
SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Date: March 30, 1998 Revised: 4/29/98 _____

Subject: Civil Actions

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Maclure/Wiehle</u>	<u>Krasovsky</u>	<u>RC</u>	<u>Favorable/CS</u>
2.	<u>Matthews</u>	<u>Krasovsky</u>	<u>CC</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

This conference committee bill is a product of the joint Committee on Litigation Reform between the Florida Senate and the House of Representatives to review the impact of the civil litigation system on Florida's business climate. The bill makes a wide range of modifications and additions to both the procedural and the substantive aspects of the civil litigation system in Florida. Some of the major provisions:

- Provide a series of jury reform measures to inform and instruct jurors, and allow greater participation by the jurors in civil trials to include the provision of juror notebooks in civil trials likely to exceed 5 days, and permission to direct written questions to witnesses;
- Authorize more sanctions to deter unfounded claims and defenses, and protracted litigation;
- Provide option for alternative or expedited court procedures in more types of civil cases;
- Eliminate automatic application of joint and several liability in cases with total damages of \$25,000 or less, and specify that joint and several liability will apply when a party's own fault exceeds 20% and exceeds the claimant's fault but only up to \$300,000 of the total of economic damages (comparative fault is applied to the remainder of the economic damages, if any);
- Require a defendant to affirmatively plead the fault of a nonparty and prove by a preponderance of the evidence at trial in order to include the non-party on the verdict form;
- Create a 12-year statute of repose for products liability cases with the period commencing from the date of delivery of the completed project to its original purchaser, and provide a grandfather clause to allow certain actions to be filed until July 1, 2003;
- Create a "government rules defense" allowing manufacturers and sellers to assert a rebuttable presumption that products are not defective or unreasonably dangerous if the product complies with certain state or federal regulatory or statutory standards;

- Prescribe a rebuttable presumption against a claim of negligent hiring provided an employer takes investigatory steps of the prospective employee;
- Limit or prohibit recovery of certain damages under specified conditions when the influence of drugs or alcohol is involved;
- Provide definitions and duties relating to premises liability for injury to invitees, customers and different categories of trespassers on business or other real property;
- Limit the vicarious liability of certain motor vehicle owners or rental companies for damages due to the operation of the vehicle by an operator or lessee to \$100,000 per person and \$300,000 per occurrence for bodily injury and \$50,000 for property damage, but allowing an additional cap of \$500,000 in economic damages when the operator or lessee is uninsured or under-insured;
- Revise burden of proof standard and conditions for recovery of punitive damages including the prohibition of repetitive punitive damages award under certain conditions;
- Set forth legislative intent to promote the adoption of stricter requirements on advertisements and solicitation of legal services; and
- Provide for actuarial study to report, by March 1, 2001, expected reduction in judgments, settlements, and other related costs in claims of certain insurers resulting from impact of the litigation reform measures, and provide for subsequent review by the Department of Insurance of certain insurers rate filings.

This bill substantially amends the following sections of the Florida Statutes: 44.102, 57.071, 57.105, 90.803, 95.031, 324.021, 400.023, 768.075, 768.095, 768.72, 768.73, 768.77, 768.78, 768.79, and 768.81. The bill also creates the following sections: 40.50, 44.1051, 47.025, 768.0705, 768.096, 768.1256, 768.36, 768.725, 768.735, 768.736. The bill also repeals the following subsections: 768.77(2) and 768.81(5).

II. Present Situation:

Background

Select Senate Committee on Litigation Reform

In August 1997, the Senate President appointed an 11-member Select Senate Committee on Litigation Reform to conduct hearings to assess the manner and extent to which the current civil litigation environment is affecting economic development and job-creation efforts in the state. The select committee was additionally charged with ascertaining what civil litigation reforms, if any, would enhance the economic development climate of the state while continuing to preserve the rights of citizens to seek redress through the judicial system.

The select committee conducted a series of public meetings from September 1997 through early 1998. Testimony was solicited on key litigation topics from a variety of civil legal practitioners, representatives of interests in the area of civil litigation, and representatives of a judicial task force created by the Supreme Court to monitor the Legislature's efforts on litigation reform. The select

committee developed and discussed specific issues within each topic. In February 1998, the select committee issued its report and recommendations on litigation reform to the Senate President, which included corresponding draft legislation.

Among the principal topics explored by the committee were alternative dispute resolution methods attorney's fees and costs, doctrines of comparative fault and joint and several liability, economic and non-economic damages, evidence, jury duty, punitive damages, statutes of limitations and vicarious liability.

House Committee on Civil Justice and Claims

The House Committee on Civil Justice and Claims similarly conducted a series of extensive hearing between September 15, 1997 and February 17, 1998. These hearings also dealt with many aspects of the tort system, including, but not limited to, negligence, expedited proceedings, products liability, employer liability, premises liability, motor vehicle liability of third party, allocation of non-party fault, workers' compensation benefits as collateral sources, and statutes of limitations and repose. The hearings focused, in particular upon the impact of tort litigation on small businesses. The committee proposed a number of legislative proposals addressing its findings and conclusions.

Current Statutory and Common Law

A comprehensive statutory and case-law analysis of each of the topics addressed by the committee is beyond the limited scope of this report. In some places, however, the "Effect of Proposed Changes" section of the report identifies how a proposed change differs from present law. The following are summary descriptions of key topics considered by the committee.

Alternative Dispute Resolution and Expedited Court Proceedings

Chapter 44, F.S., provides that courts may refer all or any part of a filed civil action to mediation. Mediation is a process in which a neutral third party acts to encourage and facilitate the resolution of a dispute between two or more parties. The mediator does not render a decision. Instead, the decision-making authority rests with the parties. Mediation is always non-binding. The law also provides that upon motion or request of a party, a court shall not refer any case to mediation where there has been a history of domestic violence that would compromise the mediation process.

