth as it existed in *Tanner*. Therefore, the father could not proceed on his NIED claim despite a set of facts just as meritorious as those presented in *Tanner*.

*Gracey v. Eaker* moved *Kush* out of the realm of hospitals and applied it to a therapy setting. In *Gracey*, a licensed therapist treating a husband and wife as separate patients revealed the confidences of those sessions to all parties, contrary to a statutorily imposed duty. The court held that the impact rule did not apply, in part because of the *Kush* reasoning. Just as in *Kush*, emotional damages are foreseeable because a therapist should realize his patients are en-

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134. *See id.*
135. *See Tanner*, 696 So. 2d at 707.
136. *See id.*
137. *See id.*
138. *Thomas*, 889 So. 2d at 971. The facts of this case are particularly unsettling. The doctor negligently removed an arm from the fetus in utero while he was still alive thinking the pregnancy symptoms were caused by a molar pregnancy. *Id.* at 971.
139. *Id.*
140. *Id.*
141. *Id.* at 972.
142. *See id.*
143. *See id.*
145. *Id.*
146. *Id.*
trusting him with their innermost secrets.\textsuperscript{147} The statutory duty owed to the patients buttressed this argument, leaving the therapist without the impact rule as a defense.\textsuperscript{148} This was an important step in the Florida impact rule, as the statutory duty could have been enough to invoke \textit{Kush} without placing emphasis on the special relationship.\textsuperscript{149} However, the court went on to emphasize the special relationship between the parties and its role in foreseeability.\textsuperscript{150} This left the door open for other special relationships that could limit the impact rule's application.

The plaintiff in \textit{Rowell v. Holt} sought to take advantage of this open door, asserting the attorney-client relationship.\textsuperscript{151} \textit{Rowell} involved a public defender who received a document from his or her client that completely exonerated the client and would have secured his release from pretrial detention.\textsuperscript{152} The public defender either lost this document or forgot about it, and the mistake was only realized when another public defender happened to interview the still incarcerated client.\textsuperscript{153} The wrongfully detained client brought an NIED claim for his unnecessarily long incarceration, to which the Office of the Public Defender answered with the impact rule.\textsuperscript{154} Following the reasoning of \textit{Kush}, the court found the impact rule did not apply here because of the attorney-client relationship and the clearly foreseeable emotional harm that resulted because of the public defender's failure to act.\textsuperscript{155} \textit{Kush} clearly implicated a doctor-patient relationship, but the relationship itself did not play a central role in the analysis.\textsuperscript{156} However, \textit{Rowell} put another special relationship on the NIED map.\textsuperscript{157} First, doctor-patient relationships are implicated. Next, therapist-patient relationships are explicitly mentioned, and now attorney-client relationships are, too.\textsuperscript{158}

This special relationship argument is where \textit{Willis} leaves its mark on the freestanding tort cases. Recall in \textit{Willis}, a robber held a

\begin{flushright}
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\textsuperscript{147.} & \textit{Id.} \\
\textsuperscript{148.} & \textit{Id. at 357.} \\
\textsuperscript{149.} & \textit{See id. at 356.} \\
\textsuperscript{150.} & \textit{See Gracey, 837 So. 2d at 356.} \\
\textsuperscript{151.} & \textit{Rowell, 850 So. 2d at 476-77.} \\
\textsuperscript{152.} & \textit{Id. at 476-77. The opinion in Rowell is careful to not reveal the identity of the attorneys that met with Rowell. Id.} \\
\textsuperscript{153.} & \textit{Id. at 477.} \\
\textsuperscript{154.} & \textit{Id.} \\
\textsuperscript{155.} & \textit{Id. at 479-80.} \\
\textsuperscript{156.} & \textit{See Kush, 616 So. 2d at 417.} \\
\textsuperscript{157.} & \textit{See id.; Rowell, 850 So. 2d at 480; Gracey, 937 So. 2d at 357.} \\
\textsuperscript{158.} & \textit{See Rowell, 850 So. 2d at 480; Gracey, 937 So. 2d at 357; Kush, 616 So. 2d at 417.}
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hotel guest at gunpoint and the impact of the gun to her head satisfied the impact rule.\textsuperscript{159} If the hotel guest had sued the robber, the intentional torts of assault and battery would overwhelm the negligence action and more clearly implicate the \textit{Kush} line of cases.\textsuperscript{160} If the relationship between doctor and patient is enough to foresee emotional harm, surely that between robber and victim will suffice to support parasitic emotional damages.\textsuperscript{161} However, the hotel had not committed any freestanding torts, so those causes of action were unavailable.\textsuperscript{162} Therefore, it is unknown how the court would apply the freestanding tort exception in cases where the defendant is not the party who committed the freestanding tort.\textsuperscript{163} However, requiring the hotel to act in such a way to preserve the hotel guest’s emotional tranquility \textit{only after} the gunman touched her does indicate the court may not be troubled by this degree of separation.\textsuperscript{164}

Perhaps most relevant to the freestanding tort line is that the court is able to avoid cementing the special relationship exception, leaving \textit{Kush} as an ad hoc limitation to the impact rule’s construction.\textsuperscript{165} \textit{Rowell}, \textit{Gracey}, and \textit{Kush} began the making of this exception, and if the courts were to extend it to the innkeeper-guest relationship, Florida would be hard-pressed to avoid calling this something other than a special relationship exception. Certainly, an innkeeper is substantially less charged with the emotional tranquility of his or her guests than a therapist of his or her patients.\textsuperscript{166} However, the easy resolution of \textit{Willis} through the impact rule left this issue untouched.\textsuperscript{167}

\textsuperscript{159.} \textit{Willis}, 967 So. 2d at 850.
\textsuperscript{160.} \textit{See id}.
\textsuperscript{161.} \textit{See id}.
\textsuperscript{162.} \textit{See id}.
\textsuperscript{163.} \textit{See id}.
\textsuperscript{164.} \textit{See id}.
\textsuperscript{165.} \textit{See Willis}, 967 So. 2d at 848. This issue was actually the third certified question in \textit{Willis}. \textit{Id}.
\textsuperscript{166.} \textit{See Rowell}, 850 So. 2d at 480; \textit{Gracey}, 937 So. 2d at 357; \textit{Kush}, 616 So. 2d at 417; \textit{see also} \textit{Woodard v. Jupiter Christian Sch., Inc.}, 913 So. 2d 1188, 1191 (Fla. Dist. Ct. App. 2005) (dismissing the case due to the lack of a special relationship exception despite the statutory duty of the clergy to keep communications confidential). \textit{Woodard} is a fascinating case. There, a high school student confessed to his teacher/minister under the assurance of confidentiality that he was homosexual. The teacher revealed these confidences to administrators and other students, and the student brought an NIED claim. Therefore, this case presents the special relationship exception question and facts that give rise to a freestanding tort analysis. \textit{See id}. However, the appeal to the Florida Supreme Court was dismissed, albeit with a dissent along the freestanding tort lines. \textit{Id}. (Pariente, J., dissenting). \textit{But see Willis}, 967 So. 2d at 848.
\textsuperscript{167.} \textit{See Willis}, 967 So. 2d at 850.
Lastly, Willis marks another instance in which the appellate courts in Florida certified questions to the Florida Supreme Court on the how the impact rule should operate. One of the supposed benefits of the impact rule is its creation of a bright line for the existence of foreseeability in an NIED claim. However, the number of certified questions regarding how to apply it would suggest that the line drawn is anything but bright.

D. Justifications for Florida’s Impact Rule

Throughout these lines of cases, Florida has maintained the traditional policy justifications for the impact rule: foreseeability, evidentiary concerns, and judicial efficiency. However, these cases have shown numerous situations in which foreseeability is more clearly proven despite the lack of an impact. The impact rule is a per se rule of foreseeability. To acknowledge that foreseeability is present in these cases absent an impact is to acknowledge that Florida is not deriving this benefit from the impact rule. Evidence concerns are not what they used to be one hundred years ago. Experts capable of proving purely emotional damages are available in situations in which they are needed. Lastly, the flood of litigation has not occurred anywhere. These justifications are seen in the approaches of other states, as discussed below.

168. Id. at 848.
170. E.g., Willis, 967 So. 2d at 848 (certifying four questions); Rowell, 850 So. 2d at 475-76 (certifying one question); Gracey, 837 So. 2d at 350 (certifying one question); Hagan, 804 So. 2d at 1235 (certifying one question); Tanner, 696 So. 2d at 706 (certifying one question); R.J. v. Humana of Florida, Inc., 652 So. 2d 360, 362 (Fla. 1995) (asking how the impact rule operates in a case of negligent HIV diagnosis); Zell, 665 So. 2d at 1054 (certifying a two-part question); Kush, 616 So. 2d at 417 (certifying one question and conflict with another DCA); Champion, 478 So. 2d at 18 (certifying one question).
171. Zell, 665 So. 2d at 1050-51. Zell dwells more on causation, because the specific issue there is whether the time interval between the physical manifestations and the bombing bar the claim. However, when causation is not so questionable, this justification distills to whether the defendant could have foreseen the emotional harm. See Hagan, 804 So. 2d at 1239.
172. See Zell, 665 So. 2d at 1050 (finding bystander liability); Kush, 616 So. 2d at 422 (finding liability based on foreseeability).
173. See Lee, 533 S.E.2d at 86.
174. Kircher, supra note 14, at 808.
175. See Osborne v. Keeney, 399 S.W.3d 1, 18 n.39 (Ky. 2012); infra Part III.C.
II. THE IMPACT RULE IN OTHER STATES

A. Indiana

Indiana follows the impact rule, but physical manifestations of the injury are not required in a direct victim claim.\(^\text{176}\) However, if the impact or manifestation is minimal, the direct victim-plaintiff must show that the injury is serious and not speculative.\(^\text{177}\) For example, a restaurant customer successfully asserted an NIED claim against a restaurant when he ate a portion of a meal that had been cooked with a worm.\(^\text{178}\) Eating the contaminated food served as the impact.\(^\text{179}\) Even though this impact does not have the force of a negligently driven car, the evidence showed genuine emotional distress that was foreseeable by the restaurant.\(^\text{180}\)

The court defined the outer limits of this test in *Atlantic Coast Airlines v. Cook*.\(^\text{181}\) In the months after September 11th, airline passengers watched an unsettled passenger harass flight attendants, smoke cigarettes on the plane, and attempt to obtain a seat near the cockpit door.\(^\text{182}\) The passenger’s actions were alarming enough for the plaintiff to secure the assistance of other passengers in case an imminent threat of attack arose.\(^\text{183}\) The flight ended uneventfully, but the plaintiff brought an NIED claim against the airline for failing to control a flight security risk.\(^\text{184}\) Faced with the impact rule, the passenger asserted the cigarette smoke from the security risk passenger and the vibrations in the floor of the airplane as the impacts sustained.\(^\text{185}\) This invoked the *de minimis* impact/serious injury test, and the court found

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\(^{176}\) Conder v. Wood, 716 N.E.2d 432, 435 (Ind. 1999). *Conder* is more appropriately categorized as a bystander case, but since the victim sustained an impact from banging on the truck that was crushing her friend, the direct victim/bystander distinction was not made until later. Thus, language from *Conder* pops up in direct victim and bystander cases. See, e.g., State Farm Mut. Auto. Ins. Co. v. D'Angelo, 875 N.E.2d 789, 796 n.2 (Ind. Ct. App. 2007) (asserting a direct impact from trying to lift a car off of the accident victim despite the presence of bystander facts); Atl. Coast Airlines v. Cook, 857 N.E.2d 989, 996 (Ind. 2006) (citing *Conder* for requirement of an impact, even though impact has not been required since 2000 for bystander cases).

\(^{177}\) *Atl. Coast Airlines*, 857 N.E.2d at 996.


\(^{179}\) See id.

\(^{180}\) See id. at 996-97.

\(^{181}\) *Cook*, 857 N.E.2d at 991-92.

\(^{182}\) Id.

\(^{183}\) Id.

\(^{184}\) Id.

\(^{185}\) Id. at 999.
the injury not one within the ambit of relief. The lack of medical treatment and symptoms to describe the emotional distress, other than anxiety during the event, led the court to describe the injury as transitory and similar to emotions many passengers feel on airplanes daily. Thus, the impact rule in Indiana does keep out apparently frivolous claims, but the impact rule is applied in name only. The Indiana courts are actually applying a serious injury test, only allowing plaintiffs to proceed on significant emotional injuries foreseeable to the defendant.

The bystander line of cases started in Shaumber v. Henderson. There, a mother and her daughter watched helplessly as their son and brother, respectively, died from his injuries following a car crash. The survivors successfully asserted a negligence action against the drunk driver for their physical injuries, but they were more severely injured emotionally from the lost family member. Instead of getting rid of the impact rule, Indiana chose to create the “direct involvement” rule. It allows claims for emotional distress to go forward if the impact is not causative of the emotional distress, so long as the plaintiff is directly involved in the injury to the third party. In asserting the direct involvement rule, a plaintiff must show the emotional damages are serious in nature and would normally be suffered by a reasonable person.

Even though the mother and daughter were both impacted in Shaumber, the impact requirement did not last long. Groves v. Taylor held no impact upon the bystander is needed. There, an eight-year-old girl heard her six-year-old brother struck by a car. She then turned to see his body rolling off the road. By allowing for recovery because of the daughter’s direct involvement in the incident, absent

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186. Id. at 1000.
188. Ross v. Cheema, 716 N.E.2d 435, 437 (Ind. 1999) (denying an NIED claim where the impact derives from a courier knocking on the front door).
189. See Cook, 857 N.E.2d at 999; Holloway, 695 N.E.2d at 996.
191. Id.
192. Id.
193. Id. at 456.
194. See id.
195. Id.
197. Id.
198. Id.
199. Id.
any impact upon her, Indiana’s bystander rule was formed. 200 The rule in Groves is more akin to the Dillon rule: a fatal or serious injury sustained by a person with a close relationship to the bystander, which would cause emotional distress to a reasonable person, only needs to be perceived by the bystander. 201

Finally, Indiana also has an intentional tort exception, which applies when the defendant’s conduct is akin to a crime or intentional tort, like arson, 202 defamation, 203 or fraud. 204 Such intentional conduct is outside the scope of the impact rule because the foreseeability function of the impact rule is unnecessary when the defendant acts with intent. 205 The intentional tort exception is exactly that and does not necessarily run to freestanding torts, like negligent stillbirth. In Spangler v. Betchel, a baby was stillborn after alleged negligent treatment while the baby was still in utero. 206 Instead of recognizing the foreseeability that would flow from the malpractice action, the court allowed the NIED claim to go forward because of the impact of the treatment to the mother. 207 Therefore, an impact is required in the negligent stillbirth context. 208

Taken together, the Indiana impact rule is perhaps nearly non-existent, but still stricter than the Florida impact rule. Indiana’s highly technical application of the de minimis impact, in conjunction with the serious injury test, functions similarly to the direct-victim line of cases in Florida. 209 Both bystander rules are versions of the Dillon rule and no longer require any type of impact on the bystander. 210 The freestanding tort exception in Florida is broader than the Indiana intentional tort exception since it encompasses torts that are negligence-based. 211 While Florida has created the negligent stillbirth action, In-

200. See id.; Shaumber, 579 N.E.2d at 453.
201. Groves, 729 N.E.2d at 573-74.
202. Kline v. Kline, 64 N.E. 9, 10 (Ind. 1902). The facts of Kline would also support an assault claim. Id. at 9.
205. Shaumber, 579 N.E.2d at 454.
207. See id. at 468 n.6.
208. See id. at 467.
209. Compare Holloway, 695 N.E.2d at 996-97, Conder, 716 N.E.2d at 435, Atl. Coast Airlines, 857 N.E.2d at 999, and Shaumber, 579 N.E.2d at 454, with Willis, 967 So. 2d at 850, Hagan, 804 So. 2d at 1236, Zell, 665 So. 2d at 1053, and Elliott, 58 So. 3d at 882.
210. Compare Conder, 716 N.E.2d at 435, and Shaumber, 579 N.E.2d at 454, with Zell, 665 So. 2d at 1053.
211. Compare Spangler, 958 N.E.2d at 467-68, with Tanner, 696 So. 2d at 706.
diana still resolves these cases through the impact rule. Indiana’s approach has limitations, such as failing to recognize the emotional well-being of the father or situations where there is no impact, even under the Indiana impact rule. Indiana’s impact rule has been somewhat modernized, but Florida’s impact rule exceptions are broader, particularly due to the freestanding tort line of cases.

B. Georgia

The Georgia impact rule follows a similar exception-riddled history, with Chambley v. Apple Restaurants, Inc. towing the direct victim line of cases. In Chambley, a restaurant customer noticed an unwrapped condom in the salad she was eating. The restaurant customer grew nauseous and required medical treatment. However, the evidence in the case tended to show the physical symptoms stemmed from her knowledge of eating the contaminated food as opposed to any harm the contaminants themselves caused. Thus, the impact required is minimal and the emotional distress must stem from the impact, but the physical injury need not relate to it.

Lee v. State Farm Mutual Ins. Co. created the bystander exception. Lee involved a mother who watched her daughter succumb to her injuries after they were both involved in a car crash. Prior to Lee, there was no bystander rule, however, the Lee court took a very small step forward. Georgia’s impact rule required a plaintiff to sustain a physical impact, which would cause a physical injury, and then cause the mental injury. Instead of creating a wholly new bystander

212. See Spangler, 958 N.E.2d at 467-68.
213. See id. But see Tanner, 696 So. 2d at 706.
214. Compare Spangler, 958 N.E.2d at 467-68, with Tanner, 696 So. 2d at 706.
216. Id.
217. Id.
218. Id. at 552.
219. Id. at 500. While the majority is content to resolve this case through the impact rule with the nausea and vomiting evincing the physical injury, the concurrence would infer malicious intent from the presence of an unwrapped condom in food. Id. at 554 (Eldridge, J., concurring); see also OB-GYN Assocs. of Albany v. Littleton, 410 S.E.2d 121, 121 (Ga. 1991). Littleton formed much of the current Georgia impact rule, where allegedly negligent medical treatment led to the death of a two-day-old infant. In the ensuing NIED claim, recovery was not permitted for the mother’s emotional distress if it stemmed from the death of the baby and not any impact on the mother. See id.
220. Lee, 533 S.E.2d at 83.
221. Id.
222. Id.
223. Id.
rule, the court simply eliminated the third requirement of the impact rule.\textsuperscript{224} Therefore, bystanders could bring an action if they suffered an impact and were physically injured, but the mental injury need not come from the physical injury.\textsuperscript{225} The Georgia Supreme Court has not addressed the holding of \textit{Lee} to date. This leaves two main questions open. First, whether \textit{Lee} is solely a bystander rule or whether it extends to direct victim cases.\textsuperscript{226} Second, whether the impact will be required in a bystander type-case.\textsuperscript{227}

Georgia also applies what, at first glance, is a special relationship-type limitation on the rule’s applicability.\textsuperscript{228} For example, in \textit{Bruscato v. O’Brien}, the impact rule did not apply to a medical malpractice claim against a psychiatrist who negligently discontinued medicating a patient.\textsuperscript{229} The patient then killed his mother due to his un-medicated mental state.\textsuperscript{230} The doctor-patient relationship created the foreseeability that the impact rule seeks to impose.\textsuperscript{231} Thus, the impact rule was unnecessary.\textsuperscript{232} \textit{Bruscato} is unclear on whether a special relationship exception actually exists, though, or if the foreseeability derived more from the cause of action sounding in medical malpractice.\textsuperscript{233} While this distinction may be irrelevant in \textit{Bruscato}, moving forward, such a distinction might determine if this exception could grow beyond medical malpractice facts.\textsuperscript{234} The \textit{Bruscato} analysis touched upon the statutory pleading requirements and rules governing medical standards of conduct, discussing how these rules establish foreseeability.\textsuperscript{235} These rules also served the policy jus-

\textsuperscript{224}. \textit{Id.} at 87.
\textsuperscript{225}. \textit{Id.}
\textsuperscript{227}. \textit{See} Oliver v. McDade, A14A0147, 2014 WL 3510716, at *2 (Ga. Ct. App. July 16, 2014). In \textit{Oliver}, the victim/plaintiff was also the truck driver that collided with the third party victim, killing him. The driver sustained an impact both in the force of the crash and from the decedent’s blood. However, instead of muddling through \textit{Lee}, the court applied the pecuniary loss exception to the impact rule. \textit{Id.} at *1-2.
\textsuperscript{229}. \textit{Id.}
\textsuperscript{230}. \textit{Id.}
\textsuperscript{231}. \textit{Id.}
\textsuperscript{232}. \textit{See} \textit{id.} at 280.
\textsuperscript{233}. \textit{See} \textit{id.} at 279.
\textsuperscript{234}. \textit{Bruscato}, 705 S.E.2d at 279.
\textsuperscript{235}. \textit{See} \textit{id.} at 280-81.
tifications for the impact rule.\textsuperscript{236} Frivolous claims were screened out by the heightened pleading requirements.\textsuperscript{237} The flood of litigation concern is addressed because a doctor-patient relationship needs to exist. The court found it unlikely that malpractice claims would become more numerous with the availability of emotional damages.\textsuperscript{238} Lastly, the element of causation is not something completely determined by the court, but governed by the applicable standards of conduct in the medical community.\textsuperscript{239} Based on the \textit{Bruscato} analysis, it would appear that special relationships do not control when the impact rule applies, but an analysis of the impact rule justifications and their presence in the case at bar.\textsuperscript{240}

Two years after \textit{Bruscato}, a federal court sitting in diversity was unwilling to work with Georgia’s impact rule exceptions, despite the presence of a contractual relationship, as well as fraud and slander claims.\textsuperscript{241} The family in \textit{Hang v. Wages & Sons Funeral Home, Inc.} could not proceed on their NIED claim when the funeral home cremated the decedent’s body prior to the viewing, even though the funeral home could likely foresee emotional harm by virtue of the contractual relationship with the family.\textsuperscript{242} \textit{Nationwide Mutual Fire Ins. Co. v. Lam} adds more confusion to the mix where a car crash aggravated an existing mental illness.\textsuperscript{243} There was no physical injury to the accident victim, which would normally bar the emotional damages.\textsuperscript{244} However, the impact rule did not bar the damages because the court could clearly relate the accident to causation and none of the policy justifications were served by applying the impact rule.\textsuperscript{245} Again, considerations of policy tend to control when an otherwise mechanical application of the impact rule would result.\textsuperscript{246}

\textit{Lam} also states the pecuniary loss rule.\textsuperscript{247} This rule allows for an NIED claim to proceed when the emotional distress complained of is

\begin{itemize}
\item \textsuperscript{236} See id.
\item \textsuperscript{237} See id.
\item \textsuperscript{238} See \textit{id.} at 280-81.
\item \textsuperscript{239} See \textit{id.} at 281.
\item \textsuperscript{240} See \textit{Bruscato}, 705 S.E.2d at 279-81.
\item \textsuperscript{244} \textit{Id.}
\item \textsuperscript{245} See \textit{id.}
\item \textsuperscript{246} See \textit{Hang,} 585 S.E.2d at 121; \textit{Lam,} 546 S.E.2d at 285; \textit{Mitchell,} 2013 WL 6510783 at *11.
\item \textsuperscript{247} \textit{Lam,} 546 S.E.2d at 284.
\end{itemize}
coupled with a pecuniary loss. The idea being that the pecuniary loss establishes a legitimate NIED claim when there is no impact. However, this line of reasoning is dubious. If the driver in Lam had borrowed her friend’s car, then that car owner could potentially claim emotional damage if she was emotionally injured by viewing her wrecked car. Such an absurd result would derive solely from the car owner’s claimed emotional distress coupled with a pecuniary loss.

McCunney v. Clary presents an even more confusing picture. There, a father driving his family car was struck by the defendant’s car. He was unharmed, but his wife and two children were injured. The father sued for emotional distress but found his NIED claim barred because he was not impacted by the defendant’s negligence. These facts would seem to implicate the Lam analysis, but upon closer inspection, the personal injury claims had already been settled before the NIED claim was brought, so there were no pecuniary losses still present. However, the court does not explicitly dispose of the case along these lines, instead finding the impact rule’s application justified. Then, without describing why the court thought the claim might be fraudulent or the causal connection difficult to draw, it held there can be no NIED recovery.

In short, Georgia’s impact rule is in a state of flux. There is no true bystander rule, the ad hoc exceptions are difficult to predict, and the definition of an impact is stretched to avoid harsh results. Even with this level of unpredictability, the Georgia impact rule is still harsher than the Florida rule. The direct victim line of cases bear similarities, as both states allow contaminated food cases to proceed and the impact required is minimal. Unlike the Lee case in Georgia,

248. Id.
249. See id. at 285.
252. Id.
253. Id.
254. Id.
255. See id. at 636.
256. See id.
257. See McCunney, 576 S.E.2d at 637.
258. See id. Lee is the closest to a bystander rule, but the apparent requirement of an impact fails to distinguish the rule announced in Lee from a modern impact rule. See Lee, 533 S.E.2d at 83.
259. See Bruscato, 705 S.E.2d at 281; McCunney, 576 S.E.2d at 637.
260. See Chambley, 504 S.E.2d at 552.
261. Compare Willis, 967 So. 2d at 850, and Hagan, 804 So. 2d at 1236, with Lee, 533 S.E.2d at 86-87, and Chambley, 504 S.E.2d at 552.
Florida has a bystander rule where impact is not required. While Florida’s freestanding tort exceptions probably allow more cases to be heard, the exceptions are at least based on the common sense application of foreseeability and not the bizarre, more limited pecuniary loss rule.

C. Kansas

Kansas applies a rule that allows for liability if the plaintiff is impacted or if there is a physical injury that results. In *Hoard v. Shawnee Mission Medical Center*, a hospital mistakenly notified parents that their daughter had died in a single car accident. The daughter had in fact survived the crash but was disabled and confined to a wheelchair. After the hospital realized its mistake and corrected it, the parents were able to tend to their daughter. This tragic situation left the parents in dual roles as full time caretakers and parents. They had medical bills to pay, both for their injuries and their daughter’s. However, the parents only had a direct victim claim on facts somewhat similar to the classic cases involving negligent transmission of death notices. The physical injuries that can support an NIED claim for the parents were those caused by, and that followed, the misinformation of their daughter’s death: fainting, nausea, and nightmares. While some damages may be successfully claimed for these injuries, the emotional distress for which the family needed compensation resulted from their daughter’s newly inflicted disabilities. Thus, direct victim cases in Kansas do not require an impact if there is

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262. Compare Champion, 478 So. 2d at 18-19, and Zell, 665 So. 2d at 1054, with Lee, 533 S.E.2d at 86-87.

263. Compare Tanner, 696 So. 2d at 708, with Lam, 546 S.E.2d at 285.


265. Id. at 1216.

266. Id. at 1217-18.

267. Id. at 1217.

268. See id. at 1217-18.

269. Id. at 1219.

270. Hoard, 662 P.2d at 1220 (citing Kaufman v. W. Union Tel. Co., 224 F.2d 723 (5th Cir. 1955)).

271. Id. at 1220.

272. See id. at 1221.

273. See id.
a physical injury, but the physical manifestation of the injuries must be caused by the defendant’s negligence.\textsuperscript{274}

\textit{Schmeck v. City of Shawnee} is the closest thing Kansas has to a bystander case.\textsuperscript{275} In this case, a woman was thrown from a motorcycle after being struck by a car.\textsuperscript{276} She was totally disabled by the accident.\textsuperscript{277} Her mother, who was not present at the scene and learned of her daughter’s injuries an hour later, brought an NIED claim.\textsuperscript{278} The mother was denied relief because she was not impacted.\textsuperscript{279} However, the court seemed willing to recognize a bystander cause of action similar to the \textit{Dillon} rule should the facts change accordingly.\textsuperscript{280} Unfortunately, this question has never been directly presented to the Kansas Supreme Court since the \textit{Schmeck} case.\textsuperscript{281}

There is also no special relationship exception in Kansas, as shown in \textit{Humes v. Clinton}.\textsuperscript{282} In \textit{Humes}, a doctor failed to warn his patient of the need to replace a contraceptive device within a year.\textsuperscript{283} As a result of this failure, the patient became pregnant.\textsuperscript{284} Pregnancy with the presence of the contraceptive device presented life-threatening risks to the mother, so she ultimately decided to have a medically necessary abortion.\textsuperscript{285} Although the mother did contract an infectious disease from the doctor’s negligence, that injury did not appear to be causative of the emotional injury.\textsuperscript{286} Consequently, the impact rule applied and barred the action, regardless of the doctor-patient relationship that existed.\textsuperscript{287}

Nor does the presence of intentional or otherwise independent torts limit the application of the impact rule. For example, in \textit{Fusaro v.}
First Family Mortgage Corp., the homeowner brought trespass, intentional infliction of emotional distress (IIED), and NIED claims when a contractor entered the plaintiff's house and disposed of his belongings.\textsuperscript{288} This underlying conduct did not limit the application of the impact rule.\textsuperscript{289} While emotional damages could be claimed under intentional tort theories, the intent must be to cause emotional harm, not invasion of some other legal interest.\textsuperscript{290} Therefore, in Kansas, the foreseeability derived from the intentional tort does not carry over into the NIED claim.\textsuperscript{291}

Of the remaining states that retain the impact rule, Kansas applies the harshest version and makes the Florida impact rule look like a general negligence approach. The high threshold for a physical injury or impact, lack of exceptions for freestanding torts, and the lack of a bystander rule all stand in stark comparison to Florida law.\textsuperscript{292} Kansas still resolves many of its impact rule cases by determining whether or not there was an impact, rather than the foreseeability analysis that often emerges in Florida.\textsuperscript{293} While the results of the cases are no doubt harsh, Kansas’ unflinching adherence to the impact rule has at least created an unrivaled clarity in the state’s NIED law.\textsuperscript{294}

D. Nevada

Nevada's direct victim cases require either an impact or physical manifestations of the injuries.\textsuperscript{295} In Chowdhry v. NLVH, Inc., for example, the court would not allow a doctor to pursue an NIED claim against the hospital when the hospital placed a reprimand on his record.\textsuperscript{296} Clearly there was no impact here, so the court then examined the record for physical manifestations of the injury.\textsuperscript{297} In this analysis, the symptoms of insomnia and general discomfort were insufficient to qualify as physical manifestations, so the court denied the NIED

\textsuperscript{289} See id. at 131.
\textsuperscript{290} See id. at 132.
\textsuperscript{291} See id.
\textsuperscript{292} Compare Schmeck, 647 P.2d at 1264, Hoard, 662 P.2d at 1219-20, Smelko, 740 P.2d at 598, Fusaro, 897 P.2d at 131, and Humes, 792 P.2d at 1038, with Willis, 967 So. 2d at 850, Hagan, 804 So. 2d at 1241, Zell, 665 So. 2d at 1054, and Tanner, 696 So. 2d at 708.
\textsuperscript{293} See Hagan, 804 So. 2d at 1241; Zell, 665 So. 2d at 1054.
\textsuperscript{294} See Schmeck, 647 P.2d at 1264; Hoard, 662 P.2d at 1219-20; Smelko, 740 P.2d at 598.
\textsuperscript{297} Id. at 462.
claim. Notice two things in this analysis: first, no direct victim claim absent an impact had actually been brought in Nevada prior to Chowdry, so the court’s willingness to entertain this claim signals its eagerness to relax the impact rule. Second, even though the court stated that these injuries were “insufficient to satisfy the physical impact requirement,” the court still commented on the significance of the injuries. Under the guise of the impact rule, the court’s analysis of the gravity of the plaintiff’s symptoms depict this test for what it really is—a serious injury test in disguise.

Two years later, the court in Shoen v. Amerco established the physical manifestations test. In this case, the court permitted a tortiously discharged employee to pursue an NIED claim. Here, the plaintiff/father built what is known today as the U-Haul company and turned control of the company over to his sons. He stayed on as an advisor and continued to draw a salary. In this capacity, he developed bi-polar disorder, and the U-Haul company paid disability payments to him since he could no longer work. Meanwhile, the father gave damaging testimony against his sons in an IRS hearing. Shortly thereafter, he was fired and the disability payments stopped. After these events unfolded, the father was diagnosed with situational depression. The court accepted this diagnosis as evidence of an emotional injury without an impact. This sliding scale required a higher showing of physical injury when the degree of outrageous conduct was less, and vice versa. This blurs the line between freestanding tort cases and direct victim cases, but underscores the theme common to a modern impact rule: foreseeability.

298. See id.
299. See id.
300. Id.
301. See id.
303. Id.
304. Id. at 471.
305. Id.
306. Id.
307. Id. at 471-72.
308. Shoen, 896 P.2d at 471-72.
309. Id. at 477. Reading Shoen in isolation, one might conclude that the impact rule was abolished, as there are not necessarily physical symptoms for depression. However, the court seems to indicate in Olivero that it is unwilling to completely move away from the impact rule. See Olivero, 995 P.2d at 1026.
310. See id.
311. See id.
312. See id.
A contrary result is shown in *Bartmettler v. Reno Air*, where an employer violated a confidentiality agreement with the employee regarding his alcohol abuse problems.\(^\text{313}\) This claim was not allowed to proceed because the “serious emotional distress” alleged by the employee was insufficient to meet the physical manifestation rule.\(^\text{314}\) There is no sliding scale analysis in *Bartmettler* despite the possibility of intentional conduct, so the court apparently resolved this case under the serious injury rule.\(^\text{315}\) It would appear that the serious injury rule is the controlling factor, with the sliding scale test being invoked in close cases; otherwise, the victim in *Bartmettler* would have been deprived of the full protection of Nevada’s impact rule.\(^\text{316}\)

In a malpractice action, the operation of the impact rule is absent.\(^\text{317}\) In *Kahn v. Morse & Mowbray*, emotional damages based on acts potentially constituting malpractice were inappropriate because the gist of a legal malpractice action is economic damages.\(^\text{318}\) Thus, emotional harm that is premised upon the loss of money is unforeseeable.\(^\text{319}\) This is a difficult holding to square with *Shoen*, as the gist of a tortious discharge claim is primarily economic, but the NIED claim can still go forward.\(^\text{320}\) Here the malpractice-type conduct alongside the NIED claim has no effect, possibly implying that the sliding scale test is only invoked when the quasi-intentional conduct is intended to emotionally harm the victim.\(^\text{321}\)

Nevada’s bystander rule is similar to the *Dillon* rule.\(^\text{322}\) A bystander must be emotionally distressed by witnessing injury to a close relative, and must be near the scene of the incident.\(^\text{323}\) The most recent refinement of the rule is in *Grotts v. Zahner*.\(^\text{324}\) There, a fiancé could not recover on her NIED claim, despite witnessing the death of her fiancé in an accident, because she was not a member of the decedent’s family.\(^\text{325}\)

\(^{313}\) *Bartmettler v. Reno Air, Inc.*, 956 P.2d 1382, 1384 (Nev. 1998).

\(^{314}\) *See id.* at 1387.

\(^{315}\) *See id.*

\(^{316}\) *See Shoen*, 896 P.2d at 477. *But see Bartmettler*, 956 P.2d at 1387 (applying the serious injury rule, not the sliding scale analysis).


\(^{318}\) *See id.*

\(^{319}\) *Id.*

\(^{320}\) *See Shoen*, 896 P.2d at 477. *But see Kahn*, 117 P.3d at 237 (considering emotional damages when the claim is premised on an unlawful discharge).

\(^{321}\) *See Shoen*, 896 P.2d at 477. *But see Kahn*, 117 P.3d at 237.


\(^{323}\) *Id.*

\(^{324}\) *Id.*

\(^{325}\) *See id.*
Nevada's impact rule is similar to Florida's but stricter, mainly due to the impact rule's application when freestanding torts are present. Otherwise, the direct victim line allows an NIED claim with only physical manifestations, the bystander rule is based on a close relative witnessing an injury to another, and the serious injury test is applied to borderline claims; all these cases look like Florida tort law. Florida does not explicitly subscribe to a serious injury rule, but the case law bears out the functional equivalent of that test. The freestanding tort exception distinguishes Florida from Nevada. Nevada's sliding scale test, which surfaces when intentional torts are present, is similar, but the Nevada impact rule still has application in these types of cases when the intentional conduct is not targeted at emotional harm, as opposed to a broader foreseeability analysis.

In summary, of all five states retaining the impact rule, the construction of the rule in Florida is the least like an actual impact rule. This reading of the Florida impact rule is created either through exceptions, limits to its application, or de minimis satisfaction of the impact requirement. This exception-riddled construction has the effect of making the law more complex than it needs to be. If Florida NIED law already looks like a general negligence approach in comparison to other states, why not simply switch to one?

III. THE EVOLUTION OF AD HOC EXCEPTIONS TO CLARITY

A. Tennessee and the Physical Symptoms Rule

Tennessee does not use the impact rule, but does require physical manifestations of emotional distress to find a viable NIED claim. Thus, a discussion of Camper v. Minor is relevant because Tennessee's rejection of a physical manifestation would be equivalent to abrogation of Florida's impact rule. In Camper, a driver disobeyed a stop sign...
and pulled out in front of a cement truck at a highway intersection. The driver of the car was killed instantly. The cement truck driver walked around to the crushed car and saw the driver's dead body at close range. While undiagnosed at the time of trial, the truck driver claimed to be reliving the accident over and over.

Prior to Camper, even with the more relaxed physical manifestation rule, Tennessee still had the same history of ad hoc exceptions. Unsurprisingly, these cases follow a similar pattern. Situations in which emotional damages could foreseeably result trumped the physical manifestations rule: mutilation of a husband's corpse; fear of injury after consuming contaminated water; experiencing mental, but no physical injuries from a car crash; and finding a cigar stub in a bottle of Coke. Faced with inequitable and illogical results of a strictly construed barrier to NIED claims, Tennessee chose to create exceptions, expand to absurdity the construction of a physical manifestation, limit the rule's applicability, and use public policy arguments to come to conclusions contrary to established law.

Camper provided Tennessee with a rule to obtain emotional damages where the plaintiff can, through expert testimony, show emotional damages with which a reasonable person would be unable to cope. Post-Camper, Tennessee law functions similar to pre-Camper cases, with the exception of a focus on predictability. Take, for example, Flax v. DaimlerChrysler Corp. There, a truck driver rear-ended a minivan, resulting in the collapse of a passenger seat which ultimately killed the bystander's son. The mother then brought an NIED claim against the manufacturer of the minivan. Prior to Camper, the mother in Flax likely would not have had difficulty bringing this claim, as the facts in Flax fall squarely within the ad hoc

335. Id.
336. Id.
337. Id.
338. Id.
339. Camper, 915 S.W.2d at 444.
340. See id.
342. Laxton v. Orkin Exterminating Co., 639 S.W.2d 431, 434 (Tenn. 1982).
345. See Camper, 915 S.W.2d at 446.
346. Id. at 531.
348. See id.
349. Id. at 525-26.
350. Id.
exceptions to the physical manifestation rule. However, after Camper, emotional damages can be won if the plaintiff can show the injury is one with which a reasonable person would be unable to cope. Such emotional damage must be proven through expert testimony.

The functional difference after Camper is predictability. Iron-ically, the plaintiff in Flax argued that expert testimony should not be required because a mother witnessing the death of her child is such an obvious source of emotional harm. This reasoning worked well pre-Camper; however, in Flax, the court sought to avoid the type of ad hoc case law that NIED claims produced prior to Camper. The court’s denial of the NIED claim comports with this goal, for here it is not necessarily the causation in question, but the amount of damages. Recall the evidence justification for the impact rule—that emotional damages are difficult to prove. In this case, the problem is not causation, but how to value the damages the mother seeks for her NIED claim. Camper’s requirement of expert testimony for such injuries takes some subjectivity out of that equation. In other words, abrogation of the physical manifestation rule in Tennessee resulted in more predictable case law, all the while still allowing meritorious claims.

B. Kentucky and the Impact Rule

Kentucky recently abolished the impact rule in Osborne v. Kee-ney. In Osborne, a negligent airplane pilot struck the plaintiff’s home, destroying her chimney and setting her house on fire. The homeowner suffered from depression, hypertension, insomnia, anxiety, and diabetes prior to the plane crash, but the medical expert at trial testified the crash exacerbated these conditions. However, the

351. See id. at 531.
352. Id. at 526.
353. Flax, 272 S.W.3d at 528.
354. See id. at 531.
355. See id.
356. See id.
357. See id.
358. Kircher, supra note 14, at 808.
359. See Flax, 272 S.W.3d at 531.
360. See id.
361. See id.
362. Osborne, 399 S.W.3d at 6.
363. Id.
364. Id.
homeowner was not physically struck by any plane debris or pieces of her house.\textsuperscript{365} After the crash, she retained an attorney to represent her against the pilot and work with her insurance company.\textsuperscript{366} Her attorney took twenty percent of payments as his fee from the homeowner's insurance company and told the homeowner more payments would be coming as her claims against the pilot progressed.\textsuperscript{367} Two years later, she still wanted to proceed against the pilot.\textsuperscript{368} Unbeknownst to the homeowner, the statute of limitations had run, so her attorney attempted to discourage her from filing suit against the pilot.\textsuperscript{369} The homeowner insisted, and her attorney filed the complaint with the court.\textsuperscript{370} The court, in turn, granted summary judgment against the homeowner because of the time bar.\textsuperscript{371} The attorney never disclosed that the statute of limitations expired to his client, so she filed a malpractice suit against him.\textsuperscript{372} At trial, the homeowner first needed to show she would have prevailed on the negligence claim against the airplane pilot, and then she could show that she was robbed of this result by her lawyer's incompetence.\textsuperscript{373} Thus, two separate instances of conduct provided the basis for her emotional distress: the airplane crash itself and her lawyer's representation. Her attorney asserted the impact rule as a defense to the NIED claims, and the lower court agreed.\textsuperscript{374} Their decision was in turn affirmed by the court of appeals in Kentucky.\textsuperscript{375}

The Supreme Court of Kentucky took this opportunity to abrogate the impact rule and handle NIED claims as general negligence actions, but required that the plaintiff demonstrate the injury was serious.\textsuperscript{376} Their opinion began with an overview of impact rule jurisprudence in Kentucky and it followed a familiar pattern.\textsuperscript{377} The court had previously adopted the impact rule because it provided a

\textsuperscript{365} Id.
\textsuperscript{366} Id. at 6-7.
\textsuperscript{367} Id. at 7.
\textsuperscript{368} Osborne, 399 S.W.3d at 7.
\textsuperscript{369} Id.
\textsuperscript{370} Id.
\textsuperscript{371} Id.
\textsuperscript{372} Id.
\textsuperscript{373} See id. at 8.
\textsuperscript{374} Osborne, 399 S.W.3d at 8.
\textsuperscript{375} Id. Under Kentucky law, a malpractice suit is tried as a suit within a suit. Essentially, this means the court would hear the underlying case where the pilot hit the house to determine the result without the lawyer's incompetence. Then, the malpractice action is heard to determine if the lawyer is actually at fault. Id. at 10.
\textsuperscript{376} See id. at 17.
\textsuperscript{377} Id. at 15.
bright line test as to when a person's emotional state could be 
foreseeably injured. The court feared it would be difficult to screen 
out fraudulent claims and that a flood of litigants would clog the dock-
ests. However, over time, this bright line excluded clearly meritorious 
claims, so the courts resorted to exceptions and varying constructions 
of an impact in order to avoid harsh results. For example, in Deutsch 
v. Shein, the court held bombarding a person's body with X-rays consti-
tuted an impact. In this case, a doctor repeatedly X-rayed a 
pregnant woman without first determining if pregnancy was the cause 
of her symptoms. Certainly, there was no apparent physical im-
 pact. Thus, with no exception, the impact rule would have prevented 
the mother's NIED claim despite the obvious and well-known conse-
quences of exposing a fetus to X-rays. In Wilhoite v. Cobb, a mother 
watched a truck strike her infant daughter, who ultimately died from 
her injuries. The court denied relief because there was no physical 
impact upon the mother. Therefore, until Osborne, the Common-
wealth of Kentucky still applied the impact rule rather harshly and 
had no bystander rule. The Osborne court reasoned that, although 
the justifications for the impact rule are no less valid today than they 
were 200 years ago, these goals could be achieved more effectively 
through the serious injury rule enconced within a negligence action.

Post-Osborne cases show the same features as post-Camper 
cases: functionally similar case law with clearer guidelines as to why 
an NIED claim may or may not fail. Keaton v. G.C. Williams Fu-
nenal Home, Inc. involved an NIED claim where a funeral home buried

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378. Id.
379. Id.
380. Osborne, 399 S.W.3d at 15.
381. Id. (citing Deutsch v. Shein, 597 S.W.2d 141, 146 (Ky. 1980)).
382. Deutsch, 597 S.W.2d at 142.
383. See id. at 146.
384. Id.
386. Id. The trial court did note the absurdity in the distinction between the X-rays that 
caused the mother's harm in Deutsch and the light rays, which caused the mother's pain 
here. Id.
387. See Steel Techs., Inc. v. Congleton, 234 S.W.3d 920, 930 (Ky. 2007) (barring a claim 
for emotional damages prior to the ultimately fatal impact in a car crash).
388. See Wilhoite, 761 S.W.2d at 626.
389. See id. at 17-18.
2013); see Osborne, 399 S.W.3d at 18. Keaton actually began before Osborne was decided, 
but Osborne was retroactive, so its holding applied. Keaton, 436 S.W.3d at 543-44.
the remains of the family’s mother in the wrong plot.\textsuperscript{391} The family discovered the mistake and was present when the casket was moved to the correct plot.\textsuperscript{392} The court denied the NIED claim because the only evidence presented regarding the emotional harm was the family’s statement of their own distress, with no expert testimony, as required under Osborne.\textsuperscript{393} Just like Tennessee after Camper, Kentucky is able to screen out speculative injuries and remove subjectivity from damages, ensuring the law regarding NIED claims is predictable without the ad hoc exceptions.\textsuperscript{394}

\textbf{C. The Flood of Litigation}

Tennessee and Kentucky have apparently managed to control the ensuing flood of litigation. In the 2012-13 fiscal year, there were 9,868 tort cases and 385 medical malpractice claims filed in Tennessee.\textsuperscript{395} Combined, there were 10,253 cases that could potentially have facts that support an NIED claim.\textsuperscript{396} The number is probably less than this, as it is unlikely every tort case filed in Tennessee has an NIED component. But, assuming the worst-case scenario, there is roughly one potential NIED claim filed for every 630 persons in Tennessee, with a small decrease from the previous year.\textsuperscript{397} Kentucky does not specifically track tort cases; however, in using total civil cases in general, in 2013 there was approximately one civil case filed in Kentucky for every 100 people living there, again with a small decrease from 2012.\textsuperscript{398} Recall in Kentucky that the impact rule was abolished in

\begin{itemize}
\item \textsuperscript{391} \textit{Keaton}, 436 S.W.3d at 541.
\item \textsuperscript{392} Id.
\item \textsuperscript{393} Id. at 544.
\item \textsuperscript{394} See Osborne, 399 S.W.3d at 18; \textit{Keaton}, 436 S.W.3d at 544; Powell v. Tosh, 942 F. Supp. 2d 678, 696 (W.D. Ky. 2013) (denying emotional damages based on the noxious odors from a pig farm due to lack of expert testimony on damages); Taylor v. JPMorgan Chase Bank, N.A., CIV. 13-24-GFVT, 2014 WL 66513, at *7 (E.D. Ky. Jan. 8, 2014) (denying an NIED claim when plaintiff had to wait seven days for a check to clear).
\item \textsuperscript{396} See id.
\end{itemize}
2012. If the feared proverbial flood of litigation had ensued, Kentucky would in fact have seen an increased caseload in 2013. Yet, it appears as if the levees held.

Florida, on the other hand, tracks cases much more specifically. In 2013, 34,790 tort cases were filed at the circuit level. In 2012, that number was 35,595. This means that there are about 550 people in Florida for every tort case filed, a figure that went down from 2012. What these numbers depict is that total caseload is more dependent on other economic factors, not the availability of emotional damages. If the impact rule is abolished in Florida, litigation rates will not likely increase significantly, or necessarily at all. The simplicity that could result from eliminating the impact rule could just as easily help judicial efficiency by creating more predictable, and therefore more manageable, judicial standards.

Formal abrogation of the Florida impact rule should follow an approach similar to the Osborne case in Kentucky, whereby the court would implement a serious injury rule to screen out frivolous claims and apply a general negligence approach. Again, this is nearly the functional equivalent of what is already happening in Florida tort law, as Florida already screens NIED claims for serious injuries when they are filed. In granting the freestanding tort exceptions and allowing for a de minimis impact, Florida is not applying the impact rule. Instead, the courts are analyzing the alleged tortious conduct to see if the tortfeasor could have foreseen the emotional injury.

399. See Osborne, 399 S.W.2d at 24.
400. See Kentucky Caseload, supra note 398.
402. Id. The malpractice cases in Florida were left out of this calculation since the impact rule does not apply in that context. See Tanner, 696 So. 2d at 706.
404. Lance Bachmeier et al., The Volume of Federal Litigation and the Macroeconomy, 24 INT’L REV. L. & ECON. 191, 206 (2004). Macroeconomic factors such as output and inflation are discussed, not the availability of emotional damages. See id.
405. See id.; Frank B. Cross, Tort Law and the American Economy, 96 MINN. L. REV. 28, 81 (2011). Cross argues that pro-plaintiff tort law is not harmful to the economy and may actually be beneficial. One of the reasons for this counter intuitive conclusion is the higher degree of predictability of tort law in pro-plaintiff forums. See id.
406. Id.
407. Compare Elliott, 58 So. 3d at 882, with Osborne, 399 S.W.3d at 17.
408. See Elliott, 58 So. 3d at 882.
409. Hagan, 804 So. 2d at 1241; Tanner, 696 So. 2d at 708.
With the adoption of an approach based on foreseeability, the outcome of NIED claims would become more predictable. Judicial efficiency would then be served by fewer appeals, or at least appeals in which the applicable law is clearer. Furthermore, a judgment would have more finality to it if it were not contingent upon the impact rule. Litigants would no longer have to think up creative complaints in order to satisfy the impact rule and plaintiffs would know which injuries would get past the motion to dismiss stage. Most importantly, parties would know which injuries are actually frivolous through a body of case law that delineates which injuries are serious. If Florida adopts, in form, what it already does in substance, the real gain for all parties involved would be case predictability.

IV. Florida Impact Rule Cases Under a General Negligence Approach

To show that Florida case law would change little after abrogation of the impact rule, two types of cases discussed above will be analyzed under a general negligence approach, utilizing a serious injury rule: direct victim cases and freestanding tort cases.

