

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1394

SPONSOR: Health, Aging, and Long-Term Care Committee and Senator Smith

SUBJECT: Limitation of Civil Liability

DATE: April 12, 2004

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Munroe</u>	<u>Wilson</u>	<u>HC</u>	<u>Fav/CS</u>
2.	<u>Matthews</u>	<u>Lang</u>	<u>JU</u>	<u>Fav/1 Amendment</u>
3.	<u>Oxamendi</u>	<u>Imhof</u>	<u>RI</u>	<u>Favorable</u>
4.	<u>Weidenbenner</u>	<u>Poole</u>	<u>AG</u>	<u>Favorable</u>
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill bars a claim for damages arising from personal injury or wrongful death against a manufacturer, distributor, or seller of foods or nonalcoholic beverages if the claim is premised upon a person's weight gain or obesity, or a health condition related to weight gain or obesity, resulting from long-term consumption of such foods or nonalcoholic beverages. The limitation on such claims does not bar a claim otherwise available under law against a manufacturer, distributor, or seller of foods or nonalcoholic beverages if such person failed to disclose statutorily required nutritional content information or provided materially false or misleading information to the public.

This bill would take effect up becoming a law and shall apply to all claims filed on or after that date.

This bill creates section 768.37, Florida Statutes.

II. Present Situation:

Obesity

Obesity is a serious public health threat that manifests itself in diseases and chronically disabling conditions such as diabetes, coronary heart disease and high blood pressure. The Surgeon General has noted that the number of deaths associated with obesity is nearly 300,000 per year in the United States.¹ According to a recent study by the Centers for Disease Control and Prevention (CDC), between 1971 and 2000, the daily caloric intake of Americans rose by more

¹ See John Alan Cohan, "Obesity, Public Policy, and Tort Claims Against Fast-Food Companies," 12 Widener L.J. 103 (2003).

than seven percent on average for men and 20 percent for women, and a greater portion of the extra calories was obtained from carbohydrates.² The consumption of food away from home, salty snacks, soft drinks, pizza, and portion size have increased. Although the study found that the percentage of fat in American diets has decreased, the study found that, during that 30-year period, individuals were consuming relatively the same amount of fat because their overall caloric intake increased. Researchers also found that during this period national restaurant chains significantly expanded their serving portions. In a separate study, the CDC found that Americans are starting to exercise more, but that the increase is not significant enough to improve health.³

A recent government study released on March 9, 2004, by the Center for Disease Control, which studied causes of death indicated that poor diet including obesity and physical inactivity (400,000) is one of the top 10 most common causes of mortality (second only to tobacco-related deaths at 435,000 annually) in 2000.

On October 15, 2003, the Governor issued Executive Order No. 03-196 creating the Task Force on the Obesity Epidemic to make recommendations regarding the problem of overweight and obesity in Florida. The February 2004 report of the Task Force found that in 2000 more than 6.5 million adults were overweight or obese in Florida.⁴ Obesity-related medical expenditures for adults in Florida totaled over \$3.9 billion.⁵ The Task Force report includes 22 recommendations.

Federal Nutrition Labeling Requirements

The Nutrition Labeling and Education Act of 1990 (NLEA)⁶ requires labeling of the following foods sold at retail, unless otherwise exempt:

- The serving size;
- The number of servings per container;
- The total number of calories derived from any source and derived from fat;
- The amount of total fat, saturated fat, cholesterol, sodium, total carbohydrates, complex carbohydrates, sugars, dietary fiber, and total protein per serving.⁷

The NLEA, and final regulations to implement the NLEA, provide a number of exemptions for retail foods.⁸ The exemptions from these nutrition labeling requirements include foods served or sold in establishments that serve food for immediate consumption, such as restaurants, schools, cafeterias, trains, airplanes, bakeries, and delicatessens, or that are sold for use only in such establishments.⁹ Restaurants are exempt from most, but not all, of NLEA's nutrition and health labeling requirements. Although the NLEA provides for federal preemption of state and local requirements that are not identical to the federal requirements for restaurant foods to bear

² "Trends in Intake of Energy and Macronutrients - United States, 1971—2000," Centers for Disease Control, Morbidity and Mortality Weekly Report, 53(04), pp. 80-82, February 6, 2004.