Chapter 44, F.S., also provides for arbitration. Arbitration is a process in which a neutral third party considers the facts and arguments presented by the parties. The arbitrator renders a decision that may be binding or non-binding. Courts may refer any contested civil action filed in a circuit court or county court to non-binding arbitration. The arbitration decision is presented to the parties in writing. This decision is final if a request for a trial de novo is not filed within the time provided by the rules promulgated by the Supreme Court. The party who files for a trial de novo

may be liable for legal fees and court costs of the other party if the judgment at trial is not more favorable than the arbitration decision. Two or more parties may elect to submit the controversy to voluntary *binding* arbitration.

Rule 2.085, Florida Rules of Judicial Administration, provides guidelines setting forth general timelines for conducting trial and appellate court proceedings. The guidelines state that civil jury trials should be conducted within 18 months after filing, and civil-non jury trials should be conducted within 12 months after filing. Civil cases not completed within the timelines are reported on a quarterly basis to the Chief Justice of the Florida Supreme Court. There is no rule providing for speedy trial resolution analogous to the criminal speedy trial rule, Rule 3.191, Florida Rules of Criminal Procedure which requires misdemeanor cases to be brought to trial within 90 days, and felony cases to be brought to trial within 175 days.

Attorney’s Fees

In Florida, attorney’s fees are determined by a contract between the client and the attorney and such a contract is enforceable according to its terms unless it is found to be illegal, obtained through improper advertising or solicitation, prohibited or excessive. Contingency attorney fees are allowed in Florida except in certain domestic relations matters and when the attorney represents the defendant in a criminal matter. A contingent fee agreement must be in writing signed by all the parties to the contract; expressly state the calculation method, percentages, and address the payment of costs; and contain a 3-day cancellation clause and statement of client’s rights. The Supreme Court of Florida has established a limit for contingency fees as follows:

CONTINGENCY FEE BREAKDOWN: Rule 4-1.5 Florida Rules of Professional Conduct			
When matter concludes:	Amount up to \$1 million	Amount between \$1 million and \$2 million	Amount over \$2 million
1. Before filing of answer	33⅓%	30%	20%
2. After filing of answer	40%	30%	20%
3. If defendants admit liability at time of filing answer	33⅓%	20%	15%
4. After notice of appeal is filed	Additional 5%	Additional 5%	Additional 5%

Numerous statutes provide for an award of attorneys’ fees and determination of the amount of the fee to be awarded is governed by statute, rule, and case law.

Comparative Fault and Joint & Several Liability

In 1986, the Florida Legislature codified the doctrine of comparative fault, which had been adopted by the Florida Supreme Court in 1973 to replace contributory negligence. Section 768.81, F.S., provides for an application of the doctrines of comparative fault and joint and

several liability for calculation of damages. Under the doctrine of comparative fault, the court enters a judgment in negligence cases against each party liable on the basis of each party's percentage of fault for all damages. Under current law, the doctrine of joint and several liability applies if a party's percentage of fault equals or exceeds the percentage fault of the claimant. This means that the court shall enter judgment with respect to the economic damages against that party such that the party is individually liable for the total amount of damages until the claimant recovers all damages completely. Furthermore, the doctrine of joint and several liability is applied automatically in cases where the total amount of damages (economic and non-economic) is \$25,000 or less.

In a significant decision construing the interplay between the doctrines of joint and several liability and comparative fault, the Florida Supreme Court ruled in *Fabre v. Marin*, 623 So.2d 1182 (Fla.1993), that a defendant could apportion fault to "phantom defendants." Specifically, the court held that, in determining non-economic damages, fault must be apportioned among all responsible entities who contribute to an accident even though not all of them were joined as defendants in the lawsuit. In *Nash v. Wells Fargo Guard Services, Inc.*, 678 So.2d 1262 (Fla.1996), the Court subsequently clarified that, in order for a non-party to be included on a jury verdict form, the defendant must have pleaded the non-party's negligence as an affirmative defense and specifically identified the non-party. In addition, the defendant bears the burden of presenting evidence that the non-party's negligence contributed to the claimant's injuries. Some legal commentators have expressed concern that the *Fabre* and *Nash* decision has resulted in plaintiffs bringing all potentially liable actors into lawsuits, some of whom might otherwise not have been named because it is likely they would have little or no liability.

Economic and Non-Economic Damages

The term "non-economic damages" encompasses not only pain and suffering but also mental anguish, inconvenience, physical impairment, disfigurement, loss of capacity for enjoyment of life, and other non-pecuniary losses. There is no strict mathematical formula for calculating such damages, rather the Florida Supreme Court has said such awards are up to the enlightened conscience of impartial jurors. Awards are subject to court review, however, and s. 768.74, F.S., which governs negligence actions, provides criteria for a court to apply in deciding whether to reduce an excessive award or add to an insufficient award, such as, for example, whether the amount awarded is indicative of prejudice, passion, or corruption on the part of the trier of fact.

As part of the Tort Reform Act of 1986, the Legislature imposed a \$450,000 cap on damages for non-economic losses. In *Smith v. Dept. of Insurance*, 507 So.2d 1080 (Fla. 1987), the Florida Supreme Court held that the cap violated s. 21, Art. I, State Constitution, which provides a right of access to the courts to seek redress of injuries. The Court said legislative restrictions on rights of access to the courts are impermissible unless: 1) the statute provides a reasonable alternative remedy or commensurate benefit, or 2) there is a legislative showing of an overpowering public necessity for the abolishment of the right and no alternative method of meeting such public necessity.

Governmental Rules and Statutory Standards in Products Liability Actions

Product liability actions can be based upon negligence, breach of warranty and strict liability. For actions based on negligence, the general standard of care applied is whether the defendant(s) exercised reasonable care under the circumstances. For actions based on breach of warranty, the standard of care depends on the performance levels promised by the manufacturer in the warranty, or may be defined by general warranties of merchantability or fitness for a particular purpose. For actions based on strict liability, the standard of care is based on whether the product, when it left the seller's control: 1) was in a "defective condition or unreasonably dangerous to the user or consumer," 2) reached the plaintiff without any substantial change in its condition, and 3) resulted in damages to the plaintiff due to the defect.