A. Direct Victim Cases

The facts of Hardy v. Pier 99 Motor Inn are helpful for analyzing direct victim cases because it presents facts similar to Willis. In Hardy, a motel guest saw his friend fatally stabbed in the motel parking lot and got into an altercation with the attacker. In this fight, the attacker stabbed the motel guest. He brought suit, arguing that the motel should have foreseen this attack due to the numerous criminal incidents that had occurred on the motel's property. However, most importantly, the motel guest sued for physical injuries he sustained in the attack. Consequently, there is no analysis of whether

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410. See Elliott, 58 So. 3d at 882; Osborne, 399 S.W.3d at 18.
411. Osborne requires the plaintiff to use expert testimony to express the damages more objectively. Such a change would be unnecessary in Florida, as the courts have been able to value emotional distress damages and use experts when necessary. See, e.g., Hagan, 804 So. 2d at 1241 (no expert for damages); Zell, 665 So. 2d at 1049-50 (using expert testimony).
412. Bystander cases would be no different absent the impact rule because Florida already uses a version of the Dillon rule in those cases. See Zell, 665 So. 2d at 1049-50.
414. Id.
415. Id.
416. Id.
417. See id. (emphasis added).
the injury was compensable since a stab wound is an impact.\textsuperscript{418} This left the hotel's foreseeability of the attack the remaining issue.\textsuperscript{419} For this type of showing, the court looked at past incidents and 911 calls to the hotel premises.\textsuperscript{420}

Compare this to the facts of \textit{de Saric v. Miami Caribe Investments, Inc.}\textsuperscript{421} In \textit{de Saric}, two hotel guests, mother and daughter, were escorted to their room by hotel personnel.\textsuperscript{422} After settling in for about an hour, they opened the door to leave and were confronted by two masked robbers, one of whom had a gun.\textsuperscript{423} One robber forced the daughter into the bathroom where she fainted.\textsuperscript{424} After regaining consciousness, the robber searched her for hidden jewelry.\textsuperscript{425} Meanwhile, the other robber ordered the mother to lie on the floor while he stole money and jewelry from her purse.\textsuperscript{426} The hotel guests were not physically injured in any serious way but suffered from emotional distress for which they could point to physical symptoms.\textsuperscript{427} They brought suit against the hotel for this emotional distress and were barred by the impact rule.\textsuperscript{428}

The impact rule today would not bar this claim because the \textit{de minimis} impact endured by the hotel guests would now be sufficient to bring an NIED claim.\textsuperscript{429} More importantly though, under a general negligence approach, the touchstone of the analysis would be the foreseeability of the attack based upon the hotel's awareness of similar incidents.\textsuperscript{430} Such a rule is more logical because foreseeability is the guidepost of the analysis. Under the impact rule, the hotel would only be under a duty to prevent robbers who physically touch their victims in the slightest way, but not those who hold a victim at gunpoint.\textsuperscript{431} The Florida Supreme Court has already noted the harsh results of “sacrific[ing] the first victim's right to safety upon the altar of foreseeability . . .,” but that is what the impact rule would have the courts

\textsuperscript{418} See id.
\textsuperscript{419} See id. at 1098.
\textsuperscript{420} Id.
\textsuperscript{421} \textit{de Saric v. Miami Caribe Invs., Inc.}, 512 F.2d 1013, 1014 (5th Cir. 1975).
\textsuperscript{422} Id.
\textsuperscript{423} Id.
\textsuperscript{424} Id.
\textsuperscript{425} Id.
\textsuperscript{426} Id.
\textsuperscript{427} \textit{de Saric}, 512 F.2d at 1014.
\textsuperscript{428} Id.
\textsuperscript{429} See \textit{Willis}, 967 So. 2d at 850; \textit{Hardy}, 664 So. 2d at 1098.
\textsuperscript{430} See \textit{Hardy}, 664 So. 2d at 1098.
\textsuperscript{431} See \textit{id. But see de Saric}, 512 F.2d at 1014.
do.\textsuperscript{432} Again, there is no functional change to the law. The NIED claim can still go forward after \textit{Willis}. The only difference would be in evidence of previous incidents and hotel security being relevant concerns, as opposed to whether or not the gun held by the robber touched the victim.\textsuperscript{433}

Applying this same reasoning to the facts of \textit{Willis}, the opinion would be several pages shorter and still come to the same natural conclusion. Of course a hotel guest victimized by negligent hotel staff and then an armed robber will sustain a serious emotional injury. The merit of that claim should not turn on whether the hotel guest was physically touched by the gun. Rather, the prior incidents at the hotel and actions of hotel personnel should be considered.\textsuperscript{434}

\textbf{B. Serious Injury Test}

The serious injury test contemplates the magnitude of the injury, not foreseeability. In other words, courts recognize there are genuine cases of emotional distress, but fear the subjectivity inherent in such an injury would have no stopping point.\textsuperscript{435} The serious injury test addresses that fear by setting a threshold for what types of injuries may support an NIED claim, usually requiring expert testimony.\textsuperscript{436} To view how the serious injury test would work in Florida, the facts of \textit{Elliot v. Elliot} are instructive.\textsuperscript{437} There, a family member dismembered his mother’s corpse and scattered her ashes over the family farm, contrary to her and her family’s wishes.\textsuperscript{438} The family members sued for negligent infliction of emotional distress.\textsuperscript{439} The family did not witness any of these events, so they argued they fit within the physical manifestation of emotional trauma exception since there was no impact.\textsuperscript{440} The injuries alleged included: stress, insomnia, hair loss, anxiety, diarrhea, headaches, diabetes, and sleep apnea.\textsuperscript{441}

\begin{itemize}
\item \textsuperscript{432} See \textit{Hardy}, 664 So. 2d at 1098.
\item \textsuperscript{433} See \textit{Willis}, 967 So. 2d at 850; \textit{Hardy}, 664 So. 2d at 1098. \textit{But see de Saric}, 512 F.2d at 1014.
\item \textsuperscript{434} See \textit{Hardy}, 664 So. 2d at 1098 (totaling 3 pages). \textit{But see Willis}, 967 So. 2d at 850 (totaling 32 pages including concurrences and dissents, 25 pages of which are dedicated to a discussion of the impact rule).
\item \textsuperscript{435} Joseph Matye, \textit{Bystander Recovery for Negligent Infliction of Emotional Distress in Missouri}, 60 UMKC L. Rev. 169, 188 (1991).
\item \textsuperscript{436} See \textit{id.} at 170.
\item \textsuperscript{437} \textit{Elliott}, 58 So. 3d at 879.
\item \textsuperscript{438} \textit{Id.}
\item \textsuperscript{439} \textit{Id.}
\item \textsuperscript{440} \textit{Id.}
\item \textsuperscript{441} \textit{Id.}
\end{itemize}
The court held the physical manifestations exception was still not of such a low threshold to allow a lawsuit for these types of injuries, particularly when supported by weak expert testimony or none at all.442

_Elliott_ is more forthright in its analysis of the physical manifestations prong of the impact rule.443 Other cases require reading between the lines a bit more. For example, even though not technically required under Florida law, NIED cases are still resolved solely on the lack of an impact. In _Janie Doe 1 ex rel. Miranda v. Sinrod_, the underlying basis of the NIED claim was the sexual molestation of the plaintiffs’ child by a school teacher.444 The parents filed the original complaint to the school board in 2006, but the NIED claim five years later.445 Here, the seriousness of the injury is dubious when the victim waited five years to file the claim. However, more to the point, the court resolved the claim by requiring an impact. When the family claimed physical manifestations in the absence of an impact, the court limited that prong to bystander type cases.446 Cases like this potentially do not receive a full-on impact rule analysis because they appear to be frivolous claims for reasons not so easily articulated in the opinion. However, if a serious injury test were part of Florida tort law, then the opinion could literally read “this injury is not serious enough,” just as _Elliott_ does.447

Again, Florida law would change very little. As _Elliott_ demonstrates, the serious injury test is already part of Florida law.448 It simply is not applied predictably because the law surrounding the impact rule is anything but predictable. Clear abrogation of the impact rule and approval of the test in _Elliott_ would solve that problem.

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443. _See Elliott_, 58 So. 3d at 879.


445. _Id._ at 788.

446. _Id.; see also_ Arditi v. Grove Isle Ass’n, Inc., 905 So. 2d 151, 153 (Fla. Dist. Ct. App. 2004) (holding that the impact rule barred the claim despite the victim’s heart attack); Rivers v. Grimsley Oil Co., 842 So. 2d 975, 977 (Fla. Dist. Ct. App. 2003) (denying an NIED claim on facts similar to _Willis_ where post-traumatic stress disorder and anxiety were medically controlled after a robbery); Testa v. S. Escrow & Title, LLC, 36 So. 3d 713, 714 (Fla. Dist. Ct. App. 2010) (dismissing NIED claim because there was no physical injury stemming from an impact despite the post _Willis_ state of the impact rule).

447. _See Elliott_, 58 So. 3d at 879.

448. _See id._
C. Freestanding Tort Cases

Freestanding tort cases would be simpler, as the results would be based on foreseeability, not impacts. To bring a negligence claim with freestanding tort facts, a plaintiff must argue that the underlying tortious conduct created foreseeability. Currently, that reasoning applies to attorney-client malpractice, doctor-patient malpractice, intentional torts, and torts where damages are primarily non-economic. If a general negligence analysis were applied to these types of cases, a court would simply examine whether or not the defendant was under a duty since that is the touchstone of foreseeability in negligence. The detour through the impact rule and its freestanding tort limitation is unnecessary.

The next likely instance in which Florida will have to deal with NIED claims will be veterinary malpractice. In Kennedy v. Byas, the First DCA denied an NIED claim stemming from veterinary malpractice. The doctor performed an operation on the owner’s dog. After the operation, the doctor left the dog on a heating pad, resulting in severe burns. The court denied relief because of the impact rule, but not before commenting on the merits of a veterinary malpractice exception.

Unsurprisingly, Kush is the genesis of the asserted veterinary malpractice exception, where the malpractice conduct is sufficient to trigger foreseeable warning signs for the defendant. Hence, in the veterinary context, the question is whether the veterinarian should foresee the potential for emotional harm. The impact rule would say no because, obviously, the owner is not impacted, and the impact is sustained by the pet, if at all. However, the foreseeability analysis is more telling. Florida law compensates a pet owner for the property value of the animal in a veterinary malpractice claim. Consequently, it

449. See Tanner, 696 So. 2d at 706.
452. Id.
453. Id.
454. Id.
455. See id.
456. Id.
would be unfair to sue a veterinarian for an NIED sized judgment when the replacement cost of the pet is less than $400.457

The Third DCA reasoned differently in Knowles Animal Hospital, Inc. v. Wills, where an award for $13,000 in emotional damages was affirmed on almost identical facts with no impact rule analysis.458 This case, while notably lacking in foreseeability analysis, is not without merit. The average veterinarian bill runs about $500 a year, with some people spending upwards of $1,000 on more serious injuries.459 Surely such expenditures show a pet owner is more emotionally invested in a pet than its property value. The opinion does contain hints of the freestanding tort exception when discussing the “gross negligence” of the veterinarian, but both Johnson and Knowles come before Kush.460

Whichever way this split goes, it makes more sense for the outcome to be based on the degree of foreseeability the veterinarian possesses, not whether the veterinarian touched the pet owner in the course of treatment.461 Under a general negligence approach, the degree of foreseeability would be determined by what type of treatment the pet was receiving and how the market value of the pet compared to the cost of the care. Thus, the doctor in Kennedy might have been on notice the dog owner was emotionally invested in his dog when he paid for a veterinary operation in the first place.462 However, the fundamental point here is that there is little difference in the case law after negligence principles apply. Both Knowles and Kennedy already examine the foreseeability to determine if the impact rule should bar the claim.463 Knowles does not even examine the impact rule, finding the emotional distress an obvious conclusion from the nature of the veterinarian’s conduct.464 If the serious injury test has any application in Florida, it will be in these veterinary malpractice cases. Pets are valued differently by different people. Before awarding an NIED sized

457. Kennedy, 867 So. 2d at 1196. The damages in Kennedy constituted $350 for replacing the basset hound and $50 for a fraud claim associated with the bill. Id. at 1196-97.
461. See Kennedy, 867 So. 2d at 1196.
462. But see id.
463. See id.; Knowles, 360 So. 2d at 38.
464. See Knowles, 360 So. 2d at 38.
judgment to a plaintiff, a court will want to be sure the emotional distress suffered by the pet owner is genuine.\footnote{465}{Margit Livingston, The Calculus of Animal Valuation: Crafting a Viable Remedy, 82 Neb. L. Rev. 783, 820 (2004); William C. Root, “Man’s Best Friend”: Property or Family Member? An Examination of the Legal Classification of Companion Animals and Its Impact on Damages Recoverable for Their Wrongful Death or Injury, 47 Ill. L. Rev. 423, 447 (2002).}

The takeaway point here is not that Osborne resulted in better case law, but that it resulted in clearer case law.\footnote{466}{Flax, 272 S.W.3d at 531.} Florida \textit{is already doing this analysis}.\footnote{467}{See, e.g., Willis, 967 So. 2d at 850; Elliott, 58 So. 3d at 882.} The foreseeability analysis is the same as a general negligence analysis. There is already a serious injury test. All that is left to do is eliminate the detour through the impact rule.

\section*{Conclusion}

In conclusion, the impact rule in Florida is already functionally abolished and the practical effect of it is indistinguishable from a more modern approach to NIED claims. Moreover, the traditional justifications of judicial efficiency, evidence concerns, and foreseeability are not served by the exception riddled version of the impact rule Florida currently follows. Compared to the remaining states that have yet to abolish the impact rule, Florida’s rule is the most complex in either creating exceptions or liberally construing the impact requirement. To truly serve these interests, predictable tort law is desirable, which is where Florida’s impact rule has its most profoundly negative impact.
EQUITABLE ESTOPEL & WORKERS’ COMPENSATION IMMUNITY: WHY LITIGANTS AND THE COURTS ARE GETTING AHEAD OF THEMSELVES

Neil A. Ambekar

INTRODUCTION

Every U.S. jurisdiction has created a separate body of law to address workplace injuries - the workers’ compensation scheme. These no-fault systems provide employees injured on the job lost wages and medical benefits. It also immunizes employers from negligence claims arising out of most workplace accidents. This article discusses a grow-
ing phenomenon in Florida’s workers’ compensation scheme, the use of estoppel to negate employer immunity.

In some instances, employers have attempted to avail themselves of tort immunity while simultaneously refusing to acknowledge that an accident is covered under workers’ compensation. Employees could thereby have been denied any recovery, contrary to a legislative intent to internalize the cost of doing business. In these instances, Florida courts have applied the doctrine of estoppel, holding that employers may not assert workers’ compensation immunity while simultaneously denying workers’ compensation liability.

Unfortunately, some Florida courts have ignored or misinterpreted precedent and allowed estoppel-based claims to go forward without the required showings. This has weakened the protection offered by workers’ compensation immunity, contrary to another legislative mandate: to avoid litigation of work injuries in the circuit courts.

This article lays out the various theories of estoppel—primarily judicial and equitable—that may be asserted in the context of on-the-job injury litigation. This article goes on to explain why Florida courts should refrain from application of equitable estoppel in employee tort actions. Instead, workers’ compensation litigation should be allowed to take its course and judicial estoppel applied when injuries are held to be non-compensable.

I. WORKERS’ COMPENSATION: A PRIMER

In Florida, injuries sustained in the course of employment are governed not under the law of torts, but under a separate body of law known as “workers’ compensation.” Similar schemes have been adopted in every U.S. state. Some states, including Florida, rely on variations of the traditional private insurance model. Other states have chosen to adopt a government-administered scheme, generally funded by employer contributions like unemployment benefit funds.1 Professor Larson lays out the general theory of workers’ compensation law as follows:

[T]he basic operating principle is that an employee is automatically entitled to certain benefits whenever [the employee] suffers a “personal injury by accident arising out of and in the course of

employment” or an occupational disease . . . [n]egligence and fault are largely immaterial, both in the sense that the employee’s contributory negligence does not lessen his or her rights and in the sense that the employer’s complete freedom from fault does not lessen its liability . . . [t]he employee and his or her dependents, in exchange for these modest but assured benefits, give up their common-law right to sue the employer for damages for any injury covered by the [workers’ compensation] act . . . .

The underlying purpose of such programs is to ensure that the industry bears the burden of providing for injured workers without the cost and complexity of tort litigation. To this end, the employer is immune from suit in tort for covered injuries, while the employee need not prove fault to receive medical and lost wage benefits. This quid pro quo, sometimes called the “workers’ compensation bargain,” is the basis of all American workers’ compensation systems. The U.S. Supreme Court resolved the constitutionality of such enactments for federal purposes in 1917.

Florida’s workers’ compensation scheme was first enacted in 1935, and is codified today at Chapter 440 of the Florida Statutes—“the Florida Workers’ Compensation Law.” Notwithstanding the statutory designation, the chapter is often styled as the “Workers’

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6. One notable exception to mandatory workers’ compensation schemes is the state of Texas, where workers’ compensation is a permissive system. Private employers “may elect” workers’ compensation coverage. “Nonsubscribing” employers do not enjoy the benefit of the bargain; that is, they are liable to employees in tort under ordinary negligence principles. Tex. Labor Code Ann. § 406.002 (1993); See, e.g., Sears, Roebuck & Co. v. Robinson, 280 S.W.2d 238, 239 (Tex. 1955).

7. In Mountain Timber Co. v. Washington, 243 U.S. 219 (1917), and N.Y. Cent. R.R. v. White, 243 U.S. 188 (1917), the U.S. Supreme Court found that New York and Washington’s workers’ compensation laws were reasonable exercises of state police powers.

Compensation Act” by courts and practitioners. The legislative intent is to provide for “the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker’s return to gainful reemployment at a reasonable cost to the employer.” The legislature also provided that “[t]he workers’ compensation system in Florida is based on a mutual renunciation of common-law rights and defenses by employers and employees alike.” The constitutionality of the Workers’ Compensation Act in terms of the Florida Constitution has been litigated several times, but has not been seriously questioned by an appellate court since 1978.

A. The Florida Workers’ Compensation System

An employee who sustains a workplace injury must request medical care and lost wage benefits from his employer. The majority of workers’ compensation claims are never litigated, as the system is designed to be “self-executing,” meaning employers are expected to pro-
vide workers’ compensation benefits without the need for litigation.\textsuperscript{15} This self-executing system places the initial burden of determining compensability on employers and their insurance carriers.\textsuperscript{16} “Compensability” refers to the determination of whether an accident was work-related (that is, whether an “employment relationship” existed, and whether the accident arose within the course and scope of that relationship).\textsuperscript{17} Assuming the employer/carrier determines a compensable accident has occurred,\textsuperscript{18} it must then determine if medical or indemnity (wage loss) benefits are due. As a general matter, such determinations are made by an adjuster assigned to the case, with or without supervisory input. The processes involved are informal and few procedures are mandated.\textsuperscript{19} At any given stage, an aggrieved em-

\begin{itemize}
\item \textsuperscript{15} See O’Neil v. Dep’t of Transp., 468 So. 2d 904, 906 (Fla. 1985).
\item \textsuperscript{16} “The employer must pay compensation or furnish benefits required by this chapter if the employee suffers an accidental compensable injury or death arising out of work performed in the course and the scope of employment.” FLA. STAT. § 440.09. The majority of workers’ compensation claims in this state are administered by workers’ compensation carriers or their third party administrators. Even self-insured employers largely farm out claim administration to third party administrators. As a result, in workers’ compensation litigation, the parties are generally styled as the “employee” or “claimant,” and “the employer/carrier” or “employer/carrier/servicing agent.” For the purposes of this article, the parties are generally referred to as the employee and the employer/carrier. Most cited references herein follow this convention, or customary abbreviations such as “E/C.” See Carroll v. Zurich Ins. Co., 286 So. 2d 21, 22 (Fla. Dist. Ct. App. 1973) (“From the beginning our courts have, so far as immunity in the sense used here is concerned, considered ‘employer and insurer’, ‘employer-carrier’ in the same context. The courts, the administrative agencies under the Act, and members of the bar have consistently and constantly considered them as interchangeable words . . . .”).
\item \textsuperscript{17} “In failing to deny compensability, the E/C only admits that there was an industrial accident resulting in some injury to the worker.” Checkers Rest. v. Wethoff, 925 So. 2d 348, 349 (Fla. Dist. Ct. App. 2006). See also N. River Ins. Co. v. Wulling, 683 So. 2d 1090, 1092 (Fla. Dist. Ct. App. 1996) (“[C]ompensability’ in the context of sections 440.192 and 440.20 is limited to a determination of whether the injury for which benefits are claimed arose out of, and occurred within the course and scope of, the claimant’s employment.”). Confusingly, compensability is often used in reference to the employer’s liability for a certain benefit, but it does not have this meaning under the Act. See, e.g., Babahmetovic v. Scan Design Fla., Inc., No. 1D14-2986, 2015 Fla. App. LEXIS 6493 (Fla. Dist. Ct. App. May 1, 2015) (“This error came about by the JCC’s conflating the existence and cause of the injury—compensability—with the existence and cause of the need for treatment.”).
\item \textsuperscript{18} Although the vast majority of workers’ compensation cases involve discrete “accidents,” such as falls, occupational disease cases and repetitive trauma injuries are also subsumed within the body of workers’ compensation law. See, e.g., Festa v. Teleflex, Inc., 382 So. 2d 122, 124 (Fla. Dist. Ct. App. 1980) (explaining methods of proving exposure theory of accident).
\item \textsuperscript{19} Most required procedures involve the filing of reports. For example, if an employer/carrier denies compensability or “entitlement to any benefit,” it must file a form entitled “DWC-12,” or “Notice of Denial,” with the Division of Workers’ Compensation. See FLA. ADMIN. CODE r. 69L-3.012 (2014). Because the Notice of Denial generally sets forth the grounds on which an employer/carrier is denying a claim, it may be sufficient in and of itself to support an assertion of estoppel. This will be discussed in greater detail below.
\end{itemize}
employee may informally raise a dispute with his employer or the insurer; seek assistance from the Bureau of Employee Assistance and Ombudsman ("EAO"); or, initiate litigation. Litigation of workers' compensation claims occurs in an administrative setting before specialist administrative hearing officers, the Judges of Compensation Claims (JCCs). No jury is involved, and the JCC acts as both fact finder and arbiter of questions of law. Proceedings before JCCs are less formal than conventional civil trials, and while rules of procedure and the Florida Evidence Code apply, their application is somewhat relaxed:

In making an investigation or inquiry or conducting a hearing, the judge of compensation claims shall not be bound by technical or formal rules of procedure, except as provided by this chapter, but may make such investigation or inquiry, or conduct such hearing, in such manner as to best ascertain the rights of the parties.

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20. The EAO is an entity established under Fla. Stat. § 440.191 (2002), to assist employees pursuing formal or informal remedies. It does not function as a "gatekeeper" like the Equal Employment Opportunity Commission, and it may not represent employees in formal adversarial proceedings.

21. "Any employee may, for any benefit that is ripe, due, and owing, file with the Office of the Judges of Compensation Claims a petition for benefits which meets the requirements of this section . . . ." Fla. Stat. § 440.192(1).

22. The Office of the Judges of Compensation Claims has original jurisdiction over all workers' compensation claims arising in the state of Florida, or under an employment contract made within the state. The Office of the Judges of Compensation Claims is a sub-office of the Division of Administrative Hearings within the Department of Management Services. Fla. Stat. § 440.45 (2012).

23. “[T]his court has fashioned the correct rule by which the JCC, as finder of fact, is to be guided.” Ullman v. City of Tampa Parks Dept, 625 So. 2d 868, 872 (Fla. Dist. Ct. App. 1993).

24. The Florida Evidence Code is outlined in Chapter 90 of the Florida Statutes.


26. The language in Fla. Stat. § 440.29(1) (2011) appears to vest JCCs with certain inquisitorial powers akin to those of a judge in a civil law jurisdiction, beyond the inherent power of all trial judges to conduct independent legal research. See Carmack v. State Dep't of Agric., 31 So. 3d 798, 799 (Fla. Dist. Ct. App. 2009). In at least one case, the First District Court of Appeal has interpreted the section as not merely a description of the JCC's authority, but a mandate requiring its exercise. See CVS Caremark Corp. v. Latour, 109 So. 3d 1232 (Fla. Dist. Ct. App. 2013) (holding that employer/carrier's failure to cite supporting authority did not justify denial of its otherwise meritorious motion as the JCC had "an independent obligation to research and be familiar with the law governing the issues presented . . . .").
Parties may choose to be represented by counsel. Fee shifting provisions allow employees to recover attorney’s fees from employers if they prevail in litigation.

Discovery in workers’ compensation proceedings is largely similar to discovery in civil actions. The primary differences are the prohibition of certain discovery vehicles and the JCC’s authority to compel discovery even where no claims are pending.

Workers’ compensation litigation is scalable. There are three “levels” of dispute in workers’ compensation matters, whether or not a matter is in litigation: first, whether the workplace accident occurred at all, including the determination of whether the injured party was an employee; second, whether the employer is liable for any benefits, notwithstanding the occurrence of an injury; and third, whether the employer is liable for a particular benefit. Thus, a JCC may be called on to adjudicate the compensability of an entire accident, to determine whether benefits are due generally, or merely to rule on whether an employee is entitled to an individual benefit. In any event, a final merits hearing before a JCC is almost invariably a shorter affair than a civil trial.

The genesis of any workers’ compensation litigation is the filing of a petition for benefits, which is the equivalent of a civil com-

27. See Fla. Admin Code r. 60Q-6.104.
28. The fee shifting provision is codified at Fla. Stat. § 440.34.
29. The workers’ compensation rules incorporate the Florida Rules of Civil Procedure pertaining to most discovery matters. For example, per Fla. Admin. Code r. 60Q-6.114(2)(a) (2014), “[d]epositions of witnesses or parties may be taken and used in the same manner and for the same purposes as provided in the Florida Rules of Civil Procedure.”
32. At all three levels, the JCC may find that one or more affirmative defenses applies that limits or eliminates the employer’s liability. For example, a claimant who is found to have committed workers’ compensation fraud is not entitled to workers’ compensation benefits regardless of compensability. Leggett v. Barnett Marine, Inc., No. 1D14-4432, 2015 Fla. App. LEXIS 8562, at *1 (Fla. Dist. Ct. App. June 4, 2015).
33. See infra text accompanying notes 199-202.
plaint.\textsuperscript{34} The petition lists the specific benefits to which the employee claims entitlement and which are alleged to be in dispute.\textsuperscript{35}

For several reasons, there is a tendency on the part of employers/carriers—the “defendants”—to stipulate to certain matters that the plaintiff would be required to prove in the context of a civil action.\textsuperscript{36} A statutory twenty percent penalty on late payments of indemnity benefits and the desire to avoid excessive attorney’s fees or sanctions are the most obvious reasons to stipulate to facts not in dispute.\textsuperscript{37} Another is to ensure defenses are narrowly tailored to the facts, for reasons that will be made clear below.\textsuperscript{38} The parties will almost invariably stipulate to the date and place of accident (at least for ministerial purposes), and to the jurisdiction of the tribunal.

The workers’ compensation “trial” is called a final merits hearing.\textsuperscript{39} The nature of workers’ compensation claims more or less limits the number of parties at a hearing to two.\textsuperscript{40} Thus, there are likely to be no more than three party witnesses: the employee, a representative of the employer, and a representative of the insurer. Due to the short
statutory time frames in which litigation must occur, expert witnesses almost always testify by deposition under Florida Rule of Civil Procedure 1.330(a)(3). After hearing testimony and argument, and considering documentary evidence, the JCC enters a compensation order disposing of the claims and defenses. This order sets forth the judge’s determination on compensability, if applicable, and on entitlement to any claimed benefits. Issues may also be disposed of via summary final order, which is akin to summary judgment in a civil action. Perhaps the most unique feature of workers’ compensation litigation is that entry of an order on the merits may not end litigation even if no appeal is taken. That is, unless the JCC’s order denies compensability or finds that no benefits will be due in the future, the employee is free to file new claims as they mature.

Worker’s compensation cases are, of necessity, taken up piece-meal. Such cases require this treatment because the various entitlements of the claim mature at different times as the course of recovery progresses. The import of this principle is that claims for various benefits may be treated as they mature, while determination of immature claims is necessarily postponed until they are ripe.

The doctrines of res judicata and law of the case will not bar such subsequently filed claims so long as they were not ripe at the time of the prior adjudication, and are not based on the same questions of fact or law.

Prior to 1979, workers’ compensation trial proceedings were heard by judges of industrial claims, and the first avenue of appeal for

41. These time frames are prescribed by law, though they may be waived. See Fla. Stat. § 440.25(4) (2011).
42. Id.
43. Id.
44. “Florida Administrative Code Rule 60Q-6.120(1) permits a JCC to enter a summary final order when the order would be dispositive of the issues raised by the petition, and there are no genuine issues of material fact.” Thomas v. Eckerd Drugs, 987 So. 2d 1262, 1263 (Fla. Dist. Ct. App. 2008).
46. M.D. Transp. v. Paschen, 996 So. 2d 902, 904 (Fla. Dist. Ct. App. 2008). The sequential nature of workers’ compensation proceedings somewhat blurs the line between the two doctrines and confuses even experienced judges. See also Fla. Dep’t of Transp. v. Juliiano, 801 So. 2d 101, 107 (Fla. 2001) (“[T]he doctrines of the law of the case and res judicata differ in two important ways. First, law of the case applies only to proceedings within the same case, while res judicata applies to proceedings in different cases. Second, the law of the case doctrine is narrower in application in that it bars consideration only of those legal issues that were actually considered and decided in a former [trial or appeal, . . . while res judicata bars relitigation in a subsequent cause of action not only of claims raised, but also claims that could have been raised.”) (internal citations and formatting omitted).
workers' compensation matters was to the Industrial Relations Commission.\footnote{See Florida Industrial Relations Commission, Industrial Relations Commission Record Group, Number 000394, FLA. DEPT OF STATE, http://dlis.dos.state.fl.us/barm/rediscov ery/default.asp?IDCFile=/fsa/DETAILSG.IDC,SPECIFIC%3D979,DATABASE%3DGROUP (last visited Aug. 23, 2015).} In the meantime, JICs were renamed deputy commissioners, and then Judges of Compensation Claims upon the creation of the Office of the Judge of Compensation Claims (OJCC).\footnote{Jack A. Weiss, A Primer on Workers' Compensation Appeals, 80 FLA. B.J. 63 (2006).} The legislature subsequently abolished the Commission, and jurisdiction over all workers’ compensation appeals vested in the First District Court of Appeal in Tallahassee, regardless of the trial venue.\footnote{See FLA. STAT. § 440.271 (2002). For this reason, virtually all appellate decisions cited to this point are decisions of the First District Court of Appeal.}

B. Workers' Compensation Immunity

Employers enjoy limited immunity to employee tort actions under Section 440.11 of Florida’s Workers’ Compensation Act, which reads, in relevant part, as follows:

Exclusiveness of liability.—
(1) The liability of an employer prescribed in s. 440.10 shall be exclusive and in place of all other liability, including vicarious liability, of such employer to any third-party tortfeasor and to the employee, the legal representative thereof, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except as follows:

(a) If an employer fails to secure payment of compensation as required by this chapter . . .

(b) When an employer commits an intentional tort that causes the injury or death of the employee . . . .\footnote{Under FLA. STAT. § 440.38 (2004), “secur[ing] payment of compensation” means obtaining insurance or authorization from the Division of Workers’ Compensation to act as a self-insurer. See Limerock Indus. v. Pridgeon, 743 So. 2d 176, 177 (Fla. Dist. Ct. App. 1999).}

The result is that an employee generally cannot maintain a tort action against his employer, outside the enumerated exceptions.\footnote{For example, the Florida Supreme Court has held that civil actions based on workplace sexual harassment are not barred by the exclusive immunity provision. Byrd v. Richardson-Greenshields Sec., Inc., 552 So. 2d 1099, 1104 (Fla. 1989).} In addition to the statutory exceptions, the legislature and courts have created or recognized other exceptions. Some exceptions are obvious, such as claims arising under unrelated statutes;\footnote{For example, the Florida Supreme Court has held that civil actions based on workplace sexual harassment are not barred by the exclusive immunity provision. Byrd v. Richardson-Greenshields Sec., Inc., 552 So. 2d 1099, 1104 (Fla. 1989).} others are more nuanced,
such as the “dual persona” doctrine. Barring an exception, the employee’s recovery against the employer is limited to the benefits specified in Chapter 440. In practical terms, this means a negligence suit filed against an employer may not survive the summary judgment stage if the employee’s proper recovery is in the workers’ compensation arena. However, when employers have taken the position that no workers’ compensation claim exists, courts have rejected the immunity defense on estoppel grounds, as discussed below.

II. Equitable Estoppel

Lord Coke defined an estoppel as “where a man is concluded, by his own act or acceptance, to say the truth.” Today, we might say estoppel is found where justice requires that a party be bound by its own representations. The Florida Supreme Court has defined estoppel generally as “(1) a representation as to a material fact that is contrary to a later-asserted position; (2) reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon.” Estoppel is deemed an avoidance, because its purpose is to avoid or negate an affirmative defense.

A. Case Studies

The following fact patterns illustrate how estoppel might arise in a disputed workers’ compensation claim.

X v. Y & Z - X, a forklift driver, contracted a severe lung disease after he was allegedly exposed to toxic dust at work. X filed a workers’ compensation claim against Y, his employer, asserting entitlement to various benefits under the Workers’ Compensation Act. Z, Y’s insurer, denied the workers’ compensation claim on the grounds that the lung condition was preexisting and unrelated to X’s employment. X then voluntarily dismissed his workers’ compen-

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55. 352 Co. Litt. a (Sir Edward Coke, The First Part of the Institutes of the Laws of England, or Coke Upon Littleton (1823)), as quoted in Root v. Crock, 7 Pa. 378, 380 (1847) and elsewhere.
56. Dep’t of Revenue v. Anderson, 403 So. 2d 397, 400 (Fla. 1981).
57. See, e.g., Moore Meats, Inc. v. Strawn In and For Seminole Cnty., 313 So. 2d 660, 661 (Fla. 1975) (“In pleading, avoidance means an allegation of new matter in opposition to a former pleading that admits the facts alleged in the former pleading and shows cause why they should not have their ordinary legal effect.” (internal quotation marks omitted)).
sation claim and sued Y for negligently causing him to be exposed to toxic dust. Y moved for summary judgment on the grounds that workers' compensation immunity precluded X's suit. X responded that Y was estopped from asserting workers' compensation immunity, on the grounds that it had denied any causal connection between the incident and X's employment.

A v. B & C - A, a printing clerk, received permission from B, her employer, to take home some empty boxes. She put the boxes on a loading dock to pick up at the end of her workday. After clocking out, she left B's building and walked around the outside to the loading dock. On the way, she tripped on a sidewalk and suffered numerous injuries in the ensuing fall. She then filed a workers' compensation claim against B. C, B's insurer, denied her claim on the ground that her injury did not arise out of the course and scope of her employment. A then filed suit against B in tort. B moved for summary judgment, asserting that A's sole remedy was in the workers' compensation arena. A demurred, arguing that B was estopped from asserting immunity since it had denied that the incident at issue arose from employment.

What factors determine whether either, neither, or both of these estoppel arguments will succeed? As discussed above, equitable estoppel requires a representation by the estopped party, reliance, and change in position by the adverse party.

Both B and Y took positions in the workers' compensation claims, which were inconsistent with those taken in the tort claims. Both A and X changed their positions based on their employers' representations. Both ensuing tort actions involved the same parties as the preceding workers' compensation claims. The voluntary dismissals arguably evidence the employees' reliance. In fact, in the cases below, we see that courts have assumed that voluntary dismissals constitute detrimental reliance without undertaking any analysis at all. Instead, they have focused on the degree of inconsistency in employers' positions.

The first fact pattern (XYZ) is taken from Tractor Supply Co. v. Kent, in which X is the employee, Francis Kent. The Kent court refused to find the employer estopped, after undertaking the following analysis:

Kent essentially maintains that he was being “whipsawed” out of any remedy for his injury/illness when TSC denied his claim for [workers' compensation] benefits and then subsequently took the position that Kent's exclusive remedy was worker's compensation. The short answer to this is that Kent could and should have liti-

gated the defense of pre-existing injury/illness in the comp action. A pre-existing injury or illness is a recognized defense to a claim for comp benefits, section 440.09(1)(b), Florida Statutes, and should have been litigated in the comp action.

Kent notes that under Florida law, where injuries are not encompassed within our Worker’s Compensation Act, the employee is free to pursue his or her common law remedies. However, in Williams, an adjudication of non-compensability had been issued by a judge of compensation claims. The plaintiff obtained a decision that his claim was outside the Worker’s Compensation Act and thus, he was free to pursue his common law remedies.59

The court also held that the denial of workers’ compensation benefits was not inconsistent with its assertion of immunity: “[t]he carrier did not assert that no employment relationship existed or that the incident occurred outside the scope of employment. Rather, the denial asserts that under the terms of the Worker’s Compensation Act, the injury is one which is not deemed to be compensable.”60 In other words, the employer/carrier admitted that Kent sustained a covered accident, but denied that benefits were due, as Kent’s condition was the result of a preexisting condition. According to the Fifth District, this type of denial, the second “level” of dispute,61 did not take Kent’s claims outside the scope of the Workers’ Compensation Act.

The second fact pattern (ABC) is taken from an earlier Fifth District case, Byerley v. Citrus Pub., Inc.62 Though its facts seem functionally indistinguishable from Kent, the outcome was quite different:

The employer created a Hobson’s choice for Byerley: the employer, through its insurance carrier, denied her claim for workers’ compensation, and then, when Byerley elected to proceed in a tort action, argued that she could not sue because her exclusive remedy was the Workers’ Compensation Act . . . . We think it would be inequitable for an employer to deny worker’s compensation coverage on the ground that the employee’s injury did not arise out of the course and scope of employment, then later claim immunity from a tort suit on the ground that the injury did arise out of the course and scope of employment. This argument, if accepted, would eviscerate the Workers’ Compensation Act and allow employers to avoid all liability for employee job related injuries . . . .

Byerley accepted and relied on the denial, bore her medical expenses, then sued the employer in tort as permitted by the statute. Here, the elements of estoppel are shown, and therefore, the em-

59. Id. (internal citations omitted).
60. Id. at 981.
61. See supra text accompanying notes 32-53 (discussing the second “level” of dispute).
It seems the Byerley court applied the test for equitable estoppel ("Byerley accepted and relied on the denial, bore her medical expenses, then sued the employer in tort . . ."). It is unclear from the record whether Byerley’s workers’ compensation claim was litigated on its merits. All that is known is that the tort action was filed after the employer/carrier denied the claim. The Kent court in fact distinguished Byerley at some length in its own opinion:

The question presented in this appeal is whether Byerley and Elliott establish that an employer such as TSC, who, through its comp carrier, denies a worker’s compensation claim on the basis that the injury or illness was pre-existing, is then estopped from asserting worker’s compensation immunity and exclusivity in defending against a civil tort action . . . .

The trial court erroneously took the narrow holding in Byerley and expanded it beyond its supporting rationale. Byerley does not support application of estoppel principles against an employer who has raised in the comp proceeding a medical causation defense that the employee’s medical condition is pre-existing and unrelated to his current employment.

An essential requisite for invoking equitable estoppel is a representation by the party sought to be estopped to the other party as to some material fact, which representation is contrary to the condition of affairs later asserted by the party sought to be estopped [citation omitted]. There is no irreconcilable conflict in the employer here raising a pre-existing medical condition defense to a comp claim, but asserting it is, nevertheless, insulated from a civil suit . . . .

Kent’s position is that whenever a comp claim is defended on the basis that the injury or illness did not result from the claimant’s employment, the employer is thereafter estopped from asserting in a civil action the worker’s compensation immunity and exclusivity defense. Acceptance of this position would force employers and their carriers to either concede the validity of a comp claim where a pre-existing condition may be implicated or open themselves up to an immediate civil action. Byerley does not so hold. Rather, it is only in taking clearly irreconcilable positions such as in claiming the incident occurred outside the employment relationship but later claiming otherwise that an employer runs the risk of being estopped to assert comp immunity as a defense to a civil suit.

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63. Id. at 1232-33 (citing Elliott v. Dugger, 542 So. 2d 392 (Fla. Dist. Ct. App. 1989)).
64. Id. at 1232. As discussed above, reliance is an element of other forms of estoppel, but is not required for judicial estoppel.
65. Kent, 966 So. 2d at 980-81.
Thus, for the Fifth District, the difference was all in the language of the denials of the workers’ compensation claims—an analysis which has largely been approved by its sister courts in the cases discussed below. In so saying, the wording of the denial in *Kent* appears to have been interpreted rather generously to the employer:

TSC’s comp carrier denied Kent’s claim by stating as follows: “[E]ntire claim denied, as the condition complained of is the result of a pre-existing medical condition that is not the result of employment with Tractor Supply.”

This denial was inartfully drafted which likely led the trial court to focus on the last phrase (“not the result of employment with Tractor Supply”) when it ruled that the worker’s compensation carrier “denied an industrial accident occurred while in the course and scope of the Plaintiff’s employment with the Defendant.” However, the intent of the denial is evident. The carrier did not assert that no employment relationship existed or that the incident occurred outside the scope of employment. Rather, the denial asserts that under the terms of the Worker’s Compensation Act, the injury is one which is not deemed to be compensable.66

Given the procedural posture of the case (i.e., the summary judgment stage, when all inferences should have been taken in favor of the non-moving plaintiff), it was probably not for the court to interpret the plain meaning of the language of the denial.67

In any event, these two cases broadly illustrate the rule governing such estoppel: it is warranted when the employer denies the occurrence of an industrial accident, but not when an employer has merely denied benefits. Although the *Kent* court referenced the assertion of “a recognized defense to a claim for comp benefits,”68 this language is not particularly helpful. Asserting that no employment relationship exists is also a “recognized defense” to a claim for workers’ compensation benefits (as workers’ compensation benefits are payable only by an “employer” on behalf of an “employee,” as defined in Sections 440.02(15) and (16) of the Florida Statutes, respectively).69 However, it is clear that an assertion that no employment relationship existed would justify estoppel, as set forth in *Byerley*.70

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66. Id. at 981.
68. *Kent*, 966 So. 2d at 981.
69. Conversely, an independent contractor arrangement is not governed by the Workers’ Compensation Act.
70. “The employer argues that Byerley . . . was not an employee at the time the injury occurred.” *Byerley*, 725 So. 2d at 1231.
The Florida Supreme Court has yet to approve or disapprove the holdings of Byerley or Kent. However, the holdings of the other four District Courts of Florida are largely consistent, as evidenced by the cases that follow.

1. The First District Court of Appeal

As noted above, the First District Court of Appeal has exclusive jurisdiction of workers’ compensation appeals. Thus, its interpretation of Chapter 440 is arguably entitled to some deference from its sister courts.

The First District appears to have been the first to consider the argument that estoppel could bar an employer’s immunity defense. In Quality Shell Homes & Supply v. Roley, the injured worker was the employee of a contractor on a construction project. The worker fell from the roof of the building under construction and sustained “serious” injuries. The developer initially indicated that workers’ compensation coverage was available to Roley. However, two weeks later, it recanted and asserted that Roley’s direct employer, the contractor, was responsible. The contractor/employer had, in fact, not obtained insurance because it had relied on the developer’s contractual agreement to do so. Roley then filed suit against the developer, Quality Shell, and others. Rather than disposing of the estoppel issue at summary judgment, the trial court submitted it to the jury with the following instruction:

[I]f you find that Workmen’s Compensation Insurance actually existed, in order for the plaintiff to recover it is necessary that the evidence establish by a preponderance of it that the plaintiff changed his position to his detriment by not filing a claim for compensation, as a result of the alleged statement that there was no such workmen’s compensation coverage, and if the preponderance

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71. See supra note 49 and accompanying text.
73. Id. at 839.
74. Id.
75. Id.
76. Id. Roley is an example of the contractor/subcontractor disputes referenced in supra note 40.
77. Id.
78. Roley, 186 So. 2d at 839. The other defendants are not identified in the opinion. Thus, it is unclear whether Roley’s direct employer (who did not change position, but apparently did not have coverage) was also estopped from asserting workers’ compensation immunity.
of the evidence does not establish that he did so change his position as a result of the alleged statement, then he cannot recover in this suit.\textsuperscript{79}

The First District upheld a subsequent jury verdict in favor of the plaintiff, noting that the jury could reasonably have inferred that the defendants were estopped from asserting immunity.\textsuperscript{80} \textit{Roley} is somewhat distinguishable because it appears that the estoppel stemmed from the denial of coverage, rather than the denial of the claim.

The First District was also the first Florida court to formulate the rule applied in \textit{Byerley/Kent}. This rule was described by the court in sequential appeals stemming from a single workplace incident.\textsuperscript{81} Elliott, a corrections officer, was employed by the Florida Department of Corrections at its Reception and Medical Center in Lake Butler.\textsuperscript{82} He alleged that inmates at the facility “spiked” his coffee with a blood sample containing the AIDS virus.\textsuperscript{83} Thereafter, Elliott reported ingestion of the coffee as a work injury.\textsuperscript{84} A blood test revealed no evidence of infection,\textsuperscript{85} but the incident was reported as a workers’ compensation claim, and subsequently denied. Elliott then filed suit against the Department of Corrections, a vendor that provided medical services to the prison facility, and individuals associated with both.\textsuperscript{86} The Department defended on the ground that Elliott’s sole remedy was workers’ compensation, and moved for summary judgment.\textsuperscript{87} Elliott argued that he was entitled to proceed in tort because the employer had denied his claim for workers’ compensation benefits.\textsuperscript{88} The specific document denying his claim was not in evidence, but Elliott testified that he received a letter indicating “no [workers’ compensation] benefits were

\textsuperscript{79.} Id. at 841. The appellate court found this to be a fair statement of the elements of equitable estoppel. The evidence apparently showed that Quality Shell did have workers’ compensation coverage and merely determined that it did not extend to the accident at issue. Id.

\textsuperscript{80.} Id.


\textsuperscript{82.} Elliott I, 542 So. 2d at 392.

\textsuperscript{83.} Id. at 393. As an aside, it appears that the risk of primary HIV infection (the precursor to AIDS) from ingesting contaminated foods is vanishingly small. The only documented cases of oral HIV transmission from food involved infants ingesting food that was “pre-chewed” by infected caregivers. See, e.g., Pepsi Contaminated with HIV, SNOPES, http://www.snopes.com/food/tainted/pepsi HIV.asp (last updated May 15, 2014).

\textsuperscript{84.} Elliott I, 542 So. 2d at 393.

\textsuperscript{85.} Elliott II, 579 So. 2d at 829.

\textsuperscript{86.} Id. at 828. The style of the case refers to the first named appellee, Richard Dugger, then Secretary of Corrections.

\textsuperscript{87.} Elliott I, 542 So. 2d at 392.

\textsuperscript{88.} Id.
due” to him.89 The trial court granted summary judgment, refusing to consider Elliott’s testimony.90 On appeal, the First District Court of Appeal reversed, noting that the lack of evidence as to the content of the letter precluded summary judgment:

We are not at this point attempting to construe the meaning of the alleged representation made by appellee that no benefits were due claimant, which representation could have meant, for instance, either that the Department of Corrections was of the opinion that there had yet been no injury shown, or that it had taken the position that Elliott had no right to claim benefits because the injury was not a covered injury. That latter interpretation is suggested in paragraph 19 of the Elliotts’ complaint as above referenced and, for purposes of a motion for summary judgment, must be taken as true. Moreover, if appellee denied workers’ compensation coverage on the basis that Robert Elliott’s alleged injury was not encompassed within the Act or on the basis that he was injured under other situations not covered by the Act, the Elliotts were free to pursue common law remedies. Based on the foregoing, we hold that the trial court erred in granting appellee’s motion for summary judgment on the basis that there exist genuine issues of material fact concerning the issue of estoppel.91

Elliott apparently did institute workers’ compensation litigation during the pendency of the first appeal.92 The deputy commissioner ruled that he sustained a compensable accident.93 However, the deputy commissioner held that no benefits were due other than payment for the prior blood testing.94 Thereafter, the employer again moved for summary judgment in the civil action (which was again before the trial court on remand).95 This time, summary judgment was granted, and the First District upheld, relying on the deputy commissioner’s holding, that Elliott had sustained a covered accident but no benefits were due.96

The court subsequently derived a clearer rule from its Elliott holdings in Schroeder v. Peoplease Corp.97 Schroeder is now arguably the leading case on point, because it establishes the proposition that

89. Id. at 393.
90. Id.
91. Elliott I, 542 So. 2d at 394 (internal citations omitted).
92. Elliott II, 579 So. 2d at 829.
93. Id.
94. Id.
95. Id.
96. Id.
mere ambiguity in the language of a denial precludes summary judgment for the employer/defendant:

Here, as in Elliott, there remain disputed issues of material fact as to the meaning of the language employed in the notice of denial. Summary judgment is inappropriate where the wording of a document is ambiguous and its interpretation involves questions of fact. Whether estoppel is appropriate in this case and whether the employer took irreconcilable positions is dependent upon the meaning to be accorded the notice of denial.98

2. Other Florida District Courts

The Second District Court of Appeal adopted the rules laid down in Byerley, Kent, and Elliott in Coca-Cola Enters. v. Montiel:99

Aquilino J. Montiel suffered a back injury while unloading Coca-Cola products at a Tampa Kash N’ Karry store. Unquestionably, the injury occurred in the course and scope of Mr. Montiel’s employment. Mr. Montiel’s deposition testimony also establishes that Coca-Cola paid workers’ compensation benefits to him for about twelve weeks. Thereafter, Coca-Cola denied further workers’ compensation benefits. The medical evidence indicated that Mr. Montiel’s condition no longer related to his work injury, but to a degenerative condition. Mr. Montiel did not claim further benefits under the workers’ compensation statute.100 Instead, he sued Coca-Cola and Kash N’ Karry for negligence, alleging that improper shelving design caused his injury. Coca-Cola sought summary judgment based on workers’ compensation exclusivity.

Neither Byerley nor Elliott presents facts similar to those before us. Mr. Montiel’s injury was work-related. Coca-Cola never contended otherwise. Coca-Cola paid benefits for approximately three months. Indeed, Coca-Cola denied further benefits only when medical evidence indicated that Mr. Montiel’s condition no longer related to his work injury. Had Mr. Montiel thought himself entitled to further benefits, the statute provided a vehicle to seek relief.101 We are aware of no statutory provision that, under these circumstances, strips the employer of the exclusivity defense. To read such a result into the statute would be contrary to the purpose of the law.102

98. Id. at 1170 (internal citations omitted).
100. See FLA. STAT. § 440.192.
101. Id.
102. Coca-Cola Enters., 985 So. 2d at 19-20.
Montiel is significant because it makes reference to a particular defense (“Mr. Montiel’s condition no longer related to his work injury . . .”), and held that the defense was not inconsistent with the later assertion of immunity. Essentially, this was the same holding reached by the Fifth District in Kent, but more elegantly phrased. Rather than deeming the defense to be “a recognized defense to a claim for comp benefits,” the Montiel Court distinguished it from denying that a work-related injury had occurred. Montiel essentially applied a logical bright-line rule that the employer’s position on compensability was the determining factor in whether it could later assert immunity.103

The leading case on point in the Third District is Coastal Masonry, Inc. v. Gutierrez.104 Gutierrez allegedly suffered a lifting injury to his lower back at work, and filed a petition for benefits.105 The employer’s insurer filed a response denying the claim, and asserting, inter alia, that:

The carrier has denied the claim in its entirety . . . . The present condition of the claimant is not the result of an injury by accident arising out of and in the course and scope of employment. There is no accident or occupational disease. The condition complained of is not the result of an injury, as defined by Florida Statute § 440.02(1).106

Gutierrez dismissed his workers’ compensation claim and proceeded against the employer in tort.107 Predictably, the employer defended on immunity grounds, and moved for summary judgment.108 The Third District first held that the employer’s positions were patently inconsistent:

Coastal denied Gutierrez’s claim for workers’ compensation benefits, stating that “[t]he present condition of the claimant is not the result of an injury by accident arising out of and in the course and scope of employment.” In this case, however, Coastal asserted as an affirmative defense that it was entitled to the exclusivity defense

103. Recall, as set forth in supra note 17, that compensability merely refers to the question of whether a work-related accident occurred.
105. Id. at 547.
106. Id. Gutierrez is thus distinguishable from most of the cases discussed above because the plaintiff had actually instituted litigation of his workers’ compensation claim, rather than relying on a pre-litigation denial.
107. Id.
108. Id.
because the accident arose in the course and scope of Gutierrez’s employment.109

The court then applied the three-element test for equitable estoppel, and held that Gutierrez’ voluntary dismissal of the workers’ compensation action satisfied the detrimental reliance requirement.110 The denial of summary judgment was affirmed.111 The court also noted, consistent with Kent, et al., that mere denial of a workers’ compensation claim was not sufficient to invite estoppel.112

The leading Fourth District case is Mena v. J.I.L. Const. Group Corp.113 Mena serves as a handy summary of the preceding decisions:

[Under Florida law, where injuries are not encompassed within our Worker's Compensation Act, the employee is free to pursue his or her common law remedies. Further, where an employer denies a claim for worker's compensation benefits on the basis that the injury did not occur in the course and scope of employment, or that there was no employment relationship, the employer may be estopped from asserting in a later tort action that the worker's exclusive remedy was worker's compensation, provided that the employee can satisfy the elements of estoppel. For the possibility of estoppel to arise, however, the employer's assertion of worker's compensation immunity must be “clearly irreconcilable” with the reason for its initial denial. If the language employed in the notice of denial could give rise to more than one interpretation, such that it cannot be fairly determined whether the employer's positions are inconsistent, summary judgment is inappropriate.