³ "Prevalence of No Leisure-Time Physical Activity—35 States and the District of Columbia, 1988—2002," Centers for Disease, Control Morbidity and Mortality Weekly Report, 53(04), pp. 82-86, February 6, 2004.

⁴ "Obesity in Florida," Report of the Governor's Task Force on the Obesity Epidemic, February, 2004.

⁵ *Id.*

⁶ See Nutrition Labeling and Education Act of 1990 (NLEA), Pub.L. 101-535, 104 Stat. 2353 (Nov. 8, 1990), 21 U.S.C. s. 343(q).

⁷ See 21 U.S.C. § 343(q)(1)(A)-(E).

⁸ See 21 CFR 101.9(j).

⁹ See 21 CFR 101.9(j)(2).

nutrition labeling in specified areas of food labeling, the NLEA provides that states would not be preempted for foods that are exempt from the federal requirements.¹⁰ States are free to apply nutrition labeling and claims requirements to claims on restaurant menus.

Litigation Against Fast-Food Companies

Recently, as a result of the successful tort litigation against tobacco product manufacturers, litigation is being filed against fast-food companies alleging health-related injuries such as diabetes, coronary heart disease, high blood pressure, and elevated cholesterol due to weight gain. Generally, such cases have alleged deceptive or misleading trade practices, as an expansion of the products liability cases involving tobacco or alcohol. It has been suggested that fast food is a pleasure producing product such as tobacco and alcohol, which causes obesity that leads eventually to other chronic health problems.¹¹ The producers and sellers of fast-food products are alleged to have engaged in targeted advertising. While conceding that, unlike tobacco or alcohol, fast food is not physically addictive, such lawsuits in some cases allege that fast food is “intrinsically harmful.”¹² The issue of liability in a fast-food lawsuit raises difficult issues of legal causation and foreseeability of harm.

A prominent lawsuit was filed in New York by two plaintiffs who alleged that the plaintiffs, two minors, suffered injuries to their health by becoming obese due, in part, to the consumption of fast food at McDonalds.¹³ The parents of the minors filed a class action lawsuit against the defendants. The plaintiffs alleged that the practices of McDonalds in making and selling their products are deceptive and that the deception has caused the minors who consumed McDonalds’ products to injure their health from obesity. The plaintiffs had become overweight and had developed diabetes, coronary heart disease, high blood pressure, elevated cholesterol intake, and other adverse health effects. The judge stated that the “opinion is guided by the principle that legal consequences should not attach to the consumption of hamburgers and other fast-food fare unless consumers are unaware of the dangers of eating such food.”¹⁴ The judge noted that “if consumers know (or reasonably should know) the potential ill health effects of eating at McDonalds, they cannot blame McDonalds if they, nonetheless, choose to satiate their appetite with a surfeit of supersized McDonald products.”¹⁵ The United States District Court for the Southern District of New York held that a retail food outlet has a duty to warn consumers of dangerous or unhealthy contents of its food products only if a reasonable consumer would be

¹⁰ See 21 U.S.C. s. 403(a)(4) and 21 U.S.C. s. 403(a)(5). *But see Public Citizen v. Shalala*, 932 F. Supp 13, at 16-17. (D.C. 1996). NLEA labeling rules must also apply to *nutrient content and health claims* that are made on restaurant menus. An attempt by the U.S. Food and Drug Administration to exempt restaurants from the nutrition and health claim labeling requirements in 21 U.S.C.A. s. 343r (1), (2)(A)(i)-(ii), (vi) from which restaurants were not expressly exempted, was held invalid. *Nutrient content claims* are those claims that describe the amount of a nutrient in the food such as “sodium free” or “low fat.” General provisions for the use of nutrient content claims have been established in 21 CFR 101.13. *Health claim* as defined in 21 CFR 101.14 means any claim made on the label or in labeling of a food, including a dietary supplement, that expressly or by implication, including third-party references, written statements, symbols, or vignettes, characterizes the relationship of any substance to a disease or health-related condition. These claims may not be made unless they are defined by FDA in regulations.

¹¹ See John Alan Cohan, “Obesity, Public Policy, and Tort Claims Against Fast-Food Companies,” 12 *Widener L.J.* 103 (2003).

¹² *Id.* at 111.

¹³ *Pelman v. McDonald’s Corporation*, 237 F.Supp.2d 512 (S.D.N.Y. 2003).