As a general rule, government rules and statutes set minimum safety standards or guidelines for the protection of the public. Under current law in Florida, a manufacturer or seller is not necessarily insulated from liability by complying with government rules and statutes. Courts, however, have allowed evidence of compliance with government rules and statutes, customary practices, industry standards, and scientific and technical advances to be considered in assessing the potential liability of a manufacturer or seller. However, a manufacturer's or seller's compliance with government rules and statutory standards is rarely determinative as the courts generally assess the cost of savings and utility of the product, the risk reasonably perceived by introduction of the product, and the reasonable expectation of the product by the public.

Punitive Damages

Section 768.73, F.S., relating to limitations on punitive damages, provides that a punitive damages award in certain types of cases is capped at three times compensatory damages. A punitive damages award which exceeds the cap is presumed excessive, unless the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive.

From 1986 to 1995, the statute provided that an award of punitive damages in certain cases was to be split between the claimant and the state. In 1995, the statute was repealed. During the period when the statute was in force, there was a total of 179 cases with punitive damages awarded. The total punitive damages awarded was almost \$130 million, of which about \$58.7 million was collectible by the state. Collections were made in 70 of the 179 cases in the total amount of about \$8.8 million.

Statutes of Limitation and Statutes of Repose

Statutes of limitation and statutes of repose impose time limits in which parties must institute actions. Statutes of limitation are generally shorter than statutes of repose and have less finality because they do not operate as a limitation upon the underlying substantive right of action. Statutes of limitation may be asserted as an affirmative defense against a claim to bar an action but if the defense is not affirmatively pled, the defense is waived and the plaintiff's may proceed with

the claim. Statutes of limitations are predicated on public policy to encourage plaintiffs to assert their cause of action with reasonable diligence and to shield defendants against stale claims. Chapter 95, F.S., sets forth different time frames for various categories of civil causes of action. Specifically, s. 95.11, F.S., provides a 4-year statute of limitation for product liability actions, negligence actions, certain personal injury actions, actions to recover personal property, and other types of actions to be measured from the time the cause of action accrues.

Statutes of repose are generally longer and involve a greater degree of finality than statutes of limitation. Courts construe a cause of action as rescinded by a statute of repose as if the right to sue never existed in the first place. In *Bauld v. J.A. Jones Constr. Co.*, 357 So.2d 401 (Fla. 1978), the Court stated that statutes of repose cut off the right of action after a specified time measured from the delivery of a product or completion of work, regardless of the accrual of the cause of action or notice of the invasion of a legal right. The courts have strictly construed the constitutionality of certain statutes of repose based upon the right of access to courts for redress of injuries as guaranteed under Art. I, s. 21, State Constitution. Currently, there is no statute of repose provisions that restricts suits for injuries caused by defective products.

Vicarious Liability

Vicarious liability is a long-standing, court-created doctrine that imposes indirect legal responsibility. The nature of the relationship, whether it be employer-employee, principal-agent, or motor vehicle owner and operator or lessor-lessee, can hold the party of authority liable for the negligent acts of the other. The doctrine has been described as typically reflecting a policy decision to allocate risks associated with a business enterprise.

One of the principal ways in which vicarious liability manifests itself in Florida's civil litigation system is in holding an employer liable for the negligent acts of an employee when those acts are conducted within the scope of the employment and in furtherance of the business enterprise. A second example of the application of vicarious liability is found in the Florida Supreme Court's decision in 1920 that an automobile is a dangerous instrumentality and that an automobile owner may be held liable for injuries caused by the negligence of someone entrusted to use the automobile.

III. Effect of Proposed Changes:

This bill reflects the consensus legislation submitted by select members of the Senate and the House of Representatives as part of the final report of the Joint Committee on Litigation Reform. The bill makes wide-ranging and substantial modifications to procedural and substantive components of the civil litigation system in Florida. Through its principal provisions, the bill:

- Creates a Juror Bill of Rights to govern mandatory activities of juries during civil trial process, including the ability to pose questions, take notes, and keep notebooks in certain trials;

- Requires court-ordered mediation for all civil cases, with limited exceptions;
- Expands the availability of sanctions for frivolous or protracted litigation;
- Establishes a 12-year statute of repose in products liability cases;
- Provides an employer with safe harbor provisions for limited vicarious liability from negligent hiring of certain employees and provides broader protections against liability for disclosing information about employees;
- Limits the vicarious liability of certain motor vehicle owners and rental companies for damages caused by the operation of the vehicle by a person other than the owner to \$100,000 per person and \$300,000 per occurrence for bodily injury and \$50,000 for property damage, provided there is no negligence or intentional misconduct on the owner's or the rental company's part with an additional liability cap of \$500,000 for uninsured or underinsured operators;
- Provides limited premises liability for certain businesses;
- Provides immunity from liability for negligent actions for injury to trespassers on real property or to a person who is committing or attempting to commit a crime;
- Establishes a government rules defense for a manufacturer or sellers of certain products, under which there is a rebuttable presumption that a product is not defective or unreasonably dangerous if the product is in compliance with applicable state or federal government standards or requirements.
- Prohibits a plaintiff from recovering damages if he or she was under the influence of drugs or alcohol to a specified degree and the drug or alcohol use contributed substantially to the plaintiff's injuries;
- Raises the standard of evidence by which a plaintiff must establish entitlement to punitive damages;
- Eliminates any application of joint and several liability to non-economic damages and specifies that joint and several liability will only apply only up to \$300,000 of the total of economic damages when a party's fault exceeds the claimant's fault and the party's own fault exceeds 20% (comparative fault is applied to the remainder of the economic damages, if any);
- Revising offer of judgment statute to address clarification of offers to multiple parties and the effect of subsequent offers of judgment for recovery of attorney fees, and imposing conditions for recovery of expert witness fees as a taxable cost; and
- Setting forth legislative public policy interest regarding misleading legal advertisements and intrusive solicitation, and legislative request for Florida Bar to further efforts to regulate prohibitive forms of advertising and solicitation.
- Providing for actuarial study to analysis expected reductions in judgments, settlements and related costs resulting from litigation reforms based on liability claims insured under other than private automobile insurance and homeowners insurance; requiring rate filings by March 1, 2001, by certain insurers to enable the Legislature to monitor and evaluate the effects of the act.