In Schroeder, the employer's notice of denial listed six different reasons. Two of the reasons stated, “The present condition of claimant is not the result of injury arising out of and in the course of his or her employment,” and “The condition complained of is not the result of an injury within the meaning of the term as used in the Florida Compensation Act.” The other four reasons suggested that the denial was based on a preexisting condition of the employee. The First District reversed the trial court's entry of summary judgment, holding “[w]hether estoppel is appropriate in this case and whether the employer took irreconcilable positions is dependent upon the meaning to be accorded the notice of denial.”114

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109. Id. at 548. The court also noted that the employer had taken inconsistent positions within the negligence proceeding, as it had denied that Gutierrez was its employee in its answer to Gutierrez’ complaint.

110. Gutierrez, 30 So. 3d at 548.

111. Id. at 549.


114. Id. at 222-23 (internal citations omitted).
3. Federal Cases

The decisions of federal courts in this area are of questionable value and sparse (in fact, there are just three of note). This is perhaps unsurprising, given that Florida's own courts have rendered relatively little relevant decisional law.

In Ashby v. Nat'l Freight, Inc., the plaintiff reported a work-related injury to his employer. The claims administrator, citing lack of timely notice, denied the claim. The plaintiff then proceeded against the employer in tort. In granting summary judgment for the employer, the court noted that the employer was not estopped from asserting immunity because it did not take inconsistent positions. It had denied his claim only on the notice defense, and never disputed that an industrial injury occurred.

More problematic is the recent decision by the U.S. Court of Appeals for the Eleventh Circuit in Picon v. Gallagher Bassett Servs. In Picon, the employee/plaintiff reported a repetitive motion injury to her employer, which authorized benefits including medical care. After six months of conservative care, the authorized treating physician recommended surgery. The employer exercised its right to an evaluation by another doctor, who opined that the injury was not causally related to the employee’s job duties, and that no further treatment was necessary “under the workers’ compensation accident.” The employer denied authorization for the proposed operation and all

116. Id.; FLA. STAT. § 440.185(1) provides that claims are barred if not reported to employers within thirty days, absent certain enumerated exceptions.
118. Id.
119. Id. Though consistent with the Florida appellate decisions, Ashby is curious because it makes repeated references to judicial estoppel. The facts of the case clearly raised the issue of ordinary estoppel, since the workers’ compensation claim was not litigated to conclusion. Furthermore, the court cited and applied the estoppel test from Kent. The Third District has cited Ashby on two occasions, including an erroneous reference to judicial estoppel. Judicial estoppel will be discussed further below as an alternative remedy.
120. 548 Fed. Appx. 561 (11th Cir. 2013).
121. Id. at 563.
122. Id.
123. FLA. STAT. § 440.13(5) allows the employee or employer to have an independent medical examination (“IME”) performed by a physician of the party’s choice if it disputes the opinion of the authorized treating physician. The term IME is somewhat misleading, because the IME physician is deemed the party’s expert.
further benefits, relying on the second doctor’s opinion.\textsuperscript{125} The employee filed a petition for workers’ compensation benefits.\textsuperscript{126} The employer did not file a Notice of Denial or response to the petition.\textsuperscript{127} However, its attorney advised the employee’s attorney of the IME physician’s opinion, and the employer’s intent to rely on the opinion.\textsuperscript{128} The employee then dismissed the petition, citing the employer’s alleged position that her injury was “not related to her employment,” and filed suit against the employer in tort.\textsuperscript{129} The civil action was removed to federal court by the employer, which then successfully moved for summary judgment in the trial court.\textsuperscript{130} The employee/plaintiff then appealed to the United States Court of Appeals for the Eleventh Circuit.

That court first undertook an exhaustive review of the case law, including the cases discussed above and Ocean Reef Club, Inc. v. Wilczewski.\textsuperscript{131} It then focused on the ambiguity issue discussed in Schroeder, noting that “[w]hen the record reveals multiple possible explanations for the denial, or the language in the denial document is ambiguous and gives rise to more than one interpretation, issues of material fact exist [precluding summary judgment].”\textsuperscript{132} The court went on to reverse, holding as follows:

Gallagher’s [attorney’s] emails, viewed in the light most favorable to Picon, can be construed as denying the existence of an incident occurring in the course and scope of employment. For example, Gallagher’s attorney wrote that Picon’s “shoulder condition is unrelated to her work activities.” Likewise, Gallagher’s senior claims representative Roth wrote that “no further shoulder treatment will be authorized as Dr. Blinn did not feel her shoulder complaints were related to her job duties.” Dr. Blinn himself wrote “it is not reasonable to state that using a mouse or computer at a workstation in a repetitive fashion is the reason for this persons [sic] right shoulder problem.” We do not conclude that estoppel applies here as a matter of law. We determine only that there were genuine issues of material fact as to what were Gallagher’s reason or reasons for the denial of Picon’s request for workers’ compensation benefits. Accordingly, the district court erred in granting summary judgment to the defendant Gallagher as a matter of law.

\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Picon, 548 Fed. Appx. at 564.
\textsuperscript{131} Id. at 572 (citing Ocean Reef Club, Inc. v. Wilczewski, 99 So. 3d 1 (Fla. Dist. Ct. App. 2012) (heard in the Third District)).
\textsuperscript{132} Id.
based on its workers’ compensation exclusivity affirmative defense.\textsuperscript{133}

Essentially, the court seems to have inferred that a dispute over causal connection was tantamount to ambiguity regarding compensability. This was questionable for two reasons. First, the employer never took the position that the claim was not compensable (even if the physician’s words are directly imputed to it.) Dr. Blinn’s finding could either mean that the employee’s condition was preexisting, or that it was the result of a subsequent accident. It was not reasonable to infer that the employer/carrier might be claiming that no compensable accident had occurred. Second, when the claim was denied, the employer no longer had the right to contest compensability. Under Section 440.20(4) of the Florida Statutes, an employer that does not deny compensability within 120 days of its first payment of benefits waives its right to dispute compensability at a later date.\textsuperscript{134} Having paid benefits to the employee for six months, the employer could no longer contest that she sustained an accident arising out of the course and scope of employment, “unless [it could] establish material facts relevant to the issue of compensability that it could not have discovered through reasonable investigation within the 120-day period.”\textsuperscript{135} Thus, while the \textit{Picon} court teased out the correct rule of law, it seemingly misapplied it.

In \textit{Rush v. BellSouth Telecommunications, Inc.},\textsuperscript{136} the employee/plaintiff filed a workers’ compensation claim based on “sick building syndrome.”\textsuperscript{137} She then filed another claim alleging the same conditions, with a different date of accident and/or disablement date.\textsuperscript{138} The employer/defendant denied her workers’ compensation claims, asserting in part that “Claimant’s alleged exposure . . . did not occur in the course and scope of her employment and Claimant did not suffer an injury by accident . . . . Claimant’s conditions are personal in nature and longstanding and unrelated to her employment.”\textsuperscript{139} The employee

\begin{itemize}
  \item \textsuperscript{133} \textit{Id.} at 573.
  \item \textsuperscript{134} \textsc{Fla. Stat.} \textsection 440.20 (2013) (“A carrier that fails to deny compensability within 120 days after the initial provision of benefits . . . waives the right to deny compensability, unless the carrier can establish material facts relevant to the issue of compensability that it could not have discovered through reasonable investigation within the 120-day period.”).
  \item \textsuperscript{135} \textit{Id.} Accordingly, there is no competent substantial evidence supporting the JCC’s findings and the determination that the e/c was not estopped to deny the compensability of appellant’s claims.
  \item \textsuperscript{136} 773 F. Supp. 2d 1261 (N.D. Fla. 2011).
  \item \textsuperscript{137} Sick building syndrome generally refers to conditions arising in building occupants as a result of indoor air quality issues, both chemical and organic. See, e.g., Lesley King O’Neal et al., \textit{Sick Building Claims}, 20 Constr. Lawyer 16, 16-17 (2000).
  \item \textsuperscript{138} \textit{Rush}, 773 F. Supp. 2d at 1262.
  \item \textsuperscript{139} \textit{Id.}
then dismissed the workers’ compensation claims and proceeded in tort.\footnote{Id.} The employer moved for summary judgment, but not on the basis of workers’ compensation immunity (though it did assert immunity as an affirmative defense).\footnote{Id. at 1262.} Instead, it primarily argued that policy considerations mandated that the workers’ compensation claim be litigated to conclusion before the JCC prior to the filing of a civil action.\footnote{Id. at 1263.} The District Court rejected this argument, holding that the facts of the case fit squarely within the requirements for estoppel.\footnote{Rush, 773 F. Supp. 2d at 1264.} “Here, BellSouth—in the workers’ compensation setting—denied that the claim was within the course and scope of Rush’s employment. In so doing, BellSouth took the position that the Workers’ Compensation Law was inapplicable to the plaintiff’s claim.”\footnote{Rush, 773 F. Supp. 2d at 1264.} The District Court also rejected the underlying policy argument.\footnote{“Policy decisions, however, are for the legislature, not the courts.” Id.}

Other federal courts have discussed Section 440.11 of the Florida Statutes, but none of the other cases directly touch on the immunity issue.\footnote{See, e.g., Sinni v. Scottsdale Ins. Co., 676 F. Supp. 2d 1319, 1330 (M.D. Fla. 2009) (discussing application of Fla. Stat. § 440.11 in context of purported breach of liability insurer’s duty to defend). Other cases generally relate to the intentional tort exception.}

\section*{B. A Bright-Line Rule?}

So, what conclusions may we draw from the foregoing cases? *Kent,* notwithstanding the mere fact that a defense is “recognized” under the Workers’ Compensation Act, does not insulate the employer from claims of estoppel. As noted above, both the lack of an employment relationship and the absence of an accident are recognized defenses.\footnote{E.g., Jenks v. Bynum Transp., Inc., 104 So. 3d 1217 (Fla. Dist. Ct. App. 2012) (holding that a truck driver receiving unpaid training prior to hire was an “employee” for workers’ compensation purposes); Vigliotti v. K-mart Corp., 680 So. 2d 466 (Fla. Dist. Ct. App. 1996) (holding that an accident sustained by an employee who had clocked out but not left employer’s premises arose out of employment).} However, the assertion of either of these defenses explicitly conflicts with a subsequent claim that an injury falls within the scope of the Act. In other words, if the employer does not admit that an accident occurred, and that it occurred at work, it cannot be immune from suit.
What distinguishes these two defenses from all others available under the Act? The answer is simple: compensability. How is compensability determined? The Act itself offers little direct guidance.

The employer must pay compensation or furnish benefits required by this chapter if the employee suffers an accidental compensable injury or death arising out of work performed in the course and the scope of employment. The injury, its occupational cause, and any resulting manifestations or disability must be established to a reasonable degree of medical certainty, based on objective relevant medical findings, and the accidental compensable injury must be the major contributing cause of any resulting injuries.

Despite setting forth definitions for nearly all terms of art used in the Act, neither Section 440.02 of the Florida Statutes nor any other section explicitly defines compensability. The definition can be found only by reference to case law.

As to the question of what the legislature intended by the term “compensability” in the context of sections 440.192 and 440.20 [of the Florida Statutes], we note that section 440.20(1) refers to “compensability or entitlement to benefits,” indicating that they are separate concepts, and that the last sentence of section 440.20(4) refers to “the issue of compensability,” indicating a distinction from other issues. Having reviewed the uses of the terms “compensability” and “compensable” in the various sections of chapter 440, we conclude that “compensability” in the context of sections 440.192 and 440.20 is limited to a determination of whether the injury for which benefits are claimed arose out of, and occurred within the course and scope of, the claimant's employment.

The determination of whether or not compensability has been denied is generally an easy one, since it will be reflected in writing in the records of the workers’ compensation claim. Helpfully, denials typically track the language of the statute.

148. See supra note 17 and accompanying text.
149. Fla. Stat. § 440.09(1).
151. As discussed above, an employer that denies either compensability or entitlement to a specific benefit must file a “Notice of Denial.” See supra note 19. It is irrelevant whether the claim is in litigation. In most of the cases discussed above, the estoppel argument rested on the grounds for denial listed in that document. In others, such as Kent and Gutierrez, the estoppel argument was based on language taken from responses to petitions for benefits. Unlike the Notice of Denial, the response—as the name suggests—is filed only to dispute the claims in a petition, and is therefore only seen during litigation.
III. Other Elements of Equitable Estoppel

The foregoing discussion has been devoted to just one element of equitable estoppel, inconsistent defensive positions taken by employers. We have not discussed the other three elements of equitable estoppel. Are those elements as crystallized in the case law as they appear?

Outside the workers’ compensation setting, the courts of Florida are unanimous in the view that equitable estoppel arises only in extraordinary circumstances. “[A] party may successfully maintain a suit under the theory of equitable estoppel only where there is proof of fraud, misrepresentation, or other affirmative deception.”152 “Equitable estoppel differs from other legal theories that may operate upon the statutes of limitation in that equitable estoppel presupposes an act of wrongdoing—such as fraud and concealment—that prejudices a party’s case . . . .”153 “Equitable estoppel presupposes a legal shortcoming in a party’s case that is directly attributable to the opposing party’s misconduct.”154 “Estoppel is an equitable doctrine which is applied only where to refuse its application would be virtually to sanction the perpetration of a fraud.”155

In other words, the adverse party’s representation must have been misleading rather than merely incorrect. There was no evidence of deception in any of the cases discussed in Section II. Strangely, there was not even any discussion of deception as a condition precedent for estoppel. It could hardly be said that a defendant asserting inconsistent defenses is guilty of “misconduct,” much less fraud or concealment. If so, nearly every injured worker would find himself estopped when he asserted alternative claims for lost wage benefits.156

156. Broadly speaking, Florida workers’ compensation law recognizes four categories of indemnity or lost wage benefits: temporary partial disability benefits, temporary total disability benefits, permanent impairment benefits, and permanent total disability benefits. Fla. Stat. § 440.13 (2015). Under no circumstances can an employee receive more than one form of lost wage benefits for any given period of lost time. However, nearly every wage-loss petition for benefits filed seeks both temporary partial and temporary total benefits, and petitions may even request all four benefit types, with the specific benefit periods further defined as litigation continues.
As an equitable doctrine, a court may find that fairness or policy considerations justify relaxing the predicate for estoppel in certain circumstances. Assuming, arguendo, that the unique nature of workers’ compensation claims is such a consideration, the misconduct requirement could be excused. However, the reliance requirement is also more complex than the cases above might indicate. “Estoppel . . . cannot exist where the parties have equal knowledge of the facts or the same means of ascertaining that knowledge.”157 “A claim of reliance [as an element of an estoppel] must fail where both parties have equal knowledge of the truth.”158 In almost any employment litigation, the employer is likely to have superior knowledge of the facts (like any institutional party). However, where the issue is merely whether a compensable accident occurred, the employee has at least as much information as the employer. The employee is the only party who will almost always have been an eyewitness to an accident.159 Moreover, the employee will certainly have all the facts necessary to determine compensability.160 Thus, there is no reason to credit a claim of reliance.

A third consideration is that the party claiming estoppel must have relied on the representation in changing position to its detriment.161 When an employer denies compensability, the employee has not immediately suffered a detriment. The employee is free to file (or refile) a workers’ compensation claim regardless of the employer’s position.162 So long as the incident is reported to the employer within thirty days,163 the employee may bring an action any time up to two years from the accident date.164 Arguably, equitable estoppel might act to extend this statute of limitations, but it is difficult to see why it is a

157. Murphy, 554 So. 2d at 1181.
159. It is possible to conceive of circumstances where this might not be true, as in cases where the employee loses consciousness before or during a workplace accident, or suffers memory loss after one. Needless to say, such circumstances should be considered separately, if at all.
160. For example, the mechanism of injury, what job duties were being performed at the time of the accident, and where the accident occurred.
161. Anderson, 403 So. 2d at 400.
162. Fla. Admin. Code r. 60Q-6.116(2) (2015) allows a party to dismiss any claim without prejudice once, as a matter of right. A second voluntary dismissal operates as an adjudication on the merits.
163. See Fla. Stat. § 440.185(1) (2015) (“An employee who suffers an injury arising out of and in the course of employment shall advise his or her employer of the injury within thirty days after the date of or initial manifestation of the injury. Failure to so advise the employer shall bar a petition under this chapter . . . .”).
164. The statute of limitations is extended by an additional year by the provision of any benefits under the Workers’ Compensation Act. The section also provides for another statu-
detriment otherwise. Nor is an employee’s decision to seek medical care outside the workers’ compensation system a detriment. Section 440.13(2)(c) of the Florida Statutes specifically provides that an employee may obtain her own care at the employer’s expense provided that “she has requested the employer to furnish that initial treatment or service and the employer has failed, refused, or neglected to do so within a reasonable time . . . .” Once a claim is found compensable by a JCC, the employee is no longer responsible for payment of any such medical care.165

This arguably brings us full circle to Byerley. Recall that the Byerley court asserted that the employer created a “Hobson’s choice” for the employee.166 At first blush, this seems like a compelling rationale. The reader is invited to believe that the employee was “damned if she did, and damned if she did not.” In fact, however, the employee was simply being forced to litigate her workers’ compensation claim like any other claimant that is denied benefits.

Returning to the facts,167 it is hard to escape the conclusion that Byerley’s workers’ compensation claim would have been meritorious. She was injured on a sidewalk while leaving the employer’s premises at the end of her workday. Ordinarily, accidents which occur while traveling to or from work are not compensable under the “going and coming” rule.168 However, the rule does not apply to most accidents which occur on the employer’s premises.169 The sidewalk where Byerley was injured was on the employer’s premises.170 Although she was engaged in a personal activity at the time of the accident (picking up some empty boxes), this was a de minimis departure from her ordinary route home.171 Had she pursued her workers’ compensation claim, she

165. FLA. STAT. § 440.13(13)(a) (2015) provides that “[a] health care provider may not collect or receive a fee from an injured employee within this state, except as otherwise provided by this chapter. Such providers have recourse against the employer or carrier for payment for services rendered in accordance with this chapter.”

166. Byerley, 725 So. 2d at 1232. Similarly, in Kent, the employee argued (albeit unsuccessfully) that he was being “whipsawed” out of any remedy. Kent, 966 So. 2d at 981-82.

167. See “A v. B & C” supra Part II.A.


169. Carnegie Gardens Nursing Ctr. v. Banyai, 852 So. 2d 374, 376 (Fla. Dist. Ct. App. 2003) (heard in the Fifth District) (“An injury is deemed to have occurred in the course and scope of employment if it is sustained by a worker, on the employer’s premises, while preparing to begin a day’s work or while doing other acts which are preparatory or incidental to performance of his or her duties, and which are reasonably necessary for such purpose.”).

170. Byerley, 725 So. 2d at 1231.

171. Id. E.g., Johns v. State Dep’t of Health & Rehab. Servs., 485 So. 2d 857 (Fla. Dist. Ct. App. 1986) (deciding that a hospital employee who arrived twenty minutes early to work
would most likely have been awarded benefits. “If this were a workers’ compensation proceeding and the deputy commissioner were to deny benefits by finding that the appellant was not within the course and scope of her employment, we would be compelled to reverse.” Not only that, but fully litigating the case before a JCC would ensure that there was no ambiguity in the position taken by the employer/carrier, and would provide clarity of fact.

In the absence of detrimental reliance, a finding of estoppel is inappropriate. Thus, the employee should be required to litigate the merits of the workers’ compensation claim. That litigation should itself supply the necessary preclusive effect under the doctrine of judicial estoppel.

IV. Judicial Estoppel

As we have seen, equitable estoppel prevents a party from taking inconsistent positions when the adverse party has relied on the original representation. The closely related doctrine of judicial estoppel prevents a party from taking inconsistent positions in judicial proceedings. Florida follows the Corpus Juris formulation of the doctrine:

In order to work and estoppel the position assumed in the former trial must have been successfully maintained. In proceedings terminating in a judgment, the positions must be clearly inconsistent, the parties must be the same and the same questions must be involved. So, the party claiming the estoppel must have been misled and have changed his position; and an estoppel is not raised by conduct of one party to a suit, unless by reason thereof the other party has been so placed as to make it unjust to him to allow the first party to [subsequently] change his position.

This version differs from that adopted in some jurisdictions in that it only applies between proceedings; no estoppel is wrought by a party's inconsistent positions taken within a proceeding (for example, conflicting statements made in a deposition and at a subsequent trial).
Other jurisdictions may also differ in whether they apply the “prior success” rule; that is, the requirement that the estopped party has “successfully maintained” its position at the earlier proceeding.\textsuperscript{176} We can draw out the following elements: (1) successful maintenance of (2) a clearly inconsistent position (3) in a prior case involving the same parties and questions, (4) which causes the adverse party to change position.\textsuperscript{177}

The leading Florida Supreme Court decision on judicial estoppel is instructive. In \textit{Blumberg v. USAA Casualty Insurance Company}, storeowner Blumberg closed his business and stored leftover stock at his home.\textsuperscript{178} Fearing theft, he contacted his insurance agent to confirm that his homeowner’s insurance policy covered the additional items (valuable collectible trading cards).\textsuperscript{179} His agent confirmed that the policy would cover such a loss.\textsuperscript{180} The same day, thieves broke into the home and the cards were taken.\textsuperscript{181} The insurer denied the resulting homeowners’ policy claim and litigation ensued.\textsuperscript{182} Blumberg asserted that the insurer was estopped from denying coverage because Blumberg had orally relied on the agent’s representation; he would have stored the cards elsewhere or obtained additional coverage but for the agent’s declaration.\textsuperscript{183} Blumberg prevailed at the ensuing jury trial, but the jury awarded him less than a pretrial settlement offer.\textsuperscript{184} Under Florida’s “offer of judgment” rule, the insurer, thereby, became entitled to recover its attorney fees.\textsuperscript{185} The parties entered into a mutual stipulation dismissing their claims against one another, leaving

\textsuperscript{176} Id. at 1246 et seq.

\textsuperscript{177} The Fourth District Court of Appeal offers the following alternative formulation:

A claim or position successfully maintained in a former action or judicial proceeding bars a party from making a completely inconsistent claim or taking a clearly conflicting position in a subsequent action or judicial proceeding, to the prejudice of the adverse party, where the parties are the same in both actions.

\textsuperscript{178} Id. at 1061, 1062 (Fla. 2001).

\textsuperscript{179} Id.

\textsuperscript{180} Id. at 1063.

\textsuperscript{181} Id.

\textsuperscript{182} Id.

\textsuperscript{183} Id.

\textsuperscript{184} Blumberg, 790 So. 2d at 1066.

\textsuperscript{185} A defendant which tenders an offer to settle a civil action, and whose offer is denied, is entitled to recover attorney’s fees and costs expended after that date if the plaintiff is ultimately awarded 25% less than the offer. Similarly, a plaintiff whose demand is rejected is entitled to fees and costs if the final award is 25% more than the demand. FLA. STAT. §§ 768.79(6)(a)-(b) (2015).
them status quo (other than Blumberg’s uncompensated loss). Blumberg then filed a new suit against the insurance agent on the ground that the agent negligently failed to obtain adequate homeowners’ coverage. The trial court granted summary judgment in favor of the agent on estoppel grounds. The Fourth Circuit Court of Appeal affirmed.

On appeal, the Florida Supreme Court noted that Blumberg had taken clearly incompatible positions in the two proceedings. In the first suit, he asserted that insurance coverage existed and he was entitled to recover under it. In the second, he asserted that no coverage existed due to the agent’s negligence. The court then discussed policy considerations for the judicial estoppel doctrine:

Blumberg is attempting “to make a mockery out of justice” by asserting inconsistent positions in the St. Paul suit (where he claimed that coverage existed and prevailed) and the Bruner suit (where he claimed that coverage did not exist) . . . .

The courthouse should not be viewed as an all-you-can-sue buffet, in which litigants can pick and choose which verdicts they want and which they do not. Blumberg certainly had the option to voluntarily dismiss the promissory estoppel claim after he received a successful jury verdict. But after receiving that successful verdict, he did not have the option of pursuing an entirely inconsistent position in a subsequent suit.

In holding that judicial estoppel barred Blumberg’s second suit, the court noted that he litigated the first claim to a successful conclusion on the merits. The subsequent voluntary dismissal of his claim did not “erase” the jury’s verdict. The court noted that mutuality of parties was not a strict requirement for judicial estoppel, and that “special

186.  Blumberg, 790 So. 2d at 1063.
187.  Id. The homeowners’ insurance carrier Blumberg sued was St. Paul Fire & Marine, not USAA. USAA was the liability carrier for Bruner Insurance Agency, the direct defendant in the second suit.
190.  Blumberg, 790 So. 2d at 1063.
191.  Blumberg, 729 So. 2d at 461.
192.  Blumberg, 790 So. 2d at 1066-67.
193.  Id. at 1067.
194.  Id.
fairness and policy considerations” dictated that it was not required in the instant case.195

Federal courts have taken a similar view of the purposes of the doctrine to those espoused by the Blumberg court:

To protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment . . . . Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process . . . and the essential integrity of the judicial process . . . [and] prevents parties from playing “fast and loose with the courts.”196

The primary distinction between judicial estoppel and generic equitable estoppel is the reliance element. For judicial estoppel to apply, the party claiming estoppel need not have relied on the estopped party’s position. Instead, the position must have been successfully maintained; we might say that the court must have relied on it, rather than the adverse party. This is consistent with the different policies underlying the two doctrines: while judicial estoppel “protects the integrity of the judicial process,” equitable estoppel “protects litigants from less than scrupulous opponents.”197

A. Instead of Equitable Estoppel, Courts Should Find Judicial Estoppel when the Facts Warrant

In construing any provision of the workers’ compensation scheme, it is important to remember the underlying purpose of the Act: “quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker’s return to gainful reemployment at a reasonable cost to the employer.”198 Put another way, the underlying policy goal is speedy delivery of benefits, returning employees to work, and low cost.

The workers’ compensation system operates much more quickly than traditional courts, a fact borne out both by the law and statistics. By statutory mandate, the OJCC is required to conduct a merits hearing no later than 210 days from the filing of a petition for benefits.199

195. Id. The court did not elaborate on the specific considerations at issue, but it can be inferred that the court was referring to the agency relationship. That is, the insurance agent that stood in the shoes of the insurer to bind it to coverage (in the original suit) must also have stood in the insurer’s shoes when defending the second suit.
199. FLA. STAT. § 440.25(4)(d) (“The final hearing shall be held within 210 days after receipt of the petition for benefits . . . .”). This requirement may be waived by the parties only
No such mandate exists for civil actions, but the Florida Supreme Court has adopted twelve months as a "presumptively reasonable" time for resolution of a non-jury civil trial. In 2013, the average length of time between the filing of a petition and a merits hearing was 162 days. The Florida circuit courts do not keep comparable statistics, but nationwide, the average tort action took over two years to reach disposition as of 2001.

The quick resolution of disputes operates to return employees to "gainful employment" more quickly and more often. The odds of a given individual returning to work after a period of disability decrease sharply with the length of the disability. Without workers' compensation benefits, injured workers are likely to have no or limited access to remedial care. Moreover, an employer being sued in tort is highly unlikely to allow the employee to return to work. Conversely, an employer/carrier, which is providing workers' compensation benefits, has a strong incentive to offer modified duty work—if only to reduce its liability for temporary partial disability benefits. It should also be noted that injured workers are more likely to prevail in workers' com-

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200. Fla. R. Jud. Admin. 2.250(a)(1)(B). A presumptively reasonable time to conclude a jury trial is eighteen months. Given the lack of a jury in workers' compensation proceedings, it seems reasonable to use the non-jury period as the primary basis for comparison.


202. Thomas H. Cohen & Steven K. Smith, U.S. Dep't of Justice, Civil Trial Cases and Verdicts in Large Counties, 2001 8 (2004), available at [link] ("Tort trials reached a verdict or judgment in an average of 25.6 months compared to 21.7 months for real property cases and 21.5 months for contract cases.").

203. See, e.g., Preventing Needless Work Disability by Helping People Stay Employed, 48 J. Envtl. Med. 972, 976 (2006), available at [link] ("[T]he odds for return to full employment drop to 50/50 after 6 months of absence. Even less encouraging is the finding that the odds of a worker ever returning to work drop 50% by just the 12th week. The current practice of focusing disability management effort on those who are already out of work rarely succeeds."). See also Joan Crook & Harvey Moldofsky, The Probability of Recovery and Return to Work from Work Disability as a Function of Time, 3 Quality of Life Res. S97 (1994) ("[W]orkers in Canada with industrial injuries] who remained absent from work after three months had a strong tendency to remain absent for more extended periods.").

204. Fla. Stat. § 440.15(4) (2015) provides that workers who are not totally disabled but have medical restrictions receive wage loss benefits equal to 80% of the difference between their pre- and post-injury earnings.
Compensation proceedings as the standard of proof in most cases is lower than the preponderance requirement found in tort actions.\footnote{205}

The last policy consideration (cost) also favors litigation in the workers’ compensation arena. One survey indicates that nationwide, the median hourly fee for a senior defense attorney practicing in civil litigation is $275.00.\footnote{206} Defense fees in workers’ compensation claims are substantially lower. The fee paid to a claimant’s attorney may be much higher than this figure,\footnote{207} but this is solely a function of the contingent nature of claimants’ attorneys’ fees.\footnote{208} Generally, a claimant’s attorney will be awarded no more than $300.00 per hour. Civil litigants may call as many expert witnesses as the trial court will allow, whereas workers’ compensation litigants are generally constrained to calling a single expert, in addition to any treating physicians and possibly a court-appointed medical expert.\footnote{209}

Thus, all three policy goals of the Workers’ Compensation Act are served by keeping litigation of “work accidents” within the purview of the Office of the Judges of Compensation Claims. It is important to note that the District Courts have roundly rejected this argument (though, as noted above, without reference to otherwise well-established precedent).\footnote{210} However, at least one Florida Supreme Court Justice has followed the same line of reasoning:

\footnote{205. The standard of proof on causation applied in workers’ compensation matters is normally “a reasonable degree of medical certainty.” \cite{stokes_v_schindler_elevator_corp_60_so_3d_1110} Other issues may be proven merely by “competent, substantial evidence.” \cite{schafrath_v_marco_bay_resort_608_so_2d_97} The meaning of this phrase is ambiguous at the trial level, as it is normally a standard of review reserved for appellate proceedings. However, it is unquestionably lower than the preponderance standard. \cite{id} However, in occupational exposure cases, the standard of proof of causation is clear and convincing evidence, a higher standard than preponderance. See \textsc{Fla. Stat.} §440.151(1) (2015).}

\footnote{206. \cite{hannaford-agor_waters_2013} The court upheld an award of a fee equivalent to $2,700.00 per hour.}

\footnote{207. In \textit{What An Idea, Inc. v. Sitko}, 505 So. 2d 497, 498 (Fla. Dist. Ct. App. 1987), the court upheld an award of a fee equivalent to $2,700.00 per hour.}

\footnote{208. \cite{spaulding_v_albertson_s_610_so_2d_721} (“\textit{W}e reject the suggestion that an award of fees to a claimant’s attorney should be influenced or controlled by evidence of the hourly rate charged by defense lawyers. The practice of the defense bar, with their fixed hourly rates, repetitive employment, and virtual guaranteed payment by solvent insurance companies, cannot be compared to the risk assumed by claimants’ attorneys in handling the appeals of workers’ compensation claimants. For defense work, fees are usually paid when billed and deferred billing and collection is not ordinarily a problem. Defense counsel also may recover costs the claimant’s attorney cannot, and is paid for the time necessary to litigate the amount of the fee.”).}

\footnote{209. \cite{discussion_ofIME_statutory_provision supra note 123}}
In order to give effect to the legislatively mandated workers’ compensation immunity, the legal existence and applicability of that immunity in individual cases should be able to be tested pretrial in appellate review. Such a procedure is necessary to prevent workers’ compensation immunity from being seriously depreciated and this integral part of the workers’ compensation system rendered worthless by reason of the expense and exposure of a jury trial. Our decision in Turner v. PCR, Inc.,211 explains the quid pro quo out of which this immunity came into existence but also has heightened the need for pretrial review by broadening what can be pled as employee conduct that is not covered by workers’ compensation immunity.212

Although Justice Wells, who retired in 2009,213 might not take the same view here, the logic still applies: litigation of potential work injuries by jury trial undercuts the purpose of the workers’ compensation system.

Another consideration is that the easy availability of equitable estoppel forces an employer to take a position more or less instantaneously. This is inconsistent with the self-administered design of the workers’ compensation scheme.214 Employers are statutorily mandated to investigate claims. Recall that the “120 day rule” of Section 440.20(4), Florida Statutes, provides, “[i]f the carrier is uncertain of its obligation to provide all benefits or compensation, the carrier shall immediately and in good faith commence investigation of the employee’s entitlement to benefits under this chapter and shall admit or deny compensability within 120 days . . . .” At the very least, employers should not be estopped based on positions taken within the investigation period.

B. Litigation to a Conclusion on the Merits is Not an Election of Remedies

As we have already seen, an employee who litigates compensability of a workers’ compensation claim unsuccessfully would not herself be subject to judicial estoppel on filing a subsequent tort action apply despite what the employer and carrier may have said in the notice of denial. We cannot agree.”); Mena, 79 So. 3d at 224 (“We note that . . . under the circumstances of this case Mena was not required to litigate his claims to a final adjudication in the worker’s compensation forum.”).

211. 754 So. 2d 683 (Fla. 2000).
(given the requirement that the position have been successfully main-
tained).\textsuperscript{215} For that matter, an employee who sues in tort unsuccess-
lessly would also be so protected in bringing a subsequent workers' compensa-
tion claim.

The doctrine of \textit{election of remedies} applies to workers' compensa-
tion claims,\textsuperscript{216} and might seem to prohibit the employee from
bringing a tort action after an unsuccessful workers' compensation
claim (or vice versa). However, the courts have held that an alternative
cause of action does not accrue until the plaintiff is found to be an em-
ployee—or not. “Florida follows the rule that either a dismissed or an
unsuccessful compensation claim does not bar a damage suit.”\textsuperscript{217}

\begin{quote}
[E]lection of remedies by its very terms presupposes that a plaintiff
has at least two viable theories upon which recovery may be had.
That is not the case with respect to an injured employee. When in-
jury is suffered in the course and scope of employment, workers'
compensation is the exclusive remedy for recovery against the
employer.\textsuperscript{218}
\end{quote}

In other words, there can be no election of remedies until a determina-
tion is reached on the merits of one of the claims, since the other cause
of action is not yet mature. Thus, an employee who litigates his work-
ers' compensation claim to a conclusion will not be deemed to have
elected his remedy unless he prevails.

\begin{flushright}
\textbf{C. Constitutional Issues}
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As a limitation on the right to recover provided at common law,
workers' compensation immunity clearly has constitutional implica-
tions. In \textit{Seaboard Coast Line R. Co. v. Smith}, Section 440.11 of the
Florida Statutes was upheld in the face of a due process challenge
under Article I, Section 9 of the Florida Constitution\textsuperscript{219} and, implicitly,
the 14th Amendment to the U.S. Constitution.\textsuperscript{220}

Arguably more pertinent is Article I, Section 21 of the Florida
Constitution, which provides that, “[t]he courts shall be open to every

\begin{itemize}
\item \textsuperscript{215} Chase & Co., 156 So. at 610-11.
\item \textsuperscript{216} Williams v. Duggan, 153 So. 2d 726, 727 (Fla. 1963).
\item \textsuperscript{217} Lowry v. Logan, 650 So. 2d 653, 656 (Fla. Dist. Ct. App. 1995).
\item \textsuperscript{218} \textit{Id.} at 658 (quoting Wishart v. Laidlaw Tree Serv., 573 So. 2d 183, 184 (Fla. Dist.
Ct. App. 1991) (heard in the Second District)).
\item \textsuperscript{219} 359 So. 2d 427, 429 (Fla. 1978).
\item \textsuperscript{220} \textit{Id.} at 429-30. The Florida Supreme Court adopted the holding of \textit{Coates v. Potomac
upheld the federal Longshoremen's and Harbor Workers' Compensation Act against a Fifth
Amendment due process challenge.
\end{itemize}
person for redress of any injury, and justice shall be administered without sale, denial or delay." In *Kluger v. White*, the Florida Supreme Court interpreted Section 21 to require that:

where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State . . . 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.221

In *Eller v. Shova*, the Florida Supreme Court applied the *Kluger* test to Section 440.11, Florida Statutes, and found that it was not a denial of access to the courts.222 It is not readily apparent why denial of equitable estoppel based on the employer's immediate post-accident position requires a different result. Rejection of the equitable estoppel claim merely requires the injured worker to litigate his claim in a different forum—the essence of the workers' compensation scheme.

**Conclusion**

It is clear that injured workers should be entitled to some preclusion when their claims are deemed non-compensable under the Workers' Compensation Act. However, Florida's appellate courts have failed to consistently apply their own precedent when finding equitable estoppel under the facts of such claims. Moreover, to find such preclusion based on the positions taken by employers—rather than the facts—undercuts the entire purpose of workers' compensation immunity.

Pursuant to Section 440.45 of the Florida Statutes, the OJCC is headed by a Deputy Chief Judge. Judge David W. Langham has served in that role since 2006, and makes the following observations on the role of the workers' compensation judiciary:

The Florida Office of Judges of Compensation Claims has adjudicators who specialize in precisely the critical decisions required of this analysis. The employer/employee relationship, compensability of accidents and injuries, major contributing cause, and other statutory constructs are issues that our judges analyze and adjudicate regularly.

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221. 281 So. 2d 1, 4 (Fla. 1973).
222. 630 So. 2d 537 (Fla. 1993).
Judges of Compensation Claims have demonstrated an ability to rapidly conclude consideration of workers' compensation claims. The delay resulting from civil court deference for consideration of these issues would be reasonable. Such deference would result in actual determination of the questions of law regarding the Act, and relieve civil courts of the burden of conjecture regarding how such a workers' compensation claim might have hypothetically concluded.

The goal of the Act is to effectuate “quick and efficient” receipt of statutory benefits. The Florida Office of Judges of Compensation Claims has proven capable of delivering timely hearings and adjudications. The participation in that process may conclude with an award of needed medical care and wage replacement benefits in an approximately six month litigation process. One in which an injured worker’s attorney fees for seeking such benefits are paid by the employer/carrier instead of being recouped from the award or settlement in a civil claim for damages.

The adjudication process for the Florida workers’ compensation system is timely, efficient, and effective. Determinations are concluded far more rapidly than in civil court proceedings. This comes in part from specialization and concentration of the adjudicators. This also comes in part from the administrative nature of the proceedings and the statutory process that enables and compels it.223

Judge Langham’s view underscores the idea that the OJCC is the proper forum for adjudication of disputes regarding workplace injuries. Accordingly, when an employer denies that an employee-employer relationship exists, or that an injury arose out of the course and scope of employment, the parties should litigate the issue to conclusion in the workers’ compensation arena. If a JCC finds that a claim is non-compensable, such a finding should have preclusive effect in a subsequent civil action. Whether the mechanisms for this preclusion are found in the election of remedies doctrine, issue preclusion, or elsewhere, is a matter for the courts to decide.

FREE TRADE AGREEMENTS AND THE LACEY ACT: A CARROT AND STICK APPROACH TO PREVENT AND DETER TRADE IN IUU FISHERIES

Ginna Arevalo

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INTRODUCTION

The U.S. is the world's largest importer of seafood, importing virtually every fish sold in the U.S. market. Trade statistics do not break down the percentage of imported wild harvested fish, but a recent study estimated that twenty to thirty-two percent are caught illegally. Trade in illegal, unreported, and unregulated (IUU) fisheries undermines efforts to conserve fish stocks, generates global annual losses of up to twenty-three billion dollars, and weakens economic opportunity for U.S. fishermen. To ensure that seafood sold in the U.S. is caught legally, on June 17, 2014, the President established a Presidential Task Force on Combating IUU Fishing (Task Force) and directed all U.S. agencies charged with overseeing the supply chain to enforce IUU fishing regulations. The extent of this mandate is unclear, since most U.S. regulations are unenforceable abroad and the initial seafood suppliers are overseas.


3. Id.


7. Id.
As the world’s largest importer of seafood, the U.S. must ensure fish from unwanted fishing practices are not entering the U.S. market. Once the IUU fish are caught, they are combined with legally caught fish, making them indistinguishable from the rest when imported into the U.S. While the U.S. has strict policies to combat IUU fishing activities, no such policies exist to deter the trade in IUU fisheries. The current U.S. trade controls may be described as “absent” compared to the controls implemented by the European Union. Indeed, the Task Force recently made fifteen recommendations that “are broad in scope and call on agencies to take concrete and specific actions to combat IUU fishing . . . throughout the seafood supply chain.” Without proper controls, it is plausible that IUU seafood has entered the U.S. market and enjoyed zero tariffs under free trade agreements (FTAs).

Illegal trade in fisheries also jeopardizes the food supply and source of income of many people around the world. People like Julian Rivas, a Colombian fisherman who has fished the Eastern Tropical Pacific Seascape (ETPS) for two decades, are concerned about a dramatic decrease in catch that results from IUU fishing. Since the goal of eliminating IUU fishing and the management of marine resources involves several actors, states “shall” cooperate—directly or through regional fisheries management organizations/arrangements (RFMO/As)—to adopt marine conservation and management measures

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10. Id.
11. DEPARTMENT OF AGRICULTURE (USDA) ET AL., PRESIDENTIAL TASK FORCE ON COMBATING IUU FISHING AND SEAFOOD FRAUD, ACTION PLAN FOR IMPLEMENTING THE TASK FORCE RECOMMENDATIONS (Mar. 15, 2015), available at http://www.nmfs.noaa.gov/ia/iuu/noaa_task_force_report_final.pdf. This paper analyses some of the mechanisms that the Presidential Task Force recently adopted, but the proposals articulate such mechanisms in a different way.
15. *See generally* *Illegal, Unreported and Unregulated (IUU) Fishing*, *supra* note 5.
(CMMs). In fact, Costa Rica, Panama, Colombia, and Ecuador (the CMAR' States) signed the San Jose Declaration in 2004 to cooperate to promote the ETPS. Since then, they have adopted numerous CMMs to protect their marine resources relevant to the ETPS. The problem is that vessels continue to IUU fish in this region due to the lack of cooperation between the CMAR' States and their poor levels of law enforcement.

An aggravating factor is the fact that flag states fail to supervise and control vessels. For instance, Panama, Colombia, and Ecuador failed to supervise the vessels that violated the CMMs of the Inter-American Tropical Tuna Commission (IATTC). This RFMO is aimed to protect tuna stocks in a region that includes the ETPS' adjacent high seas, but vessels continue to fish for tuna in violation of the IATTC's CMMs, because the levels of transparency in some developing States are not optimal. Moreover, the instruments creating RFMO/As and similar mechanisms are not always binding upon states, thereby preventing the enforcement of their CMMs within their territory and the application of the Lacey Act to regulate conduct overseas.

The Lacey Act is the most important domestic law to prevent and deter the trade in IUU fisheries. Although its coverage was expanded since 1935 to include "foreign laws," it is still unclear whether the violations of CMMs that states take directly or through

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18. Declaración de San José para el Corredor Marino de Conservación del Pacífico Este Tropical entre las Islas Coco, Galápagos, Malpelo, Coiba, Gorgona at 7 (Nos. 1 and 3) [San Jose Declaration for the conservation of the Marine Corridor of the East Tropical Pacific the Islands of Coco, Galápagos, Malpelo, Coiba, Gorgona], Apr. 2, 2004, Colom.-Costa Rica-Ecuad.-Pan [hereinafter the San Jose Declaration]. This paper does not advocate that the CMAR is an RFMA.
22. See generally Illegal, Unreported and Unregulated (IUU) Fishing, supra note 5.
23. Ecuador will not be addressed in this paper because it is not a party to an FTA with the U.S.
RFMO/As, such as the violations mentioned in this paper, would trigger the application of the Act. Indeed, the market participants who traded in seafood caught by IUU fishing vessels flagged to the three parties to U.S. FTAs—Costa Rica, Panama, and Colombia—were not punished.

In addition to domestic laws, seafood ecolabels and the FAO Agreement on Port State Measures (PSMA) may prevent IUU fisheries from entering the market. However, the seafood industry strives to secure low-cost seafood supplies\(^\text{26}\) such as IUU fish, and most states have yet to implement effective port state measures. Despite having zero tariffs, the seafood industry declines to obtain voluntary seafood ecolabels such as the Marine Stewardship Council (MSC),\(^\text{27}\) which has not been widely implemented in Costa Rica, Panama, and Colombia. These states also do not cooperate to close their ports to all IUU fishing vessels. By closing their ports, vessels travel longer distances and reduce the value of their IUU catch.\(^\text{28}\) The PSMA may strengthen their cooperation, but it cannot be enforced unless incorporated into domestic legislation.\(^\text{29}\) However, Costa Rica, Panama, and Colombia have yet to ratify the Agreement.\(^\text{30}\)

Part I of this paper explains the role of different actors in the trade of duty-free IUU fish and how IUU catches may enter the U.S. market due to the states’ failure to implement mechanisms that allow the U.S. to monitor fishing activities and landing of fish. It then highlights the issues of non-cooperation, law enforcement, and transparency displayed in IUU fishing incidents of three parties to U.S. FTAs—Costa Rica, Panama and Colombia—where vessels contravened CMMs of a RFMO, and CMMs of two of the CMAR’s states. Part II outlines key elements of three international instruments—Cooperative Environmental Clauses of FTAs, FAO Guidelines for ecolabelling of wild fish, and the PSMA—that, despite their non-binding effect, may

\(^{26}\) Pramod et al., supra note 4.


\(^{30}\) Id.
prevent IUU fisheries from entering foreign markets. These instruments are examined in light of the states’ duties to cooperate to protect the environment in FTAs, and to protect the marine environment in UNCLOS.

Part III proposes a carrot and stick solution to the trade in IUU fisheries problem. First, it proposes that FTAs be used to compel the seafood industry to obtain seafood ecolabels to benefit from preferential tariffs and use cooperative environmental clauses of FTAs to induce action to enhance the port controls of states parties to FTAs. Second, it proposes that the Lacey Act can deter the trade in IUU fisheries through the likelihood of punishment; however, it must be amended to include CMMs of RFMO/As as a source that can trigger the Act. IUU fishing vessel lists of RFMO/As will then become an important tool to initiate proceedings under the Act, as well as the National Marine Fisheries Services’ (NMFS) Biennial Reports gathering information on IUU lists of RFMOs.

I. TRADE IN IUU FISHERIES AND IUU FISHING ACTIVITIES

The process of importing seafood into the U.S. is very complex, and any action taken by one member of the seafood supply chain can affect the entire chain.31 Being able to trace the product from the point of catch to the final consumer is necessary for sustainable seafood, but full traceability is often lacking.32 Despite how many CMMs the states adopt, either directly or through RFMO/As, poor levels of law enforcement, non-cooperation, and lack of transparency continue to pose daunting challenges for full traceability of seafood imports from states such as Costa Rica, Panama, and Colombia. These challenges increase the likelihood that IUU fish have entered the markets of these state parties to FTAs to be exported.

A. A Typical Duty Free IUU Fish Supply Chain: Lack of Trace-Back Procedures, Landing Controls, and U.S Trade Measures

In 2011, U.S. market participants competed with seafood imports that included twenty to thirty-two percent of IUU fisheries,33 as

32. See id. (discussing the lack of traceability in the seafood supply chain); see also Pramod et al., supra note 4.
33. Pramod et al., supra note 4.
the seafood supply chains are often hard to trace.34 These chains are comprised of fishers, agents, processors, distributors, and wholesalers who work together to supply seafood to the final consumer.35 The length of these supply chains depends on whether the fisheries are for domestic consumption or exports, and on the harvesting techniques.36 Despite their differences, they all share a framework37 that allows IUU fish to be concealed.38

The framework of captured wild fisheries consists of fishermen who harvest the fish and then deliver it to intermediaries39 that transport it to its final destination. In Colombia, for example, industrial and small-scale vessels conduct fishing.40 Industrial vessels export all catches.41 Some small-scale vessels have motors that provide a greater range to catch larger fish stocks that are often sold to increase industrial production and for export.42 The problem is that, in the past few years, small-scale vessels conducted IUU fishing activities in jurisdictional waters of Costa Rica and Colombia, as well as industrial vessels flagged to Panama and Colombia in the high seas, and these catches were possibly exported to the U.S.43

These vessels then deliver their catch, including illegal fish,44 to intermediaries.45 Historically, small-scale fishermen in developing states have lacked suitable distribution facilities,46 so fish traders have provided an assured market outlet to small-scale seafood47 that may include IUU fisheries.48 These fisheries, for the most part, increase the industrial production in nations such as Colombia,49 and enter the U.S.

34. Id.
35. VALLEJO ET AL., supra note 31.
36. Id.
37. Id.
38. Pramod et al., supra note 4.
40. ALBA LUCÍA CEDIEL PARRA ET AL., DIAGNÓSTICO DE LAS PRINCIPALES PESQUERÍAS DEL PACÍFICO COLOMBIANO, FUNDACIÓN MARVIVA 34-35 (Juan Díaz et al. eds., 2011).
41. Id. at 34.
43. For further discussion of these incidents, see infra Part I.B.
44. Pramod et al., supra note 4.
45. VALLEJO ET AL., supra note 31.
47. Id.
48. Pramod et al., supra note 4.
49. PARRA ET AL., supra note 40.
market, because some developing nations export most catches due to their high commercial value and demand in the international market.50

To deal with the IUU fishing problem, the United Nations (UN) has encouraged all nations to include port state measures (PSMs) in their domestic legislation,51 but Costa Rica, Panama, and Colombia have yet to implement the PSMs that the UN proposes.52 Although the UN FAO Agreement on Port State Measures (PSMA) allows them to verify that foreign-flagged vessels seeking permission to enter their ports have not IUU fished, these states have yet to deposit their instruments of ratification.53 The UN has also encouraged ecolabels that certify the sustainable use of marine resources.54 The MSC is one of the most respected trace-back programs55 and has been implemented in some developing countries.56 In Costa Rica, however, only two companies are MSC certified; Panama and Colombia each have only one MSC certification.57

The reluctance to employ PSMs and seafood ecolabels has undoubtedly made it more difficult for the U.S. to verify the initial source in the supply chain. Once IUU fisheries enter the foreign market, exporters and importers transport it through international borders58 in bulk shipments of legal and illegal fish.59 A foreign party exports the fish from overseas to a U.S. importer who makes the import declaration.