¹⁴ *Id.* at 517.

¹⁵ *Id.* at 518.

unaware of these dangerous and unhealthy characteristics of the food based on the ordinary knowledge of the community.¹⁶ The court granted defendants motion to dismiss all complaints.¹⁷

III. Effect of Proposed Changes:

Section 1. This bill creates s. 768.37, F.S., to bar a claim for damages arising from personal injury or wrongful death against a manufacturer, distributor, or seller of foods or nonalcoholic beverages if the claim is premised upon a person's weight gain or obesity, or a health condition related to weight gain or obesity, resulting from long-term consumption of such foods or nonalcoholic beverages. For purposes of this section, "long-term consumption" is defined to mean the cumulative effect of multiple instances over a period of time and not the effect of a single or isolated instance. The limitation on such claims does not bar a claim under any other provision of law against a manufacturer, distributor, or seller of foods or nonalcoholic beverages if such person has failed to provide nutritional content information as required by any applicable state or federal law or has provided materially false or misleading information to the public.

Section 2. This bill would take effect upon becoming a law and would apply to all claims filed on or after that date.

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:

Article I, s. 21 of the Florida Constitution provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay." The test for assuring the right of access to the courts was declared in *Kluger v. White* in which the Florida Supreme Court held that:

Where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. s. 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the

¹⁶ *Id.*

¹⁷ *Id.* at 543.

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.¹⁸

Because the bill extends immunity from civil liability to potential defendants, it raises questions about possible infringements on the right of access to the courts. A litigant may argue that the limitation denies the litigant of his or her access to courts. It does not appear that a Florida court has ever addressed the issue of tortious liability for adverse health effects due to the long-term consumption of foods or nonalcoholic beverages. To the extent that such a tort action may be pursued under Florida law, the limitation would have to meet the constitutional test established by the Florida Supreme Court in *Kluger v. White*. The Legislature would have to: (1) provide a reasonable alternative remedy or commensurate benefit, or (2) make a legislative showing of overpowering public necessity for the abolishment of the right and no alternative method of meeting such public necessity.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

A manufacturer, distributor, or seller of foods or nonalcoholic beverages may enjoy lower insurance costs to the extent the bill limits the liability of such persons.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

When referring to the cumulative effect of consumptive actions taken by a potential defendant over a long period of time, the bill misuses the word “instance.” The general usage of the term *instance* is with reference to an example or a step in a process. If the intent is to refer to an occurrence or happening, then the word *incident* or *event* is the more appropriate term. Additionally, the bill defines “long-term consumption” to exclude the effect of a *single* or *isolated* instance. No substantive difference exists between a *single* versus an *isolated* event or act. However, if the intent is to refer to a series of *unrelated* acts or events, then the suggested phrase should read as “*a single or a series of isolated incidents.*” See page 1, lines 25-27.

VII. Related Issues:

Federal legislation (H.R. 339 and S. 1428) was introduced in Congress to prohibit obesity-related lawsuits against food sellers and manufacturers. Only the House Resolution is advancing on the

¹⁸ See *Kluger v. White*, 281 So.2d 1 (1973), at 4.

calendar. On March 10, 2004, the House passed the legislation by a vote of 276 – 139. It was received in the Senate on March 11, 2004, and it was read the second time on March 26, 2004, and placed on the Senate Legislative Calendar under General Orders Calendar No. 463. The House Resolution shields the manufacturer, distributor, or seller of a food or non-alcoholic beverage product intended for human consumption from civil liability in any state or federal actions for claims based on a person's weight gain, obesity, or any other health condition associated with weight gain or obesity relating to the consumption of such products. The action does not apply if the manufacturer or seller of a qualified product knowingly and willfully violated a Federal or State statute applicable to the manufacturing, marketing, distribution, advertisement, labeling, or sale of the product, and the violation was a proximate cause of injury related to a person's weight gain, obesity, or any health condition associated with a person's weight gain or obesity ; or the action is one for breach of express contract or express warranty in connection with the purchase of a qualified product.

VIII. Amendments:

Amendment #1 by Judiciary:

Revises the last sentence of the bill to clarify that the immunity from liability does not bar a claim for damages *if such claim is available* under any other provision of law for failure to disclose statutorily required nutritional content information or for providing materially false or misleading information to the public.