A section-by-section description follows:

Section 1 creates s. 40.50, F.S., the Juror Bill of Rights, to provide for a series of jury reform measures to be implemented by the courts including, but not limited to, providing detailed preliminary and post-trial final instructions to the jurors, furnishing notebooks to jurors in trials likely to exceed 5 days, permitting jurors to take notes and allowing the jurors to submit written questions to witnesses (subject to approval by the court). This section also requires judges, attorneys, and court staff to provide detailed information to jurors and to assure certain things, such as proceeding according to trial schedules and providing fair compensation for jury service.

Section 2 amends s. 44.102, F.S., relating to court-ordered mediation, to mandate that all civil actions for monetary damages be referred to mediation unless it falls within one of six exceptions. The exceptions are actions involving personal injury claims between landlord and tenant, actions for debt collection, actions for medical malpractice, actions governed by the Florida Small Claims Rules, actions the court determines should be referred to non-binding arbitration, and those actions which the parties have agreed to binding arbitration. In all cases for which mediation is not mandatory under the proposed changes, the court would retain the current statutory discretion to refer those cases to mediation under s. 44.102, F.S.

Section 3 creates s. 44.1051, F.S., to allow two or more parties involved in a civil action, in which no constitutional issues are raised, to agree to a voluntary trial resolution. The parties are responsible for selecting and compensating the trial resolution judge. The trial resolution judge must be a member in good standing of the Florida for the preceding 5 years (the same qualifications needed for a circuit court or county court judge). Under current law, a retired Florida judge may be assigned on a temporary basis to conduct civil or criminal trials.

The trial resolution judge shall have the authority to administer oaths and conduct the proceedings in accordance with the Florida Rules of Civil Procedure, and issue enforceable subpoenas. A party may enforce a judgment obtained in a voluntary trial resolution by filing a petition for enforcement in circuit court. An appeal may be made to the appropriate appellate court but review of factual findings is not allowed on appeal. The “harmless error doctrine” applies in all appeals which is generally applied in all appellate cases under current law. The language does not clarify what the standard of review will be other than state that no further review will be allowed of a judgment unless a constitutional issue is raised. The presence of competent substantial evidence to support the findings is a standard of review for most appellate cases.

Voluntary trial resolution is not available to parties in actions involving child custody, visitation, child support or any dispute involving the rights of a party not participating in a voluntary trial resolution.

Section 4 amends s. 57.105, F.S., relating to award of attorney’s fees in frivolous (or unfounded) lawsuits. This section replaces the existing standard for an award of attorney’s fees based on a complete absence of a justiciable issue of law or fact in cases. The new standard for an award of

attorney's fees, upon the court's initiative or motion of a party, will be based on whether the losing party or the losing party's attorney knew or should have known that the claim or defense at the time it was initially presented or at any time before trial, was not supported by material facts or by the application of then-existing law. This section retains the good faith exception (modified slightly to apply to the new standard) for the losing party's attorney if the attorney acted in good faith based on his or her client's representations as to material facts. In addition, sanctions for attorney's fees will not apply if the claim or defense is determined to have been made as a good-faith attempt with a reasonable probability of changing then-existing law.

This section expands the court's authority to impose sanctions of damages for protracted litigation if the moving party proves by a preponderance of evidence that any litigation activities were taken for the primary purpose of unreasonable delay.

This section also authorizes the court to impose additional sanctions as are just and warranted for either unsupported claims or defenses, or protracted litigation, including contempt of court, award of taxable costs, striking of a claim, or dismissal of the pleading.

Section 5 amends subsections (3), (5), and (7) of s. 768.79, F.S., relating to offer and demand for judgment. This section requires an offer of judgment to specify to whom the offer is made and the terms of the offer in cases involving multi-parties. A subsequent offer to a party automatically voids a previous offer to that party. This section additionally requires the court to determine whether an offer was reasonable under the circumstances known at the time the offer was made before awarding costs and fees.

Section 6 amends 57.071, F.S., relating to taxable costs in civil proceedings, to condition the recovery of expert witness fees as taxable costs to a prevailing party. The prevailing party must file a written notice within 30 days after entry of an order setting the trial date, setting out the expertise and experience of the witness, the subjects upon which the expert is expected to testify, and an estimate of expert witness total fees by flat rate or hourly. The party retaining the expert witness must also furnish each opposing party a written report signed by the expert witness which summarizes the opinions expressed, the factual basis, the authorities relied upon for such opinions. The report must be filed at least 10 days prior to the discovery deadline, 45 days prior to trial, or as otherwise determined by the court. This section overlaps and may conflict with the Florida Rules of Civil Procedure governing procedures for disclosure and discovery of expert witnesses and the *Florida Supreme Court Statewide Uniform Guidelines for Taxation of Costs in Civil Actions*.

Section 7 creates an optional speedy civil trial procedure called an expedited trial. Upon joint motion of the parties with approval of the court, the court is authorized to conduct an expedited civil trial. For purposes of the expedited trial where two or more plaintiffs or defendants have a unity of interest such as a husband and wife, the parties shall be considered one party. Unless otherwise ordered by the court or agreed to by the parties, discovery must be completed within 60 days. This section does not specify when discovery must begin. The court must determine the

number of depositions required. The trial, whether jury or non-jury, must be conducted within 30 days after discovery ends. Jury selection is limited to 1 hour. Case presentation by each party is limited to 3 hours each. The trial is limited to 1 day. Expert witness reports and excerpts from depositions, including video depositions, may be introduced in lieu of live testimony regardless of availability of expert witness or deponent (note: this may represent a departure from the current rule of evidence governing admissible evidence.) The trial must be tried within 30 days after the discovery cut-off.