50. Id. at 34-35 (noting that, in Colombia, the industrial catch is to be exported, and the most valuable catch by small vessels goes to increase the industrial production to be exported); see also Structure of the Fisheries and Aquaculture Sector, supra note 42.
51. Port State Measures Agreement, supra note 29.
53. Id.
57. Find a Supplier, MARINE STEWARDSHIP COUNCIL (MSC), http://cert.msc.org/supplierdirectory (last visited Aug. 30, 2015) (providing an interactive tool to find businesses with MSC certificates for sustainable seafood).
58. See generally VALLEJO ET AL., supra note 31.
59. Pramod et al., supra note 4.
tion and pays the duties\textsuperscript{60} that, for the most part, have been eliminated under the U.S. FTAs with Costa Rica, Panama, and Colombia.\textsuperscript{61} Unless and until the U.S. can verify that the initial source in the supply chain was sustainably caught, there is a high probability that seafood of “mixed origin”\textsuperscript{62} is entering the U.S. market, because the U.S. trade controls are insufficient to detect IUU fisheries.\textsuperscript{63}

The U.S. continues to rely upon importers to verify the traceability of fisheries from the point of catch to the final consumer, but traceability involves coordinated action from all market participants.\textsuperscript{64} Import transactions are conducted at ports of entry where Customs and Border Protection (CBP) enforces import regulations.\textsuperscript{65} When a shipment reaches the U.S., the importer files entry documents and CBP examines the goods and documents.\textsuperscript{66} Neither CBP nor importers can develop a “reasonable care” checklist to cover every trade, but it is assumed that their relationship is based on “informed compliance,” wherein CBP communicates the trade requirements and the importers comply with U.S. laws with reasonable care.\textsuperscript{67} So, it is essentially left to the importers to verify that IUU fish were not concealed with legally-captured fish.\textsuperscript{68}

\begin{itemize}
\item \textsuperscript{60} An exporter is “the party who makes (or on whose behalf an agent or broker makes) the export declaration. The exporter sells its goods to someone in another country, known as the importer.” Exporter, BUS. DICTIONARY, http://www.businessdictionary.com/definition/exporter.html (last visited Feb. 1, 2016). An importer is “the party who makes (or on whose behalf an agent or broker makes) the import declaration, and who is liable for the payment of duties (if any) on the imported goods.” Importer, BUS. DICTIONARY, http://www.businessdictionary.com/definition/importer.html (last visited Aug. 30, 2015).
\item \textsuperscript{61} Free Trade Agreements, DEPTO F COMMERCE INT’L TRADE ADMIN., http://trade.gov/fta/ (last visited Aug. 30, 2015) (listing the U.S. FTA partner nations, and a link to the FTA tariff tool where tariffs can be verified).
\item \textsuperscript{62} See Pramod et al., supra note 4 (addressing the concept of seafood of “mixed origin”). See generally Robin Medowell et al., AP Investigation: Are Slaves Catching the Fish You Buy?, ASSOCIATED PRESS (Mar. 25, 2015), http://bigstory.ap.org/article/cc08a86b92694f74a12b639326e93de2/ap-investigation-are-slaves-catching-fish-you-buy (noting that fisheries caught by illegal means, such as slavery, are being mixed with other legally caught fish to be exported to the U.S.).
\item \textsuperscript{63} See Pramod et al., supra note 4.
\item \textsuperscript{64} See generally VALLEJO ET AL., supra note 31.
\item \textsuperscript{66} Id.
\item \textsuperscript{67} Id.
\item \textsuperscript{68} See generally Pramod et al., supra note 4.
\end{itemize}
B. IUU Fishing by Three Parties to U.S. Free Trade Agreements

1. Violations of Conservation and Management Measures of Two Parties

Since every state may enact its own regulations to protect marine resources in its jurisdictional waters, the IUU fishing definition includes illegal fishing activities by vessels in waters under the jurisdiction of another state without its permission or in contravention of its laws. To illustrate, the parties to the 2004 San Jose Declaration established the Corredor Marino del Pacifico Este Tropical (CMAR) to cooperate, direct, and pursue the ETPS’ initiative, but each state is sovereign to regulate fishing activities and to enforce such regulations in their EEZs and territorial waters, including IUU fishing regulations. Since 2004, the CMAR States have recognized the importance of the islands and surrounding waters of Galapagos, Cocos, Coiba, and Malpelo through numerous CMMs. The islands and surrounding waters of Costa Rica and Colombia, for instance, are marine protected areas where fishing activities are restricted; however, IUU fishing continues to threaten their rich biodiversity and high productivity.

Between 2011 and 2014, more than 27,000 pounds of IUU fish were confiscated, and 52 foreign vessels were reported as having engaged in IUU fishing in the jurisdictional waters of Colombia relevant

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71. San Jose Declaration, supra note 18 (Nos. 6 and 7).
72. Id.
74. See generally id. arts. 2, 25, and 33.
75. See Eastern Tropical Pacific Seascape Project, supra note 13; see also Rosero, supra note 21.
76. See generally RAY HILBORN & ULRIKE HILBORN, OVERFISHING, WHAT EVERYONE NEEDS TO KNOW 105-06 (2012) (defining MPAs, MPAs’ levels of protection and the effects of closing such areas).
78. Eastern Tropical Pacific Seascape Project, supra note 13 (listing the major threats to the ETPS’ marine ecosystem).
to the CMAR.\textsuperscript{79} In Colombia, it was also reported that 22 foreign vessels with 11 tons of IUU fish collectively were detained,\textsuperscript{80} and marine biologists denounced a massacre of 2,000 sharks by foreign-flagged vessels, presumably from Costa Rica.\textsuperscript{81} Numerous IUU fishing incidents were also reported in Costa Rica.\textsuperscript{82} Nationals of Nicaragua captained some of the detained IUU fishing vessels,\textsuperscript{83} and at least one was flagged to Panama.\textsuperscript{84} Costa Rican officials declared that at least twenty-five vessels were detained near Coco Island\textsuperscript{85} and presented a list of recidivist vessels that were not punished.\textsuperscript{86} It is imperative that everyone engaging in IUU fishing activities in jurisdictional waters relevant to the CMAR be punished in order to attain the goals of the San Jose Declaration.\textsuperscript{87}

The extent to which the CMAR states have deterred future IUU fishing for the past eleven years is disappointing. There is little collab-


\textsuperscript{82} See infra notes 83-86.


\textsuperscript{87} See generally ROSERO, supra note 21.
oration among these states in the exercise of control over their vessels. Vessels flagged to these states, particularly to Ecuador, often operate illegally in waters belonging to neighbor states due to their poor levels of law enforcement. Costa Rica and Colombia, for instance, have particularly struggled to deter IUU fishing. A recent study from a non-governmental organization found that many cases in a Costa Rican city were dropped due to ambiguities in fisheries laws. Indeed, from seventy cases, only seven were prosecuted. It also found that procedures for the collection of evidence in Colombia were ineffective, so cases for IUU fishing were not opened and the offenders were released because there is a considerable institutional instability in the fisheries sector and statutes of limitations are often missed. Unless the CMAR States genuinely cooperate and improve law enforcement issues, the U.S. market participants will continue to be prevented from verifying that IUU fish are not concealed with legally caught fish to be exported to the U.S. Until then, the CMAR will continue to be nothing other than a meaningless “arrangement.”

2. Violations of Measures of a Regional Fisheries Management Organization

The illegal fishing definition also includes vessels flying the flag of a state party to an RFMO that conduct fishing activities in violation of regional CMMs or that undertake fishing activities in the area of competence of a relevant RFMO in contravention of the reporting procedures of that organization. Other potentially serious illegal activities such as fraud and corruption expand the scope of this traditional definition. These range from the payment of bribes to continue IUU fishing without punishment to conflicts of interest between gov-

88. Because the U.S. does not have an FTA with Ecuador, this paper is limited to Costa Rica, Panama, and Colombia.
89. Rosero, supra note 21.
90. Id.
91. Id.
92. See id. (providing an overview of the current fisheries’ authority that suggests the Legislative and Executive have strongly disagreed on this subject to the point that the Constitutional Court had to intervene).
94. IPOA-IUU, supra note 70, at 2.
ernment officials and the seafood industry. The corrective actions adopted by Panama and Colombia for IUU fishing violations of the CMMs of the IATTC raise awareness about this expanded definition of IUU fishing.

Between 2009 and 2011, many vessels flagged to Panama and Colombia IUU fished in a manner that violated CMMs of the IATTC. The U.S. Government notified Panama that one of its vessels fished without a proper registry. Panama then imposed a $500,000 fine on this vessel. It also suspended the fishing registry to a recurrent vessel and ordered it to pay $704,930. This vessel left Panama's registry to evade its obligations, so Panama recommended it to be added to IUU lists of RFMOs, because it re-flagged to Ecuador. Thus, vessels reflagging to other states may undermine the effectiveness of these sanctions.

Colombia was also notified that Colombia-flagged vessels fished without a registry, but Colombia took a different approach. To avoid a U.S. negative certification, Colombia created Autoridad Nacional de Acuicultura y Pesca (AUNAP) and transferred to it authority over fisheries, as well as activities in regulation, registration, monitoring, surveillance, and research on fisheries resources. AUNAP was also granted authority to deny requests for the renewal of fishing licenses for the vessels that fished without the IATTC's registry. Because these vessels alleged that they violated IATTC due to the lack of the

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98. Id.
99. Id.
100. Id.
101. Id. Panama also noted three vessels accused of fishing while flagged to Panama reflagged to Fiji or Vanuatu.
102. TANAKA, supra note 69, at 242 (discussing this practice and the practice of flag of convenience States).
103. NOAA Fisheries, supra note 97, at 37-39.
104. This translates to the National Authority of Aquaculture and Fisheries.
106. NOAA FISHERIES, supra note 97, at 36, 38.
capacity allocated to Colombia, the IATTC registered these vessels.

The IATTC Convention mandates consideration of the overall issue of fishing capacity within the FAO Code of Conduct for Responsible Fisheries. It follows that the new allocation to Colombia entails a duty to ensure it has decision-making processes that are expeditious and transparent as well as a duty to promote awareness of responsible fisheries through education and training. However, the Comptroller’s Office of Colombia—the entity that monitors agencies to ensure proper use of public resources—audited AUNAP and found many irregularities in their annual performance, particularly in the imposition of fines and sanctions to IUU vessels, and in the performance of agreements to promote marine research.

In 2013, NMFS reported to Congress that these states engaged in IUU fishing, but they were not issued a negative certification or subjected to trade sanctions because they demonstrated correction of these violations. The lack of transparency in implementing remedial actions makes it difficult to predict categorically whether vessels flagged to these states or lower officials also corrected these IUU fishing violations. These IUU fish landed in Panama and Colombia and entered these foreign markets possibly for export to the U.S.

II. INTERNATIONAL COOPERATION-BASED INSTRUMENTS

International and regional cooperation between nations is necessary to combat IUU fishing. There are three major cooperation-based instruments that can be used by parties to FTAs to prevent IUU fisheries from entering their markets: (1) Cooperative Environmental Clauses of FTAs, (2) the FAO Guidelines for ecolabelling of wild fish, and (3) the PSMA.

107. See generally id. at 37; see also Luis Alberto Zuleta & Alejandro Becerra, El Mercado del Atún en Colombia 57-58 (May 2013), available at http://www.repositorio.fedesarrollo.org.co/handle/11445/205 (concluding that IATTC regulations, restrictions, and allocations have had negative effects in the seafood industry and that the IATTC’s allocation is limited).


110. FAO, Code of Conduct for Responsible Fisheries art. 6 (1995) [hereinafter CCRF].

111. Contraloria Report, supra note 93.

112. NOAA Fisheries, supra note 97, at 38-39, 48-49.
FTAs open foreign markets to U.S. exporters by reducing barriers and by creating a better trading environment. Yet, these agreements undermine efforts to deter IUU fishing, because FTAs may encourage the seafood industry to move and take advantage of relaxed environmental regulations in developing nations that often lack the resources to effectively enforce IUU fishing laws. Recognizing this challenge and other environmental concerns, the drafters of FTAs have included environmental clauses.

These agreements typically begin with a preamble that confirms that the parties “shall” implement the FTAs in a manner consistent with environmental protection and conservation and that promotes sustainable development and cooperation on environmental matters. These are very important goals. Indeed, an entire chapter is devoted to fulfill these objectives. The Dominican Republic-Central America FTA (CAFTA-DR), for instance, was the first FTA between the U.S. and a group of smaller developing economies, including Costa Rica, that contained an entire chapter addressing environmental provisions. The FTA between the U.S. and Colombia (U.S.-Colombia FTA) and the FTA with Panama (U.S.-Panama FTA) each also have chapters devoted to environmental provisions.

As to the enforcement of environmental laws, these FTAs emphasize each nation “shall” ensure its laws provide for high levels of

113. Free Trade Agreements, supra note 61.
environmental protection,\textsuperscript{118} and “shall” not fail to effectively enforce environmental laws in a manner affecting trade.\textsuperscript{119} However, these FTAs also provide that each party has the right to establish its own levels of environmental protection.\textsuperscript{120} The greatest features of the FTAs—the Environmental Cooperation Provisions, counteract the recognition that each party is a sovereign nation. These emphasize the importance of cooperation to protect the environment and to promote sustainable development,\textsuperscript{121} as well as acknowledge the importance of environmental cooperation in other fora.\textsuperscript{122}

These provisions predominantly reflect the parties’ agreement to expand their cooperative relationship to protect the environment.\textsuperscript{123} To achieve this goal, the parties agreed to implement cooperative environmental activities of the Environmental Cooperation Agreement (ECA) while at the same time promoting regional economic integration.\textsuperscript{124} The ECA complements FTAs\textsuperscript{125} on issues where trade and environment converge, and the Environmental Cooperation Commission (ECC) implements a work program that reflects the ECAs.\textsuperscript{126} In other words, the cooperative environmental activities pursuant to the ECA are to be coordinated by the ECC.\textsuperscript{127}

\textsuperscript{118} U.S.-Panama FTA, supra note 117, at art. 17.1; CAFTA-DR, supra note 116, at art. 17.1; see also U.S.-Colombia FTA, supra note 117, at art. 18.1.

\textsuperscript{119} U.S.-Panama FTA, supra note 117, at art. 17.3; CAFTA-DR, supra note 116, at art. 17.2; U.S.-Colombia FTA, supra note 117, at art. 18.3.

\textsuperscript{120} U.S.-Panama FTA, supra note 117, at art. 17.1; CAFTA-DR, supra note 116, at art. 17.1; U.S.-Colombia FTA, supra note 117, at art. 18.1.

\textsuperscript{121} U.S.-Panama FTA, supra note 117, at art. 17.10(1); CAFTA-DR, supra note 116, at art. 17.9(1); U.S.-Colombia FTA, supra note 117, at art. 18.10(1).

\textsuperscript{122} U.S.-Panama FTA, supra note 117, at art. 17.10(5); CAFTA-DR, supra note 116, at art. 17.9(5); U.S.-Colombia FTA, supra note 117, at art. 18.10(3).

\textsuperscript{123} Compare U.S.-Panama FTA, supra note 117, at art. 17.10(2), and CAFTA-DR, supra note 116, at art. 17.9(2) (establishing that the Parties recognize cooperation is important for achieving their shared environmental goals, including the development and improvement of environmental protection), with U.S.-Colombia FTA, supra note 112, at art. 18.10(2) (adding the language: “including . . . environmental protection, practices, and technologies.”).

\textsuperscript{124} See, e.g., CAFTA-DR, supra note 116, at annex 17.9(1); U.S.-Panama FTA, supra note 117, at annex 17.10(1). See generally CAFTA-DR, supra note 116, at preamble; U.S.-Colombia FTA, supra note 117; U.S.-Panama FTA, supra note 117.

\textsuperscript{125} See, e.g., EPA Efforts in Latin America and the Caribbean, ENVTL. PROTECTION AGENCY (EPA), http://www2.epa.gov/international-cooperation/epa-efforts-latin-america-and-caribbean (last visited Aug. 30, 2015).

\textsuperscript{126} See, e.g., CAFTA-DR, supra note 116, at art. 17.9(4); U.S.-Panama FTA, supra note 117, at art. 17.10(4) (noting that the U.S.-Panama FTA eliminates the language “and periodically revising and updating” the work plan).

\textsuperscript{127} See, e.g., U.S.-Colombia FTA, supra note 117, at art 18.10(3).
Several issues on environmental cooperation are addressed more comprehensively in recent FTAs, particularly in their ECAs.\footnote{128} Regarding regional cooperation, these recognize the importance of regional cooperation for the protection and conservation of natural resources.\footnote{129} The ECAs then broaden the scope of application of the cooperative clauses in FTAs,\footnote{130} and authorize the ECC to define a work program that may include regional objectives.\footnote{131} For instance, an ECC has already defined a work program for environmental cooperation—the 2014-2017 U.S.-Colombia Work Program, which includes the regional goals of cooperation to promote best practices to conserve marine living resources, to address IUU fishing issues, and to enhance communication with relevant regional and international organizations.\footnote{132}

There are other collaborative activities that may be used to approach the problem of trade in IUU fisheries. These are the result of some priorities for key environmental cooperation activities that the parties to these three FTAs identified.\footnote{133} First, the parties recognized the need to strengthen each party’s environmental management systems (i.e. reinforcing institutional and legal frameworks, as well as creating the capacity to implement and enforce environmental laws and policies).\footnote{134} Second, they recognized the importance of developing

\footnote{128} See generally Taylor, supra note 114 (addressing the environmental effects of the NAFTA).

\footnote{129} Compare Media Note, Office of the Spokesperson U.S. Dep’t of State, U.S. Panama Agreement on Environmental Cooperation, art. I (May 2, 2012), available at http://www .state.gov/documents/organization/189455.pdf [hereinafter U.S.-Panama ECA] (stating that the “parties agree to cooperate to protect . . . natural resources . . . and recognize the importance of both bilateral and regional cooperation”), with Press Statement, Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Colombia Environmental Cooperation Agreement, art. 1 (Apr. 19, 2013), available at http://www.state.gov/documents/ organization/207971.pdf [hereinafter U.S.-Colombia ECA] (stating the ECA’s objective “is to establish a framework for strengthening bilateral and/or regional environmental cooperation . . . aimed at enhancing environmental protection and the conservation and sustainable use of natural resources . . .”).

\footnote{130} EPA Efforts in Latin America and the Caribbean, supra note 125 (stating that “[t]he U.S.-Colombia Environmental Cooperation Agreement (ECA) complements the U.S.-Colombia Trade Promotion Agreement.”).

\footnote{131} See, e.g., U.S.-Colombia ECA, supra note 129, at art. 1, art. 2, and art. 4(4).

\footnote{132} EPA Efforts in Latin America and the Caribbean, supra note 125.

\footnote{133} Despite some differences—particularly in the U.S.-Colombia FTA—the most important priorities for key environmental cooperation activities are established in Annex 17.9(3) of the CAFTA-DR (citing Article V of the ECA with Costa Rica), Annex 17.10(3) of the U.S.-Panama FTA (citing Article IV of the ECA with Panama), and Articles II (a)-(f) and IV (2)(a)-(k) of the U.S.-Colombia ECA of April 19, 2013.

\footnote{134} Compare CAFTA-DR, supra note 116, at annex 17.9(3)(a), and U.S.-Panama FTA, supra note 117, at annex 17.10(3)(a) (“strengthening . . . environmental management systems, including . . . institutional and legal frameworks and the capacity to . . . enforce . . .“).
and promoting incentives and other voluntary mechanisms to encourage environmental protection (i.e. through market-based and economic incentives for environmental management), as well as partnerships to address conservation and management issues. And third, they recognized the need to promote best environmental practices that could lead to sustainable management and develop and promote environmentally friendly goods. Finally, the CAFTA-DR and the U.S.-Panama FTA also provide that conserving and managing shared, migratory, and endangered species, as well as marine resources in MPAs, is a priority.

B. Key Measures of the FAO Port State Measures Agreement and Duties to Cooperate

The increasing reliance on port states to combat IUU fishing began with the adoption of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and the recognition of the importance of port state measures (PSMs) as a fisheries management system.

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135. Compare CAFTA-DR, supra note 116, at annex 17.9(3)(b), and U.S.-Panama FTA, supra note 117, at annex 17.10(3)(b) (“developing and promoting incentives and other voluntary mechanisms”), with U.S.-Colombia ECA, supra note 129, at art. IV(2)(d) (“developing and promoting economic incentives and voluntary mechanisms.”).

136. Compare CAFTA-DR, supra note 116, at annex 17.9(3)(c), and U.S.-Panama FTA, supra note 117, at annex 17.10(3)(c) (“fostering partnerships to address conservation and management issues”), with U.S.-Colombia ECA, supra note 129, at art. II(2)(d) (“facilitating partnerships . . . to promote best practices . . .”).

137. Compare CAFTA-DR, supra note 116, at annex 17.9(3)(f) (“promoting best practices leading to sustainable management of the environment”), and U.S.-Panama FTA, supra note 117, at annex 17.10(3)(f) (“promoting best practices of environmental management leading to sustainable management”), with U.S.-Colombia ECA, supra note 129, at art. IV(2)(b) (“strengthening the conservation and sustainable use of natural resources”), art. (2)(c) (“promoting mechanisms to support the conservation and sustainable use”).

138. Compare CAFTA-DR, supra note 116, annex 17.9(3)(h), and U.S.-Panama FTA, supra note 117, at annex 17.10(3)(h) (“developing and promoting environmentally beneficial goods and services”), with U.S.-Colombia ECA, supra at note 129, art. IV(2)(g) (“promoting the development . . . on environmental goods and services.”).

139. Compare CAFTA-DR, supra note 116, at annex 17.9(3)(d) (“conserving and managing shared, migratory, and endangered species in international trade and management” of MPAs), with U.S.-Panama FTA, supra note 117, at annex 17.10(3)(d) (“conserving and managing species that are shared, migratory, endangered, or subject to international commercial trade, as well as MPAs”).


141. Doullman & Swan, supra note 28 (explaining that UNCLOS can be interpreted to include provisions on PSMs).
Since then, “increasing political pressures” have influenced nations to agree to an UNCLOS regime that has gradually become binding hard law.\textsuperscript{142} This is a regime of cooperation that involves port states, coastal states, flag states, and regional and international organizations.\textsuperscript{143}

Although coastal states have sovereign rights over natural resources in their EEZs, they cannot disregard the duties set forth in UNCLOS\textsuperscript{144} that include the duty to ensure living resources are not endangered by over-exploitation.\textsuperscript{145} Foreign flagged vessels fishing in another state’s EEZ must also cooperate and comply with fishing reporting and landing requirements in addition to other CMMs.\textsuperscript{146} UNCLOS also calls for cooperation between neighbor nations, directly or through an RFMO, to protect straddling and highly migratory fish stocks.\textsuperscript{147} In other words, UNCLOS has numerous provisions relating to a common duty to cooperate to “protect and preserve the marine environment” which also includes numerous obligations to cooperate to prevent, deter, and eliminate IUU fishing.\textsuperscript{148}

Some of the objectives of the International Plan of Action to prevent, deter, and eliminate IUU Fishing (IPOA-IUU) invoke the need for PSMs to combat IUU fishing.\textsuperscript{149} The PSMA develops these measures and is built upon the cooperation between port states, as well as the cooperation of port states with flag states, coastal states, and RFMOs.\textsuperscript{150} It is also based on the premise that regional cooperation is

\textsuperscript{142} Harry N. Scheiber et al., Ocean Tuna Fisheries, East Asian Rivalries, and International Regulation: Japanese Policies and the Overcapacity/IUU Fishing Conundrum, 30 U. Haw. L. Rev. 97, 100-01 (2007).

\textsuperscript{143} David Hunter et al., International Environmental Law and Policy 745 (3d ed. 2007).

\textsuperscript{144} UNCLOS, supra note 73, at arts. 56(1)(a), 56(2).

\textsuperscript{145} Marion Markowski, The International Law of EEZ Fisheries 26-6 (2010); see also UNCLOS, supra note 73, at art. 61.

\textsuperscript{146} Markowski, supra note 145, at 26-6; see also UNCLOS, supra note 73, at art. 62(4).

\textsuperscript{147} UNCLOS, supra note 73, at arts. 63(1), 63(2); see also UNFSA, supra note 17, at art. 8.

\textsuperscript{148} UNCLOS, supra note 73, at art. 19. See, e.g., CCRF, supra note 110, at art. 8.1 (noting the duties of all states include the supervision and control of fishing operations), art. 8.2 (listing flag state’s duties such as authorizing fishing operations and enforcing measures against IUU fishing vessels), and art. 8.3 (noting the port states role in implementing these measures). See IPOA-IUU, supra note 70, at 4-10 (listing states’, flag states’, coastal states’, and port states’ responsibilities in implementing measures against IUU fishing); see also Press Release, International Tribunal for the Law of the Sea, Tribunal Delivers its Advisory Opinion Regarding Illegal, Unreported and Unregulated Fishing Activities (Apr. 2, 2015), available at https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_227_EN.pdf (observing similar obligations in the case of fish stocks that occur both within the EEZs members to the SRFC and its adjacent high seas).

\textsuperscript{149} Skonhoft, supra note 140.

\textsuperscript{150} Doulman & Swan, supra note 28, at 35.
necessary to ensure harmonization in the scope, structure, application, and sanctions of domestic port measures to combat IUU fishing. To this end, effective regional mechanisms oriented to strengthen cooperation must be established, including closing all ports to IUU fishing vessels.

The denial of use of ports is a key measure under the PSMA. Port uses such as “landing, transshipping, packaging and processing of fish that have not been previously landed and other port services including, inter alia, refueling and re-supplying, maintenance and dry docking” would always be denied to IUU fishing vessels. These uses may be denied prior to entry into port (i.e. when a vessel is on IUU vessel lists of an RFMO), upon entry into port (i.e. when a foreign vessel is fishing without authorization from the flag or coastal state, or cannot confirm whether the catch complied with domestic and RFMOs’ fishing requirements), or after an inspection (i.e. when a vessel has engaged in IUU fishing or fishing related activities).

The most interesting feature of the PSMA is the use of cooperation provisions to impose obligations upon flag state parties and non-parties. The PSMA’s Preamble calls for cooperation between flag states and port states. Parties must undertake actions relating to ports and to the supervision and control of their fishing vessels. In their capacity as flag states, they must cooperate with port inspections, request other port states to inspect vessels flying its flag if they were engaged in IUU fishing, encourage their vessels to use ports that comply with the PSMA, initiate immediate investigation and proceedings against IUU fishing vessels flying its flag identified by any port state, report actions taken against IUU fishing vessels, and take other actions to combat IUU fishing. They are also required to encourage non-parties to become parties to the PSMA, and must deter activities of non-parties that undermine the effective implementation of the

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151. Id. at 5.
152. Id.
154. DOULMAN & SWAN, supra note 28, at 34 (citing Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported And Unregulated Fishing at arts. 9(4)-(5), 11, and 18).
155. Id.
156. Port State Measures Agreement, supra note 29.
157. Id.; see also PSMA, supra note 153, at art. 20.6.
Agreement. To this end, the PSMA encourages public identification of states that contravene the Agreement.

Another innovative requirement is the sharing of information at the international level, particularly IUU vessel lists. The PSMA aims to combat IUU fishing through cooperation between states and RFMOs, and by effective communication and coordinated action amongst flag states, coastal states, and relevant RFMOs and international organizations. The PSMA establishes numerous mechanisms and requirements related to procedures for notification, communication, and release of information. It also provides assistance for developing nations to develop the legal mechanisms and technical capacity necessary to implement PSMs against IUU Fishing.

C. Voluntariness of Ecolabelling Programs and Cooperation Obligations of Flag States

Another important aspect of UNCLOS is the reassurance that every nation has the right for its nationals to engage in fishing on the high seas. This right is subject to treaties to which the flag state is a party, the UNCLOS rights and interests of coastal states, and the UNCLOS provisions on the high seas. These provisions include the flag state’s duty to adopt measures for the conservation of living resources in the high seas, to cooperate with other states and RFMOs in the conservation and management of shared and highly migratory fish stocks, and to adopt conservation measures for those nationals fishing on the high seas. In addition, flag states must keep their vessels under sur-
veillance and control, and take measures to prevent vessels from IUU fishing in the high seas and in the EEZs of other states.167

Of particular relevance for voluntary ecolabel programs is the fact that flag states assume jurisdiction over each vessel and its crew168 because “the ship, everything on it, and every person involved or interested in its operations” are considered as a unit linked to the flag state.169 Once a vessel meets the flag state’s conditions for the grant of its nationality, it is entitled to receive flag documents.170 The vessel itself, its activities, and its crew must comply with the flag state’s domestic laws because the registration is treated like a grant of citizenship.171 Each vessel and its crew should then comply with CMMs while exercising the right to fish; however, this is one of the flag states’ greatest challenges in policing, particularly for developing nations.172

To deal with this challenge, the international community has encouraged the involvement of all nations in ecolabelling schemes because they are designed to certify and promote labels for products from well-managed marine capture fisheries and to assure sustainable use of fisheries resources, as well as to incentivize a reduction of environmental impacts.173 In other words, ecolabelling schemes entitle a fishery product to bear a distinctive logo that certifies the fish were harvested in compliance with conservation and sustainability standards.174

The MSC was found to be the most compliant with the Guidelines for the Ecolabelling of Fish and Fishery Products from Marine Capture Fisheries (FAO Guidelines).175 The FAO Guidelines aim to promote ecolabelling schemes that verify a specific fishery operates in

167. See UNCLOS, supra note 73, at art. 94(1); see also Ted McDorman et al., International Ocean Law 289 (2005) (addressing and citing to the UNFSA).
168. See UNCLOS, supra note 73, at art. 94(2)(b); see also S.S “Lotus,” 1927 P.C.I.J (ser. A) No. 10 at 26 (Sept. 7) (stating there is no doubt ships on the high seas are subject to the jurisdiction of the State whose flag they fly).
170. UNCLOS, supra note 73, at art. 91(1); see also M/V “SAIGA,” supra note 169, at 63 (stating that under art. 91, it is for the flag states “to fix the conditions for the grant of its nationality to ships” under domestic law, and “to issue . . . flag documents to that effect”).
172. See Tanaka, supra note 69, at 152; see also McDorman et al., supra note 167 (stating that flag states can take measures to ensure their vessels’ compliance with CMMs while they exercise the right to fish).
173. FAO Guidelines, supra note 54, at 2, 108; see also Gee, supra note 55, at 1-4.
174. FAO Guidelines, supra note 54, at 5.
compliance with domestic and international regulations, and has no adverse impacts on the ecosystem.\textsuperscript{176} MSC therefore is guided by a principle that a fishery must be conducted in a manner that avoids depletion of exploited fisheries, or in a manner that increases populations already depleted.\textsuperscript{177} It also promotes compliance with domestic and international marine conservation standards and incorporates frameworks for responsible and sustainable use of fisheries.\textsuperscript{178} Fishing operations, on the other hand, must allow for the maintenance of the ecosystem on which the fishery depends.\textsuperscript{179}

Although the MSC ecolabelling program and other similar programs are voluntary and market-driven, the FAO Guidelines and the normative basis for all sustainable fisheries standards are based on international fisheries instruments such as UNCLOS, the 1995 UN Fish Stocks Agreement, and the 1995 Code of Conduct for Responsible Fisheries, as well as all applicable national legislation.\textsuperscript{180} The minimum substantive requirements and the criteria for assessing whether a fishery can be certified for an ecolabel to be awarded to a fishery are also based on these instruments.\textsuperscript{181} While some states may be bound by these international instruments, they are not bound by the FAO guidelines and ecolabelling programs.

III. Proposals to Prevent and Deter Trade in IUU Fisheries

A. Free Trade Agreements Can Help Prevent IUU Fisheries from Entering the Market

1. Enforcing Cooperative Environmental Clauses to Enhance Foreign Port Controls

Greater attention should be given to port controls abroad, because the lack of adequate port controls in seafood-exporting nations increases the probability of IUU fisheries entering the U.S. market.\textsuperscript{182} The PSMA is used as an important tool to combat, prevent, deter, and

\begin{footnotesize}
\begin{enumerate}
\item[176.] FAO Guidelines, supra note 54, at 6-7, 10.
\item[177.] Gee, supra note 55, at 7.
\item[178.] FAO Guidelines, supra note 54, at 6-7.
\item[179.] Id.
\item[180.] Id. at 1, 13-14 (addressing the sustainable fisheries standards that comprise quantitative and qualitative indicators of the governance or management systems of a fishery, as well as of its outcome in terms of conservation).
\item[181.] Id. at 5.
\item[182.] See generally Skonhoft, supra note 140 (stating that there is an urgent need to enhance port state controls and port measures to combat IUU fishing); see also Pramod et
\end{enumerate}
\end{footnotesize}
eliminate IUU fishing because it allows port states to enforce CMMs against IUU fishing, blocks the entrance of IUU catches into their market, makes operation of IUU fishing vessels rather difficult, and enhances cooperation between nations to identify IUU vessels.183

Had the U.S. led other nations along the East Pacific Ocean in harmonizing the scope, structure, application, and sanctions of their PSMs to combat IUU fishing, the vessels flagged to Panama, Costa Rica, and Colombia that caught the IUU fish that were possibly exported to the U.S. would have been denied the use of ports. These vessels would have been forced to travel longer distances to find a port that would have allowed them to land their catch, thereby increasing its operational cost and decreasing the value of their IUU catch. The denial of ports for landing, transshipping, and processing of fish, as well as for refueling and re-supplying, maintenance, and dry-docking, is a fundamental purpose of the PSMA.184

The PSMA encourages port states to deny use of ports to all IUU vessels so that the vessels on IUU vessel lists of RFMOs (such as the ones flagged to Colombia and Panama) would have been denied the use of ports. This denial of port access would also apply to foreign vessels, such as the ones flagged to Ecuador and other neighboring states that engaged in IUU fishing in jurisdictional waters of Colombia and Costa Rica (or the vessels that fished without being on the IATTC registry or that contravened this RFMO’s fishing regulations). Had these vessels been denied the use of ports, their catch would not have entered the foreign markets to be exported.

The PSMA also imposes obligations on flag states’ parties and non-parties. Had these three nations been parties to the PSMA, they would have cooperated with port inspections and requested other port states to inspect the vessels that were suspected of having engaged in IUU fishing. The countries would have also encouraged all their vessels to use ports that comply with the PSMA, and would have initiated proceedings against IUU fishing vessels. In the case of vessels that IUU fished in jurisdictional waters of Colombia and Costa Rica and in the IATTC area, these states could have reported actions taken against these vessels to make this information public.

al., supra note 4 (explaining where and how IUU fisheries enter the U.S. market and estimating the amount of IUU fish entering the U.S. seafood market).


184. See supra Part II.B.
Even if these states do not wish to become a party to the PSMA, they can implement similar PSMs as the ones in the PSMA. The U.S. must use all mechanisms available to compel them to implement such measures. First, it can use tariffs to compel state parties to FTAs to strengthen their port controls, as having preferential tariffs on numerous goods and services also benefits other sectors of the economy. Second, the cooperative environmental clauses of FTAs can be enforced to improve port controls. ECAs under FTAs already recognize the importance of regional cooperation for the protection of natural resources, so the ECC can define a work program that may include regional objectives, such as harmonization in the scope, structure, and sanctions of their port measures to combat IUU fishing.

The ECC’s work program may include a broad range of activities, as the parties to these three FTAs have already recognized numerous priorities for key environmental cooperation activities. They agreed to take actions to strengthen their environmental management systems that may include PSMs against IUU fishing. They also agreed to promote best environmental practices leading to sustainable management, such as implementing PSMs. In order to force IUU vessels to travel longer distances and reduce the profitability of IUU fishing, the ECC’s work program may include activities that require Costa Rica, Panama, and Colombia to deny the use of ports to all IUU fishing. Because IUU vessels will be forced to travel longer distances, they may choose to make sustainable use of the resources so they are allowed to land their catch.

2. Conditioning Preferential Tariffs to Encourage Voluntary Seafood Ecolabels

FTAs also increase the profits of the seafood industry—and any government action that increases seafood industry profits is tantamount to a fisheries subsidy.185 This subsidy is being granted to imports of fresh or chilled fish, frozen fish, fish fillets and other fish meat, dried fish, crustaceans, mollusks, and aquatic invertebrates that enter the U.S. market in shipments of seafood of “mixed origin,” including IUU fisheries.186 Unless a system to monitor fishing activities is available at ftp://ftp.fao.org/docrep/fao/007/y5424e/y5424e00.pdf.


186. These seafood products enjoy zero tariffs. For specific information relating to tariffs of all seafood imports see EXPORTS.GOV, http://export.gov/fta/ftataiffool/TariffSearch.aspx (last visited Aug. 30, 2015) (user simply needs to indicate whether he or she is importing or exporting goods, select the partner country, and search for the product).
implemented, the U.S. is prevented from verifying whether a shipment contains IUU catches and, as a result, duty free IUU fish will continue to enter the U.S market.

The parties to these three FTAs also have recognized the importance of developing and promoting incentives and other voluntary mechanisms to encourage environmental protection that include market-based and economic incentives for environmental management, such as zero tariffs for market participants that certify their seafood. Thus, the U.S. may use tariffs to encourage voluntary certifications. These certifications are a very important tool when it comes to verifying that a fishery complies with CMMs, as well as to corroborate that a shipment of seafood does not contain IUU fish.

To certify a fishery, an FAO Guideline compliant program (such as the MSC) assesses the management systems, the fishery and associated stock, and the serious impacts of the fishery on the ecosystem.187 The presence of these programs also fosters development and support of fisheries to become increasingly sustainable.188 These programs reduce the environmental impacts resulting from fishing activities, and benefit all market participants. Fishers-producers get easy access to markets, recognition, price premiums, and increased negotiating power for access to the resources; retailers and suppliers receive value for the brand, price premiums, and reassurance of future supplies. Consumers are reassured that the seafood has reduced ecological impacts.189 Unfortunately, although the benefits of these programs are apparent, cost remains the key factor in implementing them.

Costs depend on the industry's structure, but may be countered with the price premiums that a consumer would pay for certified seafood products.190 These stimuli are important, yet insufficient, to compel the seafood industry to certify their seafood. Tariffs, on the other hand, are more compelling when deciding whether to certify seafood. Tariffs are a very important aspect of import-export businesses and constitute a crucial cost factor when importing and exporting seafood. The seafood industry should not receive preferential treatment when importing seafood to the U.S. whenever it does not certify its seafood. The U.S. is in the bargaining position to condition preferential tariffs to coerce the industry to certify seafood through the MSC or another program in accordance with FAO Guidelines.

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187. See supra Part II.C.
188. GEE, supra note 55, at 1, 9.
189. Id.
190. Id.
An ecolabel or certificate will have to accompany seafood imports from any state party to an FTA, so the U.S. can verify the initial producer's compliance with CMMs. Tariffs will only be eliminated upon showing of such ecolabel or certificate. The seafood industry will have to examine the price premiums and other benefits in certifying as well as the savings of having preferential tariffs, and then subtract the costs relating to a certification program. Accordingly, it can decide whether to implement a new certification and ecolabelling program, or assume the increased costs associated with not receiving zero or reduced tariffs.

A simple cost-benefit analysis of the economic incentives of FTAs compared to the costs of certifying seafood will permit the U.S. to ensure preferential tariffs do not constitute yet another incentive to trade in IUU fisheries. Conditioning preferential tariffs is an effective way to use the current trade legal framework to ensure increased seafood imports reach U.S. consumers at lower prices but not at the expense of U.S. fishermen who have to comply with stringent U.S. fishing regulations. The U.S. must ensure that U.S. trade policies and fishing regulations are in order, but do not provide an unlawful price advantage to foreigners.

**B. Bolstering the Lacey Act to Deter Trade in IUU Fisheries**

As previously discussed, one of the most significant challenges in preventing IUU fish from entering the U.S. market is that most cooperation-based instruments are not binding unless the exporting-nation agrees to be bound. No matter what steps the U.S. takes to reduce IUU fishing activities and the trade in IUU fish in its territory and jurisdictional waters, the challenge of eliminating IUU fishing goes beyond its boundaries. Even if the U.S. intends to provide extraterritorial application to its domestic wildlife conservation laws such as the Lacey Act, it is unclear whether such laws would apply to all foreign-flagged vessels and their crews when they violate CMMs of

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191. The economic and financial considerations of this analysis are beyond the scope of this paper. For a definition of cost benefit analysis, see *Cost Benefit Analysis (CBA)*, Bus. Dictionary, http://www.businessdictionary.com/definition/cost-benefit-analysis-CBA.html#ixzz3WdkAWRvr (last visited Aug. 30, 2015).

192. Although this paper relates to the use of tariffs in FTAs, the solution proposed in this paper would also be applicable to other nations that are non-parties to FTAs that import seafood into the U.S. and receive preferential tariffs under the original GATT, succeeded by the Agreements Establishing the Word Trade Organization.

RFMO/As, or to U.S. nationals who trade in fisheries caught by vessels in IUU lists of RFMOs.

1. The Act’s Element of Violation to Foreign Laws and U.S. Treaties

The Act provides for certain civil and criminal penalties\(^{194}\) to deter unlawful trade in fisheries.\(^ {195} \) Under section 3372(a)(1) of the Act, it is unlawful “to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the [U.S.] . . . .”\(^ {196} \) Section 3372(a)(2)(A), on the other hand, makes it unlawful “to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law.”\(^ {197} \) Two types of laws are particularly important to apply the Act to conduct overseas: foreign laws and U.S. treaties.

Regarding foreign laws, Congress has the power to regulate commerce with foreign nations\(^ {198} \) and does not unconstitutionally delegate legislative power to foreign governments by incorporating foreign laws into the Act,\(^ {199} \) because these laws are not assimilated into federal laws.\(^ {200} \) The U.S. government does not apply the foreign law, but rather looks to it to determine if the Act’s provisions are triggered.\(^ {201} \) Because these laws cover numerous regimes around the world, defendants often raise challenges on vagueness grounds. These challenges generally are unsuccessful because the language that imposes civil sanctions is reviewed for vagueness with a high degree of flexibility, and the language that imposes criminal penalties is reasonably certain to survive “an attack for failure to provide sufficient notice.”\(^ {202} \)

\(^ {194} \) U.S. v. Lee, 937 F.2d 1388, 1390-91 (9th Cir. 1991).


\(^ {198} \) U.S. Const. art. I, § 8, cl. 3.

\(^ {199} \) Rioseco, 845 F.2d at 301-02.

\(^ {200} \) U.S. v. 594,464 Pounds of Salmon, 871 F.2d 824, 830 (9th Cir. 1989).

\(^ {201} \) Id.

\(^ {202} \) The Act has survived vagueness challenges despite the fact that it provides for both civil and criminal penalties because the standard of review for each is different. The language providing for civil sanctions “is reviewed for vagueness with somewhat ‘greater tolerance’ than one involving criminal penalties.” To impose criminal sanctions, the Act re-
An issue often raised is the vagueness of the phrase “any foreign law.” The Act’s definition of the word “law” begins with the word “laws,” and does not establish whether the word “laws” is restricted to foreign statutes or whether it includes other legally binding foreign regulations and rules. To determine its plain meaning, courts have turned to dictionary definitions and cited broad and narrow definitions. Law means any rule of conduct that has binding legal force, but also simply means a statute. Courts, therefore, have held the term law is ambiguous and have looked beyond the language to determine legislative intent.

The Act is a federal law that was introduced in 1900 to protect wildlife and proscribe interstate illegal trafficking in wildlife, and was amended in 1981 due to the increased illegal trade in fisheries and wildlife. The intent of Congress in amending the Act “was to expand its scope and enhance its deterrent effect.” It intended for foreign laws to include regulations, non-statutory provisions such as resolutions, and other legally binding provisions that foreign governments may promulgate to protect wildlife, such as decrees. It also includes foreign laws that only impose civil fines and economic regulations relating to wildlife. Certainly, the underlying law must be valid during the time period charged in the indictment. Courts often look to the forum where the law was promulgated to determine requires a showing of knowledge, which mitigates its potential vagueness. See id. at 829; see also Lee, 937 F.2d at 1394-95.

204. Id. at 1237.
205. Id.
206. See id.
207. See id.; see also 594,464 Pounds of Salmon, 871 F.2d at 827.
208. McNab, 331 F.3d at 1238 (quoting 594,464 Pounds of Salmon, 871 F.2d at 828).
209. See Lee, 937 F.2d at 1395-96 (holding that the term “any foreign law” encompasses a foreign regulation); see also 594,464 Pounds of Salmon, 871 F.2d at 830 (holding that a Taiwanese regulation is a “foreign law” under the Act).
210. See generally U.S. v. Reeves, 891 F. Supp. 2d 690, 697 (D.N.J. 2012) (rejecting the argument that an invalid state regulation not passed in accordance with state laws could serve as the Act’s predicate).
its validity and effect,\textsuperscript{215} and rely on experts of foreign law to determine the validity of the offenses under foreign law.\textsuperscript{216} Therefore, the government has the burden of establishing the validity of the underlying law.\textsuperscript{217}

In addition to foreign laws, U.S. treaties also may trigger the Act. The Constitution grants the President the power to make treaties\textsuperscript{218} with foreign nations that the President negotiates and the Senate ratifies to be effective.\textsuperscript{219} Even if an agreement is not submitted to the Senate for approval, it is effective so long as the President signs.\textsuperscript{220} These are known as Executive Agreements, and can be used for any purpose.\textsuperscript{221} Both Treaties and Executive Agreements are binding under international law\textsuperscript{222} and upon the parties\textsuperscript{223} that have consented to be bound.\textsuperscript{224} In this context, a violation by a party to a U.S. Treaty or Executive Agreement is sufficient to apply the Act, as well as a violation of U.S. regulations adopted under a treaty, such as regulations on catch limits.\textsuperscript{225} With regard to non-parties, the U.S. may give extraterritorial application to domestic laws,\textsuperscript{226} but it is unclear whether an executive agreement relating to CMMs may also apply overseas. The general rule is that U.S. laws are presumed not to

\textsuperscript{215} See \textit{id.} at 707 (holding that the term “law or regulation of any state” in 16 U.S.C. § 3372(a)(2)(A) requires reference to the state law to determine if a given requirement qualifies as a law or regulation under state law); see also U.S. v. Molt, 599 F.2d 1217, 1218-19 (3d Cir. 1979) (holding that foreign laws and regulations referred to in the Act are laws and regulations for the protection of wildlife in Fiji and Papua New Guinea).

\textsuperscript{216} See, e.g., Molt, 599 F.2d at 1220 (stating the lower court overlooked the testimony of an expert witness); see also 2,507 Live Canary Winged Parakeets, 689 F. Supp. at 1113-14 (relying on experts’ testimony).

\textsuperscript{217} See generally United States v. Sohappy, 770 F.2d 816, 824 (9th Cir. 1985).

\textsuperscript{218} U.S. CONST. art. II, § 2, cl. 2.

\textsuperscript{219} ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 368 (3d ed. 2006).

\textsuperscript{220} Id.

\textsuperscript{221} Id. at 668.


\textsuperscript{224} See \textit{id.} at art 2(g), at 333 (defining the term “party”).

\textsuperscript{225} See, e.g., United States v. Cameron, 888 F.2d 1279, 1280 (9th Cir. 1989) (holding that violations to catch limits adopted by the International Pacific Halibut Commission (IPHC) were sufficient for the Act to be applied, as well as regulations promulgated by the IPHC, which are deemed to be adopted in accordance to 16 U.S.C. §§ 773-773k).

\textsuperscript{226} See generally HUNTER ET AL., supra note 143, at 1509 (addressing extraterritorial application of U.S laws); see also Black’s Law Dictionary (10th ed. 2014) for a definition of extraterritorial.
have extraterritorial effect, but the application of U.S. laws overseas “has become increasingly common.”

As a preliminary consideration, courts have applied the presumption against extraterritoriality in a manner inconsistent with prior precedents relating to the use of federal statutes to regulate conduct outside the U.S. boundaries. In the early 1990s, for instance, the Supreme Court adopted a test of strict presumption against extraterritoriality. In this regard, it appears the Court has moved away from a strict presumption test to numerous alternative tests, but this variation has added “to the incoherence of the Court’s jurisprudence.”

So far, the courts have consistently reaffirmed that there is a “longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the U.S.” Despite other interpretations to restrict the scope of the presumption against extraterritoriality, courts have held that only Congress may overcome this presumption and proscribe or regulate conduct outside of the boundaries of the U.S. Courts must then determine whether Congress clearly manifested and intended to proscribe or regulate conduct beyond the U.S. territory because “whether Congress has actually exercised that authority is a matter of statutory interpretation.” Although courts will take different approaches to the presumption against extraterritoriality, courts

227. See European Cmty. v. RJR Nabisco, Inc., 764 F.3d 129, 133 (2d Cir. 2014) (recognizing a presumption against extraterritoriality); see also Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869, 2877-78 (2010) (holding that “when a statute gives no clear indication of an extraterritorial application, it has none”).


231. See Knox, supra note 229, at 377.

232. See Aramco, 499 U.S. at 248; see also Morrison, 130 S. Ct. at 2877; Smith v. United States, 507 U.S. 197, 203-04, (1993); European Cmty., 764 F.3d at 133.

233. See Foley Bros., 336 U.S. at 285; see also European Cmty., 764 F.3d at 133.

234. See Hunter et al., supra note 143, at 1513.
will more commonly allow extraterritorial application of economic laws than environmental laws.235

2. Amending the Act to Include Conservation and Management Measures of Regional Fisheries Management Organization/Arrangements

The Lacey Act has far-reaching criminal and civil effects on IUU fishing activities abroad and the trade of IUU fisheries caught beyond the U.S. jurisdictional waters, and may deter the trade in IUU fisheries. However, it must be amended to provide a revised and more comprehensive scheme, because the current provisions relating to the extraterritorial application of the Act are inadequate.

There is uncertainty as to whether CMMs of a RFMO such as the IATTC’s CMMs may qualify as “foreign laws” under the Act.236 To illustrate, three instruments are important for these CMMs to have binding effect: the Convention for the Establishment of an Inter-American Tropical Tuna Commission (IATTC Convention), the Protocol to Amend the 1949 Convention (The Protocol), and the Convention for the Strengthening of the 1949 Convention (Antigua Convention).237 Costa Rica ratified the IATTC Convention,238 so it has the force of a Treaty for this State. Panama ratified The Protocol, but Colombia did not even sign it.239 It is, therefore, a treaty for Panama, but has no binding effect for Colombia.240 Panama and Costa Rica also ratified the Antigua Convention,241 but Colombia has not even signed it.242 Therefore, it

235. Id. at 1514.
236. This proposal will not address the extraterritorial application of § 3372(a)(1) since all instruments mentioned in this paper may be applied extraterritorially so long as they are ratified by the U.S. But the process of ratification is often long and courts are reluctant to give extraterritorial application of U.S environmental laws, so deterring IUU fishing activities and the trade in IUU fisheries through § 3372(a)(1) is as of yet more uncertain.
240. For a treaty to be valid in Colombia, its Congress must approve it. The President may only give provisional application to treaties relating economic and commercial nature that must always be sent to Congress for approval, otherwise, the effect and application of such treaty will be suspended. See Constitución Política de Colombia [C.P] art. 224.
has binding effect as a treaty for Costa Rica and Panama, but has no binding effect on Colombia.