Section 8 amends s. 768.77, F.S., relating to itemized verdicts, to repeal the requirements that the trier of fact itemize and calculate on the verdict form economic damages before and after reduction to present value and to specify the period of time for which future damages are intended to provide compensation. This section may have the effect of simplifying the verdict form and reducing some of the confusion for jurors. The trier of fact would still be required to itemize damages as to economic and non-economic losses, and to itemize punitive damages when awarded.

Section 9 amends s. 768.78, F.S., relating to alternative methods of payment of damage awards, to conform the provisions of the alternative payment statute with the elimination of the itemization of future economic losses by the trier of fact as amended in s. 768.77, F.S. The term “trier of fact” is replaced with the term “the court” as the specific trier of fact to make the determination of whether an award includes future economic losses exceeding \$250,000, for purposes of alternative methods of payment of damage awards.

Section 10 creates s. 47.025, F.S., to find that a venue provision that requires legal action against a resident contractor, subcontractor or sub-subcontractor to be brought outside the state is void as a matter of public policy if enforcement would be unreasonable or unjust. In that event, such legal actions arising out of that contract may be brought only in the State of Florida and only in either the county where the defendant resides, where the cause of action occurred, or where the property in litigation is located, unless the parties agree to the contrary after the defendant has been served.

Section 11 requires the clerk of the court through the uniform state case reporting system to report to the Office of the State Court Administrator certain information from each settlement or jury verdict and final judgment in a negligence case as defined in s. 768.81(4), F.S. This reporting requirement need be made only as deemed necessary from time to time by the President of the Senate and the Speaker of the House of Representatives.

Section 12 amends s. 90.803, F.S., to broaden substantially the hearsay exception for former testimony. This section allows the admission into evidence certain former testimony even if the witness is *available* to testify. In addition, the use of former testimony is no longer limited to retrials involving the same parties and facts. The former testimony exception will be applicable to testimony given as a witness at another hearing of the same or different proceeding, or in a deposition during the course of the same or another proceeding. However, use of the former

testimony may be allowed only if the party against whom it is offered, a predecessor in interest, or a person with a similar interest “had an opportunity and similar motive to develop the testimony” by direct, cross, or redirect examination.” However, if former testimony will not be admissible if the court finds that the testimony is not inadmissible under s. 90.402, F.S., relating to admissibility of relevant evidence, or s. 90.403, F.S., relating to exclusion of relevant evidence on grounds of prejudice or confusion.

The changes to this section bring it almost to conformity with exact language in s. 90.804, F.S., relating to an exception to the former testimony hearsay exception which allows certain former testimony into evidence provided the witness is *unavailable* to testify. Since this section expands the former hearsay exception in s. 90.803, F.S., it also may have the effect of expanding s.90.804, F.S. Like s. 90.803, F.S., s. 90.804, F.S., as part of the Florida Evidence Code, was adopted by the Florida Supreme Court as rules of evidence to the extent that they concern court procedure.

[Note: This section incorporates verbatim the text of SB 1830, which passed as CS/HB 1597 during the 1997 Session and which the Governor subsequently vetoed. Veto notwithstanding, CS/HB 1597 became law on March 11, 1998 by veto override of the Senate and the House of Representatives. *See* chapter 98-2, F.S.]

Section 13 amends s. 95.031, F.S., to create a 12-year statute of repose applicable to product liability actions, regardless of the product. The new statute of repose requires that an action based on products liability be brought within 12 years from the date of delivery of the completed product to the original purchaser or lessee, regardless of the date on which the defect in the product was or should have been discovered. Otherwise, the action is forever barred. This provision would operate in conjunction with s. 95.11(3), F.S., relating to 4-year statute of limitations, to bar product liability actions. The 12-year statute of repose would not apply if the manufacturer knew of a defect and concealed or attempted to conceal the defect. The 12-year statute of repose also would not apply in those product liability actions whereby the claimant’s injury did not manifest itself until after the 12-year period has expired. The new statute of repose period only applies to products delivered on or after October 1, 1998.

Section 14 creates a grandfather clause to allow products liability actions that would not have otherwise been barred, but for the new statute of repose provisions, to be brought before July 1, 2003, or otherwise be subject to the new 12-year statute of repose limitation.

Section 15 creates s. 768.1256, F.S., to provide for a “governmental rules defense” in product liability actions. This section provides that a manufacturer or seller could raise a rebuttable presumption that a product is not defective or unreasonably dangerous and thus, he or she would not be liable, if at the time the product was sold or delivered to the initial purchaser or user the aspect of the product that allegedly caused the harm was in compliance with applicable federal or state product design, construction, or safety standards and such standards were designed to prevent the type of harm that allegedly occurred. Non-compliance with the applicable standards or lack of agency approval, however, does not raise a presumption of liability. The term “product” is

not defined and would presumably include drugs or medical devices approved by the Federal Food and Drug Administration (FDA).

Section 16 creates s. 768.096, F.S., to provide for a rebuttable presumption that an employer was not negligent in hiring an employee if, before hiring such employee, the employer conducted a pre-employment background investigation and the investigation did not reveal any information that reasonably demonstrated the unsuitability of the individual for the particular work to be performed or for the employment in general. The background investigation must consist of: 1) a criminal background investigation, 2) reasonable efforts to contact references and former employers, 3) completion of an employment application that elicits information on criminal convictions and civil actions for intentional tort, 4) a check of the prospective employee's driver's license record, if such a check is relevant to the type of work the employee will be conducting and the record can be reasonably obtained, and 5) an interview with the prospective employee.

Section 17 amends s. 768.095, F.S., to broaden the immunity from liability for information disclosed by an employer about a former employee to a prospective employer, to apply also to information disclosed about current employees. The bill also expands the immunity from liability to apply to information disclosed beyond information about an employee's job performance. Further, this section narrows the grounds for subjecting the employer to liability by requiring a showing of clear and convincing evidence that the information disclosed by the employer was knowingly false or violated the person's civil rights. Under current law, the employer may also be subject to liability if the information was intentionally misleading or was disclosed with a malicious purpose. This section eliminates those two grounds.

Section 18 creates s. 768.0705, F.S., relating to limitation for premises liability. A person or organization owning or controlling an interest in a business premises ("business property owner") is not liable for civil damages sustained by invitees, guests, or other members of the public caused by the intentional criminal acts of third parties, other than employees or agents, if the business property owner maintains a reasonably safe premises in light of the foreseeability of the occurrence of the particular criminal act. This provision essentially restates current case law on premises liability for damages sustained by visitors from criminal acts by third parties.

Additionally, this section creates a "safe harbor" for business property owners from civil premises liability, by providing a presumption that adequate security existed for invitees, guests or other members of the public against criminal acts of third parties, other than employees or agents, that occurring in common areas, in parking areas, or on portions of the premises not occupied by buildings or structures. (Convenience stores are not included as business premises.) In order for the presumption to apply, the business property owner must have substantially complied or implemented at least 6 of 9 statutory security measures enumerated in this section. This presumption would not be applicable in actions where criminal acts of third parties took place in the interior of buildings or structures.

Section 19 amends s. 768.075, F.S., to expand the immunity from liability to trespassers on real property, to preclude *all* civil or criminal trespassers under the influence of drugs or alcohol from recovery of damages. The elements of trespass must still be proved by the property owner. This section also lowers the blood-alcohol threshold from 0.10% or higher to 0.08% or higher. The immunity does not apply if the property owner engaged in gross negligence or intentional misconduct.

This section defines the terms “implied invitation,” “discovered trespasser,” and “undiscovered trespasser.” This section also delineates the duties owed by property owners to different categories of trespassers. Under this section, a property owner is not liable to an undiscovered trespasser if the property owner refrains from intentional misconduct. There is no duty to warn of dangerous conditions. A property owner is not liable to a discovered trespasser if the property owner refrains from gross negligence or intentional misconduct and warns the discovered trespasser of dangerous conditions known to the property owner but were not readily observable by others. This section modifies the common law as it relates to constructive notice of the presence of trespassers.

This section expressly provides that it does not alter the common law doctrine of attractive nuisance which applies to children who are lured onto property by the structure or condition that injures them, and who, because of their age, are unable to appreciate the risks involved. Therefore, a property owner has a duty to protect children from dangerous conditions when he or she knows that children frequent the area, and the expense of eliminating the danger is slight compared to the risk.

This section also provides that a property owner is not liable for civil damages for negligent conduct resulting in death, injury or damage to a person attempting to commit or in the commission of a felony on the property.

Section 20 creates s. 768.36, F.S., to prohibit recovery of any damages for injury or loss to person or property in any civil action by a plaintiff whose blood or breath alcohol level was at least 0.08% or whose faculties were impaired due to the influence of alcohol or drugs, at the time of injury, and, as a result was more than 50 percent at fault for his or her own harm. The section also defines the terms “alcoholic beverage” and “drug.”

Section 21 creates s. 768.725, F.S., to raise the common law burden of proof necessary in civil actions from “preponderance of evidence” to “clear and convincing evidence” to establish an entitlement to an award of punitive damages. The greater weight of the evidence burden of proof applies to the determination of the amount of punitive damages.

Section 22 amends s. 768.72, F.S., relating to claims for punitive damages. This section adds subsection (2) to stiffen the common law standard of conduct necessary to hold a defendant liable for punitive damages. A defendant may only be liable for punitive damages if shown by clear and convincing evidence that the defendant was guilty of intentional misconduct or gross negligence.

The term “intentional misconduct” is defined as conduct which the defendant had actual knowledge of its wrongfulness and of its high probability that it would result in injury to damage to the claimant but intentionally pursued anyway. The term “gross negligence” is defined as conduct so reckless or wanting in care that it constitutes a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

This section also adds subsection (3) to revise substantially the common law threshold for holding an employer vicariously liable. This section specifies the criteria necessary to hold an employer, principal, corporation, or other legal entity liable for punitive damages based on the conduct of an employee or agent. The conduct must rise to the level of gross negligence or intentional misconduct, and either: a) the employer, principal, corporation or other legal actively and knowingly participated in such conduct, b) the officers, directors, or managers thereof knowingly condoned, ratified, or consented to such conduct; or c) the employer, principal, corporation, or other legal entity engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.

Section 23 amends s. 768.73, F.S., relating to caps on punitive damages, to revise the current cap set at three times the amount of compensatory damages. This section imposes a cap of \$250,000 in punitive damages for judgments of \$50,000 or less in compensatory damages, and a cap of three times the amount of compensatory damages or \$250,000, whichever is higher, for judgments of more \$50,000 in compensatory damages. This section eliminates the presumption that an award exceeding the cap is excessive but adds that in order for an award of punitive damages to exceed the cap, the claimant must prove by clear and convincing evidence that the defendant engaged in intentional misconduct in addition to the existing requirement that the award would not be excessive in light of the facts and circumstances of the case.

This section also adds a limitation to multiple awards of punitive damages against the same defendant in any civil action if that defendant can establish that punitive damages have previously been awarded against the defendant in any state or federal civil for the alleged harm from the same act or single course of conduct for which claimant seeks damages and that the defendant’s act or course of conduct has ceased. The defendant must establish the inapplicability of punitive damages before trial. A subsequent award of punitive damages may be made if the court determines by clear and convincing evidence that the amount of prior awards was insufficient to punish the defendant’s behavior, with the subsequent award to be reduced by the amount of the earlier award or awards.

The amendments in this section apply to all civil actions pending on October 1, 1998, in which the initial trial or retrial of the action has not commenced and to all civil actions commenced on or after that date.