In cases of violations of CMMs of this RFMO, courts will have to decide whether the IATTC Convention, The Protocol, and the Antigua Convention are valid foreign laws of Costa Rica, Panama, and Colombia, sufficient to trigger the Act and whether the CMMs adopted by the IATTC, an RFMO that was established by these instruments, are also valid foreign laws. Given the very broad judicial interpretation of the Act’s three-word phrase “any foreign laws,” it is safe to conclude a court will likely find these instruments are foreign laws as long as an expert determines they are valid. In the cases of Costa Rica and Panama, an expert will likely find the instruments ratified by the States valid, but Colombia has not signed or ratified any of them. Thus, these instruments are not valid laws in Colombia.

The case law relating to the validity of these instruments under section 3372(a)(2)(A) is limited to nonexistent. Courts will have to determine whether fishing or trade activities that contravene CMMs of this RFMO, established by an instrument to which a State has not agreed to be bound, will trigger section 3372(a)(2)(A). To deal with this challenge, courts will likely rely on the opinion of an expert on foreign law who will determine whether the CMMs that gave rise to the underlying court proceedings are valid laws in that particular State, so that the trier of fact may decide whether or not it was unlawful “to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish or wildlife taken, possessed, transported, or sold . . . in violation of any foreign law.”

The risk if the Act is not amended is a deluge of judicial opinions with different conclusions concerning the validity of the same instrument. For instance, consider the IUU fishing vessels flagged to Panama and Colombia that violated the IATTC’s CMMs detailed in this paper. An expert in foreign law will probably establish that the CMMs of the IATTC, or to be more precise, the CMMs implementing The Protocol and the Antigua Convention, are valid laws in Panama because Panama has signed and ratified these instruments, but Co-

242. Id.
243. For further discussion on this broad interpretation, see supra Part III.B.1.
244. For further discussion about the validity of “foreign laws” see id.
245. Constitución Política de Colombia [C.P] art. 224 (mandating that for a treaty to be valid, it must be approved by Congress, and establishing that the President may only give provisional application to treaties relating economic and commercial nature that must always be sent to Congress for approval, otherwise, the effect and application of such Treaty will be suspended).
lombia has neither signed nor ratified them. Therefore, an expert will probably establish that the same CMMs are not valid laws for Colombia. As a result, a court will likely apply the Act to proscribe IUU fishing activities conducted by Panamanian nationals, but not against Colombian nationals. At the same time, U.S. nationals who have traded in these IUU fisheries may be punished only if they imported, exported, transported, sold, received, acquired, or purchased fisheries caught by IUU fishing vessels flagged to Panama, and not if the vessels were flagged to Colombia.

In addition to issues concerning the enforcement of CMMs of RFMOs, courts will have to deal with issues related to CMMs of RFMAs. Instruments that stipulate the parties’ express intent not to be bound often create RFMAs. These instruments may take the form of Arrangements,247 Memorandums of Understanding,248 or even Declarations, so long as they relate to a “cooperative mechanism established in accordance with [UNCLOS] and [UNFSA] by two or more States” to establish CMMs in a sub-region or region.249 Indeed, the term “Declaration” is “deliberately chosen to indicate that the parties do not intend to create binding obligations but merely want to declare certain aspirations.”250 Although the San Jose Declaration251 states that “the parties agreed” to create a joint management system for the sustainable use of marine resources in the ETPS,252 it uses the term “Declaration” so a court will likely find that it is not legally binding because it simply declares the aspirations of the CMAR States. And, unlike the Universal Declaration of Human Rights, the San Jose Declaration does not reflect customary international law.

It is highly unlikely that CMMs of RFMAs will qualify as foreign laws unless they have been adopted by national legislation. Since


249. UNFSA, supra note 17, at art. 1(d).

250. Definition of Key Terms Used in the UN Treaty Collection, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/overview.aspx?path=overview/definition/ page1_en.xml (last visited Aug. 30, 2015) (stating that few declarations not originally intended to be binding, but reflecting customary international law such as the Universal Declaration of Human Rights, may be considered binding).

251. This paper does not advocate that the CMAR is a Regional Fisheries Management Arrangement because the CMAR does not focus on specific marine species and it appears that the CMAR does not have managerial functions.

sovereign States are reluctant to enter into agreements that curtail their right to exploit marine resources within their jurisdictional waters or their right to fish on the high seas, the U.S. will continue to be prevented from deterring IUU fishing activities overseas. Subsequently, these IUU fisheries will continue to enter foreign markets, including the markets of parties to the U.S. FTAs, possibly to be exported to the U.S.

These challenges impose a high burden on the court system, and increase the time and costs involved in judicial proceedings. A court will need to determine on a case-by-case basis whether these sources of law are sufficient to trigger the Act, which may lead to conflicting results. Congress can alleviate this burden by amending section 3372(a)(2)(A). The following amendment is being proposed to clarify that CMMs of RFMO/As will also trigger the Act: “(a) Offenses other than marking offenses: It is unlawful for any person . . . (2) to import, export, transport, sell, receive, acquire, or purchase in inter-state or foreign commerce (A) any fish or wildlife taken, possessed, transported, or sold . . . in violation of any foreign law or conservation and management measures of Regional Fisheries Management Organizations or Arrangements.”

3. Leveraging the Act’s Automatic Application: IUU lists of RMFOs and the NMFS

The purpose of the proposed amendment to section 3372(a)(2)(A) is to clarify that other laws, such as CMMs of RFMO/As, may also trigger application of the Act. Once the Act offers a straightforward rule that makes the trade of fisheries taken in violation of CMMs adopted by RFMO/As unlawful, the inclusion of a certain foreign-flagged vessel in an IUU list of a RFMO would automatically trigger the Act. Consequently, the crew and owner of such vessel, and U.S. nationals who trade in its catch, would be subject to investigation under the Act.

Numerous RFMOs have databases of IUU fishing lists, which contain the information of vessels that have presumably violated the CMMs of a RFMO. Examples include: the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), the Inter-American Tropical Tuna Commission (IATTC), the International Com-

253. For a definition of conservation and management, see UNFSA, supra note 17, at art. 1(b).
254. Id. at arts. 9 and 10 (addressing the objectives and functions of RFMO/As).
255. For a definition of arrangement, see id. at art. 1(d).
mission for the Conservation of Atlantic Tunas (ICCAT), the Indian Ocean Tuna Commission (IOTC), the Northwest Atlantic Fisheries Organisation (NAFO), the North East Atlantic Fisheries Commission (NEAFC), the South East Atlantic Fisheries Organisation (SEAFO), Western and Central Pacific Fisheries Commission (WCPFC), South Pacific Regional Fisheries Management Organisation (SPRFMO). Indeed, the National Marine Fisheries Service (NMFS) often gathers information from publicly available databases that include IUU vessel lists of RFMOs.256

Since 2006, the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act has required the U.S. Secretary of Commerce to submit a biennial report to Congress identifying nations whose vessels were engaged in IUU fishing.257 The first biennial report to Congress was submitted in 2009 and included six nations identified by the NMFS as having been engaged in IUU fishing in the years of 2007 and 2008.258 Those nations were France, Italy, Libya, Panama, People’s Republic of China, and Tunisia.259 In the following report, Colombia, Ecuador, Ghana, Italy, Mexico, Panama, the Republic of Korea, Spain, Tanzania, and Venezuela were identified.260 This year, Colombia, Ecuador, and Mexico were identified again.261

These reports outline numerous IUU fishing incidents by foreign-flagged vessels that violated CMMs of RFMO/As, such as the ones described in this paper. It is then further proposed that the Act or its implementing regulations authorize the U.S. government to initiate automatic proceedings against the owner of the foreign-flagged IUU vessel and all U.S. nationals who trade in fisheries caught by vessels identified by the NMFS as having violated CMMs of a RFMO or that have been included in IUU list of RFMOs to which the U.S. is a party.262

**Conclusion**

Several IUU fishing incidents in jurisdictional waters and adjacent high seas of three state parties to FTAs—Panama, Costa Rica,
and Colombia—have occurred. Although the amount of IUU catch that entered these markets cannot be determined, the probability that these fish entered the U.S. market is high because these nations have problems with law enforcement, non-cooperation, and lack of transparency that prevent full traceability of their seafood imports.

Under the current international legal framework, it is difficult to prevent these IUU fish from entering the markets of these three nations, and with the current domestic mechanisms in place, the U.S. could not verify that shipments of seafood from these nations did not contain IUU fish. Yet, preferential tariffs in FTAs did not discriminate between legally caught and IUU fish, so the IUU fish caught in the incidents mentioned in this paper also enjoyed zero tariffs. On the other hand, legal proceedings against the owners of all the foreign-flagged IUU vessels and other market participants who traded in those IUU fisheries have not been instituted, so future unlawful conduct has not been deterred. Moreover, it is unclear whether these violations would trigger the application of the Lacey Act.

The U.S. can take three actions to fight against trafficking in IUU fisheries and to assure U.S. fishermen are able to distribute seafood to U.S. consumers at equal or better rates than competitors who trade in IUU fisheries and enjoy zero tariffs. First, while foreigners are subject to less stringent fishing requirements compared to the requirements the U.S. fishermen are subjected to, most of their catch enjoy zero tariffs, so FTAs’ preferential tariffs to seafood should be granted only to those importers who can prove the catch sought to be imported has not undermined efforts to conserve fish stocks or jeopardized the food supply and source of income of foreigner fishermen.

Second, tariffs could be used to compel state parties to FTAs to enhance their port controls. Seafood is only one of the many goods that enjoy zero tariffs. Since having preferential tariffs to other goods and services is beneficial to other sectors of the economy, undertaking activities under the cooperative environmental clauses of FTAs to improve port controls would be less burdensome to state parties to FTAs than losing preferential tariffs for all other goods and services. Third, the U.S. can combat trafficking in IUU fisheries by imposing civil and criminal penalties to any foreigner or U.S. national engaging in the trade of IUU fish taken in violation of conservation and management measures of RFMO/As. Accordingly, foreigners and U.S. nationals who traded in IUU fish caught by the vessels identified by the NMFS as having violated CMMs of the IATTC would be punished automatically.
These actions will prevent IUU fisheries from entering foreign markets and will deter future trade in IUU fisheries. They are effective measures to ensure sustainable use of marine resources and to balance the market conditions of U.S. fishermen, so both foreign and U.S. fishermen may benefit.
A Blanket of Immunity Will Not Keep Florida Dry:
Proposed Adjustments to Florida’s Drainage Regulations and Sovereign Immunity Laws to Account for Climate Change Impacts

Theresa K. Bowley

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INTRODUCTION

The saying that “[w]ater is Florida’s lifeblood” is commonplace and management of water resources is a concern for all Floridians. Since the Sunshine State receives 50 to 65 inches of rainfall from about 120 storms a year, the resulting runoff represents a key component of the state’s water resources, and proper stormwater management is vital to the quality of life in Florida. Responsibility for stormwater management is a common theme, but when discussing climate change impact, the importance of stormwater management has been essentially silent.

Addressing stormwater drainage in Florida has been an ongoing challenge since the middle of the twentieth century when the State began to experience rapid growth. Initially, stormwater drainage was a challenge from a regulatory perspective because there were only four drainage basins in all of Florida; therefore, drainage systems extend over county and city boundaries. The scale of these drainage basins dictated that the infrastructure, as well as the regulations addressing this infrastructure, was at a scale that only the Florida state government could manage. Additionally, since stormwater drainage is based on topography of the entire state as opposed to the jurisdictionally established boundaries, the governance of stormwater drainage interconnected. These interconnected systems have not been updated or expanded proportionately to adapt to the rapid urbanization of the state over the past fifty years. Stormwater storage capacity is decreasing due to increased storm activity caused by climate change; the

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3. Id. at 7-15.
5. Florida Water Story, supra note 1.
anticipated discharge from future development will only make the situation worse in coming years.

Drainage problems already occur in Florida during seasonal high tides, heavy rains, and in storm surge events, and the impacts projected by climate change will exacerbate flooding. Identification of deficiencies in Florida’s existing drainage systems should include the responsibility and liability of drainage systems to be retrofitted to adapt to climate change.\(^6\) Options that can be considered for adaptation to climate change include the redesign and improvement of existing storm drainage canals, flood control structures, and stormwater pumps.\(^7\) Climate change adaptation efforts, specifically regulatory changes, are in the preliminary stages.\(^8\) Florida has not yet considered assigning the responsibility to manage climate change impacts; as of 2015, Florida Statutes only reference that climate change impacts should be averted by global actions and, where needed, additional efforts should be expended to make Florida less vulnerable to the impacts.\(^9\) The legal effects of climate change adaptation efforts have not yet been considered in either the legislative or the judicial platforms of Florida government.\(^10\) In light of Florida’s existing sovereign immunity laws, modifications to Florida’s legal system to address climate change will be difficult to achieve. Courts have interpreted sovereign immunity laws to justify inaction by the government on stormwater drainage adaptation.\(^11\) Specifically, due to the myriad of exceptions created by both case law and statute which result in no public duties or any liability for negligence, the citizens of Florida have

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\(^6\) John Englander, High Tide on Main Street: Rising Sea Level and the Coming Coastal Crisis 98, 107-19 (2d ed. 2013).


\(^8\) Englander, supra note 6, at 170 (noting that adaptation to climate change, including sea level rise, will require a shift in our perspectives and expectations).


\(^11\) Thomas Ruppert & Carly Grimm, Drowning in Place: Local Government Costs and Liabilities for Flooding Due to Sea-Level Rise, 87-NOV Fla. B.J. 29, 29, 30-31 (2013). The waiver of sovereign immunity is further limited by Fla. Stat. § 373.443, which provides complete immunity to the water management districts, the state, and their employees or agents against claims challenging the issuance of any permit, the issuance or enforcement of any order relative to maintenance or operation, measures taken to protect against failures during emergencies, and control or regulation of any relevant stormwater system. Id.
little to no assurance that the State will make any adjustments to modify stormwater drainage regulations in light of climate change.

Before Florida’s drainage systems fail due to climate change, the Florida government should proactively plan and legislate for necessary improvements and be held accountable and liable for failure to operate, regulate, and warn about adverse drainage impacts related to climate change. Climate change is creating a new era for the management of our environment—one in which a comprehensive approach is feasible based on advances in technology. This new era should include changes in the law governing stormwater drainage. Currently, Florida law barely mentions climate change, nor instructs regarding a proactive approach to adapt to the foreseeable future. If nothing is done to address the legal responsibilities, then, in addition to dealing with the physical impacts of climate change, Florida courts will likely also have to swim through a flood of litigation. Specifically, liability for negligence from a lack of governmental adaptation response to climate change may occur when harm such as flooding from failed stormwater drainage infrastructure occurs. Therefore, amendments to existing Florida law should be made to address the adverse impacts of climate change, including flooding impacts. This paper spotlights how sovereign immunity in Florida is discouraging adaptation actions and clouding the duty of the government to prepare, protect, and warn its citizens about climate change.

Part I of this paper explains the connection between global climate change and its effects on stormwater drainage in Florida. The existing governmental entities for stormwater drainage in Florida are identified and the scope of their governance is explained in Part II. Part III summarizes the existing sovereign immunity laws in Florida, including an explanation of how the federal roots and key exceptions to sovereign immunity influence Florida law. Part IV discusses two views on proposed changes to Florida’s sovereign immunity laws. Because the courts have not created a clear distinction between planning discretion immunity and public duty, there is no incentive to proactively address changes needed in stormwater drainage regulations and infrastructure based on climate change impacts. Impacts, especially flooding, are foreseeable and create a known danger for which the Florida government has a public duty to act. The alternative approach

proposes that, even if sovereign immunity applies, citizens should be afforded governmental accountability. Finally, even if Florida governments are not liable based on statutory immunity, the ethical and professional duty to react and adapt for climate change should prevail in order to protect Florida and its citizens.

I. FLORIDA’S ENHANCED VULNERABILITY TO INCREASED FLOODING FROM CLIMATE CHANGE

Due to the expansive shoreline, low elevation, and highly permeable aquifers, as well as the location of high population centers and economic investments close to the coastline, Florida is predisposed to the effects of climate change. Florida is projected to experience warmer temperatures and more extreme weather, including prolonged droughts and intense storms. Some of the direct effects of climate change include increased flooding, water pollution, and saltwater intrusion into the fresh water supply. Stormwater drainage management is influenced by all of these factors. Stormwater drainage management relies on absorption of rainwater into Florida’s soil. When the rainwater cannot be absorbed, the flow of drainage typically relies on gravity as opposed to pumps to move it. If there is a change in weather patterns and Florida has a surge in rain events, the current capacity of Florida’s drainage systems will not be able to accommodate the additional rain and flooding will result.

A. Stormwater Drainage is Interconnected in Florida

The volume of stormwater runoff generated by a rainstorm depends on the total amount of rainfall, except that which is lost by

15. ENGLANDER, supra note 6, at 107.
16. Id.
17. KOCH-ROSE ET AL., supra note 14, at vi.
19. Id.
infiltration and evaporation, and the amount of surface storage. The amount of this reduction is a function of climate, soils, geology, topography, vegetative cover, and, most importantly, land use. Historically, the primary goal for stormwater management was to move runoff away from a developed area as quickly as possible after a storm for flood protection. Florida rules on drainage systems maximize local convenience and protection to move stormwater as fast as possible, without considering other important factors such as damage from accelerated flow and increased water pollution.

Florida is relatively flat; most of the state’s stormwater is managed through gravity-driven canals. South Florida, in particular, relies heavily on a gravity-driven canal system to prevent flooding. In low-elevation areas of Florida where the flood control infrastructure was established several decades ago, climate change impacts have already adversely impacted systems. Twice a year, the streets of Miami Beach flood due to an event known as the “king tide,” when a gravitational alignment of the moon and sun produce the highest tides of the year and causes water to “spill[] over seawalls and gurgle[] up through storm drains.” Scientists deem these high tides to be a preview of what life would be like in Florida as the climate continues to warm.

From an engineering perspective, sea-level rise will decrease the water elevation gradient along the canal system and, in so doing, will reduce the capacity for gravity-driven drainage throughout the entire system of networked canals and storage ponds. This lack of capacity in the current flood control systems will continue to grow to the point of being overwhelmed, resulting in unacceptable drainage; more pumping of water will be required to provide flood protection. Also, groundwater levels will increase, which decreases the storage ca-

22. Id.
23. Id. at 16.
24. Id. at 15.
25. Koch-Rose et al., supra note 14, at ix.
26. Id.
29. Id.
30. Koch-Rose et al., supra note 14, at ix-x.
31. Id. at x.
pacity of the soil that helps hold stormwater runoff. “Many Florida towns now experience flooding on sunny days, especially during king tides.”

B. Flooding Vulnerability in Stormwater Drainage

Anywhere it rains, it can flood. A flood is defined as a general and temporary condition when water inundates an area that is typically dry; as rain falls, water is retained in soil, evaporates, or travels over the land as surface runoff. When a “one in one hundred year” rain occurs, large areas can experience flooding. When a ten-year storm event occurs, localized flooding can occur. There is a misconception that a “one in ten year” only occurs once every ten years; instead, the term “one in ten year” means there is a ten percent chance of a rain event of that intensity occurring in any given year. In Florida, design regulations typically require that a stormwater management system be designed to accommodate a “one in twenty-five” year rain event based on rainfall intensity data for the particular area of Florida.

Although required to be designed for a “one in twenty-five” year rain event, stormwater drainage design can vary widely and there are times when even the best system can be overwhelmed by extreme downpours. Flooding can occur either when it rains for a long time or when there is an exceptionally intense rain event and stormwater facilities are overwhelmed. Since regulations are established based on historic rainfall patterns, the design requirements do not address the future needs of drainage that will occur as the effects of climate change

32. Id.
33. Warrick, supra note 28.
35. Id.
37. Id.
40. Id.
impact Florida. Additionally, there is a lack of retrofitting requirements which will also contribute to additional flooding when the effects of climate change increase over time.

Depending on the design and condition of the drainage network, flooding can occur when the system cannot absorb the rain; for example, when typically dry soils are already saturated, flooding will occur. In urban areas, flooding can occur when man-made drainage systems, such as ponds or storm sewers, are overwhelmed. Although sometimes triggered by events like flash flooding, urban flooding is defined as a recurring impact on systems which are not designed to accommodate a certain flow of water. Flooding in urban areas is usually seen as a function of under-capacity design that can occur from either increased development overtime, in which the drainage systems accommodating the area are not expanding accordingly, or a change in the parameters of the drainage system.

C. Stormwater Drainage Capacity Decreased

As Florida developed, heavy rainfall always posed a threat to development, including water control and stormwater drainage facilities. Following widespread regional flooding in the 1940s, Floridians appealed to the federal government to develop a flood protection plan to help them cope with the impacts of the state’s weather extremes. In response, Congress authorized the Central and Southern Florida Project (C&SF Project), a massive flood control network designed to control water flow across a 16,000-square-mile area from Orlando to the Everglades. As a result of this interconnected drainage system—which happens to be the largest drainage facility in the state—flood control is now, and continues to be, a shared responsibility between

41. See Harper & Baker, supra note 39; see also Koch-Rose et al., supra note 14.
45. See generally id.
47. Id.
Considerable portions of the current regional drainage network are over fifty years old and were designed and built according to the land uses and climate conditions of a time with no anticipation of climate change or sea level rise. Initially designed to protect 2 million people, the drainage systems in central and south Florida now serve a population of more than 19.5 million. Therefore, the drainage systems currently existing in Florida are strained and often overloaded due to the aging systems not being updated or retrofitted at the same pace as Florida's urbanization.

Another factor affecting stormwater drainage capacity is climate change. According to the United States Government’s National Climate Assessment, Florida will be affected by climate change from decades of extreme weather—dry season droughts and increased rainy seasons. “The rainy seasons will be stormier, with fiercer hurricanes and higher storm surges.” By 2060, a two-foot rise of the ocean could occur, which would put many of the coastal lands underwater. Additionally, Florida’s prime drainage infrastructure, which includes 2,100 miles of canals and gates to keep out saltwater, will be impacted by sea level rise. If the sea rises eight inches, approximately eighteen gates would have to be rebuilt with a new pumping system at an estimated cost of seventy million dollars per pumping station. Two feet of sea level rise would result in approximately eighty percent of these gates failing. If the state’s drainage infrastructure cannot be modified to

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52. Id.
54. ENGLANDER, supra note 6, at 110.
55. Id.
56. Id.
address the increase of sea level rise, predictions reveal that there will be land use problems, including flooding at various nuclear power plants, sewage treatment facilities, and airports in Florida.\textsuperscript{57}

II. Stormwater Drainage Regulation in Florida

Stormwater drainage regulation in Florida essentially began with the C&SF Project, which is a system of 2,100 miles of canals and gates originally built by the federal government more than fifty years ago.\textsuperscript{58} The C&SF Project was managed by the Central and Southern Florida Flood Control District, which was created by the Florida Legislature.\textsuperscript{59} The Central and Southern Florida (C&SF) Flood Control District was the first of its kind.\textsuperscript{60} The success of the C&SF Flood Control District led to the creation of other water control districts.\textsuperscript{61} Florida Statute Section 298.01 authorized formation of drainage or “water control” districts upon petition of landowners to the circuit court.\textsuperscript{62} After 1980, new water control districts can only be formed by special legislation or by a county’s creation of a municipal service, benefit, or taxing unit.\textsuperscript{63} Water control districts are authorized to employ an engineer to develop a water control plan, and thereafter to construct, operate, and control the works and improvements described in that plan.\textsuperscript{64} Under Florida Statute Section 298.305, the board of supervisors may levy a non-ad valorem assessment both for the construction of the works and improvements, and for their maintenance.\textsuperscript{65} These were very important governmental agencies from 1950-1970, because water control districts had the ability to change the drainage patterns of entire regions and tax the public for drainage systems.\textsuperscript{66} However, because each water control district was established individually, there

\textsuperscript{57} Parker, supra note 51.
\textsuperscript{59} WATER SUMMIT 2007, supra note 4.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{63} Fla. Stat. § 298.01 (2012).
\textsuperscript{64} Id.
\textsuperscript{65} Id. § 298.305 (2012).
\textsuperscript{66} WATER SUMMIT 2007, supra note 4.
was inconsistency in the regulatory aspects of the management of the drainage systems.67

In 1972, recognizing the importance of water to the state, the legislature passed the Water Resources Act which, inter alia, ultimately created five water management districts.68 The first district established under the new law was the South Florida Water Management District, which was the successor to the C&SF Flood Control District.69 The South Florida Water Management District still operates and maintains the C&SF Project, as well as numerous other stormwater drainage facilities, and is therefore the largest operator of a stormwater drainage system in Florida.70 The water management districts’ functions include: (i) flood protection programs; (ii) technical investigations into water resources; (iii) water management plans for water shortages; and (iv) acquiring, establishing, and managing lands for water management purposes.71

In February 1982, the State Stormwater Rule was adopted and the framework for implementation by the Department of Environmental Regulation was set forth in the State Water Policy.72 In 1989, updated stormwater legislation further refined the State Stormwater Rule and State Water Policy by establishing a statewide watershed management framework that relied on a cooperative effort between the Department of Environmental Regulation, water management districts, and local governments.73

The goals for stormwater management in the State of Florida are outlined in Chapters 62-40 of the Florida Administrative Code.74

67. Id.
70. Development of the Central & South Florida (C&SF) Project, supra note 58. The South Florida Water Management District operates the remainder of the project in accordance with regulations prescribed by the Corps. The local sponsor has an essential role with the Corps in developing water management criteria for the C&SF Project. Id.
73. Id. (noting that the watersheds were defined with established water drainage basins in Florida).
74. Id.
This code of regulations also provides general guidelines related to water use and reuse, water transfer, water quality, surface water management, flood protection, and minimum flows and levels.\textsuperscript{75} Implementation of Florida's stormwater regulations has focused more on water quality and pollution reduction than flood control because the Federal Clean Water Act requires specific performance levels of water quality to be achieved via state regulation.\textsuperscript{76} In addition, stormwater design criteria for similar stormwater management systems vary widely throughout the state, meaning performance efficiency of stormwater management systems may differ between regions. Additionally, much of Florida was developed prior to stormwater regulations being in place, which resulted in varied and often haphazard networks of control measures.\textsuperscript{77} Further, Florida's laws and regulations have no provision for retrofitting stormwater facilities that do not meet the current criteria regulations.\textsuperscript{78}

\section*{III. Sovereign Immunity in Florida: Operational and Planning Distinctions}

If the government does not regulate stormwater drainage, the matter of draining or having water flow downstream could simply be reviewed under the common laws of nuisance, trespass, or negligence. If a stormwater drainage facility fails, as is the case here, the doctrine of \textit{res ipsa loquitur} would likely apply.\textsuperscript{79} "The use of \textit{res ipsa loquitur} has been noted to be essentially the equivalent of strict liability."\textsuperscript{80} However, Florida courts hold that the importance of providing a public service such as stormwater drainage systems warrants extension of sovereign immunity; thus strict liability, even \textit{res ipsa loquitur}, is not applicable.\textsuperscript{81} Because the regulation of stormwater drainage is a key public function in Florida,\textsuperscript{82} the government regulation of stormwater

\begin{itemize}
\item \textsuperscript{75} \textit{Fla. Admin. Code Ann.} r. 62-40.110 (2015) ("The waters of the state are among its basic resources. Such waters should be managed to conserve and protect natural resources and scenic beauty and to realize the full beneficial use of the resource.").
\item \textsuperscript{76} Harper & Baker, supra note 39.
\item \textsuperscript{78} Id.
\item \textsuperscript{80} Robert A. Leflar, \textit{Negligence in Name Only}, 27 N.Y.U. L. Rev. 564, 582 (1952).
\item \textsuperscript{81} Id.
\item \textsuperscript{82} Id.
\end{itemize}
drainage is a “public duty,” meaning that the scope of the regulation is
broad, complex, and carries a “great risk of harm” such that it should
not be undertaken by private persons (e.g., providing fire protection or
regulating drainage and floodwaters).83

Stormwater drainage systems, especially regulations mandating drainage systems, involve discretion (e.g., flood forecasting, planning for drainage policy) and courts generally do not hold governments liable for discretionary or planning acts because sovereign immunity is found to apply.84 Conversely, a government acts as a landowner when it constructs and operates stormwater drainage facilities.85 In these situations, courts consider governments to be acting in a proprietary or operating capacity and sovereign immunity does not apply.86 Therefore, it is important to determine when the government of Florida is acting as a regulator under planning discretion or as an operator of a drainage facility.

A. Federal Roots and Key Exceptions

In 2005, when Hurricane Katrina ravaged the Gulf Coast of the United States, the storm caused an estimated $110 billion in damages and ruined 275,000 homes.87 Initially, the storm was deemed to be the sole source of responsibility for the damages, but upon further deliberation, the public considered the storm to be a manmade disaster created by a levee system that was improperly built and maintained by the United States Army Corps of Engineers.88 Subsequently, citizens openly blamed the Corps for the damages and a grassroots campaign “Hold the Corps Accountable” for the breach of the levee system was ultimately unsuccessful in the courts.89 The tort liability claim was based on a breach of a duty to the injured party on the premise that all parties have a general duty to refrain from causing harm to others.90

85. Id.
86. Id.
87. Christopher R. Dyess, Off with His Head: The King Can Do No Wrong, Hurricane Katrina, and the Mississippi River Gulf Outlet, 9 NW. J. L. & SOC. POL’Y 302, 303-04 (2014).
88. Id.
89. Id.
90. Slemp v. City of N. Miami, 545 So. 2d 256, 259 (Fla. 1989).
The courts denied relief to the victims of Hurricane Katrina by concluding that the doctrine of sovereign immunity was applicable to the Corp’s responsibility on the levee breach.\textsuperscript{91}

The maxim “the King can do no wrong” is the foundation for the common law doctrine of sovereign immunity, which is the government’s privilege not to be sued without consent.\textsuperscript{92} The history of sovereign immunity includes pragmatic concerns of government efficiency and protecting government funds.\textsuperscript{93} Prior to 1946, citizens could only seek relief from the government by petitioning Congress.\textsuperscript{94} In 1946, Congress enacted the Federal Tort Claims Act (FTCA), which waived the federal government’s sovereign immunity.\textsuperscript{95} The FTCA authorizes private tort actions against the United States government “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the laws of the place where the act or omission occurred.”\textsuperscript{96} The FTCA is a broad waiver of sovereign immunity, but includes exceptions such as the discretionary function exception and the public duty doctrine.\textsuperscript{97}

The discretionary function exception involves decisions made on a planning level but not on an operational level.\textsuperscript{98} Under the FTCA, claims are specifically excluded where the government agent or employee’s actions involved policymaking, planning, or “discretionary” functions.\textsuperscript{99} This discretionary function exemption serves as a caveat that allows for the government to retain immunity in areas where a government official had discretion on whether to act. Historically, the exception has been deemed a necessary rule to enable the government to make basic policy decisions without the threat of liability.\textsuperscript{100} By bar-

\textsuperscript{91} Dyess, supra note 87.
\textsuperscript{92} Katie Schaefer, Reining in Sovereign Immunity to Compensate Hurricane Katrina Victims, 40 Ecology L.Q. 411, 413 (2013). See also St. Bernard Parish Gov’t v. United States, No. 05-1119 L, 2015 WL 2060296, at *6 (Fed. Cl. May 1, 2015) (finding government liability for takings through flooding has been based on deliberate government inaction, including responding to forty years of erosion that had the foreseeable effect of flooding the plaintiff’s land).
\textsuperscript{93} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Dan Dobbs et al., Torts and Compensation: Personal Accountability and Social Responsibility for Injury 464 (7th ed. 2013).
\textsuperscript{98} Id.
\textsuperscript{99} Nelson, supra note 94.
\textsuperscript{100} Id.
ring this exception, the courts would be congested with lawsuits further impeding government efficiency.\textsuperscript{101}

In \textit{United States v. Varig Airlines}, the Court explained that discretionary immunity “marks the boundary between Congress’ willingness to impose tort liability on the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.”\textsuperscript{102} Discretionary immunity is designed to “prevent judicial ‘second-guessing’ of legislative and administrative decisions . . . .”\textsuperscript{103} Federal courts initially determined immunity according to whether government decisions were made at the “planning level,” in which case immunity applies, or at the “operational level,” where immunity is not a privilege.\textsuperscript{104} The distinction between the operational and planning decisions changed when the Supreme Court held in \textit{United States v. Gaubert} that “[i]t is the nature of the conduct rather than the status of the actor that governs whether the [discretionary function] exception applies [in a given matter].”\textsuperscript{105}

The public duty doctrine also shields the government from tort liability.\textsuperscript{106} Under the public duty doctrine, a governmental entity is not liable in tort for breaching a duty that the government owes to the public generally.\textsuperscript{107} The public duty doctrine prevents suits by individuals who receive public services like other members of the general public.\textsuperscript{108} Consequently, actions classified as a public duty may not be the subject of private suits under the view that the government has no duty to provide public services to any particular citizen.\textsuperscript{109} Although these exceptions are not conjunctive, oftentimes they can both be applied to the same situation.\textsuperscript{110}

\textsuperscript{101.} Id.
\textsuperscript{102.} United States v. Varig Airlines, 467 U.S. 797 (1984). \textit{See also} St. Bernard Parish Gov’t, 2015 WL 2060296, at *6 (finding that, in 2004-2005 when the Corps had recognized that MRGO created a serious risk of flooding, it should have been addressed prior to Hurricane Katrina).
\textsuperscript{103.} Nelson, \textit{supra} note 94.
\textsuperscript{104.} \textit{DOBBS ET AL.}, \textit{supra} note 97, at 469.
\textsuperscript{106.} \textit{DOBBS ET AL.}, \textit{supra} note 97, at 469.
\textsuperscript{107.} Id.
\textsuperscript{109.} Id.
\textsuperscript{110.} Eleanor L. Grossman & Mary Ellen West, \textit{Exceptions to Waiver}, 28 FLA. JUR. 2D Gov’t Tort Liab. § 13 (2d ed. 2015); \textit{see also} Jeffrey A. Burns, \textit{Actions Against the Government and Its Employees}, in \textit{2A MO. PRAC., METHODS OR PRAC.: LITIG. GUIDE} § 29.15 (4th ed. 2013) (noting that if a special relationship exists between an individual and a governmental entity, there could be a duty of care owed to the individual, thereby creating an exception to
The Florida Legislature adopted and codified the doctrine of sovereign immunity,\(^{111}\) meaning that the State of Florida, including all subsidiaries and subdivisions, such as the Florida Department of Environmental Protection (FDEP) or the South Florida Water Management District, may not be sued without permission from the State Legislature.\(^{112}\) A state may waive immunity via a statute or constitutional amendment.\(^{113}\) Article X, Section 13 of the Florida Constitution states: “Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.”\(^{114}\) The Florida Legislature exercised its exclusive power to waive sovereign immunity approximately forty years ago via the adoption of Florida Statute Section 768.28, which was entitled “Waiver of Sovereign Immunity in Tort Actions; Recovery Limits; Limitations on Attorney Fees; Statute of Limitations.”\(^{115}\) Since its enactment, Florida’s waiver of sovereign immunity has been amended numerous times and judicial interpretation has been extremely varied.\(^{116}\) “Florida courts have held that any waiver of sovereign immunity must be clear and unambiguous.”\(^{117}\)

B. Planning Immunity Created by Florida Statute § 768.28

Similar to the scope of immunity contained in the FTCA, the Florida Supreme Court, in Commercial Carrier v. Indian River County, narrowed immunity on the state level.\(^{118}\) Policy decisions remained protected, but not ministerial decisions. “For example, a city’s decision concerning where to place a bus stop shelter is immune from suit.”\(^{119}\) If that shelter is not properly maintained and thereafter collapses and


\(^{114}\) FLA. CONST. art. X, § 13.

\(^{115}\) FLA. STAT. § 768.28 (2012); see also Larry A. Klein & Brad A. Chalker, Developments in Florida’s Doctrine of Sovereign Immunity, 35 U. MIAMI L. REV. 999, 1010 (1981).

\(^{116}\) William N. Drake, Jr., & Thomas A. Bustin, Governmental Tort Liability in Florida: A Tangled Web, 77-FEB FLA. B.J. 8, 8, 12 (2003).


\(^{118}\) Drake, Jr., August Body of Law, supra note 108.

\(^{119}\) DOBBS ET AL., supra note 97, at 469; see also Robert E. Heyman, Waiver of Sovereign Immunity in Florida: When the “King” Can Be Sued, HEYMAN LAW FIRM (Oct. 30, 2010),
causes injury, a claim is permitted. The Florida courts have created an exception to the waiver of sovereign immunity contained in Florida Statute Section 768.28, which provides that immunity for discretionary government functions has not been waived.

The development of the immunity standard has evolved from attempts to turn a precise, predictable definition into a flexible, if unpredictable, guideline. "Florida courts have struggled to find consistency in their application of the waiver, applying an implied exception for discretionary functions based on a nebulous four-part test, a ‘known dangerous condition’ factor, embracing the previously-rejected public duty doctrine before again rejecting it and employing a ‘foreseeable zone of risk’ factor." The variations in application of the immunity standard have been so significant that a Florida Supreme Court Justice noted that "the enigma is now shrouded in mystery."

C. Operational Immunity Created by Florida Statute § 373.443

When flooding occurs from governmental actions, the liability for negligence from the government’s operations is also waived. Separated from the negligence section of the Florida Statutes, there is a section of law focused on water resources, including water laws. This section of law was enacted by the state in 1972. In 1989, the law was modified to provide waiver of operational liability on stormwater systems. Two key cases highlight how this change in the law extended the shroud of sovereign immunity: Nanz and Barnes.


120. Id.
123. Dep’t of Transp. v. Neilson, 419 So. 2d 1071, 1079 (Fla. 1982) (Sundberg, J., dissenting) (“In a laudable effort to simplify the distinction between those acts of governmental agencies which still enjoy immunity and those which do not, it occurs to me that the majority has simply exchanged one set of result descriptive labels for another. Hence, the irreconcilable results among the several district courts of appeal are not harmonized, but rather the confusion is compounded. The enigma is now shrouded in mystery.”).
124. FLA. STAT. § 768 (2014).
125. FLA. STAT. § 373.443 (2014).
126. Tatiana Borisova & Roy R. Carriker, Public Policy and Water in Florida 2 (2015), available at http://edis.ifas.ufl.edu/pdffiles/FE/FE79900.pdf (noting that, prior to 1972, Florida's water law was based on common law doctrines that had evolved through custom and case law in the eastern United States beginning in colonial times).
In *Sw. Florida Water Mgmt. Dist. v. Nanz*, the plaintiff Nanz sued Southwest Florida Water Management District (the District) based on the District’s alleged failure to manage stormwater drainage following rainfalls in the autumn of 1988. In 1994, the *Nanz* court held that the District, having assumed control of this drainage system and undertaken to operate and maintain [it], . . . had a duty and obligation to prudently operate, control, maintain, and manage [the] system so that it would work properly and drain off excess waters so as not to cause flooding in the area.

“The Defendants’ duty of care was breached through the negligent . . . acts . . . of the Defendants including, but not limited to . . . [failing] to properly dredge, clean, and otherwise operate, control, and/or maintain the drainage system.” During the same period that *Nanz* was decided, the Florida Supreme Court certified the following determination as part of the *Slemp* case: “[A] city [can] be held liable for flooding damages that result from the allegedly negligent maintenance of a storm sewer pump system it constructed.” Government entities are not immune from liability for their torts arising from operational functions. Tort principles will apply if government entities are not entitled to immunity.

In 1989, one year after the *Nanz* holding, Florida Statute Section 373.443 was broadened to include stormwater management systems within its scope. When the statute was originally enacted in 1972, it applied only to dams, impoundment reservoirs, and appurtenant work or works. In the amended version, the statute immunizes the state, the district, and their agents and employees from liability based on the partial or total failure of any stormwater management system by virtue of the performance of four designated activities, including the control or regulation of the system.

This change in the law was not challenged until *Barnes v. District Board of Trustees of St. Johns River State College*. This case involved homeowners seeking recovery from the government for damages to their property from water that had overflowed from a retention

129. *Id.* at 1086.
130. *Nanz*, 642 So. 2d at 1086.
131. *Slemp*, 545 So. 2d at 257.
132. *Id.*
133. *Id.* at 258.
134. *Barnes*, 147 So. 3d at 105.
135. *Id.* at 107.
pond that was part of the District’s stormwater management system. The *Barnes* court held that Florida Statute Section 373.443 extended immunity to the operational level negligence claims that would otherwise be actionable under Florida Statute Section 768.28. While the sovereign immunity statute in Section 768.28 did not immunize the District from the plaintiffs’ claims of operational negligence, the *Barnes* court concluded that Section 373.443 confers broader immunity than Section 768.28 and applies to operational negligence. The court also held that liability could not be predicated on the failure to warn or protect the public from a known dangerous condition because the record did not contain any evidence that the District “knew prior to the extraordinary rain event . . . [that resulted in the damage to the plaintiffs’ property] that its stormwater management system was other than one that was designed to handle all but the most extreme rainfalls.”

The Florida Supreme Court has not yet reviewed this interpretation of broader immunity by the district court. Therefore, the relatively recent modification in the law has yet to be fully vetted by the courts. The question of operational immunity is likely to be further tested in the future, especially when impacts of climate change result in increased flooding due to the failure of stormwater management systems.

**D. Impact of Public Duty on Sovereign Immunity**

When evaluating the public duty doctrine, the Florida Supreme Court identified the following four categories of governmental functions to be considered: (1) legislative, permitting, licensing, and executive officer functions; (2) enforcement of laws and the protection of public safety; (3) capital improvements and property control operations; and (4) providing professional, educational, and general services for the health and welfare of the citizens. The *Trianon* case in 1985 was a negligence action by a condominium association against a municipality for faulty building inspection. The plaintiff contended that

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136. *Id.* at 103.
137. *Id.* at 105.
138. *Id.* at 109.
139. *Id.* at 107.
140. *Barnes*, 147 So. 3d at 109.
141. Wilkins, *supra* note 122, at 454.
143. *Id.* at 914 (noting that owners of condominiums sustained damages caused by severe roof leakage and other building defects allegedly arising out of negligent actions of city
the government had a common law duty of care to enforce the building regulations when the city inspected the building.\textsuperscript{144} In \textit{Trianon}, the court stated that there is no common law duty for the functions in categories one and two; however, regarding categories three and four, there exists a common law duty of care.\textsuperscript{145} Therefore, in order to evaluate if sovereign immunity applies, the latter functions are to be analyzed by the court to determine whether they are planning or operational functions.\textsuperscript{146}

With respect to capital improvements and property control operations described in the third category, the court held that “once a governmental entity builds or takes control of property or an improvement, it has the same common law duty as a private person to properly maintain and operate the property,”\textsuperscript{147} even though the “decision not to build or modernize a particular improvement [in the first instance] is a discretionary judgmental function with which [courts] . . . cannot interfere.”\textsuperscript{148} The \textit{Trianon} court also found a common law duty of care under the fourth category regarding the provision of professional, educational, and general services for the health and welfare of citizens.\textsuperscript{149} Following the court’s application, an example of how the fourth category would apply to stormwater drainage is in the number of engineers hired in a stormwater drainage management department. This is a planning decision that is a discretionary choice by the government and is therefore immune from tort liability. However, if the engineer is incompetent in accordance with the State’s professional criteria and commits malpractice, then there is a common law duty and the government may be liable.\textsuperscript{150}

The analysis of the public duty doctrine provided in \textit{Trianon} significantly expands immunity established by \textit{Commercial Carrier}, which held that the public duty doctrine was akin to the planning function of government.\textsuperscript{151} The \textit{Trianon} court did not unanimously embrace

\begin{itemize}
\item \textsuperscript{144} \textit{Id.} at 921.
\item \textsuperscript{145} \textit{Id. But see} Carter v. City of Stuart, 468 So. 2d 955, 958 (Fla. 1985) (Shaw, J., dissenting) (stating that the court called \textit{Trianon} into doubt noting the intent to clarify common law since \textit{Trianon} should not establish a “bright line”).
\item \textsuperscript{147} \textit{Trianon}, 468 So. 2d at 921.
\item \textsuperscript{148} \textit{Id.} at 920.
\item \textsuperscript{149} \textit{Id.} at 921.
\item \textsuperscript{150} \textit{Trianon}, 468 So. 2d at 921.
\item \textsuperscript{151} Wetherington & Pollock, \textit{supra} note 112, at 37-38.
\end{itemize}
this expansion of immunity. For instance, one of the dissenting opinions criticized the Trianon majority’s commingling of immunity and the public duty doctrine.\(^{152}\) Under Trianon, the public duty doctrine was applied to operational functions as well as planning functions.\(^{153}\) The court in Trianon held that it was a discretionary choice of the government to build, expand, modernize, or improve and upgrade capital improvements such as stormwater drainage systems and that the lack of said improvements did not impose tort liability.\(^{154}\)

\section*{E. The Duty to Warn or Avert Dangerous Conditions}

Although the Trianon decision substantially narrowed the scope of a local government’s potential liability,\(^{155}\) there is an exception regarding decisions not to build, expand, modernize or improve stormwater facilities.\(^{156}\) “This exception provides that once a governmental entity creates a known dangerous condition that may not be readily apparent to those who could be injured by the condition, then the government must take steps to correct the dangerous condition or warn those who may be injured by it.”\(^{157}\) The known dangerous condition exception can be established on the following elements: “(1) the government created a dangerous condition, (2) the condition was not readily apparent to the injured party, (3) the government had knowledge of the dangerous condition, and (4) the government failed to take steps to warn the public of the danger or to avert the danger.”\(^{158}\) “In fixing the bounds of duty, not only logic and science but also policy plays an important role.”\(^{159}\) However, it is possible to create a duty that is not financially feasible.\(^{160}\) “Thus, the courts have generally recognized that public policy and social considerations, as well as

\begin{itemize}
\item \textsuperscript{152} Drake, Jr., & Bustin, \textit{supra} note 116, at 12. \\
\item \textsuperscript{153} Id.; see also Slemp, 545 So. 2d at 256 (holding that a city that undertook to install a storm drain and pump had a duty to maintain the system). \\
\item \textsuperscript{154} Thomas A. Sawaya, \textit{Capital Improvements and Property Control Functions}, 6 FLA. PRAC., PERS. INJ. & WRONGFUL DEATH ACTIONS § 9:9 (2014) (citing Trianon, 468 So. 2d at 912). \\
\item \textsuperscript{155} Wolf, \textit{supra} note 146, at 625. \\
\item \textsuperscript{156} Sawaya, \textit{supra} note 154. \\
\item \textsuperscript{157} Id. \\
\item \textsuperscript{158} Henry P. Trawick, Jr., \textit{Modification of Planning Versus Operational Approach}, 4 FLA. PL. & PR. FORMS § 37:3 (2015). \\
\item \textsuperscript{159} William N. Drake, Jr., \textit{Foresseeable Zone of Risk: Confusing Foresseeability with Duty in Florida Negligence Law}, 78-APR F LA. B.J. 10, 10 (2004). \\
\item \textsuperscript{160} Id.
\end{itemize}
foreseeability, are important factors in determining whether a duty will be held to exist in a particular situation.161

IV. PROPOSED CHANGES TO FLORIDA’S SOVEREIGN IMMUNITY LAWS RELATED TO STORMWATER DRAINAGE

Florida’s drainage regulations do not account for climate change impacts and the sovereign immunity laws discourage the proactive changes needed to Florida’s drainage systems. If these changes do not occur, then there will likely be increased flooding problems. The responsibility to proactively plan and implement better drainage regulations falls on the State of Florida; however, the sovereign immunity laws are so broad that inaction by the State is acceptable. Governmental immunity law in Florida has become so muddled that courts have difficulty in consistently applying immunity analyses and distinguishing the public duty doctrine.162 While the impacts of climate change are being modeled far in advance, the courts do not have a clear path of legal precedent to assess the liability associated with the adverse impacts attributable to climate change. As a result, as climate change occurs over time, the actual harm caused could be attributed to the failed duty of Florida governmental entities. Therefore, amendments to the applicable law and rules should occur so that the current stormwater drainage regulations require climate change adaptation targeted changes such as upgrades, modifications and retrofitting to our drainage systems. These changes could be implemented incrementally so that both the public and private sectors can more readily absorb cost impacts for the changes.

A. Planning Immunity Does Not Constitute a Waiver of the Public Duty to Plan

The public duty doctrine is not a privilege of immunity or a waiver to take action.163 It is an affirmative defense to a tort claim because a public duty is defined as the absence of a duty to a specific individual.164 Therefore, a prima facie case for a negligence claim will fail for the lack of the element of duty.165 The doctrine of a public duty

161. Id.
162. Drake, Jr., & Bustin, supra note 116.
165. Id.
is worthless if it is considered to be an extension of the sovereign immunity created by Florida Statute Section 768.28. The Trianon court was divided. One of the dissenting opinions criticized the Trianon majority’s commingling of discretionary-function immunity and the public duty doctrine. Without clarification and direction from governmental leadership in Florida, the failure to plan for climate change could simply be dismissed since there is no potential liability for the failure to properly perform a public duty.

Inaction by Florida government to plan for climate change and take any type of responsibility for adaptation efforts has been repeatedly noted in the media. Recently, news reports detailed that the FDEP has been prohibited or discouraged from using the term “climate change.” Part of the agency’s responsibility is to study climate change. A former attorney with the FDEP said, “It’s an indication that the political leadership in the state of Florida is not willing to address these issues and face the music when it comes to the challenges that climate change presents.”

Responding to the claims, Governor Scott said that he has not been convinced that climate change is occurring and needs better scientific evidence. Additionally, Governor Scott was elected on a campaign pledge saying he wanted to run government like a business and believes that there is too much government regulation, and he expressed a desire to eliminate some of those regulations. This is a significant change from the prior administration’s leadership that had formed a commission on climate change. This climate change commission had been working for about one year when Governor Scott took office and disbanded the commission. If officials cannot use the terms climate change or global warming, then it is impossible to plan for them. When asked, Lisa Kelly, Assistant Director of the Central

166. Drake, Jr., & Bustin, supra note 116, at 12.
167. Id.
171. Korten, supra note 169.
172. Allen, supra note 170.
173. Id.
District office of the FDEP, said that she has never needed to use the term because the topic simply never comes up in her job.\footnote{Interview with Lisa Kelly, Assistant Director of Central District Office FDEP, in Orlando, Fla. (Apr. 7, 2015).}

1. Foreseeability of Drainage Failures Due to Climate Change Should Be Attributable to Governmental Negligence

Originally, downstream property owners and governments absorbed flooding damages.\footnote{\textsc{Livingston} \& \textsc{McCarron}, supra note 2, at 61.} However, the evolution of common law recognized that the responsibility and cost for correcting problems rests with the person who created the problem, or with the government that permitted the development without appropriate stormwater management.\footnote{\textit{Id.}} 

\textit{“Since the implementation of Florida’s Stormwater Rule, many thousands of on-site stormwater management systems have been constructed to serve new development, redevelopment, or roadway projects.”}\footnote{\textsc{Edwin Herricks}, \textsc{Stormwater Runoff and Receiving Systems} 342 (1995).} Through proper planning, it is much simpler and inexpensive to prevent stormwater problems, as opposed to spending time and money on restoration and building projects.\footnote{\textsc{Livingston} \& \textsc{McCarron}, supra note 2, at 5.}

In the liability case, where the Army Corps of Engineers faced suit for negligence based on their failure to armor the banks of the Mississippi River Gulf Outlet prior to Hurricane Katrina, part of the claim was that scientific data was available that the arming was needed.\footnote{\textit{In re Katrina Canal Breaches Litig.}, 696 F.3d 436, 452 (5th Cir. 2012).} As climate change forecasting continues to predict that the amount of rainfall will increase, it is reasonably foreseeable that there will be an increase in flooding. Advancements in our forecasting will continue to make the danger more foreseeable.\footnote{Wilkins, supra note 122, at 497.}

\textsc{Stormwater Management: A Guide for Floridians}, the need for modification and adaptation was described as follows:

One of the major stormwater management problems facing Florida is how to modify old drainage systems that were built solely for flood protection. These systems had one purpose: to convey stormwater away from improved properties as quickly as possible. There was little regard for any environmental effects. It is extremely difficult, and expensive, to correct problems caused by old systems. The solution will take years. Innovative technology, and close coordination with planned infrastructure improvements and
urban re-development will be required to solve our stormwater problems.181

In March of 2012, the lower court’s decision in In re Katrina Canal Breaches Litigation gave hope to property owners to argue against sovereign immunity.182 As part of the decision, the court found that the Corps was liable since there was data available to foresee the danger.183 Unfortunately, a year later, the decision was overturned.184 The law in Florida is similar. Courts’ decisions over time have narrowly interpreted the waiver of immunity established in Florida Statute Section 768.28, and standards to determine exceptions are unclear and difficult to apply to new claims.185 Revisions to the Florida laws on the waiver of sovereign immunity should be clarified so that liability can be assessed when the foreseeability of danger and the duty to act are clearly apparent. While it may be debated that this is a loose standard and that the current Governor does not recognize any type of climate change at this point in time, the courts will rely on more than just the Governor’s opinion. The court will use the reasonable person standard for elevations of foreseeability of harm.