Section 24 creates s. 768.,735, F.S., to exempt certain abuse actions or actions arising under ch. 400, F.S., relating to nursing homes and other health related facilities, from a number of the new punitive damages provisions. Any civil action based upon child abuse, abuse of an elderly

person or abuse of a developmentally disabled, or any civil action arising under ch. 400, F.S., are exempt from the new provisions in s. 768.72(2)-(4), F.S. (relating to types of conduct necessary for an award of punitive damages, and vicarious liability by employers), s. 768.725, F.S., (relating to caps on punitive damages), and s. 768.73, F.S. (relating to the burden of proof required for an award of punitive damages).

The term “developmentally disabled” is not defined. A definition exists for the term “disabled adult” that is defined in ch. 415, F.S., to mean any person 18 years or older who suffers from physical or mental incapacitation due to a developmental disability organic brain damage, or mental illness, or who has one or more physical or mental limitations substantially affecting the performance of normal activities. In addition, actions based upon neglect or exploitation of a child, an elderly person, or a disabled adult (as defined in ch. 415, F.S.) would not likely be covered by the term “abuse” and thus, would not be exempt from the new limitations on punitive damages provisions.

Section 25 creates s. 768.736, F.S., to prohibit application of ss. 768.725 and 768.73, F.S., to preclude the recovery of punitive damages by any defendant who, at the time of the act or omission was under the influence of any alcoholic beverage or drug to the extent that the defendant’s normal faculties were impaired, or who had a blood or breath alcohol level of 0.08 percent or higher. This would mean that the provisions on burden of proof and limitation of punitive damages would not apply.

Section 26 amends s. 768.81, F.S., relating to comparative fault and apportionment of damages. This section eliminates automatic application of joint and several liability for actions with total damages of \$25,000 or less. This repeal has the effect of eliminating joint and several liability for all non-economic damages. Subsection (3) is amended to add that in order for joint and several liability to apply instead of comparative fault, the defendant’s percentage fault must not only equal or exceed the claimant’s percentage fault, but the defendant’s percentage fault must also exceed 20%. Subsection (3) also provides a cap of \$300,000, on that portion of the economic damages for which joint and several liability would only apply. It is clarified that the doctrine of comparative fault would be applied to the remainder of the economic damages, if any, based on the defendant’s percentage fault, and that a claimant is not entitled to recover more from the defendant(s) than the total amount awarded to that claimant.

This section also codifies in part, *Fabre* and *Nash*, to require a defendant who alleges a non-party to be at fault, to affirmatively plead that defense, and absent a showing of good cause, identify that non-party or describe as specifically as practicable, in a motion or in an initial pleading, subject to amendment any time before trial in accordance with the rules of court. Additionally, in order to include the non-party on the verdict form, the defendant must prove at trial the non-party’s fault in causing the claimant’s injuries by a preponderance of the evidence.

Section 27 amends s. 324.021, F.S., relating to the financial responsibility of an operator or owner of a motor vehicle. This section limits the vicarious liability of a motor vehicle owner or a

rental company that rents or leases motor vehicles. Subsection (9)(b)2. is added to provide that unless there is a showing of negligence or intentional misconduct on part of a motor vehicle owner or rental company that rents or leases motor vehicles for a period less than 1 year, the vicarious liability of the lessor to a third party for injury or damage to a third party due to the operation of the vehicle by an operator or lessee is limited to \$100,000 per person and \$300,000 per occurrence for bodily injury and \$50,000 for property damage. If the lessee or operator of the motor vehicle is uninsured or has less than \$500,000 combined property and bodily injury liability insurance), then the lessor is liable for an additional cap of \$500,000 in economic damages which shall be reduced by amount actually recovered from the less, the operator or insurance of the lessee or operator.

Subsection (9)(b)3. is added to apply the same vicarious liability limitations to owners (who are natural persons) who lend their motor vehicles to permissive users other than relatives residing in the same household. Subsection (9)(c) is added to exclude owners of motor vehicles that are used for commercial activity, other than rental companies that rent or lease motor vehicles, from the limits on vicarious liability in subsections (9)(b)2. and (9)(b)3. The term "rental company" is defined to include an entity that is engaged in the business of renting or leasing motor vehicles to the general public and rents or leases a majority of its vehicles to persons with no direct or indirect affiliation with the rental company, and a motor vehicle dealer that provides temporary replacement vehicles to its customers for up to 10 days.

This section has the effect of limiting the amount of damages that may be awarded under Florida's common law dangerous instrumentality doctrine, which currently allows a motor vehicle owner to be held liable for injuries caused by the negligence of someone entrusted to use the motor vehicle.

Section 28 amends s. 400.023, F.S., relating to civil enforcement of rights of nursing home residents. This section adds subsection (6) to require mediation by the parties in actions based upon this section as prerequisite to recovery of attorney's fees. Mediation must be held within 120 days of filing a responsive complaint or defense motion in response to a complaint. This section details the procedure for setting and conducting the mediation. If no settlement is reached, then the last offer made by the defendant at the mediation is reduced to writing to include the amount of the offer, the date of the written offer, and the date of the offer's rejection. If the amount awarded in damages, exclusive of attorney's fees, is equal to or less than the last written offer, then the plaintiff is not entitled to recover any attorney's fees. The mediation provisions apply to all causes of action, with the exception of actions for injunctive relief, accruing on or after October 1, 1998.

This section adds subsection (7) to prohibit the discovery of financial information for purposes of valuing punitive damages in any civil action under this section unless the plaintiff proffers or shows evidence in the record that a reasonable basis exists to support a punitive damages claim.

This sections also adds subsection (8) to require, in addition to any other standards for punitive damages, that any award of punitive damages must also be reasonable in light of the actual harm

suffered by the nursing home resident and the egregiousness of the conduct that caused the actual harm to the resident.