2. Duty to Warn or Protect Applies to Climate Change Adaptation Efforts

Despite the general applicability of sovereign immunity to planning-level decisions, liability of a governmental entity may arise from a planning-level decision when that decision creates a dangerous condition.186 A government entity may be held liable if it fails to provide a warning pertaining to a known dangerous condition.187 When such a condition is knowingly created by a governmental entity, it reasonably follows that the governmental entity has the responsibility to protect the public from that condition, and the failure to protect cannot be dismissed by the shield of sovereign immunity.188 In Escambia County v.

181. LIVINGSTON & McCARRON, supra note 2, at 21.
183. Id.
184. Id.
185. Sawaya, supra note 154.
186. Payne v. Broward Cnty., 461 So. 2d 63 (Fla. 1984) (holding that: (1) county had no duty to warn of intersection upon opening road absent hidden danger or trap, and (2) county had no duty to warn of intersection until planned traffic control light was installed absent hidden danger or trap).
187. Drake, Jr., & Bustin, supra note 116, at 10.
188. Grossman, supra note 110.
Stichweh, for instance, the court held that the county had actual or constructive notice of the defective condition of a stop sign at an intersection. 189

The duty to plan for climate change can be interpreted by the courts as a failure to warn of a known dangerous condition. Scientific projections, which have been disseminated to the Florida government, indicate that thirty percent of the state’s coast, including Miami, the fourth largest urban region in the United States, is projected to be underwater by 2100 due to the impacts of climate change. 190 As scientific knowledge of global climate change increases and its impacts are experienced in Florida, there is a clear need for a broader approach to governmental adaptation efforts.

In Collom, the plaintiff sought to recover damages from the City of St. Petersburg for the death of his wife and daughter, who were swept into a storm sewer and drowned. 191 The city had designed, installed, and maintained the drainage system. 192 “When a governmental entity creates a known dangerous condition, which is not readily apparent to persons who could be injured by the condition, a duty at the operational-level arises to warn the public of, or protect the public from, the known danger.” 193 The Florida Supreme Court in Collom held that “courts can require: (1) the necessary warning or correction of a known dangerous condition; (2) the necessary and proper maintenance of existing improvements, as explained and illustrated in Commercial Carrier v. Indian River, and (3) the proper construction or installation and design of the improvement plan . . . .” 194 The 1982 holding in Collum defining a duty to warn or protect the public was applied to the stormwater drainage failure in Barnes. In Barnes, the plaintiff claimed that the District’s stormwater drainage system was deficiently designed to the point where it created dangerous conditions to which a duty was automatically imposed on the District to warn or protect the public. 195

191. City of St. Petersburg v. Collom, 419 So. 2d 1082, 1084 (Fla. 1982).
192. Id.
193. Id.
195. Barnes, 147 So. 3d at 109.
To date, the known dangerous condition standard has not been applied to any climate change related matters. A brief analysis of the elements required to determine whether Florida has created a known dangerous condition by not improving stormwater drainage infrastructure to adapt to climate change demonstrates that an argument can be made that Florida may be found liable. For the first element—the government has created a dangerous condition—the defense is that climate change is a global issue and not one created “locally” by Florida. However, the court could interpret Florida’s lack of response to climate change, in particular a lack of adaptation on stormwater infrastructure, as evidence of the government creating a dangerous condition. The second element—the dangerous condition is not readily apparent—is easily demonstrated since climate change impacts are not, at least at this point in time, readily observable. Readily observable has been the standard that courts have applied in interpreting this element to date.\textsuperscript{196} The Florida government’s knowledge of the dangerous condition, which is the third element, can be established by the numerous reports by various governmental agencies.\textsuperscript{197} Knowledge may also be demonstrated by the absurd stance of avoiding using the term “climate change” by Governor Scott’s administration.\textsuperscript{198} In doing so, and by responding that he is not convinced that climate change has been scientifically proven, an individual can show that Governor Scott had actual and constructive notice of the dangerous condition. Lastly, the lack of action to make changes in either the existing infrastructure or by modifying current stormwater drainage regulations can easily satisfy the fourth element.

Concern regarding lack of funding for major modifications to the State’s drainage infrastructure is the explanation as to why the state has not responded to date.\textsuperscript{199} If the sea rises eight inches, approximately eighteen flood control gates in the C&SF Project would have to be rebuilt with a new pumping system at a cost of an estimated seventy million dollars per pumping station.\textsuperscript{200} The solution for the

\textsuperscript{196} Collom, 419 So. 2d at 1083 (holding that when a governmental entity creates a known dangerous condition that is not readily observable to those who may be injured by such condition, a duty arises at the operational level to warn of or protect the public from the known danger and the failure to fulfill this duty will give rise to a cause of action).

\textsuperscript{197} For example, in Escambia County v. Stichweh, the court held that the county had actual or constructive notice of the defective condition of a stop sign at an intersection. 536 So. 2d 1058 (Fla. Dist. Ct. App. 1988).

\textsuperscript{198} Id.


\textsuperscript{200} Id.
government of Florida to avoid liability associated with the dangerous condition doctrine could be simple. The state could take measures such as a modification of the current stormwater drainage regulations regarding the design parameters for drainage to include a warning or advisement regarding the likely increases in the amount of rainfall anticipated.

B. Even If Sovereign Immunity Applies, Floridians Should Be Able to Rely on the State to Act

The conviction that motivated both the state and federal governments in 1947 to build a drainage system to take care of the citizens of the State should be repeated now. The 1947 C&SF Project was, at the time, the largest civil works project in the nation.201 During this time of need for government action, the decision to act and build the C&SF Project was not ignored because of planning authority discretion or dismissed by sovereign immunity. The State, assisted by the federal government, proactively planned, designed, and constructed the infrastructure improvements needed at the time to deal with drainage. In many respects, there is again a foreseeable need and duty for the government to act—this time to prepare for climate change as it relates to stormwater drainage.

In November 1947, Jeanne Bellamy, a writer for the Miami Herald, wrote a series of articles about water problems in Florida; the series included descriptions of the flood of 1947, the existing problems, and the solutions for drainage improvements.202 The following passage reflects parallels to the challenges that climate change and stormwater drainage present today.203

The great flood of 1947 may become a turning point in the history of South Florida. Fixing blame for the flood is easy... Experience of the past 50 years has proved that drainage alone does as much harm as good. Unchecked drainage has... [b]rought a summer of flood in the Everglades. Every winter may bring drought. Some years, or series of years, bring too much rain, others too little. So formula has been found for predicting when these long range floods or droughts will come.204

203. Id.
204. Id.
As stated by Bellamy, “[f]ixing blame for the flood is easy” and in response, the government acted as needed in 1947. Given that the state has been the source for regulation of our stormwater drainage system in Florida for the past fifty years, the state should take responsibility for adjustments needed at this point in time to plan for climate change impacts. Even if sovereign immunity waives liability for the actions of the state, Floridians should be able to rely on the state to act.

C. Operational Immunity Conflicts with the Ethical and Professional Duty to Respond

In Barnes, there was a claim of operational negligence by the Southwest Florida Water Management District. The operational aspect of the claim was not disputed by virtue of the District’s control and regulation of the system. The court in Barnes noted, however, that Florida Statute Section 373.443 cannot be read “to grant absolute immunity from all forms of negligence.” “[A] strong argument exists that § 373.443 ‘was enacted specifically to avoid the operational versus planning distinction’ under § 768.28 ‘otherwise there would be no reason to enact’ the former.”

Stormwater drainage is an important social good with respect to flood protection and pollution control. By allowing immunity from liability claims against governments, a disincentive result could occur and governments could be less inclined to develop stormwater drainage. As noted in Barnes, negligence occurs not only from initial flawed design and construction, but also from failing to adapt and “operate in a responsible way.”

As noted in the NSPE Code of Ethics for Engineers, “Engineering has a direct and vital impact on the quality of life for all people. Accordingly, the services provided by engineers require honesty, impartiality, fairness, and equity, and must be dedicated to the protection of the public health, safety, and welfare.” Therefore, even though Florida has adopted a specific exception to the waiver of sovereign immunity for the operation of stormwater drainage facilities, there is an

205. Id.
206. Barnes, 147 So. 3d at 104-05.
207. Id.
208. Id.
209. Id.
210. Schaefer, supra note 92, at 430.
211. Barnes, 147 So. 3d at 104.
ethical and professional duty for engineers to ensure safety in the design of the facilities. This professional and ethical duty directly applies to stormwater drainage facilities since a licensed engineer must conduct stormwater drainage design in order to be permitted by the regulatory agencies of Florida.\textsuperscript{213}

**CONCLUSION**

Change is inevitable and necessary, and often requires investment in improvements and modification of our laws. Change is the benchmark of evolution and lack of change can result in inertia. “[T]here are problems associated with inertia, which implies that the legal regime does not keep up with demands. A variety of factors, including new information, new technology, new circumstances, and new social mores may call for changes in regulation.”\textsuperscript{214}

The important legislative changes and judicial interpretations of the last several years have significantly affected the doctrine of sovereign immunity in Florida.\textsuperscript{215} Although Florida’s courts continue to explore new theories and establish new guidelines regarding the statutory waiver of immunity, the new challenges presented by climate change require legislative and judicial attention. To ensure that Florida can proactively protect and warn its citizens about the upcoming climate change impacts, further statutory amendments or further interpretation by the courts must occur in a timely manner.\textsuperscript{216} Without governmental leadership in Florida addressing the legal responsibility for drainage systems improvements needed in light of climate change, the failure to plan for climate change could simply be dismissed as no potential liability for the failure to properly perform a public duty. Like the events demanding government action, both in the legislature and infrastructure, that occurred in the 1940s after wide-spread flooding, a similar situation is presented in which Floridians need governmental assistance to develop a flood protection plan to help them cope with the impacts of the state’s weather extremes. Not only do we need the scientific and engineering guidance of climate change adaptation options such as the redesign and improvement of existing storm drainage canals, flood control structures, and stormwater pumps, but we also need the legal responsibility for these changes to be addressed. Inertia regarding the public duty has set in and thwarts changes needed in

\textsuperscript{213} Livingston & McCarron, supra note 2, at 30.
\textsuperscript{214} Holly Doremus, Takings and Transitions, 19 J. Land Use & Envtl. L. 1, 18 (2003).
\textsuperscript{215} Klein, supra note 115.
\textsuperscript{216} Id.
stormwater drainage regulations and infrastructure based on climate change impacts. These impacts are recognized and known in the state and create a dangerous condition. Even if sovereign immunity is determined by the courts to exempt liability on a public duty, citizens should be afforded governmental accountability.
“TAKE BACK THE BEACH!”
AN ANALYSIS OF THE NEED FOR
ENFORCEMENT OF BEACH ACCESS
RIGHTS FOR U.S.
VIRGIN ISLANDERS

Aliya T. Felix

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INTRODUCTION

The U.S. Virgin Islands:¹ I call it home; you call it “America’s
Paradise.” One of the trademarks of the U.S. Virgin Islands is its beau-

¹ J.D., Florida A&M University College of Law, 2015.
1. Fearing a German seizure that would have given U-boats a base in the Caribbean
during World War I, the U.S. purchased the then “Danish Virgins” for $25,000,000 in gold
coins and renamed them the Virgin Islands of the United States. See Purchase of the United
tiful beaches. One of the luxuries of being born and raised in the beautiful U.S. Virgin Islands is having access to some of the world’s most beautiful beaches every single day. Imagine being able to go to a place where the sand is white, soft, and just caresses your feet, while the trees shade you as you lounge. The crystal sparkling water is pristine and marine life is visible as you bathe. Thousands flock each year to feel gentle breezes and experience the sandy shores of this tropical paradise.²

These are the attributes that draw throngs of tourists each year and what locals cherish and appreciate.³ “There is probably no custom more universal, more natural or more ancient . . . than that of bathing in the salt waters of the ocean,” and enjoying the warm sands.⁴ For years, tourists, together with the people of the U.S. Virgin Islands, have enjoyed this splendor each year, all year long. As a little girl, and now as an adult, one of the most popular past times I cherish is enjoying the beach. As a native Virgin Islander, I realize and treasure the role that our beaches play in our lives and would love to see my children and their children come to feel that same love as they grow. Our islands are really special; they are our pride and joy.

Unfortunately, the ability to enjoy the beaches faces complications from private landowners⁵ who have blocked or restricted beach access.⁶ In the U.S. Virgin Islands, beaches have been transformed from fishing boat landings and morning and evening bathing sites to exclusive retreats for condominium owners and hotel guests.⁷ Being somebody else’s playground changed the Caribbean’s fishermen into beach boys and its farmers into waiters.⁸ As the coastlines were built

John, St. Croix, and Water Island. It also consists of about one hundred small isles and inlets. HAROLD W.L. WILLOCKS, GEOGRAPHY OF THE VIRGIN ISLANDS OF THE UNITED STATES 54 (2005) [hereinafter WILLOCKS, GEOGRAPHY].

² Telephone Interview with Harold W.L. Willocks, Historian/Author, THE UMBILICAL CORD: THE HISTORY OF THE UNITED STATES VIRGIN ISLANDS FROM PRE-COLUMBIAN ERA TO THE PRESENT (Feb. 8, 2014) [hereinafter Willocks Interview].
³ Id.
⁴ City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 75 (Fla. 1974).
⁵ Private “littoral” owners restrict public use of the upland or dry-sand area. Recreation depends on this part of the beach. Without it, the public is only left with wet-sand. Steve A. McKeon, Note, Public Access to Beaches, 22 STAN. L. REV. 564, 565-66 (1970). “Historically, these rights were called littoral rights if the land abutted the seashore, and riparian rights if the land abutted rivers and coastal waters. Today, the distinction is disappearing and being replaced with the generic term ‘riparian.’” ALISON RIESER ET AL., OCEAN AND COASTAL LAW 126 (2013).
⁶ Issues regarding the “seaward access” to the beaches and shorelines are beyond the scope of this paper.
⁷ Willocks Interview, supra note 2.
⁸ Id.
up and became more crowded, more and more beaches were being closed off. This closing off of beaches to the general public led to a national beach access movement, which tried to protect and expand the public’s ability to gain physical access to the shoreline.

Defense of the public’s access to the beaches is protected and expanded by the public trust doctrine, which embodies the principle that certain natural and cultural resources are preserved for public use, and that the government owns and is required to protect and maintain these resources for the public’s reasonable use. It has its genesis in the ancient laws of the Roman Emperor Justinian of Constantinople (527 A.D. - 565 A.D.), later became English law under the Magna Carta (1215 A.D.), and subsequently became a settled part of the common law of the United States, as evidenced in the case of Illinois Central Railroad Company v. Illinois. In that case, the Court held that the common law public trust doctrine prevented the government from alienating the public right to the lands under navigable waters, with the exception of very small portions of land that have no affect on free access or navigation. The doctrine applies to navigable waters and waters influenced by tides, as well as to the natural resources existing on the land and water of public trust property. While laws upholding the public trust doctrine vary among jurisdictions within the United States, they generally limit the rights of waterfront

9. Id.
10. Harold W.L. Willocks, The Umbilical Cord: The History of the United States Virgin Islands From Pre-Columbian Era to the Present 385-86 (1995) [hereinafter Willocks, The Umbilical Cord]. “The free beach movement in the Virgin Islands began in 1971 on St. Thomas. The Citizens’ Committee for Beaches for All obtained 2,500 signatures on a petition to the Governor and the Legislature to make all sandy beaches and the entire shoreline the property of all the people of the Virgin Islands. They held protests, marches, and swim-ins on closed beaches. As a result of demonstrations by these groups and others and a public demand for unrestrained access to all beaches, the Legislature passed the Open Shorelines Act.” Id.
11. Willocks Interview, supra note 2.
13. Id.
14. Id. at 475-76.
15. The history of the public trust doctrine in America is recounted at length in Shively v. Bowlby, 152 U.S. 1 (1894).
17. Id.
18. Id.
private property owners and allow for the public’s right to recreational use and navigation thereon.\textsuperscript{19}

The U.S. Virgin Islands upholds the principles of the public trust doctrine through the Open Shorelines Act.\textsuperscript{20} This law specifically prohibits inhibiting access to what is defined in the act as the shoreline.\textsuperscript{21} However, hotels and condominiums are placing a high burden on the people of the U.S. Virgin Islands to access beaches so that they can preserve exclusivity to their guests and residents.\textsuperscript{22} They are getting craftier and, in some cases, they are finding indirect ways of limiting access and are getting away with it in many of those cases. Some people do not know any better and do not fight for the right of access to be preserved, others who know better are not upholding the laws, and those who are ready to fight feel as though they do not have the power to make a difference because those who can make a change sit back and allow the injustice to occur.\textsuperscript{23}

Part I of this paper defines the traditional use of the beaches in the U.S. Virgin Islands and includes a personal anecdote as evidence of a trend toward restricting beach access in the U.S. Virgin Islands. Part II provides a legal framework of public beach access rights through an analysis of the general public trust doctrine, the U.S. Virgin Islands Open Shorelines Act, and the U.S. Virgin Islands’ case law. Part III examines case studies involving private entities blocking beach access to the public in the U.S. Virgin Islands. Part IV offers a proposal for reform to ensure protection of the public’s right of access to the beautiful beaches of the U.S. Virgin Islands. The reform first proposes clarification of the laws and their enforcement through Coastal Zone Management (CZM),\textsuperscript{24} and assessment of penalties for violations of those laws. Utilizing uplands in various forms is a second avenue that this paper proposes the government take in ensuring that the people’s rights are preserved. By regulating the uplands contiguous to the shorelines, the government can also ensure the people’s access to, and utilization of, the beaches through tax exemption and other investment incentive programs, which contractually obligate the upland beneficiaries to provide, preserve, and defend the people’s rights.\textsuperscript{25} It is time

\textsuperscript{19} Id.
\textsuperscript{20} V.I. CODE ANN. tit. 12 §§ 401-404 (2012).
\textsuperscript{21} § 402.
\textsuperscript{22} Telephone Interview with Camara M. Merchant, Public Relations Coordinator, Ritz Carlton St. Thomas (Feb. 8, 2014).
\textsuperscript{23} Telephone Interview with Verne Hodge, Chief Judge Emeritus (retired), V.I. Superior Court (Feb. 12, 2014).
\textsuperscript{24} V.I. CODE ANN. tit. 12 § 903 (2012).
\textsuperscript{25} V.I. CODE ANN. tit. 29 § 708(i) (2012).
to take back our beaches for the people of the U.S. Virgin Islands and future generations.

I. TRADITIONAL USE OF BEACHES IN THE U.S. VIRGIN ISLANDS

“The sea has long dominated the history of the U.S. Virgin Islands” and served as a gateway for each of the seven flags that have reigned over these islands. The shoreline, where the sea meets the land, is the threshold to the sea. Since the U.S. Virgin Islands is made up of islands and cays, all of which are surrounded by water, each island or cay has shorelines. All residents and visitors have, in the past, used the shorelines of the U.S. Virgin Islands freely. It is a longstanding tradition in the U.S. Virgin Islands that the beaches are used for access to the sea. As early as 2000 B.C., there is evidence of dependency on the shore by the people who inhabited these islands. Beaches are a vital part of the U.S. Virgin Islands, providing the people with aesthetic beauty, economics, meditation, recreation, a natural resource, and a cultural custom. They also provide a buffer against high winds and waves during storms or turbulent seas. To fishermen, the sea and its shores are a way of life. As one of the territory’s biggest economic generators, tourism is critically important to the U.S. Virgin Islands. Tourists flock to the U.S. Virgin Islands in droves each year. Some of the most popular tourist attractions are the white sands and crystal clear, blue beaches. The second half of the twentieth century has brought adverse changes to the U.S. Virgin Islands’ shorelines. There has been uncontrolled and uncoordinated develop-

26. § 401.
27. The U.S. Virgin Islands has been owned in part by England, Spain, France, Knights of Malta, Holland, Denmark, and now the U.S. Willocks, THE UMBILICAL CORD, supra note 10, at 3.
29. Willocks, GEOGRAPHY, supra note 1.
30. Id.
31. Willocks Interview, supra note 2.
32. Id.
34. Willocks Interview, supra note 2.
35. Id.
36. Id.
37. Id.
38. Id.
39. Id.
memt of this area, together with attempts, some successful, to curtail the use of these areas by the public. 41

With this economic development of the shorelines, obstructions to the public’s access and use of the beaches has become more and more objectionable as upland owners and businessmen attempt to maximize their profits by excluding “free beach locals” to give privacy to their paying tourists. 42 This compelled the U.S. Virgin Islands’ Legislature to enact the “declaration for policy” in its Open Shorelines Act in 1971 and create an “Open Beaches Committee.” 43

Growing up in the U.S. Virgin Islands, Vessup Beach is a beautiful beach on St. Thomas that I frequented as a little girl. During the summer of 2013, I visited home. My daughter’s second birthday was fast approaching and I decided to throw her a beach party there. I was a little apprehensive because I heard of a hotel blocking access to that beach. I discovered that access to that particular beach, as I knew it, no longer existed. The hotel’s poolside and lots of shrubbery blocked access to the beach. I decided to try to gain access and walked through the private entity’s property; however, I was stopped and told that access was only granted to guests of the hotel and that since I was not a guest, I was trespassing and had to leave the premises. I was shocked, but I left peacefully. I knew in my heart that it was wrong for a hotel to deny me access to a beach, especially one frequented by the public for so long, but I left and did nothing. Little did I know, I actually had a legal right to take action.

II. Legal Framework of Public Rights of Access

The land located above the mean high-tide line, or dry sand, is often privately owned. 44 A state generally holds legal title to the land seaward of the mean high-tide line in trust for the public. 45 As a result of this “trust”, the public has a right to use these lands and waters, subject to reasonable limitations. 46 Historically, this doctrine traces back to Roman and English common law, with the principle being that the sea belongs to no one, and that use is common to all. 47 Not surprisingly though, the extent of the public’s rights of access to the intertidal

41. Id.
42. Hodge, supra note 23.
43. V.I. Code Ann. tit. 12 § 401 (2012). This act will be discussed further in Part II.A.
44. Rieser et al., supra note 5, at 125.
45. Id.
46. Id.
47. Id. at 127.
zone has been the subject of litigation in many states, producing diverse results.\textsuperscript{48} The scope of the public's right to use this specific land also varies significantly among the coastal states.\textsuperscript{49} Courts have "consistently acknowledged that the public trust rights in the intertidal land adapted to reflect the realities of use in each era."\textsuperscript{50} "[T]he common law gives expression to the changing customs and sentiments of the people,\textsuperscript{51} and its genius is the 'flexibility and capacity for growth and adaptation.'"\textsuperscript{52} The V.I. Legislature and courts have both recognized the importance of this right of access to the beaches of the U.S. Virgin Islands through the Open Shorelines Act of 1971,\textsuperscript{53} the Investment Incentive Act of 1972, and judicially established case law.\textsuperscript{54}

As indicated above, the principles of the public trust doctrine were long engrained in the people of the U.S. Virgin Islands, and any distinctions between the "shoreline" and the "beaches" are merely illusory. Since beaches have always been a part of the shoreline, traditional uses have also included the use of the beaches by the public.\textsuperscript{55} Thus, as will be explained below, the V.I. Open Shorelines Act, as well as the V.I. Incentive Act, encompass not only the well-known shoreline uses, but also the access to and use of the beaches.

\textbf{A. V.I. Open Shorelines Act}

The Legislature of the U.S. Virgin Islands found that there has been uncontrolled and uncoordinated development of the shorelines together with attempts to curtail the use of those areas by the public.\textsuperscript{56} Accordingly, the legislature declared, as a matter of policy, that the right of the public to frequent, uninterrupted, unobstructed use of the shorelines must be preserved.\textsuperscript{57} The Open Shorelines Act of the U.S. Virgin Islands provides that

\begin{quote}
[n]o person, firm, corporation, association or other legal entity shall create, erect, maintain, or construct any obstruction, barrier, or restraint of any nature whatsoever upon, across or within the
\end{quote}

\begin{itemize}
\item \textsuperscript{48} See \textit{id.} at 128.
\item \textsuperscript{49} \textit{Id.}
\item \textsuperscript{50} McGarvey v. Whittredge, 28 A.3d 620, 631 (Me. 2011).
\item \textsuperscript{51} \textit{Id.} at 635 (quoting State v. Bradbury, 9 A.2d 657, 658 (Me. 1939)).
\item \textsuperscript{52} \textit{Id.} (quoting Pendexter v. Pendexter, 363 A.2d 743, 749 (Me. 1976) (Dufresne, C.J., concurring)).
\item \textsuperscript{53} V.I. \textsc{Code Ann.} tit. 12 § 903 (2012).
\item \textsuperscript{54} Hodge, \textit{supra} note 23.
\item \textsuperscript{55} All beaches are shorelines, but not all shorelines are beaches.
\item \textsuperscript{56} V.I. \textsc{Code Ann.} tit. 12 § 903 (2012).
\item \textsuperscript{57} \textit{Id.}
shorelines of the United States Virgin Islands as defined in this section, which would interfere with the right of the public individually and collectively, to use and enjoy any shoreline.\textsuperscript{58}

The act defines the shorelines of the U.S. Virgin Islands as meaning the area along the coastlines of the United States Virgin Islands from the seaward line of low tide, running inland a distance of fifty feet; or to the extreme seaward boundary of natural vegetation which spreads continuously inland; or to a natural barrier; whichever is the shortest distance. Whenever the shore is extended into the sea by filling or dredging, the boundary of the shorelines shall remain at the line of vegetation as previously established.\textsuperscript{59}

This policy demonstrates that, since the public has made frequent, uninterrupted, and unobstructed use of the shorelines and beaches throughout Danish and American rule, it intends to preserve that tradition and protect what has become a right of the public.\textsuperscript{60} Indeed, the constitutionality of that enactment was upheld in \textit{Rivera v. U.S.}\textsuperscript{61}

\subsection*{B. V.I. Investment Incentive Act}

While struggling to develop its economy, the V.I. Legislature provides various incentives to attract businesses to its shores, particularly rum production, oil refinery, and tourism.\textsuperscript{62} To this end, the Legislature declared as policy that certain investment benefits would be made available through business activities, provided that the public interest was not adversely affected.\textsuperscript{63} Thus, legislative provisions had to be enacted in order to advance the economic and social development of the islands, while at the same time protecting the traditional rights of the people.\textsuperscript{64} The Investment Incentive Act of the U.S. Virgin Islands provides:

For any applicant who proposes to do business on land adjoining any beach or shoreline of the Virgin Islands, agree to grant to the government of the Virgin Islands a perpetual easement upon and across such land to the beach or shoreline to provide free and unrestricted access thereto to the public, which easement shall be duly

\begin{footnotesize}
\textsuperscript{58} § 403.
\textsuperscript{59} § 402.
\textsuperscript{60} Id.
\textsuperscript{61} Rivera v. United States, 33 V.I. 234 (D.V.I. 1996).
\textsuperscript{62} § 701.
\textsuperscript{63} Id.
\textsuperscript{64} Id.
\end{footnotesize}
recorded in the Recorder of Deeds upon the designation of the business as an Enterprise Zone Business.65

C. Case Studies of Past Litigation

There are cases in the U.S. Virgin Islands that document the fight between the public right of access to the beaches and private property owners blocking that access. These cases support the notion that the government recognizes the importance of public beach access. United States v. St. Thomas Beach Resorts involved the Bolongo Bay Beach and Tennis Club, which borders the Caribbean Sea.66 The club constructed two fences that were each nine feet high.67 Each fence ran the length of the beach area adjoining the Club’s property and extended into the ocean for “approximately 50 and 30 feet at the eastern and western extremities, respectively, of the Bolongo Bay Beach and Tennis Club.”68

The plaintiffs in this case were the governments of the U.S. and the U.S. Virgin Islands.69 Their argument was that the parts of the fences “seaward of the mean high-tide mark [were] trespasses [on] United States [property], and that the inland extension of the fences . . . obstruct the Virgin Islands shoreline, in violation of the Virgin Islands Open Shorelines Act . . . .”70 The plaintiffs demanded the “removal of the fences and that [the] defendant be permanently enjoined from maintaining any fences or ‘other obstruction[s] upon the property of the United States; or any obstruction interfering with the right of the public, individually and collectively to use and enjoy the shoreline of the Virgin Islands.’”71 The court stated that in the U.S. Virgin Islands, submerged lands up to the mean high-water mark are property of the United States of America.72 The court held that the fences were both a trespass on U.S. land and a violation of the V.I. Open Shorelines Act.73

The court discussed the right of the public to use the beach and how that right was “established by firmly, well settled, long standing

65. § 1011(1)(h).
67. Id.
68. Id.
69. Id.
70. Id.
71. Id. at 771.
72. St. Thomas Beach Resorts, 11 V.I. at 771.
73. Id.
custom.”74 To the extent that beachfront property is concerned, the court stated that the Open Shorelines Act codifies this right.75 The court also relied on the plaintiffs’ affidavits that proved that the public used the beach “on a regular and continuing basis for swimming and recreation, without permission from, or need of permission of the upland owners, at least from 1923 through March, 1974.”76 There was even an affidavit from a prior owner of the property77 revealing that during the prior owner’s ownership

the beach was “always . . . open for the use of the public for . . . recreational purposes”, that she never interfered with the public use of the beach, and that the public never asked her permission to use the beach, “but simply used it as if it were a public beach.”78

Although a victory for beach access rights, this trend should be the norm for the administrative agency in charge of beach access on its own, and not need to have the U.S. Government involved as an enforcer for the complainants.

Another case showing the strong public access roots in the courts involved a “partial shutdown of the federal government due to ongoing budget-related problems and the temporary closing of Buck Island to the public.”79 Buck Island, off the coast of St. Croix, became part of the National Park System under proclamation by President John F. Kennedy, and is thus federally controlled.80 National Park Service employees informed the plaintiffs that, because of the partial shutdown, the beach was closed and they could not use the beach at Buck Island.81 Plaintiffs argued that closing the beach violated the Open Shorelines Act, as well as the “express language of the presidential proclamation [which] prohibited the closing of the beach at Buck Island.”82 Therefore, plaintiffs sought injunctive relief.83 The defendant maintained that closing the beach was within its authority because federal regulations permit limitations on public access.84

The court held that “[a] requirement that Buck Island be closed to the public due to a federal budget crisis directly contravenes the ex-

74. Id. at 772.
75. Id.
76. Id.
77. Id.
78. St. Thomas Beach Resorts, 11 V.I. at 772 (citing Affidavit of Winia M. Giroux).
80. Id. at 239-40.
81. Id. at 240.
82. Id.
83. Id.
84. Id. at 241.
press directive\textsuperscript{85} that the federal government not interfere with the bathing and recreational activities at Buck Island.\textsuperscript{86} The court also held that an injunction was the only means of redress.\textsuperscript{87} Although these favorable decisions uphold the Open Shorelines Act of the U.S. Virgin Islands, problems still exist that involve violations of this Act. Other than the few cases like \textit{Rivera} and \textit{St. Thomas Beach Resorts}, offended members of the public seldom seek administrative or judicial enforcement of their free beach and open shoreline rights.\textsuperscript{88} Thus, rights once enjoyed by the public without interruption are now under attack by private property owners and businessmen with almost total impunity.\textsuperscript{89}

III. Problems Exercising Beach Access Rights

Although U.S. Virgin Islanders enjoy public trust rights to beaches, access to those beaches is still often restricted. Private entities in the U.S. Virgin Islands, specifically private hotels and large residential entities that are beachfront owners, have facilitated the trampling of the people’s right to public beach access by the government, because the law is flawed.

Historically, these entities argued that blocked access was in the best interest of tourism, which is a major contributor to the local economy.\textsuperscript{90} They claimed that tourists came to these islands to enjoy our beaches away from public intrusion and that keeping beaches public would be inviting crime upon the tourists and the homes built around the coast.\textsuperscript{91} Many St. Thomians were passive actors in terms of development until the latter 1970s.\textsuperscript{92} Most people earned an income, but “[t]hose who owned land and controlled the political system built their exclusive subdivisions, created tourist enclaves, and paved their island.”\textsuperscript{93} This resulted in the public finding fewer beaches for social-

\begin{itemize}
\item \textsuperscript{85} \textit{Rivera}, 918 F. Supp. at 242.
\item \textsuperscript{86} \textit{Id}.
\item \textsuperscript{87} \textit{Id} at 243.
\item \textsuperscript{88} Hodge, \textit{supra} note 23.
\item \textsuperscript{89} \textit{Id}.
\item \textsuperscript{90} Willocks, \textit{The Umbilical Cord}, \textit{supra} note 10, at 385.
\item \textsuperscript{91} \textit{Id}.
\item \textsuperscript{93} \textit{Id}.
\end{itemize}
izing, bathing, or landing their fishing boats.\textsuperscript{94} The Open Shorelines Act cemented a right of public use of the coastal zone. However, access to that zone, to this day, is still not effectively enforced.\textsuperscript{95}

St. Thomians are no longer passive in the development decision-making process. “The final straw [was] when the . . . government approved zoning changes that [allowed] construction of a [large-scale] resort adjacent to Magens Bay [Beach] . . . .”\textsuperscript{96} This rezoning by the Senate occurred without formal application, planning office input, public hearings,\textsuperscript{97} or “comment or discussion on the Senate floor.”\textsuperscript{98} Three weeks after the public became aware of the zoning change, voters braved Hurricane Klaus to remove all senators who approved the rezoning.\textsuperscript{99} The rezoning was fairly quickly repealed, however, and the developer filed a formal application that was approved by the planning commissioner (against his staff’s recommendation).\textsuperscript{100} It was not until two years later—a day before the hearing proposal on the issue—that nine of the fifteen senators in the legislature voiced their lack of support for the development.\textsuperscript{101}

This incident illustrates how the legislature has been forced to acknowledge that the public means business and that beach access is a serious matter of concern. This was an issue in the past, and the legislature should remain alert for similar instances in the future. It also established that private entities cannot and will not run these islands by trampling the rights of the people. Although U.S. Virgin Islanders have been granted these rights and have proven to the legislature that beach access is a necessity, there is a current epidemic concerning blocked beach access.

On January 9, 2014, the Sapphire Beach Resort erected barricades that eliminated the parking area used by beach-goers.\textsuperscript{102} For years, beach-going locals and visitors used this parking area.\textsuperscript{103} The

\begin{itemize}
  \item \textsuperscript{94} Id.
  \item \textsuperscript{95} Id.
  \item \textsuperscript{96} Id.
  \item \textsuperscript{97} Political contributions influenced the legislature here. The official name of the property—“Zeugfriedenhoy”—was used so as to disguise from the public what they knew to be Magens Bay Beach. Id.
  \item \textsuperscript{98} Johnston, \textit{supra} note 92.
  \item \textsuperscript{99} Id.
  \item \textsuperscript{100} Id.
  \item \textsuperscript{101} Id.
  \item \textsuperscript{103} Id.
\end{itemize}
Resort’s CZM permit is conditioned on open beach access. The question in this pending case is likely to be whether restricting parking amounts to restricting access to the beach in violation of the permit. Although the new owner may try to argue that the purpose of the restriction is to protect his property, it appears to be yet another attempt by private resorts to restrict public access to the beaches. Reducing or eliminating parking altogether creates a restriction for the public of reasonable access that will likely deter attempts to access the beach at all and should be held as a violation of the Resort’s permit and the Open Shorelines Act.

This case exemplifies the flaws in the Open Shorelines Act. There is a sense of uncertainty when access issues arise. Who does the public turn to and what can they do? What constitutes blocking access? These are the questions that seem to be in the mind of the public that go unanswered.

Another ongoing beach access issue on the island of St. Croix involves Easter campers. During Easter, it is a local tradition for people to camp out on the beaches. One such beach that is often visited by Easter campers is Salt River Columbus Landing. Some families have been camping there for about fifty years. However, there is growing uncertainty as to whether the campsite will remain open and/or accessible.

In 2010, a Texas couple bought adjoining beachfront property, began building, and placed boulders on the dirt access road that ran parallel to the beach on their property. The change displaced the campers and each campsite had to be set up further down the beach than in previous seasons. Fewer campsites became available and, as a result, some campers were displaced altogether. Consequently, some campers try setting up as early as April 1st to ensure their

104. Id.
107. See id.
108. Id.
109. Willocks Interview, supra note 2.
110. Shea, supra note 106.
111. Id.
112. See id.
113. Id.
spot. Blocking the access road also creates limited vehicle access. Campers often carry heavy equipment, including stoves and refrigerators, and are forced to find a new beach or stop camping altogether. Regarding this matter, the Assistant Director of CZM stated: “[W]hile we can make public beach access a requirement of a major CZM permit, we cannot make a private residential homeowner grant access to a shoreline.” This case displays the lack of enforcement power of CZM as well as what seems to be a lack of guidance for CZM to follow in terms of beach access and what they can and cannot do under the Open Shorelines Act.

Another contentious debate is occurring in the Judith Fancy community, where locals were told to present driver’s licenses before access would be granted to the beach. The homeowners association recently implemented this policy. Locals argue that the road leading in to the area should not be subject to “any type of restricted access by the association.” On the other hand, the association argues that the road is private property and, as such, can be protected through the current measures, “especially in light of recent increase in burglaries.” Police Lieutenant Joseph Platt advised that “no one other than a police officer is authorized to request a driver’s license from any motorist and that motorists should not surrender their license to anyone other than an officer or the court.” As to accessing the beach, the CZM Office stated that it could only regulate what the V.I. Code covers and that “the code does not address the manner of gaining access.” Essentially, there is nothing the CZM Office can do and the matter should be addressed with the legislature to amend the law. To date, nothing has been done to completely resolve this issue and those involved still claim to be gathering information to find a solution.

This demonstrates how the Open Shorelines Act lacks specific provisions regarding the manner of enforcing access to the beaches

114. Id.
115. Id.
116. Id.
117. Id.
119. Id.
120. Id.
121. Id.
122. Id.
123. Id.
124. Id.
held in public trust. It also shows CZM’s frustration in trying to achieve its goals. CZM was created to ensure that the public has the continuous right to use and enjoy the shorelines and to maximize public access to and along the shorelines. However, because of the state of the law, CZM feels powerless to enforce that purpose.

In February of 2014, the Virgin Islands Daily News reported another incident of beach access restraint, proving that beach access issues are still very much alive and well. A local resident took his family to the Buccaneer Hotel to go to the beach, as he has been doing for years, but a security guard told the family to turn around and leave. When the resident questioned the security guard, there was no explanation as to why the family was denied access to the beach. The manager who responded to the incident said that their general policy is to close the beach to locals when it is busy with tourists and that locals may return when there is less business.

In addition to all of these unresolved matters, there are other issues with limited access to beaches fenced in at Sandy Point, the Buccaneer Hotel, Carambola, Enfield Green, and other areas that need to be addressed. All of these cases show a multitude of issues that must be resolved by the Legislature of the U.S. Virgin Islands, including how widespread and pressing this issue is in the territory, as well as the lack of government support in addressing the issues. The people of the U.S. Virgin Islands are more than willing to share access to the beaches; however, they will no longer tolerate tourists, hotels, or condominiums blocking access for their own private uses.

IV. Proposal for Reform

Heightened emotions of the public, the lack of legislative backing, and the persistent purpose to obstruct public access from large private landowners makes beach access reform more necessary than ever in the U.S. Virgin Islands. Comprehensive public access legislation, coastal management regulations, and vigorous enforcement are

127. Id.
128. Id.
129. Id.
130. Id.
needed to address these problems and increase access. 132 The present system of regulatory controls does not adequately protect rights to access the beaches and the shores.

This part of the article proposes widespread reform to ensure access to the beaches for the public. The U.S. Virgin Islands Legislature should amend the current law to provide specific public beach access rights, grant authority to CZM to enforce those rights, compel CZM to ensure proactive enforcement for beach access, and establish penalties for violations of those rights. Additionally, the article suggests that access to the beaches can be secured through land and easement acquisitions. Beach parks, easements, and exactions are all ways of ensuring the preservation of beach access. Finally, a government-managed leasing program to preserve beach access could be implemented.

A. Amend the Current Law

“We in the Virgin Islands have been plagued with this beach access issue for some time now. It’s no secret that this needs to be looked at and revisited,” said V.I. Department of Planning and Natural Resources spokesman, Jamal Nielsen. 133 The legislature must amend the Open Shorelines Act. There needs to be an explicit right to reasonable beach access so that CZM can exercise its authority to enforce the rights of the people. The law should also enable the public to compel CZM to ensure proactive enforcement of beach access. Additionally, the V.I. Code must include penalties for violation of these laws.

1. Express Requirement of Access to Shoreline

The Open Shorelines Act specifically vested in the public the right to the shorelines of the U.S. Virgin Islands; however, there is no specific language vesting a right to access those shorelines. 134 One without the other is meaningless. 135 It seems obvious, therefore, that having a right and not being able to exercise that right ensures no right at all. Indeed, it triggers memories of the historical struggles of our civil rights heroines and heroes, which continue today, and the

132. Id. at 540.
133. Shea, supra note 106.
never-ending battle between property rights and the public interest. As the law is currently written, the right of access to the shoreline is implied. Yet, when a conflict arises between a private landowner and the public, such as in the Judith’s Fancy example, the public is left with little recourse and the government officials can only intervene to prevent physical confrontation. CZM, the agency vested with the authority to ensure the public’s right to utilize the shorelines, claims that, because there is no specific right to access public trust land enumerated in the legislation, they cannot carry out their purpose of enforcing the public’s right to the shorelines. The result is, in effect, a violation of the Open Shorelines Act. This has led to a standstill in the enforcement of public beach access. To correct this oversight, and to ensure that CZM exercises its authority to enforce the Act, the language of the legislation needs more specificity.

The federal government recognized the importance of the states’ exercising “their full authority over the lands and waters in the coastal zone” by statute. In Florida, the legislature has enacted specific legislation with the purpose of ensuring the public’s right to reasonable access to beaches. The legislature found that conserving land was an important part of the economy and ecology of the state. The legislature further determined “that rapid increases in population and development threatened the integrity of the environment and limited opportunities for citizens and visitors to enjoy the state’s natural areas.” An interest thus developed to establish an agency that would assist in resolving land use conflicts. As a result, within the Department of Environmental Protection, the Florida Legislature created the Florida Communities Trust. This agency was specifically given all powers necessary or convenient to carry out the purposes and provisions including undertaking, coordinating, or funding activities and projects, including those of public access. The Florida Communities

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137. See generally Stokes, supra note 118.
139. See Stokes, supra note 118.
140. See id.
143. § 380.502(1).
144. Id.
145. Id.
146. § 380.504(1).
147. § 380.507.
Trust was also given specific authority to make rules necessary to carry out its purpose and to exercise any power granted to it by law.\textsuperscript{148} The V.I. Legislature has already acknowledged the “uncontrolled and uncoordinated development of the shorelines and attempts to curtail the use of the shorelines by the public.”\textsuperscript{149} As a result, the V.I. Legislature determined that it needed to preserve tradition as well as protect what became a right of the public.\textsuperscript{150} Thus, within the V.I. Department of Planning and Natural Resources, a CZM Commission was created to achieve that goal.\textsuperscript{151}

In the effort of the U.S. Virgin Islands to balance the right of private property owners and the public’s right to access, the U.S. Virgin Islands’ Legislature should enact legislation to specifically obtain and maintain public access to the beaches for the benefit of the public, with full respect for the constitutional rights of landowners, through eminent domain, contract, easements, and other compensating means of ingress and egress. This proposed amendment should strengthen the law and make it clear to CZM, private entities, and to the public at large that the Code does, in fact, vest in the people a specific right of access to the shorelines of the U.S. Virgin Islands so that CZM can accomplish its mission.

2. Enable Coastal Zone Management to Ensure Proactive Enforcement

The CZM should also take a more proactive approach so as to result in prevention of violations of the Act. The foregoing amendment clarifies the agency’s specific legislative authority to enforce the Open Shorelines Act. Such an amendment would place CZM in the ideal position to establish appropriate policies that are consistent with its objective to preserve public access and ensure equitable application of the public trust doctrine, while respecting the rights of all interested parties.

One of the issues that CZM faces in ensuring access to the public is the lack of access methods. Many existing access avenues are inadequate and underused because they are cumbersome to traverse to the sea.\textsuperscript{152} Overgrowth of plants and trees block access and no signs exist to direct the public to available adequate access routes to the

\begin{footnotes}
\footnote{148. \textit{Id.}}
\footnote{149. \textit{V.I. Code Ann.} tit. 12 § 903(a)(6) (2012).}
\footnote{150. \textit{Id.}}
\footnote{151. § 904.}
\footnote{152. Willocks Interview, \textit{supra} note 2.}
\end{footnotes}
There are also instances of deliberate obstruction by private entities to block access, as shown by the Easter campers and Judith Fancy examples previously mentioned. In fact, access ways are not available at all in many instances. Finding exactly where a public beach access point is located can be a difficult challenge for those who want to spend time at the beach. If people cannot find their way to the beaches, there can be no reasonable access to those beaches.

After reviewing beach access provisions from various jurisdictions, it appears that several mechanisms can be successfully implemented in the U.S. Virgin Islands to ensure beach access and should be promulgated in the rules and regulations of CZM. Coastal Zone Management should: (1) implement a public access education program; (2) provide accessible offices to address complaints and compliments; (3) determine, implement, and enforce right-of-way passages to the shore line; (4) develop and activate investigation teams to enforce compliance with the Open Shorelines Act; (5) establish a public access web page and other social media outlets to publicize its website and cause; (6) develop and publish maps highlighting public access metes and bounds to the shorelines throughout the V.I.; (7) coordinate joint operations with other appropriate agencies to protect the people’s rights and access to the shoreline; (8) recommend legislation to obtain legal enforcement authority which may not be obtained administratively; and (9) seek annual special appropriations through departments budgetary process to fund its enforcement activities. Each of these suggestions will strengthen and facilitate CZM because these are all steps that, when done conjunctively and proac-

153. Id.  
154. Shea, supra note 106.  
155. Stokes, supra note 118.  
156. Willocks Interview, supra note 2.  
157. Hodge, supra note 23.  
158. Id.  
161. Sullivan, supra note 105, at 351.  
tively, will help alleviate the present conflicts the agency faces in preserving public beach access rights.

3. Establish Specific Penalties for Violation

Presently, Title Twelve, Chapter Ten of the V.I. Code concerning the Open Shorelines Act includes three sections, none of which delineate any consequences or penalties for violating the law.\textsuperscript{164} Even Chapter Ten's prohibition against obstruction of the shorelines does not declare violations of that section to be crimes to which the general penalty section of the V.I. Criminal Code could be applied.\textsuperscript{165} The lack of any express penalty for violation of the Open Shorelines Act lends a hand to its present inadequate enforcement. The following amendments should be implemented into the current Chapter Twenty-One penalty section, as well as establishing a specific penalty section for Chapter Ten, in order to ensure adequate consequences, which will in turn deter potential violators.

Imagine a law on the books that had no consequence for its violation. People would have no reason, other than perhaps one of morality, to abide by the law. This is not at all to suggest that penalties thwart wrongdoers unequivocally;\textsuperscript{166} however, penalties certainly provide added deterrence. Provisions issuing penalties should be added to the Open Shorelines Chapter itself, similar to the penalty provision provided in Chapter Twenty-One of the V.I. Code dealing with CZM, which states:

\begin{quote}
\textit{Pain and pleasure are the great springs of human action. When [people] perceive[,] . . . pain [or displeasure] to be the consequence of an act [they often withdraw from committing that act]. If the [ ] magnitude . . . of [the] pain [exceeds] the . . . value of the pleasure or good [expected] to be the consequence of the act, [man] will be absolutely prevented from performing it.}\textsuperscript{167}
\end{quote}

Deterrence\textsuperscript{168} is the idea that, through fear of punishment, crime can be avoided or limited.\textsuperscript{169} Research on the subject indicates that “there is a significant correlation between preventive strategies and the re-

\textsuperscript{164} V.I. CODE ANN. tit. 12 §§ 401-03 (2012).
\textsuperscript{165} § 3.
\textsuperscript{167} KATE E. BLOCH & KEVIN C. McMUNIGAL, CRIMINAL LAW: A CONTEMPORARY APPROACH 44 (Erwin Chemerinsky et al. eds., 2005).
\textsuperscript{168} “Deterrence” derives from the Latin verb meaning to frighten or terrify. \textit{Id.} at 31.
\textsuperscript{169} \textit{Id.}
duction or deflection of deviant activities."\textsuperscript{170} Although not the only reason for these activities, people generally will engage in deviant behavior if they have no fear of apprehension and punishment.\textsuperscript{171} Norms, laws, and enforcement are designed to "maintain the image that 'negative' behaviors will receive attention and punishment," so as to reduce the probability of deviance.\textsuperscript{172} "Drunk-driving crackdowns, task forces for gang-related crimes, and highly visible notices of laws and policies are all examples of this concept."\textsuperscript{173}

Because of the lack of a penalty section in Title Twelve, Chapter Ten, of the V.I. Code concerning the Open Shorelines, private entities are able to violate the law and CZM has no authority to penalize them.\textsuperscript{174} Title Twelve, Chapter Twenty-One, dealing with CZM, however, consists of a general penalties section that only applies to the provisions of that specific chapter.\textsuperscript{175} Language from this general penalties section should be used as an example to draft a penalties section for the Open Shorelines Act in Chapter Ten. At the same time, the current penalty section of Chapter Twelve pertaining to CZM should be enhanced so as to create a more strengthened body of law to maintain the public's right of beach access.

Chapter Twenty-One's penalty section has a civil fine for violation of that chapter not to exceed ten thousand dollars.\textsuperscript{176} This type of fine should be added to Chapter Ten; however, the fine amount should be increased to a sum with a maximum limit, subject to the discretion of the administrator to ensure that the punishment fits the crime.\textsuperscript{177}

The purpose of punitive damages is to serve as a punishment as well as a deterrent.\textsuperscript{178} For punitive purposes, evidence of the offender's wealth can be considered to determine the total damage award.\textsuperscript{179} Each individual violator's penalty will therefore differ, depending on what amount would create the greatest deterrent.\textsuperscript{180} Otherwise, it is very likely that such small fines may not deter multi-million dollar en-

\begin{itemize}
\item \textsuperscript{170} Keel, supra note 166.
\item \textsuperscript{171} Id.
\item \textsuperscript{172} Id.
\item \textsuperscript{173} Id.
\item \textsuperscript{174} See V.I. Code Ann. tit. 12 §§ 401-03 (2012).
\item \textsuperscript{175} § 913(c).
\item \textsuperscript{176} Id.
\item \textsuperscript{177} 33 U.S.C.A. § 1319 (2012).
\item \textsuperscript{178} DAN B. D OBB S ET AL., TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 600 (Louis H. Higgins ed., 2009).
\item \textsuperscript{179} Id.
\item \textsuperscript{180} See id.
\end{itemize}
tivities such as hotels and large residential corporations, which to them would be quite nominal.181

Chapter Twenty-One deems any violation of the Chapter a misdemeanor and any conviction punishable by imprisonment for no more than one year.182 The law does not speak of any difference in penalty for repeat offenders.183 This does not lend a hand in achieving effective deterrence and compliance with the law. Repeat offenders must be subject to a harsher penalty than those with first time violations, and this is evidenced in other parts of U.S. Virgin Islands’ law.184 For example, Title Fourteen of the V.I. Code, which embodies the Criminal Code, provides for more aggressive penalties for habitual offenders.185

B. Land Use Mechanisms

In addition to the foregoing proposals for reform, other means could be utilized with respect to enforcing beach access rights. By implementing various forms of these other options, the V.I. Government can avoid conflicts with private property owners while simultaneously preserving the people’s right of access. “Beach parks” via gift of purchase or land, “historical usage easements,” “exactions,” and “government-controlled leasing,” are land use mechanisms that can be used to fulfill this goal. When appropriately applied and enforced, these proposals could reconcile all of the competing interests and would leave no doubt as to the rights of the people to upland access for ingress and egress to the beaches and shorelines, to enjoy their beach access rights.

1. Creation of Beach Parks

“A park integrates the entire beach environment (tidelands, dry sand, and uplands) into a single recreational unit,” so that “[t]he natural beauty . . . can be preserved intact.”186 It would benefit the public as a whole to have the beaches turned into parks and then have the government maintain those lands as beach parks. Establishing a beach park creates an obligation on the relevant management entity to maintain it. As a result, the beach could have amenities like water-based recreational activities, restroom and shower facilities, lifeguards, ven-

181. See id. at 602.
183. Id.
184. §§ 61-62.
185. § 61.
186. McKeon, supra note 5, at 566.
Beach parks create a greater sense of security for both tourists and the public and are not burdened by access conflicts involving private entities.

This idea has already taken shape in the U.S. Virgin Islands with Magens Bay Beach as a successful example. On December 28, 1946, Magens Bay Beach was acquired by deed of gift from the owner, Arthur S. Fairchild. This beach is over 500 yards long and is regarded as one of the most magnificent by world travelers. The area was developed by the Magens Bay Authority for “public recreation in accordance with the wishes of the public-spirited donor through whose generosity and vision the community has so largely benefitted.” A nominal fee is charged for entry to the beach in order to defray the cost of maintenance, security, restrooms, concessions, etc. Following the success of Magens Bay Beach, in late 2006, the U.S. Virgin Islands Government purchased 21 acres of Lindqvist Beach for 8.9 million dollars with the goal of creating another successful park under management of the Magens Bay Authority.

There are several other beaches in the U.S. Virgin Islands that have the potential to be turned into beach parks. Looking at the success of the Magens Bay Beach Park, the government, when faced with beach access conflicts, should consider creating beach parks as an alternative. The Magens Bay Beach, although a gift, is a prime example of how the creation of beach parks preserves beach access to the public. Donation does not have to be the only way of acquiring the lands necessary for the creation of beach parks. Acquisition of beaches can also be achieved through purchase. Although it might be the costliest option, to the extent that the government is determined to preserve access in posterity for the public, investments must be made in order to produce desired results.

188. An adjoining fifty acres of grove and grassland were acquired as well. Id.
189. Id.
190. Id.
191. “For the purpose of acquiring, improving and operating parks and beaches, the Magens Bay Authority [was] declared to constitute a corporate instrumentality of the Government of the United States Virgin Islands.” V.I. CODE ANN. tit. 32 § 51 (2012).
192. M AGENS BAY AUTH., supra note 187.
193. Hodge, supra note 23.
195. WILLOCKS, GEOGRAPHY, supra note 1, at 22-24.
Very little has been done since the acquisition of Magens Bay Beach in terms of expanding the idea of creating beach parks. Since 1946, the only other attempt at creating a beach park was in 2006, with the Lindqvist Beach. There are no public beach access issues at the Magens Bay Beach, which proves the success of such an acquisition and the need for its consideration on a more frequent basis. The government needs to consider this option more fully and frequently when struggling with preservation of public beach access.

2. Historical Usage Easements

Access does not require control of all proprietary rights in a parcel of land. An easement is an interest in land owned by another person which grants a right to use or control such land for a specific limited purpose. Acquiring such a right for the public to pass over private property along a defined route for ingress and egress can be sufficient to satisfy public beach access concerns. With an easement, the right of use is acquired, but not fee simple title to the property. By avoiding the purchase of the title from the owner, the lessee acquires the easement at a much cheaper price and still acquires the much-needed access. This is an option that is fairly compatible with private investments in adjoining uplands. In addition to being a less costly option of providing access to natural recreational facilities for the public, easements also allow commercial developers, such as resorts, to build on the uplands without destroying the public’s enjoyment of the beaches, as they remain accessible. Thus, having a right to the beach combined with the ability to exercise that right via an access easement preserves the public’s enjoyment of its beaches.

“Prescription,” “Implied Dedication,” and “Custom” are all “legal doctrines, which recognize that, under certain circumstances, rights in [private] land[s] may be obtained through use.”

196. Willocks Interview, supra note 2.
199. Dreyfoos, supra note 197.
200. McKeon, supra note 5, at 567; see also BLACK’S LAW DICTIONARY 257 (4th ed. 2011).
201. McKeon, supra note 5, at 567.
202. Id.
203. Id.
204. Id.
205. Id. at 572.
may acquire rights to access a beach simply by using a beach for a number of years.\textsuperscript{206} In order to be confirmed rights, however, lawsuits would have to be brought on behalf of the public.\textsuperscript{207} The U.S. Virgin Islands applies such doctrines when trying to preserve the public’s right of access to the beaches.\textsuperscript{208}

An easement by prescription may be established after proving uninterrupted and adverse\textsuperscript{209} use of property for a specific number of years.\textsuperscript{210} An easement by dedication is established through a gift from a private owner of real property to the public.\textsuperscript{211} It requires an offer\textsuperscript{212} by the owner,\textsuperscript{213} through an unequivocal act showing intent to dedicate, and acceptance by the public.\textsuperscript{214} To establish an easement by custom,\textsuperscript{215} the public’s use must be “[immemorial], exercised without interruption, peaceable and free from dispute, reasonable, certain, obligatory, and consistent with other customs or other law.”\textsuperscript{216} Under these theories, however, access ways are only legally public after successful litigation.\textsuperscript{217} While many access ways may be legally obtainable for public use, most of such routes have not been legally established.\textsuperscript{218}

\begin{itemize}
\item \textsuperscript{206} Id.
\item \textsuperscript{207} Id.
\item \textsuperscript{208} See, e.g., Red Hook Marina Corp. v. Antilles Yachting Corp., 9 V.I. 236 (D.V.I. 1971); St. Thomas Beach Resorts, Inc., 11 V.I. at 79 (holding that the Open Shorelines Act merely codified the “firmly, well-settled, long-standing custom” that dates back to the period when the islands were under Danish rule, and before their purchase by the United States in 1917). The V.I. court used both the “Customs” and the “Implied Dedication” easements to vindicate the public’s right of access to the beaches. Id.
\item \textsuperscript{209} “To prove adverse use, the claimant must [...] establish that his or her use of the private property was open, notorious, and visible, and against the owner’s will.” Erika Kranz, Sand for the People: The Continuing Controversy over Public Access to Florida’s Beaches, 83-JUN FLA. B.J. 10, 16 (2009).
\item \textsuperscript{210} Id.
\item \textsuperscript{211} JOSEPH W. SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 64 (Vicki Been et al. eds., 2010). “The public normally takes only an easement by implied dedication, with the owner retaining the underlying fee.” McKeon, supra note 5, at 564.
\item \textsuperscript{212} “Longstanding acquiescence in use of beachfront property by the public is interpreted as an offer by the owner and acceptance by the public, creating an implied dedication. Once the implicit offer has been accepted, the owner cannot revoke his dedication.” SINGER, supra note 211.
\item \textsuperscript{213} “Previous owners may [...] be[ ] responsible for [a] dedication if they have the requisite intent to dedicate to the public.” Sullivan, supra note 105, at 336.
\item \textsuperscript{214} SINGER, supra note 211.
\item \textsuperscript{215} “The doctrine of custom grew out of the feeling that a usage which had lasted for centuries must surely have been founded upon a legal right conferred at some time in the past.” McKeon, supra note 5, at 582. When this right has been established, private property owners may not interfere with continued enjoyment of that right. Id.
\item \textsuperscript{216} Kranz, supra note 209, at 19.
\item \textsuperscript{217} Id. at 16.
\item \textsuperscript{218} See generally DREYFOOS, supra note 197.
\end{itemize}
In the interim, this may leave the public with a feeling of inadequate delivery of the right to access. Following rules of law and the judicial process take time, but can lead to perpetual rights of access and are just additional steps in resolving legal conflicts.

In *U.S. v. St. Thomas Beach Resorts, Inc.*, the V.I. District Court used the doctrine of custom as the justification for upholding the public’s right of unobstructed use of the shoreline. Simultaneously, this court noted its acceptance of both dedication and prescription as legal remedies under V.I. law. The court acknowledged that, even if custom was inapplicable, the rights of the public could have been upheld through a prescriptive easement appurtenant to the beach for recreational purposes. Likewise, the court made clear that the conduct of the former owner of the resort uplands, “in acquiescing in the public use of the [land] and not attempting to prevent or limit such use,” would have resulted in an implied dedication to the public.

Although all of these legal remedies are available and have been used in the past, they are not being used as often or as fully as they should because beach access problems still exist. It should be public policy that on a regular basis, these legal remedies are available to actively pursue different claims. It should not wait until the public is denied access and suffers injury. The V.I. government should be proactive, through CZM and other administrative agencies like the Economic Development Commission (EDC) and the Attorney General’s Office, in seeking out and acquiring access through easements that are legally established and enforced. The public should not have to resort to the time and expense of litigation, as such a burden should rightfully fall on the government of the U.S. Virgin Islands. Through annual budget appropriations, as well as through other private, local, and federal grants, CZM should acquire the necessary funding to preserve public beach access rights.

220. See id. at n.4.
221. Id.
222. Id.
223. The Economic Development Commission was created in part so that “industrial development benefits [c]ould be made available for development and expansion of such industrial or business activities determined . . . to be in the public interest by advancing the growth . . . of the economy of the . . . Virgin Islands.” V.I. Code Ann. tit. 29 § 701 (2012).
3. Exactions

Exactions are contributions or concessions that landowners are required to give before the government will allow land development.\(^{224}\) It is very often private development, specifically resorts and large residential entities, that impair public beach access in the U.S. Virgin Islands. Developments “may cut off existing access to the beaches . . . [and] new development[s] will raise land values and create a pattern of land use that will make it more difficult and expensive to purchase beach easements in the future.”\(^{225}\) Coastal lands should therefore be developed in a manner that not only increases their value, but also allows public recreational use.\(^{226}\)

In exercising this option, the V.I. Government authorized the Economic Development Commission\(^{227}\) to obtain public access to the beach and shoreline, by way of contract with applicants for tax exemptions and subsidies.\(^{228}\) This is an exemplary instance of how to proactively secure perpetual access to the beach and shoreline. Under this provision, an applicant for tax incentive benefits under the EDC must agree to fulfill various requirements as a condition of receiving benefits from the program.\(^{229}\) If the beneficiary does not remain in compliance with the contract, the beneficiary can suffer revocation or suspension of its benefits, assessment of fines, or both.\(^{230}\)

Although this is a great proactive program, it does not apply to businesses that are non-beneficiaries.\(^{231}\) There are still instances of ob-

\(^{225}\) McKeon, supra note 5, at 571.
\(^{226}\) Id. at 572.
\(^{227}\) This Commission’s name is constantly in flux, having been changed to the “Industrial Development Commission,” and is presently pending another change in name to “Economic Development Program,” by Bill No. 30-0300, which is currently pending before the Committee on Economic Development, Agriculture, and Planning of the Thirtieth Legislature of the U.S. Virgin Islands. Hodge, supra note 23.
\(^{228}\) “For any applicant who proposes to do business on land adjoining any beach or shoreline of the Virgin Islands, agree to grant to the Government of the Virgin Islands a perpetual easement upon and across such land to the beach or shoreline to provide free and unrestricted access thereto to the public . . . upon the granting of a certificate of a certificate of industrial development benefits. This provision shall not be construed as requiring free use of public facilities, but only as requiring free access to the beach or shoreline to the general public as a condition precedent to the granting of industrial development benefits.” V.I. Code Ann. tit. 29 § 708(i) (2012).
\(^{229}\) Id.
\(^{230}\) § 722.
\(^{231}\) See generally § 701.
struction of public beach access by private entities along the shoreline, as evidenced from the examples mentioned earlier. The legislature must mirror the example from the EDC section of the V.I. Code, but should expand this idea to condition all building permits in the coastal zone on whether a developer agrees to grant easements and thereby preserve public access.232 If building plans do not meet the standards required, the commission will have the authority to reject the plans altogether.233 This would “provide[ ] a power of control over the [developer] that can easily be applied to secure a public easement through any planned [development] which threatens to block upland access to the beaches.”234

The EDC Provision should mandate the coordination of enforcement with other appropriate governmental agencies so as to bolster the collective effort to ensure public beach access. These agencies must be actively and jointly involved in the struggle to preserve public access to the shores. This is a collective effort that has to be addressed as such.

Access through exactions has several advantages. “It is inexpensive, [ ] easy to administer . . . [and] reaches areas about to undergo extensive development, where the potential for conflict in land use is high.”235 Exactions do not require prior public use of the area, “and [they] force[ ] developers to pay costs that would otherwise be borne by the public.”236 Although there are many advantages to such exactions, the fact that exactions only apply to land that is about to undergo immediate development makes this method only a partial measure to preserve public rights.237 However, it is still a necessary measure in the struggle to preserve public access. The lure of advancement through economic development investments may be strong; however, it can never come at the price of the right of the people. Our government must encourage private entities to be good corporate citizens so that both interested parties can thrive in the absence of unnecessary debate and litigation.

4. Government-Managed Leasing Program

A government-managed leasing program establishes a lessor/lessee arrangement with a private entity as the lessee of government-
owned land. This is a program that would provide a compromise between competing entities. The government would be able to control and preserve beach access for the public on coastal lands to which it already holds title, while generating revenues to be kept in an interest-bearing “public trust” fund. Simultaneously, the lessee would get reasonable control of choice government-owned beachfront property with the ability to develop and make a profit off of the land without having to purchase the land. This idea is a unique way to manage an important public resource as well as generate needed funds to preserve beach access.

The government should publicize requests for proposals. Upon receiving proposals, the government would ensure potential lessees’ eligibility to take part in the program. Applicants would have to produce records of solid credit history and income information to prove that the applicant could pay the lease fees. Preferences would be given to applicants with the intent to use the land to ensure the greatest environmental conservation. A bidding process should also be applied. Upon meeting all application requirements, the highest bidder would become the lessee.

All management responsibilities would be vested in an appropriate administrative agency. Benefits and restrictions would be conveyed within the lease. The beach is still a significant natural resource. As such, as a provision in the lease, a lessee would not be able to commit waste upon the uplands or the beach. The right of first refusal would have to vest in the government at the end of the term. Revenue generated throughout the term should make this a sustainable program to fund beach access preservation in general. The special “public trust” fund could also be utilized as a depository for

239. See generally id.
240. After title to the lands of the Virgin Islands were conveyed to the U.S. by Denmark, the U.S., in turn, placed such land under the control of the Government of the Virgin Islands. 48 U.S.C. § 1405c (2015).
241. Radzievich, supra note 238, at 19.
243. Id.
244. Id.
245. The law imposes an obligation on a tenant to return the premises “at the end of the term unimpaired by any negligence of the tenant.” Singer, supra note 211, at 651.
247. Radzievich, supra note 238, at 28.
other grants and to acquire more property from private land owners, as well as various other gifts or awards to continue preserving beach access in perpetuity.

By implementing the foregoing programs, the government would be taking steps to ensure that free beach access is broadly available to as many people as possible.\textsuperscript{248} It is the American way. U.S. history has frowned upon placing the “value and benefits of great natural beauty on the market to be bought by the highest bidder.”\textsuperscript{249} Instead, these resources should be timelessly preserved for the use and pleasure of the public.\textsuperscript{250} These programs effectuate that preservation, and at the same time, raise much needed revenue to fund public access and perpetuate the public enjoyment of its majesty.

CONCLUSION

The U.S. Virgin Islands’ struggle to preserve beach access is no isolated problem. Across the U.S., the body of law governing this issue is vast and varying among various jurisdictions. Private control of the uplands threatens public enjoyment of the beaches. Owners, through their resort staff and residential subdivision security, isolate beaches by denying public access across private uplands.\textsuperscript{251} The public’s right in trust lands is rendered valueless, because restrictions on access make de facto private beaches.\textsuperscript{252}

Through its various administrative agencies, local governments must ensure that public beach access is properly preserved in perpetuity. This is a serious problem for the U.S. Virgin Islands and immediate action is necessary. Tempers are flaring and those who are informed are becoming impatient, and those who do not know as much are still injured and seeking answers.

The law must be amended to strengthen and solidify the public’s right of beach access as well as penalize those who violate that right. The CZM needs to be given specific authority to initiate the enforcement of the laws and enhance their strategies to proactively preserve beach access. Aside from amending the law, acquisition of the uplands to prevent conflict between competing interests of the public and large private entities should be considered as an option. Creating

\textsuperscript{248} Robert Thompson, Affordable Twenty-Four Hour Coastal Access, 12 Ocean & Coastal L.J. 91, 116 (2006).
\textsuperscript{249} Id.
\textsuperscript{250} Id.
\textsuperscript{251} McKeon, supra note 5, at 566.
\textsuperscript{252} Id.
beach parks, acquiring easements, and applying other land-use regulations are all options that should also be explored to ensure effective preservation of beach access in the islands. Finally, government-managed leasing can prove to be an innovative and useful tool for protecting dual rights of access and use forever.

It is time to take back the beaches by providing rights of access to use those beaches. To do so, the laws must change; the enforcement agencies must be activated; and citizens must assert their public beach access rights.
EXECUTIVE ACTION ON IMMIGRATION: CONSTITUTIONAL OR DIRECT CONFLICT?

Todd Curtin

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INTRODUCTION

In the United States, many immigrants—both of legal and illegal status—may never understand the fallout of the events that took place on November 20, 2014. On that day, the White House released a press statement notifying viewers that President Obama would do everything within his executive powers to solve the problems surrounding the immigration system.1 The press release went on to explain that every president in office since the Eisenhower Administration has used executive authority to address immigration issues.2 The White House was clearly communicating to both legal and illegal immigrants about the opportunity for change.

On the evening of November 20, 2014, President Obama laid out the steps he planned to take to fix the country’s “broken immigration system.”3 The White House made it clear that the President would

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2. Id.
be acting with legal authority in taking these steps. This paper addresses whether or not the Obama Administration did, in fact, act with legal authority by initiating the following steps using his executive authority: “cracking down on illegal immigration at the border; deporting felons, not families; and accountability through criminal background checks and taxes.”

President Obama, acting through Secretary of Homeland Security Jeh Johnson, had two primary objectives in issuing executive actions on immigration. The first was to expand the already-enacted policy under the Deferred Action for Childhood Arrivals (DACA) program. The second was to create a new program for a new class of citizens, called the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program. However, the Obama Administration has hit a massive roadblock in introducing these actions. On February 16, 2015, in *Texas v. United States*, United States District Court Judge Andrew Hanen issued a temporary injunction that prevents the Department of Homeland Security from accepting applications under the new, expanded portions of the DACA program. The order also enjoined the implementation of the new DAPA program; however, the injunction does not hinder or change any of the already existing polices under DACA.

Judge Hanen issued the order because the Obama Administration, in expanding DACA and creating DAPA, created a substantive rule without abiding by the procedural requirements set out in the Administration Procedure Act (APA). The court held that the Obama Administration was required to follow the APA requirements in issuing DAPA and failed to do so by not providing the proper “notice-and-comment rule making procedure mandated” by the APA. Judge Hanen avoided discussing broad constitutional claims or “tackling

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4. *Id.*
5. *Id.*
7. *Id.*
8. *Id.*
10. *Id.*
presidential powers head-on.”¹³ Thus, the order issued by Judge Hanen did not specifically address any constitutional claims falling under the Take Care Clause or the separation of powers doctrine.¹⁴ However, this paper addresses those issues head-on in order to make an accurate prediction of the arguments and potential decisions that the court could face if the injunction is lifted.

Before addressing the constitutional questions, however, a correction must first be made to the media in its misuse of the terms “executive order” and “executive action.” Judge Hanen correctly addressed the public’s misunderstanding of the two in the following:

Finally, both sides agree that the President in his official capacity has not directly instituted any program at issue in this case. Regardless of the . . . Executive Branch[’s] . . . public statements to the contrary, there are no executive orders or other presidential proclamations or communiqué that exist regarding DAPA. The DAPA Memorandum issued by Secretary Johnson is the focus of this suit.¹⁵

Judge Hanen correctly asserted that President Obama has not actually signed or executed any formal documents regarding the expansion of DACA or creation of DAPA. However, in his statements to the media, the President has accepted responsibility for these actions.¹⁶

For these reasons, the President cannot escape constitutional scrutiny for his own actions by seeking cover from his cabinet members. Additionally, lawyers for President Obama have admitted that Secretary Johnson acted in accordance with the President’s requests.¹⁷ Based on these facts, executive orders and executive actions can and should be used interchangeably. This paper groups both President Obama and Secretary Johnson’s actions collectively under the Executive Branch.

Due to the communications by the President and the actions of Secretary Johnson, the issue of existing legal authority to expand DACA and create DAPA still remains. To answer this question, this

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¹⁴ Texas, 86 F. Supp. 3d at 676.

¹⁵ Id. at 607.


paper analyzes the expansion of DACA, creation of DAPA, the courts’ responses to these measures, and the constitutional framework of executive action. In the end, applying the framework to President Obama’s actions will show that the President did not act within his legal authority, and thereby violated the United States Constitution.

I. EXPANSION OF DACA AND CREATION OF DAPA

In order to understand whether the President and the Department of Homeland Security (DHS) are acting within their legal authority, one must analyze the existing DACA program, the proposed expansion of DACA policies, and the newly proposed DAPA program. Understanding the differences between the original program and the new proposals is necessary in this analysis.

A. DACA

DACA was originally initiated on June 15, 2012, under the direction of then Secretary of Homeland Security Janet Napolitano. Secretary Napolitano issued a memorandum entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children.” Secretary Napolitano issued this memorandum to her department heads, specifically U.S. Customs and Border Protection, Citizenship and Immigration Services, and Immigration and Customs Enforcement. Throughout her memorandum, she set forth how department heads could use their prosecutorial discretion in cases involving young individuals who were brought to the United States during their childhood and know only this country as home. Secretary Napolitano’s memorandum instructed department heads to exercise prosecutorial discretion for illegal immigrants if they met the following five criteria:

19. Id.
20. Id.
21. Id. Prosecutorial discretion is used by a governmental agency that has the discretion to enforce the law against an individual. It is a “choice whether to exercise coercive power of the state in order to deprive an individual of a liberty or property interest” when the law allows the governmental agency authority to take action. See U.S. DEP’T OF HOME- LAND SEC. & CUSTOM ENFORCEMENT OFF. OF RETENTION & REMOVAL, DETENTION AND DEPORTATION OFFICER’S FIELD MANUAL 20.9 (March 27, 2006), available at http://www.immigration.com/sites/default/files/icedetention.pdf.
[the immigrant] came to the United States under the age of sixteen; has continuously resided in the United States for at least five years preceding [June 15, 2012] and is present in the United States on [June 15, 2012]; is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and is not above the age of thirty.\footnote{Napolitano Memo, \textit{supra} note 18.}

At the end of the memorandum, it was noted that only Congress can grant substantive rights regarding immigration status and citizenship, but the executive branch still has the authority to enact policies that allow exercise of discretion within the framework of existing law.\footnote{Id.}

\section*{B. Expanding DACA}

The expanded DACA program—announced on November 20, 2014, under the direction of Secretary of Homeland Security Jeh Johnson\footnote{Jeh Charles Johnson, Memorandum from the U.S. Dep’t of Homeland Sec. on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the U.S. as Children and with Respect to Certain Individuals Who are the Parents of U.S. Citizens or Permanent Residents 1 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [hereinafter Johnson Memo].}—was issued via memorandum entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and Respect to Certain Individuals Who are the Parents of U.S. Citizens or Permanent Residents.”\footnote{Id.} Secretary Johnson issued this memorandum to the same department heads as Secretary Napolitano, specifically U.S. Customs and Border Protection, Citizenship and Immigration Services, and Immigration and Customs Enforcement.\footnote{Id.} Ironically, Secretary Johnson’s memorandum maintained the same title as that of Secretary Napolitano with respect to children; however, he created a new program with a different title regarding parents of U.S. citizens or permanent residents.

Secretary Johnson’s memorandum specifically notes that it is “intended to reflect new policies for the use of deferred action” by way of Secretary Napolitano’s June 15, 2012 memorandum.\footnote{Id.} Therefore, there is no question that Secretary Johnson enacted new policies that
had not yet been executed. Secretary Johnson further noted that the legal authority for this policy was well established because DHS has the power to exercise prosecutorial discretion, as does every other law enforcement agency. The memorandum also stated that deferred action is allowed under the memorandum because it is a mechanism that has been in place and implemented for decades, “by which the Secretary of Homeland Security may defer the removal of an undocumented immigrant for a period of time.” Secretary Johnson acknowledged that deferred action historically has been used on a case-by-case basis, but the expansion of DACA policies should be treated no differently.

Secretary Johnson’s memorandum instructed Department heads to expand DACA in the following three areas:

[(1)] DACA will apply to all otherwise eligible immigrants who entered the United States by the requisite adjusted entry date before the age of sixteen (16), regardless of how old they were in June 2012 or today . . . ; [(2)] [t]he period for which DACA and the accompanying employment authorization is granted will be extended to three-year increments, rather than the current two-year increments . . . ; [and (3)] [i]n order to align with [DAPA] the eligibility cut-off date by which a DACA applicant must have been in the United States should be adjusted from June 15, 2007 to January 1, 2010.

Secretary Johnson, acting under President Obama, clearly expanded DACA. First, he removed the age cap on any potential applicant. An applicant will no longer need to be under the age of thirty-one to apply for deferred action. Second, he extended the DACA renewal and work authorizations from two years to three years. Finally, he adjusted the date of entry requirement by moving it up almost three years to allow more applicants to fit within the criteria of DACA. By expanding each of the aforementioned policies, there is no question that Secretary Johnson and President Obama attempted to enlarge the application pool for illegal immigrants to receive potential deferred action, which would allow them to remain legally in the United States for a period of time.

28. Id.
30. Id.
31. Id. at 3-4.
32. Id. at 3.
33. Id.
34. Id. at 3-4.
C. Creation of DAPA

In addition to expanding DACA, Secretary Johnson created a new program—Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)—“for exercising prosecutorial discretion . . . on a case-by-case basis”36 if the applicant:

- [has], on the date of this memorandum, a son or daughter who is a U.S. citizen or lawful permanent resident; ha[s] continuously resided in the United States since before January 1, 2010; [is] physically present in the United States on the date of this memorandum, and at the time of making a request for consideration of deferred action with the USCIS; ha[s] no lawful status on the date of this memorandum; [is] not an enforcement priority as reflected in the November 20, 2014 Polices for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum; and present[s] no other factors that, in the exercise of discretion makes the grant of deferred action inappropriate.37

Secretary Johnson supported the creation of DAPA for two reasons. First, the DHS does not have enough resources to locate and remove all illegal immigrants in the United States; second, there are humanitarian concerns that justify implementation of the program.38 Effectively, by way of creating DAPA, Secretary Johnson created a new class for the protection of illegal immigrants who could apply for deferred action and remain legally in the United States for a period of time. Therefore, both President Obama and Secretary Johnson have made the potential applicant pool even larger for illegal immigrants who could apply for deferred action.

Like Secretary Napolitano, Secretary Johnson, at the end of his memorandum, noted that these new policies do not create any substantive rights regarding immigration status or citizenship.39 He also stated that the executive branch must establish the necessary policies for the exercise of prosecutorial discretion within the framework of the existing law.40 These statements at the end of the memoranda by Secretary Napolitano and Secretary Johnson indicate that they foresaw the division these actions would create within Congress. Both Secretary Johnson and Secretary Napolitano asserted the power to defer action with respect to certain illegal immigrants based upon historical practice.

36. Id.
37. Id.
38. Texas, 86 F. Supp. 3d at 613.
40. Id.
II. THE CONFRONTATION CASES

Shortly after President Obama addressed the nation on Secretary Johnson’s memorandum expanding DACA and creating DAPA, a number of courts throughout the United States heard challenges based on these actions. Three cases in particular have addressed the issues associated with the executive actions. Each case addresses the potential constitutional arguments. For this reason, it is important to understand these cases and analyze the potential constitutional arguments that may arise if the injunction in Texas v. United States is lifted.

A. Arpaio v. Obama

In Arpaio, the elected Sheriff in Maricopa County, Arizona, brought suit and sought a preliminary injunction against President Obama, Secretary Johnson, and other federal officials. The suit was based on the President’s televised address to expand deferred action for DACA and create DAPA, and he asserted that the actions were “unconstitutional, otherwise illegal, and should be stopped from going into effect.” The defendants moved to dismiss the case on the ground that the sheriff did not have standing to bring the lawsuit. The court had to decide (1) whether to grant the Sheriff’s motion for preliminary injunction, or (2) whether to grant the defendants’ motion to dismiss for lack of standing.

The sheriff pointed out that, as a result of the executive order, the President and his Cabinet Secretaries were granting illegal amnesty to thousands of undocumented immigrants in the United States. He argued that the executive action was illegal and provided three constitutional reasons in support of this argument. First, “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” Second, “Congress shall have Power . . . To establish an uniform Rule of Naturalization.” Third, there is no provision in the

42. Id.
43. Id. at 196.
44. Id.
46. Id. at 12-18.
47. Id. at 3 (citing U.S. CONST. art. I, § 1).
48. Id. (citing U.S. CONST. art. I, § 8).
United States Constitution that dictates power to the executive branch “with regard to immigration, admission of aliens to the country, or naturalization or citizenship.” With respect to the latter, the only duty the President has is to make sure that he “shall take Care that the Laws be faithfully executed . . . .”

Regarding the first constitutional reason, the sheriff argued that the President violated Article I, Section 1 of the United States Constitution because President Obama sought to legislate in place of Congress. DACA and the Executive Order Amnesty are unconstitutional because legislation must pass both the Senate and House of Representatives before being sent to the President under the Presentment Clause. Here, the sheriff argued that the President and his administration legislated unilaterally and then “dare[d] Congress to disagree.”

In addressing the second and third points, the sheriff argued that the President and his administration could not use discretion in determining how much congressional funding could be used on immigration or in deciding not to fully enforce a law. The sheriff argued that the Supreme Court held in Train v. City of New York that the President does not have the power to “frustrate the will of Congress by killing a program through impoundment.” The sheriff’s argument was very simple—the President and his administration were tweaking the law that was already on the books by using a tool called deferred action, and deferred action cannot be used because it goes against the intent of Congress in approving already existing clear immigration law and regulations.

The Executive Branch, in its response memorandum to the sheriff’s request for a preliminary injunction, argued that their executive action was legal for two reasons. First, the Executive Branch has the authority to exercise discretion over immigration enforcement.
Second, the Executive Branch has long exercised the use of deferred action in immigration enforcement.\footnote{58}

In addressing the first point, the President argued that Congress has conferred to the Secretary of Homeland Security the right to supervise and enforce immigration laws.\footnote{59} Because this authority has been granted, it allows the Secretary to perform any such acts, including establishing regulations and issuing instructions, that he deems necessary to perform this duty as delegated by Congress.\footnote{60} The President argued that the appropriations from Congress are inadequate to allow the removal of all illegal immigrants.\footnote{61} For this reason, the Secretary must use the appropriations granted by Congress for the highest priorities, such as controlling illegal immigrants attempting to cross over the border.\footnote{62}

The President’s second argument was based on the premise that deferred action has been the historical practice for many years,\footnote{63} as reflected in the following actions:

\textit{[f]rom 1956 to 1990, discretionary mechanisms similar to deferred action were used to defer enforcement against aliens who were beneficiaries of approved visa petitions, nurses who were eligible for H-1 visas, nationals of designated foreign states, and the ineli-}

\footnote{58. Id. at ¶ 5.}

\footnote{59. Id. at ¶ 4. See 8 U.S.C.A. § 1103(a)(1) (2014) (“The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: Provided, however, that determination and ruling by the Attorney General with respect to all question of law shall be controlling.”) (emphasis added).}

\footnote{60.Defs.’ Mem. of P. & A., supra note 17, at ¶ 50. See 8 U.S.C.A. § 1103(a)(3) (2014) (“He shall establish such regulations; prescribe such forms of bond, reports, entries and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter.”).}

\footnote{61.Defs.’ Mem. of P. & A., supra note 17, at ¶ 10.}

\footnote{62. Id. at ¶¶ 9, 10.}

\footnote{63. Id. at ¶ 12. See also Arpaio, 27 F. Supp. 3d at 193 (“Deferred action is simply a decision by an enforcement agency not to seek enforcement of a given statutory or regulatory violation for a limited period of time. In the context of the immigration laws, deferred action represents a decision by DHS not to seek the removal of an alien for a set period of time. In this sense, eligibility for deferred action represents an acknowledgment that those qualifying individuals are the lowest priority for enforcement.”).}

\footnote{64.Defs.’ Mem. of P. & A., supra note 17, at ¶ 12; see United States ex. rel Parco v. Morris 426 F. Supp. 976, 979-80 (E.D. Pa. 1977).}

\footnote{65.Defs.’ Mem. of P. & A., supra note 17, at ¶ 12; see Voluntary Departure for Out-of-Status Nonimmigrant H-1 Nurses, 43 Fed. Reg. 2776-01 (Jan. 19, 1978) (finding foreign nurses were allowed in the United States on a temporary basis under the Immigration Nationality Act in order to practice if they secured temporary licenses and passed the State examinations for permanent licensure).}
gible spouses and children of aliens who have been granted legal status under the immigration Reform and Control Act of 1956.\textsuperscript{67} The President noted that the Supreme Court, too, has recognized that the Executive Branch has been granted the authority to exercise prosecutorial discretion in the field of immigration through deferred action.\textsuperscript{68} In recent years, the Supreme Court reaffirmed the notion that deferring the initiation of immigration removal proceedings falls within the Executive Branch’s authority.\textsuperscript{69}

The District Court in \textit{Arpaio} noted that the Immigration and Nationality Act (INA) is the statute governing immigration and naturalization practices.\textsuperscript{70} The INA, which was approved by Congress, separates immigrants into two categories—those who are inadmissible upon their first entrance into the United States,\textsuperscript{71} and those immigrants who are subject to removal once they arrived in the United States.\textsuperscript{72} Additionally, the court stated that the immigration laws require prioritization because, per the DHS, there are approximately 11.3 million undocumented immigrants who may qualify for removal residing in the United States, but the agency only has enough resources to remove about 400,000 of those immigrants.\textsuperscript{73}

The Obama Administration argued that Secretary Johnson issued the DACA and DAPA directives in accordance with his authority under the INA.\textsuperscript{74} As mentioned above, however, the sheriff argued that the President and DHS were not acting pursuant to the INA because

\begin{itemize}
\item \textsuperscript{68} Defs.’ Mem. of P. & A., supra note 17, at ¶ 13; Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 483-84 (1999) (“At each stage [of the removal process] the Executive has discretion to abandon the endeavor, and at the time IIRIRA was enacted the INS had been engaging in a regular practice (which had come to be known as ‘deferred action’) of exercising that discretion for humanitarian reasons or simply for its own convenience.”).
\item \textsuperscript{69} Defs.’ Mem. of P. & A., supra note 17, at ¶ 13; see Arizona v. United States, 132 S. Ct. 2492, 2499 (2012) (“A principal feature of the removal system is the broad discretion exercised by immigration officials . . . Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.”).
\item \textsuperscript{70} Arpaio, 27 F. Supp. 3d at 192; see 8 U.S.C.A. § 1101 (2015).
\item \textsuperscript{71} Arpaio, 27 F. Supp. 3d at 192; see 8 U.S.C.A. § 1182 (2015).
\item \textsuperscript{72} Arpaio, 27 F. Supp. 3d at 192; see 8 U.S.C.A. § 1227 (2015).
\item \textsuperscript{73} Arpaio, 27 F. Supp. 3d at 192-93.
\item \textsuperscript{74} Defs.’ Mem. of P. & A., supra note 17, at ¶ 2.
\end{itemize}
they were “frustrating the will of Congress” by using deferred action as a tool to circumvent enforcing the INA to the fullest extent practicable.

The court did address the constitutional arguments presented by both parties. Specifically, the court, by way of dictum, acknowledged that “the challenged deferred action programs represent a large class-based program, such breadth does not push the programs over the line from the faithful execution of law to the unconstitutional rewriting of the law for the following reason: the programs still retain provision for meaningful case-by-case review.”75 Furthermore, the court agreed with the President in that “case-by-case decision making reinforces the conclusion that the challenged programs amount only to the valid exercise of prosecutorial decision.”76

The court dismissed the sherriff’s complaint on the basis that the sheriff was unable to demonstrate how the case could be successfully litigated on the merits, and the sheriff did not suffer an irreparable harm, thus finding a lack of standing.77 Had the Arpaio court ruled on the legal authority of the Executive Branch in expanding DACA and creating DAPA, the court would likely have concluded the President and Secretary Johnson acted with legal authority.

B. United States v. Juarez-Escobar

The District Court in Juarez-Escobar had a much different take on the constitutionality of the Executive Branch’s recent executive action on DACA and DAPA. The court, on its own motion, held a hearing before sentencing the defendant, who was an illegal immigrant due to his re-entering the United States.78 Ultimately, the court had two issues to examine. The first was whether the expansion of DACA and creation of DAPA fell within the President’s executive authority.79 If so, then the second issue the court had to examine was whether the President’s executive action would unjustly and unequally impact the defendant, because the court has a duty to avoid sentencing disparities among defendants who undergo similar situations.80

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75. Arpaio, 27 F. Supp. 3d at 209; see Heckler v. Chaney, 470 U.S. 821, 831 (1985) (“[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise.”).
77. Id. at 207.
79. Id. at 784.
80. Id.
This case is unique because Judge Schwab asked the Government, which was trying to deport the defendant, why deferred action did not apply.81 The Government responded by stating that executive action did not apply in this case because it applies only to “civil immigration enforcement status.”82 Defense counsel, however, was quick to point out that the recent executive action by Secretary Johnson could be “an additional avenue of deferred action that will be available for undocumented parents of United States citizen[s] or permanent resident children” and could apply to the defendant in this case.83

The court held that the Executive Branch acted illegally because, even if Congress does not act, an unconstitutional executive action does automatically become constitutional, and executive action becomes legislation if it exceeds the scope of prosecutorial discretion.84 Judge Schwab, in addressing the court’s first point, noted, “Congress's lawmaking power is not subject to Presidential supervision or control.”85 The court cited many statements by President Obama in attempting to force Congress’s hand. Specifically, he noted that President Obama pressured Congress by telling it to “pass a bill” and that “the day I sign that bill into law, the actions I take will no longer be necessary.”86 These statements are indicative that the President acted without congressional approval.

Furthermore, the court found that, despite Congress’s dereliction of duty regarding invalidating previous executive actions, as evidenced by the failure to invalidate DACA in 2012, such failures do not indicate that effectuating unlawful executive actions are lawful.87 This also does not create a grant of lawmaking power to the President.88 For this reason, the court held that this executive action crosses the line and constitutes legislation by its changing the United States immigration policies and procedures.89 Therefore, the President may only “take care that the Laws be faithfully executed” and is not allowed to create laws through executive action.90

81. Id. at 779.
82. Id.
83. Id.
85. Id. at 786; see Youngstown Sheet & Tube Co. v. United States, 343 U.S. 579, 588 (1952).
87. Id.
88. Id.
89. Id.
90. Id.
In addressing the second point that the executive action created legislation, the court noted that presidents and certain members of their administrative agencies are granted prosecutorial discretion in cases dealing with criminal matters; however, such prosecutorial discretion is exercised on a case-by-case basis.91 The court, applying this logic to the case at hand, found that President Obama’s executive action exceeded prosecutorial discretion because “it provides for a systematic and rigid process by which a broad group of individuals will be treated differently than others based upon arbitrary classifications, rather than case-by-case examination,” and it grants substantive rights to those individuals who fall within a broad category, such as the undocumented immigrants.92 The court determined that the Obama Administration’s Executive Action does not provide a case-by-case review for illegal immigrants because it creates a “threshold eligibility criteria” before illegal immigrants can apply.93 This eligibility requirement modifies the application process because it “substantively changes the statutory removal system” and does not adapt “its application to individual circumstances.”94

According to the court, individuals who qualify under the “threshold eligibility criteria” will obtain substantive rights because they have the right to apply for deferred action.95 In doing so, they can apply for work authorization documentation and they will temporarily cease “accruing unlawful presence” for the purposes of federal law.96 In addition, the court reasoned that the Obama Administration overreached because the predominant purpose underlying the executive action was a humanitarian one aimed at promoting family unity.97 The court thus concluded that, given the aforementioned actions, the Executive Branch acted unconstitutionally because the executive action violated the separation of powers doctrine and the Take Care Clause.98

91. Id.
93. Id.
94. Id. at n.7 (“According to the White House, the Executive Action will apply to more than 4 million undocumented immigrants. There are an estimated 11.2 million unauthorized immigrants in the United States.”).
95. Id.
96. Id.
97. Id. at 788.
98. Id.
As previously discussed, *Texas v. United States* is the current roadblock to the Executive Branch’s expansion of DACA and creation of DAPA. The court sought to address three issues: standing, legality, and constitutionality of the plaintiffs’ claims. As noted above, Judge Hanen ordered the injunction because the Obama administration, by expanding DACA and creating DAPA, clearly performed a task that falls within the scope of the legislature and enacted a substantive rule without complying with the procedural requirements under the APA. Therefore, the court did not address the constitutional arguments. In addressing the Executive Branch’s actions under the APA, however, the court analyzed issues that could be relevant when discussing whether or not the Executive Branch acted with constitutional authority in expanding DACA and creating DAPA.

The court addressed the President’s argument justifying the creation of DAPA because of historical precedent that illustrates Executive-granted deferred action as being a lawful exercise of discretion. The plaintiffs countered by arguing that all of these previous deferred action scenarios were much smaller in scope. The court was quick to point out that “[p]ast action previously taken by DHS does not make its current action lawful.” The court cited to *Youngstown Sheet & Tube Co. v. Sawyer*, where President Truman claimed his action was legal because of “executive precedents.” In *Youngstown*, the Supreme Court rejected this position because past executive actions could not be considered binding authority nor a historical standard. Based on this decision, the court rejected the Government’s argument that historical precedent justified the current action.

Under the APA, there are two exceptions to the notice-and-comment requirement. The APA’s formal rulemaking requirements do not apply to (1) “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice;” and (2) “matter[s] relating to agency management or personnel or to public property,

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100. Id. at 663.
101. Id.
102. Id.
103. Id.; see *Youngstown*, 343 U.S. at 648.
104. *Texas*, 86 F. Supp. 3d at 663-64 (citing *Youngstown*, 343 U.S. at 649).
105. Id. at 665.
loans, grants, benefits, or contracts.” However, if the rule is substantive, the exception does not apply and the formal rulemaking requirements must be adhered to in a diligent manner.

The court determined that the Executive Branch was making substantive changes in the existing law. If the court’s reasoning was correct, this would support the argument that the Executive Branch exceeded its constitutional authority by creating substantive law. Here, the court held that DAPA was a substantive change in the law because

[i]t is a program instituted to give a certain, newly-adopted class of 4.3 million illegal immigrants not only “legal presence” in the United States, but also the right to work legally and the right to receive a myriad of governmental benefits to which they would not otherwise be entitled.

The court was very clear that the expansion of DACA and creation of DAPA do more than just supplement the INA. It, in fact, contradicts the INA. The court held that, in effect, this executive action created new law because:

DAPA turns its beneficiaries’ illegal status (whether resulting from an illegal entry or from illegally overstaying a lawful entry) into a legal presence. It represents a massive change in immigration practice, and will have a significant effect on, not only illegally-present immigrants, but also the nation’s entire immigration scheme and states who must bear the lion’s share of its consequences.

Here, the court determined that President Obama and Secretary Johnson were not just giving mere advice or guidance, but rather were giving benefits and imposing obligations based on detailed criteria to those responsible for enforcing it.

Judge Hanen noted that the DHS was not given any sort of discretion by law to give 4.3 million illegal immigrants the legal authority to

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106. Id.
107. Id.; see Prof’ls & Patients for Customized Care v. Shalala, 56 F.3d 592, 595 (5th Cir. 1995).
108. Texas, 86 F. Supp. 3d at 671.
109. Id. at 670, n.102 (“One could argue that it also benefits the DHS as it decides who to remove and where to concentrate their efforts, but the DHS did not need DAPA to do this. It could have done this merely by concentrating on its other prosecutorial priorities. Instead, it has created an entirely new bureaucracy just to handle DAPA applications.”).
110. Id.
111. Id.; see Shalala, 56 F.3d at 597 (concluding the agency’s policy guidance was not a binding norm largely because it did “not represent a change in [agency] policy and [did] not have a significant effect on [the subjects regulated]”). In the instant case, the President, himself, described it as a change.
112. Texas, 86 F. Supp. 3d at 671.
to remain in the United States. Furthermore, the DHS adopted new rules that changed the status and employability of millions of illegal immigrants. Because of these substantial changes, the Obama administration went beyond mere enforcement or even non-enforcement of the nation’s immigration laws.

In holding that the executive actions were substantive and, therefore, not in compliance with the APA, the court did not address whether or not the executive actions were unconstitutional. The court’s conclusion that the President’s actions were substantive for the purpose of the notice-and-comment requirements of the APA, however, indicates that it would have held these actions to be unconstitutional.

III. Constitutional Framework of Executive Action

The court in Juarez-Escobar noted that federal courts in two cases have found Executive Orders unconstitutional: Youngstown Sheet & Tube Co. v. Sawyer and Chamber of Commerce of United States v. Reich. Precedent has shown that most federal courts will apply Youngstown to questions involving whether or not the President is acting within his constitutional power when he issues executive orders.

In Youngstown, the main question was whether the President was acting within his constitutional powers when he ordered the Secretary of Commerce to seize and operate many of the nation’s steel mills. The plaintiffs argued that these actions by the President amounted to an encroachment on the legislative process because the Constitution expressly delegates the power to make laws to Congress and not the President. The Government argued that the President’s decisions and actions were necessary because, if steel production was halted, a national catastrophe could occur. President Truman, acting as the Chief Executive and Commander-in-Chief of the Armed Forces, determined that potential strikes by a majority of the nation’s steel mills would immediately jeopardize the production of the military and war materials needed in the Korean War. For this reason, Presi-

113. Id.; see 5 U.S.C.A. § 701 (2014) (“[A]gency action is committed to agency discretion by law”).
114. Texas, 86 F. Supp. 3d at 671.
115. Id.
117. Youngstown Sheet & Tube Co., 343 U.S. at 582.
118. Id.
119. Id. at 583.
120. Id.
dent Truman issued an executive order to the Secretary of Commerce to take possession of a majority of the steel mills and make sure they continued to operate.\textsuperscript{121} The Court had to consider whether or not the President had the constitutional authority to seize the mills.\textsuperscript{122}

The Court expressed that the “President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”\textsuperscript{123} The Court held that, in this case, there was no “statute that expressly authorizes the President to take possession of property . . . nor is there any act of Congress to which [] attention has been directed from which such power fairly be implied.”\textsuperscript{124} The Court addressed the President’s powers under Article II and found that President Truman’s seizures did not fall within the scope of those granted to the President under the Constitution.\textsuperscript{125} Specifically, the President’s power is to see that laws are faithfully executed and not that the President become the lawmaker.\textsuperscript{126}

Generally, the courts will apply Justice Jackson’s three-tier designation of presidential power found in his concurring opinion in \textit{Youngstown} to determine whether the President is acting in an area that is usually governed by Congress under the Constitution.\textsuperscript{127} A review of these designations as they apply to the Executive Branch’s actions on expanding DACA and creating DAPA is warranted here. When the President’s actions fall within the first area of presidential powers, his authority is at its apex because he is acting pursuant to an express or implied authorization by Congress.\textsuperscript{128} The first area of presidential power “includes all that [the President] possesses in his own right plus all that Congress can delegate.”\textsuperscript{129} Simply put, if Congress authorizes the action, there is a strong presumption in favor of the executive action.

\begin{itemize}
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} \textit{Youngstown Sheet & Tube Co.}, 343 U.S. at 585.
\item \textsuperscript{124} \textit{Id.} at 587.
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} Brief for the Members of Congress et al. as Amici Curiae Supporting Plaintiffs’ Motion for Preliminary Injunction, Texas v. United States, 2014 WL 7497765 (No. 1:14-CV-00254).
\item \textsuperscript{128} \textit{Youngstown Sheet & Tube Co.}, 343 U.S. at 582; see \textit{Ex parte} Merryman, 17 F. Cas. 144 (C.C.D. Md. 1981) (“Since the Constitution implies that the writ of habeas corpus may be suspended in certain circumstances but does not say by whom, President Lincoln asserted and maintained it is an executive function in the face of judicial challenge and doubt.”).
\item \textsuperscript{129} \textit{Youngstown Sheet & Tube Co.}, 343 U.S. at 582.
\end{itemize}
Second, “when the President acts in absence of either a congres-
sional grant or denial of authority, he can only rely upon his own
independent powers, but here is a zone of twilight in which he and
Congress may have concurrent authority, or in which its distribution is
uncertain.”\textsuperscript{130} When the President falls within the second category, it
is more likely to “depend on the imperatives of events and contempo-
rary imponderables rather than on abstract theories of law.”\textsuperscript{131} Finally,
the President’s powers are at its lowest ebb when he acts contrary to
the express or implied authorization of Congress.\textsuperscript{132} In this third tier of
presidential power, the President can only rely on his constitutional
powers, for the constitutional powers of Congress will not support his
actions.\textsuperscript{133} Justice Jackson expressed that the courts must often dis-
able the President when his actions fall under this category.\textsuperscript{134} The
reason for disabling the President is because “what is at stake is the
equilibrium established by our constitutional system.”\textsuperscript{135}

IV. Youngstown Application

In applying the three categories to President Obama and Secre-
tary Johnson’s actions, the first would not be applicable. Based on the
history of DACA and DAPA, there is nothing in the record that shows
Congress has given the expressed or implied authority to President
Obama, Secretary Napolitano, or Secretary Johnson to enact such poli-
cies. There has been no express authority granted to the Executive
Branch to create DACA and to expand DAPA. As the court noted in
\textit{Juarez-Escobar}, the President chastised Congress on such policies by
telling them to “pass a bill” and that “the day I sign that bill into law,
the actions I take will no longer be necessary.”\textsuperscript{136} Those statements
referencing the expansion of DACA and creation of DAPA indicate that
the President knew he acted unilaterally and without the express au-
thority of Congress.