Section 29 establishes legislative findings and intent with respect to the regulation of legal advertising. The U.S. Supreme Court has declared that states must have a substantial governmental interest to justify regulation of truthful commercial speech, such as advertising. This section declares the Florida Legislature's interest to be in protecting citizens' privacy, ensuring that advertising provides consumers with thorough information, and ensuring that advertising does not reflect poorly on the legal profession, the legal system, or the administration of justice. This section also cites Florida Bar research and recognition by the U.S. Supreme Court as supportive of the public views that legal advertising and solicitation are intrusive, contribute to poor images of the profession and the legal system, and, in some cases, provide inadequate information. The section includes a legislative finding that electronic advertising and television advertising are not useful or factual, and diminish the public's respect for the fairness and integrity of the legal system. The Legislature requests that the Florida Supreme Court regulate attorney advertising to advance the state's public policy interests as declared, and that the Florida Bar form a task force to address the adoption of rules prohibiting advertising.

Section 30 requests the Florida Supreme Court to consider adoption of rules to effectuate the legislative expression of public policy set forth in the act.

Section 31 requires the Department of Insurance to contract with a national independent actuarial firm to conduct an actuarial analysis of the expected reduction in judgment and related costs resulting from the litigation reform provisions in this act. The analysis must be based on credible loss cost data derived from settlement or adjudication of liability claims accruing after October 1, 1998, and must include an estimate of the percentage decrease in judgments, settlements and costs by type of coverage affected by the act. Liability claims insured under private passenger automobile insurance ("personal auto insurance") and personal line residential property insurance ("homeowners insurance") are excluded from the analysis. The analysis report must be submitted to DOI by March 1, 2001. The analysis report may be admitted into evidence in any proceedings if the actuary providing the report is available to testify regarding the report's preparation and validity. Each party to such proceeding shall otherwise bear its own cost.

The DOI must subsequently review rate filings of insurers, and underwriting profits or losses for Florida liability insurance businesses, and require any rate modifications deemed necessary, in accordance with applicable rating law. Liability insurers other than personal auto insurers and homeowners insurers are required to submit their first rate filing to include specific data on judgments, settlements, and costs after March 1, 2001, for the purpose of enabling DOI and the Legislature to monitor and evaluate the effects of the act.

It is clarified that the provisions of this section do not limit the authority of the DOI to order an insurer to refund excessive profits to policyholders as refunds or credits, as provided in s. 627.066, F.S., relating to motor vehicle insurance, and s. 627.215, F.S., relating workers'

compensation, employer's liability, commercial property and commercial casualty insurance (Note: The refund of excessive profits provision as applied to commercial property and commercial casualty insurance ceased on January 1, 1997).

Section 32 provides a severability clause.

Section 33 provides that the act shall take effect October 1, 1998.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Legislative Encroachment Upon the Judicial Authority

The bill raises a concern regarding legislative encroachment upon judicial authority regarding matters of practice and procedure in violation of state constitutional separation of powers provision. *See* art. II, s. 3, Fla. Const. Whereas the Legislature has authority to create substantive law, the Florida Supreme Court has sole and preemptive constitutional authority to promulgate court rules of practice and procedure. *See* art. V, s.2(a), Fla. Const. However, the Legislature can repeal the court rules by a 2/3 vote. *See* art. V, s.2(a), Fla. Const.. The Legislature can not enact law that amends or supersedes existing court rules, it can only repeal them. *See Market v. Johnston*, 367 So.2d 1003 (Fla. 1978).

What constitutes practice and procedure versus substantive law has been decided by the courts on a case by case basis. With few exceptions, it not entirely clear or definitive. Generally substantive laws create, define and regulate rights. Court rules of practice and procedure prescribe the method or process by which a party seeks to enforce or obtain redress. *See Haven Federal Savings & Loan Assoc.*, 579 So.2d 730 (Fla. 1991).

Based on current law, the courts tend to find certain provisions unconstitutional such as those regarding timing and sequence of court procedures, creating expedited proceedings, issuing

mandates to the courts to perform certain functions, and attempting to supersede or modify existing rules of court or intrude in areas of practice and procedure within the province of the court. The bill contains a number of provisions which arguably involve matters of judicial practice and procedure versus substantive law.

However, over the years, the courts have shown some willingness to adopt a “procedural” statute as a court rule, particularly when the court finds the legislative intent or underlying legislative policy to be beneficial to the justice system. In this situation, the court will typically invalidate the procedural as constitutionally infirm and then adopt the substance of the invalid section as a court rule. *See TGI Friday’s, Inc. V. Dvorak*, 663 So.2d 606 (Fla. 1995); *Timmons v. Combs*, 608 So.2d 1 (Fla. 1992)(re: Fla.R.Civ.P. 1.442, Proposals for Settlement]. Under Florida Rule of Judicial Administration 2.130(a), the courts can also adopt the substance of an invalid section as an emergency rule of procedure based on a recognition of the importance of providing a procedural vehicle or otherwise recognizing the usefulness of the policy sought to be asserted by the Legislature. *See Fla.R.Civ.P. 1.222- emergency rule adoption of statutory provisions governing Mobile Homeowners’ Association.*

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill substantially affects a wide variety of procedures and standards governing civil actions in Florida, from the perspective of both plaintiffs and defendants. For example, certain provisions are devised to enable civil trial jurors to become better informed and more active participants; provide options for alternative and speedier forms of resolution; discourage frivolous lawsuits and deter protracted litigation; lessen unnecessary litigation; provide incentives to businesses to maintain reasonably safe business premises and conduct employee background checks, discourage lawsuits for recovery of damages for injuries incurred by claimants under the influence of drugs or alcohol; and clarify duties and limit property owners’ liability to different trespassers. However, precise impact of this bill on the private and business sector is indeterminate. Further insight into the impact of certain litigation reform measures may be available upon completion of the actuarial study report on expected reductions in settlements, judgments, and related costs, due in March 20001, and of the Department of Insurance’s review of certain insurers’ rate filings.

C. Government Sector Impact:

The bill requires the clerk of court, through the uniform state case-reporting system, to report, as deemed necessary from time to time by the Senate President and the House Speaker, to the Office of the State Courts Administrator certain information from each settlement, jury verdict or final judgment in negligence cases,

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.