However, a potential argument for the Government could be that Congress \textit{implied} this authority because it failed to take action

\begin{itemize}
\item \textsuperscript{130} Id.
\item \textsuperscript{131} Id.
\item \textsuperscript{132} Id.
\item \textsuperscript{133} Id.
\item \textsuperscript{134} Id. at 638; Humphrey’s Ex’r v. United States, 295 U.S. 602 (1935) (“President
Roosevelt’s effort to remove a Federal Trade Commissioner was found to be contrary to the
policy of Congress and impinging upon an area of congressional control, and so his removal
was cut down accordingly.”).
\item \textsuperscript{135} \textit{Youngstown Sheet & Tube Co.}, 343 U.S. at 638.
\item \textsuperscript{136} \textit{Juarez-Escobar}, 25 F. Supp. 3d at 786.
\end{itemize}
against the original implementation of DACA by Secretary Napolitano on June 15, 2012. Since Congress failed to challenge the original DACA program, they have impliedly given its approval to the executive action. This position is flawed because, as the court stated in Texas, “past action previously taken by DHS does not make its current action lawful.”137 Additionally, Youngstown rejected this position because past executive actions are not considered precedent, nor authorization for the President to take more action.138 Here, the President cannot create new executive actions by arguing that his previous executive actions, such as the creation of DACA, were legal. Further, as noted in Juarez-Escobar, the court found that, regardless of Congress’ failure to take action against past executive actions, such as implementing DACA in 2012, it does not indicate that taking such executive actions are lawful, nor does it confer authority to the Executive to create laws.139 Based on this analysis, Congress has not implied this authority by failing to act. Therefore, Justice Jackson’s first category does not apply to the Executive Branch’s actions.

Justice Jackson’s second category would not be applicable, either, to the expansion of DACA and creation of DAPA. There is no “zone of twilight” present because Congress has expressly legislated in the area of immigration enforcement. Specifically, Congress has enacted the INA to establish laws governing immigration and naturalization.140 The Executive Branch, however, would probably argue that their actions fall within the “zone of twilight” because Congress is silent in telling DHS exactly how to enforce the INA. This is because Congress has sent mixed signals by conferring on the Secretary of the DHS the right to administer and enforce immigration laws.141 Because this authority has been granted, it has allowed the Secretary of the DHS to “establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority” under the powers delegated by Congress.142 This argument is flawed because, as the court in Texas noted, the expansion of DACA and creation of DAPA did more than just supplement the INA. It actually stands contrary to the INA.143 For this reason, there is no “zone of twilight” present, as Congress expressed how to

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137. Texas, 86 F. Supp. 3d at 663.
143. Texas, 86 F. Supp. 3d at 670.
enforce rules against certain illegal immigrants and the Executive Branch failed to do so by expanding DACA and creating DAPA.

Finally, President Obama and Secretary Johnson’s executive actions do fall under Justice Jackson’s third category. Here, the Executive Branch has taken measures that contradict the will of Congress.144 President Obama and Secretary Johnson crossed the line by creating legislation that changed the United States immigration policies and procedures.145 This is clear as there would be a substantial number of illegal immigrants who would be eligible to apply for deferred action. The DHS estimated that there are around 11.3 million undocumented immigrants residing in the United States.146 As the court pointed out in Texas, the expansion of DACA and creation of DAPA would allow a “class of 4.3 million illegal immigrants not only legal presence in the United States, but also the right to work legally and the right to receive a myriad of governmental benefits to which they would not otherwise be entitled.”147 Strictly based on numbers alone, almost one-third of all undocumented immigrants would have the ability to apply for deferred action. This is clearly incompatible with the “express or implied will of Congress” because, if Congress wanted to protect this newly created class, even for a period of time, Congress would have done so by enacting legislation.

The Government has repeatedly argued throughout these legal challenges that they are not creating legislation because deferred action on each immigrant is done on a case-by-case basis, and history has shown that such an exercise of prosecutorial discretion is allowed.148 Because there is discretion with deportation proceedings on certain illegal immigrants, the Obama Administration contends its action is not legislation.149 As the court noted in Juarez-Escobar, the President’s executive action was more than prosecutorial discretion because “it provides for a systematic and rigid process by which a broad group of individuals will be treated differently than others based upon arbitrary classifications, rather than case-by-case examination, [and] it allows undocumented immigrants, who fall within these broad categories, to obtain substantive rights.”150 The Executive Branch dispenses these

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144. Youngstown Sheet & Tube Co., 343 U.S. at 635.
146. Arpaio, 27 F. Supp. 3d at 192-93.
147. Texas, 86 F. Supp. 3d at 670.
149. Id.
150. Id. at 787.
substantive rights because a very small percentage of those immigrants who apply for deferred action are actually denied.

The Government has argued that there are no alternate means to control illegal immigrants because the appropriations from Congress are inadequate in removing all illegal immigrants.\textsuperscript{151} Thus, requiring appropriations to be spent on keeping illegal aliens out and not deporting ones here is valid.\textsuperscript{152} There is no doubt that this could be a realistic issue. This, however, does not give the Executive Branch the right to “frustrate the will of Congress” by creating legislation based on a budget deficit. Thus, the Executive Branch is in direct conflict with Congress’ intent, as the INA was enacted to enforce rules and procedures that the DHS directives aim to protect. In applying \textit{Youngstown}, since the President is in direct conflict with Congress, his constitutional powers are the only ones available to him.\textsuperscript{153} Here, the President and DHS do not have any constitutional authority to legislate substantive laws over immigration and naturalization. Instead, the President is authorized to make sure that the INA laws are faithfully executed under the Take Care Clause of Article 2.\textsuperscript{154} For this reason, if the Executive Branch fails to execute the INA as intended by Congress, the courts must disable the President and his administration from acting to the contrary.\textsuperscript{155}

\textbf{Conclusion}

Secretary Napolitano and Secretary Johnson, at the end of their directives, iterated that these new policies did not give any substantive rights or pathways to citizenship.\textsuperscript{156} In fact, this may be true. The problem, however, is that the Executive Branch has failed to enforce the INA directives by exercising prosecutorial discretion and deferred action.\textsuperscript{157} This type of non-enforcement is in direct conflict with Congress’ intent under the INA. Therefore, President Obama and the Executive Branch are not acting within their constitutional powers. Under the President’s Article II powers, he must be diligent in making sure that the laws are faithfully executed. The INA is no different in this context. The President, however, has gone against the will of Con-

\textsuperscript{151} Id.
\textsuperscript{152} Defs.’ Mem. of P. & A., \textit{supra} note 17, at ¶ 10.
\textsuperscript{153} Id.
\textsuperscript{154} U.S. \textit{Constit.} art. II, § 3.
\textsuperscript{155} \textit{Youngstown Sheet \\& Tube Co.}, 343 U.S. at 638.
\textsuperscript{156} Johnson Memo, \textit{supra} note 24, at 5.
\textsuperscript{157} Id.
gress by creating policies that do not enforce immigration laws against approximately one-third of the nation’s illegal immigrant population. This is evident because President Obama and the Executive Branch are exercising prosecutorial discretion and deferred action for a class of immigrants that the INA does not protect.

President Obama’s executive actions implemented on June 15, 2012, under the direction of Secretary Napolitano, are illegal. Even though these actions have not yet been challenged, it does not make the actions legal. Hence, these initial actions cannot be regarded as precedent.\(^\text{158}\) Furthermore, the President cannot use these previous actions to justify his authority for initiating new actions on immigration.

For the foregoing reasons, President Obama and Secretary Johnson’s actions on November 20, 2014, expanding DACA and creating DAPA, are in direct conflict with Congress’ intent and are thus unconstitutional. The Executive Branch did not act with legal authority to fix our broken immigration system. Accordingly, these illegal actions should neither be implemented nor enforced under the law.

\(^{158}\) Youngstown Sheet & Tube Co., 343 U.S. at 648.
You Get What You Pay for: The NFIP is Underwater and Climate Change Adaptation is Essential to Reach Dry Land

Alana Dietel

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INTRODUCTION

“Researchers and lawmakers warn: Florida is ‘Ground Zero’ for sea level rise.”¹ “This map shows how screwed Miami is if sea levels keep rising.”² “Bay area communities brace for flood insurance onslaught.”³ “Despite no floods, Brevard residents find themselves living in a flood zone.”⁴

Climate change is a reality, and Florida is uniquely situated to feel its effects sooner than other states.⁵ This is due to the prediction of a substantially rising sea level and the fact that a majority of the most populated and popular areas in Florida are located along or near the coasts.⁶ In particular, Florida’s residents have long been victims of extreme weather events, including hurricanes, tornados, storm surges, and the resultant flooding during and after these events.⁷ Federal, state, and local governments have long taken a reactive approach to preparing for and insuring against the possibility of extreme weather conditions, focusing too much on rebuilding the risk rather than prudently retreating from it. The harsh reality is that a complete and proportionate response to climate change is highly implausible due to the rigid nature of our society and the sense of entitlement many

⁷. See NOAA Office for Coastal Management, Historical Hurricane Tracks, DIGITALCOAST, http://coast.noaa.gov/digitalcoast/historical-hurricane-tracks (last visited Aug. 26, 2015). This site, as part of the NOAA Office of Coastal Management, offers an interactive mapping program to search and display hurricane data, view coastal population data, and access National Hurricane Center storm reports. The search parameters also allow for the inclusion of tropical storms, depressions, etc.
Americans feel with regard to coastal land ownership, use, and protection.

The National Oceanic and Atmospheric Administration (NOAA) defines a coastal area as one in which “at least fifteen percent of the county’s total land area is located within the Nation’s coastal watershed; or a portion of or the entire county accounts for at least fifteen percent of a coastal cataloging unit.”

“A watershed is an area of land that water flows across as it moves toward a common body of water, such as a stream, river, lake, or coast.”

In 2008, 15.9% of Florida’s population lived along the coastline, nearly doubling from the 8.1% calculated in 1960.

As of 2010, over fifty percent of the U.S. population lived in coastal watershed counties. To put that into perspective, nearly all of Florida could arguably be considered a coastal watershed.

In most Florida counties, all of which are on or near a coast, global warming has a multiplier effect on the likelihood of extreme floods from a factor of just 1.1 up to a factor of 7, depending on the region. This article evaluates the effects of flood risks along Florida’s coasts in light of a much-needed overhaul of the National Flood Insurance Program (NFIP) as a location-sensitive adaptive response to climate change.

By incorporating more location-sensitive options for purchasers of flood insurance, the NFIP is ideally positioned to transform from running at a deficit into the functional equivalent of an insurance program Americans expect. The NFIP could be a program that is adequately self-funded to pay out insurance claims for flooding and flood damage; consistently rewards proactive measures against flooding and risks of extreme weather events; raises awareness of the personal and financial risks and costs associated with coastal land ownership; and,

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11. NOAA 2013, supra note 6, at 3.
provides location-specific options for coping with climate change adaptation and retreat.

Part I of this article examines the realities of climate change, including the global rise in temperatures, sea-level rise and coastal erosion, storm surge, and coastal storm ferocity. Part II reviews the current state of the most significant attempt at flood insurance by the Federal government, the NFIP. Part II also reviews Florida’s statewide initiatives, as well as local initiatives of three distinct Florida counties, each of which is positioned to feel the effects of climate change in subtly different, yet potentially devastating, ways. Part III addresses the importance of recognizing the different effects that the necessary flood insurance reform will have on the three counties and how extending the NFIP in a workable manner is necessary to promote the longevity and safety of these regions. Part III also discusses how implementing a variety of options for adaptation is essential to address flood risk differences from region to region, emphasizing that insurance is not usually, and should not be treated as, a “one size fits all” product.

I. CLIMATE CHANGE REALITIES

The global temperature has increased most dramatically from 1983 to 2012, with an overall rise of .85°C from 1850 to 2014. Scientists overwhelmingly agree that the increase in global temperatures is due primarily to human contribution of greenhouse gases into the atmosphere. In its 2014 synthesis report, the Intergovernmental Panel on Climate Change (IPCC) posited that “it is likely that extreme sea levels . . . have increased since 1970, being mainly the result of mean sea-level rise.” The IPCC also opined with high confidence that the long-term increases in economic losses from climate and weather-related disasters are due to increasing exposure of people and economic assets. If that were not enough, the IPCC predicted with very high confidence that coastal systems and low-lying areas will increasingly experience submergence, flooding, and erosion due to sea-level rise.

17. Id. at 11-12.
19. Id.
20. Id. at 67.
A. Effects of Climate Change

Since record keeping began, nine of the ten warmest years occurred during the 21st century.\footnote{Global Analysis – Annual 2014, NOAA Nat’l Centers for Envtl. Info. (Jan. 2015), http://www.ncdc.noaa.gov/sotc/global/2014/13. Recorded history started in 1880.} The year 2014 marked the 38th consecutive year since 1977 that the yearly global temperature was above average.\footnote{Id.} For 650,000 years, the amount of carbon dioxide in the atmosphere did not exceed 300 parts per million.\footnote{NASA, supra note 5.} As of 2014, the carbon dioxide levels reached an unprecedented 400 parts per million.\footnote{Id.} The IPCC assessment of climate change concluded with over ninety percent probability that the unparalleled global warming experienced—a departure from the past 650,000 years in Earth’s history—is due to human activities.\footnote{Id.} These facts scientifically and irrefutably confirm that the Earth is warming at an increased rate compared to previous periods in history and that the increase is due to humans.\footnote{Id.; Alexander et al., supra note 16.} Human influences by way of industrialization, deforestation, and burning of fossil fuels have contributed most significantly to the sharp increase in the emission of greenhouse gases since 1880.\footnote{Union of Concerned Scientists, Causes of Sea Level Rise: What the Science Tells Us 1 (Apr. 2013), available at http://www.ucsusa.org/sites/default/files/legacy/assets/documents/global_warming/Causes-of-Sea-Level-Rise.pdf.} IPCC scientists predict that the global surface temperature change for 2016-2035, relative to 1986-2005, will be in the range of 0.3°C to 0.7°C.\footnote{Alexander et al., supra note 16, at 18.} This increase in global temperature begs the question: will this increase disproportionately pose greater risks for already warm and heavily populated coastal regions?

In 2014, Florida surpassed New York to become the third most populous state in the United States, boasting a population of 19.9 million.\footnote{See U.S. Census Bureau, Florida Passes New York to Become the Nation’s Third Most Populous State, Census Bureau Reports (Dec. 23, 2014), available at http://www.census.gov/newsroom/press-releases/2014/cb14-232.html.} Also, Florida is home to some of the most heavily populated coastal areas.\footnote{NOAA 2013, supra note 6; Wilson & Fischetti, supra note 8.} As a result of global temperature rise on land and sea,
many coastal regions are taking the brunt of the most immediate impacts of climate change by way of sea level rise and coastal erosion.\textsuperscript{31}

As the Earth warms and forces the oceans to absorb excessive amounts of carbon, the top layers of the ocean warm, too, contributing to thermal expansion of the oceans and other bodies of salt water.\textsuperscript{32} Although thermal expansion contributed more significantly to rising sea levels immediately following the Industrial Revolution, that influence has generally remained constant in recent years.\textsuperscript{33} While it may seem like the leveling off of the thermal expansion of the oceans and seas is encouraging, its positive effects are overshadowed by the fact that the shrinking of land ice has accelerated, thereby negating any delay in the rising of sea levels.\textsuperscript{34}

Climate Central, after conducting a comprehensive sea level rise analysis of fifty-five sites across the United States, found that Florida is home to about half of the exposed population and eight of the top ten at-risk cities.\textsuperscript{35} Susceptibility to sea level rise is a strong indication of increased susceptibility to storm surges, tidal surge flooding, and extreme flood events caused by stronger and more vicious storms.\textsuperscript{36}

Conceding that the link between hurricane intensity, ocean temperatures, and human influence is complex, the consensus is still that there has been a substantial increase in the intensity and duration of Atlantic hurricanes since the 1980s.\textsuperscript{37} Along with the possibility of extreme flooding from harsher storm activity, the National Climate Assessment predicts that the instances of heavy downpours will increase by twenty-seven percent for the Southeast region of the United States, including Florida.\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{32} Union of Concerned Scientists, supra note 27, at 1.
\item \textsuperscript{33} Id.
\item \textsuperscript{34} Id.
\item \textsuperscript{35} Strauss et al., supra note 13, at 2.
\item \textsuperscript{37} Id.
\end{itemize}
B. Hurdles to Climate Change Adaption

The Federal Emergency Management Agency (FEMA) plays a vital role in providing information regarding disaster planning and relief in the aftermath of a disaster. Some unintended consequences of providing insurance against and financial relief from natural disasters have materialized since the inception of the NFIP. Some, but certainly not all, of the unintended consequences of providing cheap flood insurance and not requiring mitigation has resulted in a moral hazard dilemma and cognitive biases, as discussed further in the following sections.

1. Moral Hazard

Moral hazard refers to the idea that those insured against a particular type of loss will take fewer precautions to avoid the risks associated with that type of loss. Moral hazard, as a term of art, traces its origins to the insurance industry. Economists embraced this term to describe the “loss-increasing behavior that arises under insurance.” Innate to the insurer-insured relationship is the shifting of responsibility, specifically financial. The practical effect of this concept as it relates to flood insurance is that the availability of a subsidized policy encourages people to live in high-risk areas because of the perception that they are protected. Although research and literature are available regarding the moral hazard dilemma in other fields, the information currently available regarding flood insurance, specifically, is limited.

41. Id.
42. Tom Baker, On the Genealogy of Moral Hazard, 75 Tex. L. Rev. 237, 252 (1996); Wriggins, supra note 40, at 388.
44. Id.
45. Wriggins, supra note 40, at 388.
46. Id.
47. A majority of the research tends to focus on either medical issues or other forms of insurance that are not readily comparable to flood insurance.
2. Cognitive Biases

Other issues hindering many home and property owners’ decisions to mitigate or purchase flood insurance are the cognitive biases that form around high cost-low probability events, such as tsunamis and meteor impacts.\(^{48}\) These theories—normalcy bias, risk compensation, and gambler’s fallacy—apply not only to individuals, but to the government as well.\(^{49}\)

Normalcy bias is the refusal to plan for, or react to, a disaster that has never before happened.\(^{50}\) A good example of normalcy bias in action comes from a Brevard County news story, wherein a woman who was recently mapped into a flood zone thought she did not need insurance because she never experienced a flood in her area.\(^{51}\) Risk compensation is the tendency to take greater risks when the perceived safety increases.\(^{52}\) It has been suggested that analyzing visibility, effect, motivation, and control can help provide guidance for injury prevention measures.\(^{53}\) The analysis of these variables may be used to assess the probability and extent to which risk-compensating behavior is demonstrated with regard to flooding mitigation and adaptation.\(^{54}\)

Gambler’s fallacy is the tendency to think future probabilities are altered by past events or, more specifically, that the probability of an event is reduced if the same or similar event has recently occurred.\(^{55}\) The research regarding these biases, like moral hazard, tends to focus on issues other than flood insurance. However, the theories do lend themselves to general application in flood-related disaster scenarios.


\(^{49}\) Id. at 12.


\(^{51}\) Heath, supra note 4.

\(^{52}\) See James Hedlund, Risky Business: Safety Regulations, Risk Compensation, and Individual Behavior, 6 INJURY PREVENTION 82, 84-86 (2000), available at http://injuryprevention.bmj.com/content/6/2/82.full.pdf. An example would be the idea that having a seat belt law will influence some drivers to drive with less caution.

\(^{53}\) Id. at 88.

\(^{54}\) Id.

II. EXISTING FLOOD INSURANCE FRAMEWORK

A. Federal Initiatives

The Federal government introduced its national flood insurance initiative in 1968 and the government has attempted to make it a workable and solvent program ever since. The most notable efforts began in 1994, with the National Flood Insurance Reform Act. This act was followed by the Biggert-Waters Act in 2012, and finally resulted in the Affordability Act of 2014. The sections that follow will detail each significant step in the evolution of the Federal government’s flood insurance program.

1. National Flood Insurance Act and Program

In 1968, the federal government saw a need for federal intervention in the flood insurance industry. Its efforts resulted in the enactment of the National Flood Insurance Act of 1968, and implementation of the National Flood Insurance Program (NFIP). It became apparent to Congress that the private insurance industry was not ready or able to provide competitive premium pricing that reflected the actual level of risk they were willing to underwrite. Rather than leaving homes and property owners unprotected, the NFIP aimed to create a uniform national program to address the potential losses and damages caused by flooding.

From the outset, the NFIP objectives were simple: to create a self-sustaining federal flood insurance program funded by collected premiums for land located in flood hazard areas as determined by FEMA and in compliance with the program’s proposed system of national management of flood plains. Within the NFIP, the federal government plays the role of financier, while private insurance compa-
nies administer the program.65 Ancillary to the goal of pooling risk among a national base, the program was intended to encourage mitigation behaviors for those communities that participated.66

The NFIP is intended to work in a relatively simple manner. FEMA funds the program through collection of policy premiums and receives appropriations for some flood mapping and mitigation activities.67 Due to the unpredictability of natural disasters and the high correlation among filing of claims after these disasters, it has become necessary in some of the more severe instances for FEMA to borrow from the U.S. Treasury if premiums collected do not cover claim payouts, which has happened after every major hurricane or storm of the 21st century.68 Congress sets the limits on FEMA’s borrowing authority and, as of December 31, 2013, FEMA’s borrowing authority was $30.4 billion.69 Premiums collected also cover the program’s operation expenses, outreach, and research, in addition to paying out claims.70 While $30.4 billion sounds like a large amount of money, the NFIP is currently in debt to the U.S. Treasury for about $24 billion.71

The NFIP agenda consists of three components: risk identification and assessment, risk mitigation, and insurance.72 In risk identification and assessment, the NFIP tasked FEMA with identifying and mapping all flood plain areas, including special hazard areas, and establishing and updating flood-risk zone data (flood insurance rate maps or FIRMs) to make estimates with respect to rates of probable flood-caused losses.73 Secondly, the NFIP encouraged state and local measures that: constrict development of land exposed to flood damage; guide development of proposed construction away from locations threatened by flood hazards; assist in reducing damage caused by floods; and otherwise improve the long-range land management and use of flood-prone areas.74 Lastly, the NFIP program provides flood insurance to the extent that the community has been mapped by FEMA,

65. Id.
68. Id.
69. Id.
70. Id.
71. Id.
74. § 4102.
risk assessed, and the local government has instituted the required ordinances under the program’s guidelines for flood plain management.75

The National Flood Insurance Act defines a flood as “having such meaning as may be prescribed in regulations of the Administrator, and may include inundation from rising waters or from the overflow of streams, rivers, or other bodies of water, or from tidal surges, abnormally high tidal water, tidal waves, tsunamis, hurricanes, or other severe storms or deluge.”76 Providing insurance and creating incentives to mitigate flood risks and damage seems reasonable given that ninety percent of all natural disasters in the United States involve flooding.77

As of September 30, 2013, there were approximately 22,000 communities participating in the NFIP, which equates to more than 5.5 million policies in force.78 Although it may seem counterintuitive, not all individuals in flood prone areas are required to purchase flood insurance.79 Individual participation in the NFIP is predicated on whether the community in which the individual’s property is situated has adopted and enforces the NFIP floodplain management regulations.80 If so, participation may still be optional if the property is not financed through regulated lending institutions,81 government-sponsored enterprises for housing, or federal agency lenders.82 To the extent that flood insurance is actually available, it may not be required in all instances. For example, flood insurance is not required if the property is outside of the high-risk area.83

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75. §§ 4011, 4012(c).
76. § 4121.
78. Id. at 24.
79. About the National Flood Insurance Program: When Insurance is Required, FLOODSMART.GOV, https://www.floodsmart.gov/floodsmart/pages/about/when_insurance_is_required.jsp (last updated June 17, 2015).
80. Id.
81. Includes “any bank, savings and loan association, credit union, farm credit bank, Federal land bank association, production credit association, or similar institution subject to the supervision on a Federal entity for lending regulation.” 42 U.S.C. § 4003(a)(10) (2015).
83. “In high-risk areas, there is at least a 1 in 4 chance of flooding during a 30-year mortgage. All home and business owners in these areas with mortgages from federally regulated or insured lenders are required to buy flood insurance.” Defining Flood Risks, FLOODSMART.GOV, https://www.floodsmart.gov/floodsmart/pages/flooding_flood_risks/defining_flood_risks.jsp (last updated June 17, 2015).
To encourage participation in the national program, the government implemented the National Flood Disaster Act of 1973.\textsuperscript{84} The 1973 Act authorized FEMA to grant premium subsidies to create incentives for communities and property owners to accept the program’s requirements.\textsuperscript{85} By 1980, nearly all communities with flood hazard areas agreed to join the program, and the Act added mandatory purchase requirements for properties in certain flood-prone areas.\textsuperscript{86} The 1973 Act was followed by the implementation of FEMA’s “Write Your Own” (WYO) program in 1983. In this program, private insurers were authorized to market NFIP flood policies; however, the federal government remained the guarantor for the WYO insurers.\textsuperscript{87}

In a continuing effort to make purchasing a flood insurance policy mandatory, the federal government enacted the National Flood Insurance Reform Act of 1994.\textsuperscript{88} Under the 1994 Act, the government expanded the mandatory flood insurance purchase requirement and prohibited further flood disaster assistance for properties that did not maintain flood insurance.\textsuperscript{89} More specifically, the 1994 Act required three new categories of people to purchase flood insurance: those who received their loans from federally regulated institutions or whose loans were secured by improved real estate or a manufactured home; those whose loans have been purchased by the Federal National Mortgage Association or Federal Home Loan Mortgage Corporation; and property owners in participating special flood hazard area (SFHA) communities who received federal financial assistance for property acquisition and construction purposes.\textsuperscript{90}

Even though the government was attempting to implement a flood insurance purchasing requirement, it also wanted to help owners afford flood insurance. The two most prominent ways in which the NFIP furthered these two objectives was by granting heavily subsidized premiums and allowing for grandfathered rates.\textsuperscript{91} The subsidized policies are predominantly for properties built before Flood Insurance Rate Maps (FIRMs) became available and are referred to as

\begin{itemize}
  \item \textsuperscript{84} Flood Disaster Protection Act of 1973, Pub. L. No. 93–234, HR 8449, 87 Stat. 975.
  \item \textsuperscript{85} Quynh T. Pham, \textit{The Future of the National Flood Insurance Program in the Aftermath of Hurricane Katrina}, 12 CONN. INS. L. J. 629, 632 (2006).
  \item \textsuperscript{86} Id.
  \item \textsuperscript{87} Id.
  \item \textsuperscript{90} Pham, supra note 85, at 642.
  \item \textsuperscript{91} Abbott, supra note 72, at 30-33.
\end{itemize}
“pre-FIRM” policies. The assumption was that subsidized policies would be eliminated over time due to attrition by way of code compliance, triggered by substantial damage or substantial improvements. Other subsidized policies are those for properties behind certain unfinished or decertified levees, certain post-FIRM properties, and emergency program properties. Conversely, grandfathered premiums are generally those premiums that reflect the FIRM risk as calculated when the policy was taken out, rather than a premium based on the present day, and actual, FIRM risk.

In its original iteration, it is easy to see how the National Flood Insurance Act and its program were well intended—but in hindsight, it is evident that the program has fallen woefully short of its original objectives. The state of the NFIP as of the 1994 Act was as follows: nearly all communities that were eligible to participate in the NFIP participated; flood insurance has now become a requirement for all properties financed through any federally insured or regulated lending institution; and all new construction and substantial improvement to existing structures (improvement by more than fifty percent of the property's fair market value) are to be assessed premiums that reflect actuarially sound risk rates.

Of the 900 weather-related loss events that occurred worldwide in 2014, 20% of the events happened in North America, including Central America and the Caribbean. This means that there is an 18% chance that, in the event of a natural disaster in the United States, victims will experience flood related loss or damage. To put this into perspective, some states, such as Florida, require drivers to carry car insurance. In 2014, 1.5% of car crashes in Florida resulted in injury. This means that the average citizen has a 1.5% chance of getting injured in a car accident and an 18% chance of losing his/her home to a flood. However, insurance is only required in one of these scenarios.

96. See supra pp. 10-14.
99. Id.
A community that incorporates a mandate for the best available mitigation and adaptation strategies in its community development plan or flood plain management scheme is eligible to participate in the Community Rating System (CRS). This program rates each county or city according to its efforts with regard to alleviating the risk of flooding and flood damage. Each county receives a ranking from nine to one, with one being the best rating. The closer the rating is to one, the higher percentage discount the community receives on its NFIP flood insurance rates.

More than 67% of all flood insurance policies are written in CRS communities, even though CRS communities only make up about 5% of the 22,000 communities who participate in the NFIP.

2. Biggert-Waters Reform and Flood Insurance Affordability Act

In an effort to relieve taxpayers of the burden of paying for disaster relief that should have otherwise been covered by the NFIP, Congress rolled out the Biggert-Waters Flood Insurance Reform Act of 2012 (BW-12). BW-12 was what some now consider an aggressive departure from the historical practices of the NFIP in an effort to increase the program’s solvency and adequately incentivize preparation for and insuring against all flood-risk realities.

Under the BW-12, pre-FIRM subsidized premiums would increase at a rate of 25% each year until reaching the full-risk rates for severe repetitive loss properties—properties with cumulative paid flood losses exceeding fair market value, non-primary residences, and businesses/non-residential buildings. Policies would also be written or renewed at full-risk rates for property purchased on or after July 6, 2012.

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101. FEMA, supra note 39.
103. Id.
104. Id.
106. FEMA, supra note 39. FEMA defines a severe repetitive loss property as “residential property that is covered under an NFIP flood insurance policy” and that has at least four NFIP claim payments with a cumulative amount exceeding $20,000.00; or property “for which at least two separate claim payments” with a cumulative amount exceeding the market value of the building have been made. For both such situations, “at least two of the referenced claims must have occurred within any ten-year period, and must be greater than ten days apart.” Severe Repetitive Loss Property Locations in FEMA Regions IV and VI,
2012; new policies effective on or after July 6, 2012; and lapsed policies reinstated on or after October 4, 2012.107 With mounting pressure on multiple fronts, Congress decided to save face rather than protect its constituency.108 Thus, the Homeowner Flood Insurance Affordability Act of 2014 (HFIAA-14) was proposed by Congressmen Menendez and Grimm and passed.109

If BW-12 was Congress’s Goliath attempt to make the NFIP functional, the HFIAA-14 was its David-esque response that effectively dismantled most of BW-12’s best and most aggressive tactics.110 A few of the most significant provisions of the HFIAA-14 are the repeal of certain rate increases,111 restoration of grandfathered rates,112 introduction of surcharges for all policies,113 and the gradual integrated rate increases for newly mapped areas with special flood hazards.114

In its “Repeal of Certain Rate Increases,” the HFIAA-14 repealed any immediate rate increases to actuarial rates and supplanted the BW-12 provision by requiring gradual rate increases by no less than five percent annually until the premium reaches its full-risk rate.115 With regard to premium increases, “the chargeable risk premium rate for flood insurance under [HFIAA-14] for any property may not be increased by more than eighteen percent each year.”116 There are a few exceptions that will retain the BW-12 rate increases: older business properties insured with subsidized rates, older non-primary residences insured with subsidized rates, severe repetitive loss properties insured with subsidized rates, and buildings that have been

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107. Id.
110. Abbott, supra note 72, at 51. HFIAA is one third the length of BW-12.
112. Id.
114. § 6, 128 Stat. 1023.
substantially damaged or improvements built before the local adoption of a FIRM.\textsuperscript{117}

Where the BW-12 included catastrophic loss years in calculating the “average historical loss year,” the HFIAA-14 no longer requires the inclusion of catastrophic loss years when determining risk levels—in effect restoring grandfathered rates.\textsuperscript{118} In an effort to counteract the loss of potential revenue generated by the BW-12 immediate premium increases, the HFIAA-14 implemented a surcharge on all flood insurance policies of $250.00 for non-residential properties and residential properties that are not the primary residence of an individual, and a $25.00 surcharge for all other policies.\textsuperscript{119}

HFIAA clarifies the rate at which newly mapped special flood hazard areas will be assessed and the timeline during which the rate should reach its actuarial risk level.\textsuperscript{120} An owner who purchased his or her property after the enactment of HFIAA and whose property was recently designated a special flood hazard area would pay the preferred risk policy premium\textsuperscript{121} for the first policy year.\textsuperscript{122} Upon renewal of such a policy, the premium would be calculated in accordance with actuarial rates and any flood mitigation activities the owner has undertaken.\textsuperscript{123}

\section*{B. \hspace{0.5cm} State and Local Initiatives}

\subsection*{1. \hspace{0.5cm} Florida Coastal Management Statutes}

Florida has set forth by statute its own efforts to encourage vulnerable jurisdictions to develop comprehensive strategies to mitigate the risks associated with natural disasters and the extensive flood damage that may result.\textsuperscript{124} The Florida coastal management legisla-

\begin{thebibliography}{99}
\bibitem{117} FEMA, \textit{supra} note 39.
\bibitem{119} § 8, 128 Stat. 1023-24.
\bibitem{120} § 6, 128 Stat. 1023.
\bibitem{121} A preferred risk policy offers “multiple coverage combinations for both buildings and contents [ ] that are located in moderate-to-low risk areas . . . . [These policies] are available for residential or non-residential buildings also located in these zones, and that meet eligibility requirements based on the building’s entire flood loss history.” \textit{Frequently Asked Questions, FloodSmart.gov,} https://www.floodsmart.gov/floodsmart/pages/faq/what-is-the-preferred-risk-policy.jsp (last visited Aug. 26, 2015).
\end{thebibliography}
tion mirrors the federal Coastal Zone Management Act.\textsuperscript{125} In large part, development and implementation of coastal management is left to each municipality.\textsuperscript{126} In one of its first sections, the state statute lays out the required aspects of these comprehensive plans, and it also provides recommendations for optional additions to the plans.\textsuperscript{127} What is slightly more disturbing is that, by and large, the prudent measures to protect the coasts and its population from flooding appear to be optional:

At the option of the local government, develop an adaptation action area designation for those low-lying coastal zones that are experiencing coastal flooding due to extreme high tides and storm surge and are vulnerable to the impacts of rising sea level. Local governments that adopt an adaptation action area may consider policies within the coastal management element to improve resilience to coastal flooding resulting from high-tide events, storm surge, flash floods, stormwater runoff, and related impacts of sea-level rise. Criteria for the adaptation action area may include, but need not be limited to, areas for which the land elevations are below, at, or near mean high water, which have a hydrologic connection to coastal waters, or which are designated as evacuation zones for storm surge.\textsuperscript{128}

Florida’s coastal management statute covers the basics and allows each municipality to adopt local ordinances and codes that suit each municipality’s unique topography, economy, and population.

2. Local Responses and Initiatives

Most coastal counties in Florida have adopted coastal floodplain management ordinances.\textsuperscript{129} Generally, each community will develop a comprehensive code but may focus more on hazards frequently experienced in their location.\textsuperscript{130}

\begin{itemize}
    \item \textsuperscript{125} 16 U.S.C. §§ 1451-65 (2014). Although federal coastal management is relevant, it is beyond the scope of this paper. For a more in-depth review of federal coastal management and how it relates to and sometimes diverges from state and local coastal management, see Chad J. McGuire, \textit{Climate Change and the Coastal Zone Management Act: The Role of Federalism in Adaptation Strategies}, \textit{in Climate Change Impacts on Ocean and Coastal Law: U.S. and International Perspectives} 419-37 (Randall S. Abate ed., 2015).
    \item \textsuperscript{127} § 163.3177.
    \item \textsuperscript{128} § 163.3177(6)(g)(10) (emphasis added).
    \item \textsuperscript{129} See generally MUNICODE, https://www.municode.com/ (last visited Aug. 26, 2015).
    \item \textsuperscript{130} The purpose of this section is to outline, by way of a three county example, the general structure and objectives of most municipal flood ordinances in Florida. Specific detail and nuanced differences between and among the counties is beyond the scope of this paper.
\end{itemize}
Miami-Dade County and City of Miami Beach

Greater Miami and the Beaches received 14.2 million visitors in 2013, making it one of the most popular destinations in the world.\textsuperscript{131} While visiting Miami, 43.6\% of visitors who used lodging stayed in Miami Beach.\textsuperscript{132} Another staggering, although not entirely unexpected, statistic is that 68.2\% of overnight visitors to Miami visited the Beaches.\textsuperscript{133} The total population of Miami-Dade County was estimated at a little over 2.6 million in 2013.\textsuperscript{134} Of this total for the county, the estimated 2013 population for Miami Beach was only 91,026.\textsuperscript{135} This section includes both the City of Miami Beach and Miami-Dade County, because Miami Beach is at increased risk of flooding, and Miami-Dade is heavily reliant on Miami Beach.

Chapter 54 of the City of Miami Beach’s municipal code is dedicated to floodplain management.\textsuperscript{136} The code sets out in its statement of purpose its intention to promote public safety, health, and general welfare, and to minimize public and private losses from flood conditions by provisions designed to restrict or prohibit uses that are dangerous because of water or erosion hazards; require uses vulnerable to floods be protected against flood damage throughout their intended lifespan; control alteration of natural floodplains and natural protective barriers involved in accommodating floodwaters; control development that may increase erosion or flood damage; and prevent or regulate construction of flood barriers that unnaturally divert floodwaters or increase flood hazards to other lands.\textsuperscript{137}

Miami-Dade County institutes similar objectives with regard to floodplain management and building codes in coastal flood hazard areas.\textsuperscript{138} Among the provisions of this chapter is a requirement that new construction or substantial improvement construction in coastal flood hazard areas use construction materials and utility equipment that are resistant to flood damage and construction practices that minimize

\begin{footnotesize}
\textsuperscript{133} Research and Statistics, supra note 131.
\textsuperscript{135} Id.
\textsuperscript{136} Miami Beach, Fla., Ordinances ch. 54, art. II, § 54 (2009).
\textsuperscript{137} Id. at § 54.33.
\end{footnotesize}
flood damage. The County Manager or his designee administers and enforces the provisions of the floodplain management and building codes.

**ii. Brevard County**

Brevard County sits along Florida’s Atlantic coast and is home to popular tourist destinations, the Space Coast, and residential areas. Some of the better-known cities in Brevard County include Cape Canaveral, Cocoa and Cocoa Beach, Indian Harbour Beach, Melbourne, Palm Bay, Rockledge, Satellite Beach, Titusville, and West Melbourne. The U.S. Census Bureau puts the county’s population around 550,823, as of the 2013 estimate. The homeownership rate from 2009 to 2013 was approximately 73.5%, making residential property owners a significant contributor to the population base.

Brevard puts forth its flood regulations in its Flood Damage Protection ordinances. Similar to Miami Beach and Miami-Dade County, the purpose of the Brevard ordinances is to promote health, safety, and general welfare and to “minimize public and private losses due to flood conditions.” The provisions are designed to prevent occurrences such as water erosion, flood damage, and acts such as dredging, which may increase erosion or flood damage.

**iii. Pinellas County**

Although few people may know the county by name, they are probably familiar with the cities in Pinellas County, including Clearwater Beach, St. Petersburg Beach, Treasure Island, and countless more beaches and beach communities throughout. An overhead view of this area shows that it is a peninsula, just like Florida, making it a peninsula within a peninsula. The 2013 population estimate for Pinellas County, Florida, was the highest in the state, with a population of over 900,000. The homeownership rate from 2009 to 2013 was approximately 74.5%, making residential property owners a significant contributor to the population base.

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139. Id. at § 11C-3(b).
140. Id. at § 11C-8.
142. Id.
143. State and County Quick Facts, supra note 134.
144. Id.
146. Id. at § 62-4003.
147. Id. at § 62-4003(1)-(3).
nellas was around 929,048. Of this total, the homeownership rate from 2009 through 2013 was sixty-seven percent, making it more residential than commercial. As of the 2010 census, Pinellas’s population density was 3,300 people per square mile, making it the most densely populated county in Florida.

As with most Florida coastal counties, the purpose and objectives with regard to community management of floodplains and flood areas are generally homogenous. Pinellas varies in no significant way from the purposes set forth by Miami-Dade County, the city of Miami Beach, or Brevard County.

Because a national program can do little to address location-specific issues (population density, residential versus commercial, wealthy versus impoverished, vulnerability to storm surge versus downpour flooding, etc.), it only makes sense that the NFIP has fallen woefully short in providing cogent, long-term adaptation strategies that best fit each unique coastal community.

III. LOCATION-SENSITIVE PROVISIONS FOR NFIP ADAPTATION TO CLIMATE CHANGE

Keeping in mind that the NFIP has a community rating system that allows for greater discounts for flood preparedness and mitigation, it would stand to reason that communities in a state like Florida with coasts on three sides would be ranked high on the list to secure the best discount for its residents. Sadly, that is not the case. Not one community in Florida that is eligible to participate in the CRS is rated better than a five. While each of the three counties and one city discussed have implemented floodplain management ordinances in compliance with the NFIP, they are still not doing enough to enforce the rules already on the books and motivate their residents to take more rigorous proactive measures. Allowing subsidies and grandfathered rates is not the same as providing a discount for imple-

150. State and County Quick Facts, supra note 134.
151. Id.
153. See generally MUNICODE, supra note 129.
156. National Flood Insurance Program Community Rating System, supra note 102. One is the best rating, ten means the locale does not participate, and nine is the worst rating. Id.
menting proper mitigation techniques. With subsidies and grandfathered rates, the NFIP is basically rewarding the most at-risk properties, which is entirely counterintuitive to its purpose. The NFIP rate estimate policies, as reformed by the HFIAA, have become less financially burdensome than the provisions of the BW-12 by allowing the end goals of the BW-12 to be implemented more slowly over time, rather than immediate increases after a triggering event.\textsuperscript{157}

It has become apparent that allowing more policyholders to pay less is not helping the NFIP repay its debt to the treasury.\textsuperscript{158} Intuitively, policyholders would be unlikely to voluntarily participate if they would end up paying more in premiums for the same policies. It could be argued that, at least in part, the financial solvency of the NFIP was predicated on the notion that the program could make up in volume what it lacked in actuarially sound policies. Without requiring communities to participate, it is difficult to see how this particular end was justified by its means.

A. General Provisions

Consistent with the HFIAA-14, the eventual elimination of subsidies and grandfathered rates is essential to extending the life of the NFIP. The policy surcharges imposed also promote that objective. Consistently calculating in catastrophic loss years in estimating the FIRM risks will help bring the policy rates steadily back to actuarial soundness. These policy changes and premium adjustments happen across the board but still do not provide struggling property owners with enough relief when it comes to insuring or reinsuring property in flood prone areas.

B. Every City is Not the Same: Location-Sensitive Provisions

Just like car insurance providers take into account multiple factors when determining the rates they provide to individual drivers, so should flood insurance providers—and not just the FIRM information provided by FEMA. It is equally as important to take into account the local population base and economies of each city and county participating in the NFIP.

\textsuperscript{158} U.S. Government Accountability Office, supra note 15.
1. Miami-Dade County and City of Miami Beach: Taxes and Tourists

Thankfully, Miami-Dade County and the city of Miami Beach do participate in the CRS, but as of October 2014, Miami-Dade County held a rating of five and the City of Miami Beach held a rating of six. With a rating of five, Miami-Dade County is able to offer a 25% discount on policies in special flood hazard areas and a 10% discount for non-special flood hazard areas. Miami Beach, at a six, can offer a 20% discount on special flood hazard policies and the same 10% on non-special flood hazard policies.

Arguably, the most immediate and irreversible threats to this region of Florida are sea-level rise, higher levels of tidal flooding, and storm surge reaching farther inland from more intense storm activity and hurricanes. Most of the Miami Beach area is developed, with condominium high rises, resorts, and tourist destinations, as tourism is its number one industry. Most of Miami Beach’s economy is tied to the high rates of tourism, but at the projected rates of sea-level rise, it is estimated that by 2030, the frequency of tidal flooding will increase from six to forty-five events per year.

Miami Beach and Miami-Dade County need to tighten their proverbial ships to allow the residents in each location to qualify for the most generous discounts available by the NFIP through the CRS. Considering that these regions are most at risk for extreme flooding, it is baffling that the two locations have not done everything in their power to mandate and enforce coastal floodplain management provisions to achieve the highest rating the NFIP CRS has to offer, thereby adding to the protection of each to the highest extent possible and making insurance more affordable to the residents. The NFIP can help this particular region by focusing on policy adjustments that address the manner in which FEMA incorporates sea level rise and tidal flooding into its risk mapping and aggressive marketing to inform the community of the financial realities of their investments.

Since a majority of Miami Beach is commercial property, businesses are likely to be more resilient than residential property owners to flood insurance rate increases. Also, due to Miami’s widespread reliance on tourism, business owners are eager to keep new and returning visitors coming to its beaches. Implementing a tax credit scheme, re-

160. Id.
162. Id.
warding mitigation efforts, and penalizing lapses in coverage or below risk policy premiums should motivate business owners to protect their investments and keep tourists (rather than the ocean) flooding through their doors. With regard to residential property owners, multi-million dollar homes predominate some of the most at-risk residential neighborhoods in Miami Beach. These owners have likely already taken property mitigation precautions or are financially stable enough to survive a complete loss. By implementing a tax credit system in a county and city dominated by tourist-industry businesses, commercial properties, and wealthy residential property owners, the NFIP could shift the financial burden to the tourists and more palpably encourage mitigation and adaptation strategies.

2. Brevard County: Bring Back Private Insurers

Brevard County boasts on its website that it participates in the NFIP’s CRS but, like Miami-Dade County, its rating is lower than it should be. At a rating of seven, Brevard secures a discount of 15% for policies taken out in special flood hazard areas and a 5% discount for non-special flood hazard areas. While some discount is better than none, these reductions are effectively removed when you take into account the gradual increases mandated by the HFIAA-14.

Although Brevard has taken proactive measures in updating its FIRMs and reassessing insurance requirements and premiums, the backlash was almost immediate. A resident of Rockledge, in Brevard, was shocked to find that, in 2014, her home was remapped into a flood zone. FEMA responded by providing the resident with two options: pay a minimum of $1,000 to get her own survey and resubmit the data to FEMA, or continue spending hundreds of dollars a month on flood insurance. Having lived in her neighborhood for over ten years and never having experienced a flood or even pooling water following strong storms, she is concerned that the extra expense will force her out of her home.

Perhaps the best solution for Rockledge, Brevard County, and other similarly situated cities and counties in combating the rising cost

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164. Id.
165. Id.
168. Id.
169. Id.
of flood insurance in an age of unprecedented rising seas may be at least a partial shift back to private flood insurance. In a market-based economy, private insurers are compelled to provide actuarially sound policies at competitive rates if they are to remain solvent. The idea of reintroducing private flood insurance is already gaining traction in the Florida State Senate. The proposition that private flood insurance could fix at least some of the NFIP’s problems is not without some critics. However, because a private company will generally dictate the terms upon which a policy may be issued, these private insurers are in a much better position than the attenuated reach of the federal government to incentivize and monitor mitigation approaches and enforce penalties for allowing policies to lapse. The consumer base for private flood insurance could not be more robust than it is now in the era of failed governmental reforms and societal backlashes.

3. Pinellas County: Buyouts for Those Already in Trouble

Like Brevard, Pinellas County holds a rating of seven in the NFIP’s CRS and offers the same percentage discounts to its residents. The difference is that Pinellas’s population density dwarfs that of Brevard, which can be readily inferred just by looking at the size of each county in comparison. With more people tightly packed into a smaller area, the effects of flooding, hurricanes, and storm surge are felt by a greater number of people and have more structures upon which to inflict damage. A lot of Pinellas’s infrastructure was put into place before the NFIP, and a number of its communities are filled with homes and buildings constructed before FIRMs became available. This leaves the area particularly vulnerable to sea level rise and floods reaching farther inland, perhaps from both sides, converging in the middle of the peninsula.

In addition to the HFIAA-14 policy changes, this area would most likely benefit from a buyout program for distressed owners who simply cannot afford the real cost of flood insurance or to rebuild their


173. State and County Quick Facts, supra note 134.

174. PINELLAS COUNTY, supra note 148.
homes to make them more resistant to flooding. Barrier island towns and cities, including Indian Rocks Beach, Indian Shores, Redington Beach, Redington Shores, and Madeira Beach, protect a lot of the main trunk of Pinellas. As the names suggest, most of these towns and cities, and by extension their economies, are based on or around beaches and beach activities. Retreat from these areas can only flee so far away from the Gulf before residents meet the intra-coastal on the other side. A member of the Indian Shores Town Council put it best when, in response to NFIP rate hikes, he said: “I built this according to code and I’m on the intra[-]-coastal side, not the Gulf; but in the real world, if we have a direct hit, we’re going to be a speed bump for the mainland.”

In the same article, the council member indicated that under FEMA’s new maps of his city, insurance rates for his residents doubled or tripled, noting that lifting a fifty-year-old beach cottage is likely too expensive for many, leaving the residents no other choice but to leave or hope for the best. This is where the buyout program, similar to the one established in New Jersey after Superstorm Sandy, would provide a third option.

Using the Superstorm Sandy Blue Acres Buyout (Blue Acres) program in New Jersey as a guide, Florida could implement a similar program to give distressed owners a way to leave their homes with something, rather than remaining in a home that will likely be underwater, both literally and figuratively. In New Jersey’s Blue Acres program, the state uses federal disaster funds to give owners the option to sell Sandy-damaged homes in flood-prone areas at pre-storm value. The program uses some of the following criteria to evaluate each neighborhood within which it decides to offer buyouts: flood damage from Superstorm Sandy, or repeated flood damage from previous storms; willing sellers (as the program is strictly voluntary); clusters of flood-prone homes, or whole neighborhoods; and other criteria.

Pinellas could benefit from utilizing the same criteria, but with some adjustments. Although highly vulnerable to flooding and hurricanes, Pinellas remains largely unscathed in comparison to Louisiana, New Jersey, and other parts of Florida. The proposed program for Pinellas, or Florida generally, could be adjusted to include the following provisions: repeated flood damage from previous storms or storm

175. Boatwright, supra note 3.
177. Other criteria include: support from the local government; cost-effectiveness of the buyout according to FEMA guidelines under federal law; and opportunity for significant environmental impact and/or improvement to public health, safety, and welfare. Id.
surges; willing sellers (as the program is strictly voluntary); support from the local government; clusters of flood-prone homes, or whole neighborhoods; cost-effectiveness of the buyout according to FEMA guidelines under federal law; opportunity for significant environmental impact and/or improvement to public health, safety, and welfare; predicted sea level rise and tidal flooding models; and allowing for commercial properties to be considered, but contemplating the potential local economic impact of buyout for these properties.

While the buyout program would not be a panacea for all the issues facing the residents of Pinellas in securing affordable flood insurance, it at least allows for another alternative to spending money the residents likely do not have.

Conclusion

The federal government’s attempt at flood insurance through the NFIP has continued to limp on in the wake of reform after reform and superstorms, alike. The problem is that exponentially intensifying effects of climate change have become the deathblows to an already mortally wounded program, much to the chagrin of those denying that climate change is a reality for this generation. The climate change adaptation sensitive options that should and need to be instituted within the NFIP, particularly to protect Florida, are not intended to be a cure, but rather a procedure by which the NFIP’s life is extended. It is inevitable that the NFIP’s ship should sink if it remains on its current course, but that does not mean Florida’s residents have to go down with it.