

# 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.)

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Prepared By: Commerce and Consumer Services Committee

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BILL: SB 2228

SPONSOR: Senator Webster

SUBJECT: Asbestos-related Claims

DATE: March 28, 2005

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Siebert	Cooper	CM	<b>Favorable</b>
2.	_____	_____	BI	_____
3.	_____	_____	JU	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

This bill provides liability limitations on asbestos-related claims involving a successor corporation created before January 1, 1972. The cumulative successor asbestos-related liabilities of a corporation are limited to the adjusted fair market value of the total gross assets determined at the time of the merger or consolidation, as provided in the bill.

This bill creates eight undesignated sections of the Florida Statutes.

## II. Present Situation:

### Asbestos-related Litigation

Asbestosis a fibrous material that is strong, durable, and resistant to heat and fire. Asbestos is used in various products such as vehicle brakes, building materials, ships, roofing materials, plastics, paints, and paper products.<sup>1</sup> It is abundant and inexpensive to mine and process.<sup>2</sup> With the passage of the Occupational Safety and Health Act (OSHA), safety regulations governing workplace exposure to asbestos were enacted.<sup>3</sup> Later, in 1989, the Environmental Protection Agency (EPA), attempted to ban all products containing asbestos, but the ban was overturned.<sup>4</sup> Today, no new uses of asbestos are permitted but some current uses of asbestos are still permitted.<sup>5</sup>

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<sup>1</sup> Insurance Information Institute, Asbestos Liability, <http://iiiidev.iii.org/media/hottopics/insurance/asbestos.htm> (lasted visited March 18, 2005).

<sup>2</sup> Asbestos Litigation Costs and Compensation: An interim report, RAND Institute for Civil Justice, 2002 (updated 2003).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

The first modern documented case of an asbestos-related death was in 1924, and in 1966, the first asbestos-related lawsuit was filed in Texas.<sup>6</sup> By the end of the 1970's, approximately 950 cases had been filed in federal courts.<sup>7</sup> However, in the 1980's, the number of cases filed began to decline, and continued until the late 1990's.<sup>8</sup>

By 1999, the filings of asbestos-related claims began to increase again. One factor that affected the number of claims was the trend of suing companies that had a less direct link to asbestos such as users of the material instead of manufacturers and successor owners of companies that produced asbestos.<sup>9</sup> Another factor was the filing of claims by those who had not yet developed health issues.<sup>10</sup> A third factor is the application of joint and several liability, which may require defendants to pay for disproportionate damages.<sup>11</sup>

Generally, the majority of asbestos-related litigation is located in a few states for a given period. This may be due to the states' joinder ruler, which determines how difficult it is for out-of-state plaintiffs to file a claim. From 1970 to 1987, 60 percent of asbestos personal injury cases were filed in California, Pennsylvania, New Jersey, and Illinois.<sup>12</sup> From 1998 to 2000, 66 percent of the filings were in Mississippi, New York, West Virginia, Ohio, and Texas.<sup>13</sup> Later, Florida, Louisiana, Virginia, and West Virginia joined the list of states that receive large numbers of asbestos claims.<sup>14</sup>

### **Economic Impact of Litigation**

Asbestos litigation has affected most sections of the U.S. economy. Asbestos-related defendants range from large corporations to firms with as few as 20 employees, and account for 83 different industries.<sup>15</sup>

The cost of asbestos-related litigation has increased over the years. In 1982, asbestos-related litigation costs businesses approximately \$1 billion for more than 21,000 asbestos product liability claims filed against 300 defendants.<sup>16</sup> By 2000, the cost was \$54 billion, and over 600,000 claimants had filed against 6,000 defendants.<sup>17</sup> By 2002, the cost of litigation rose to \$70 billion.<sup>18</sup>

The bankruptcy filings identifying asbestos-related litigation cost as a reason for the bankruptcy has increased over the years. In the 1980's, sixteen major corporations filed Chapter 11

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<sup>6</sup> See *supra* note 1.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See *supra* note 2.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

bankruptcy petitions that identified asbestos-related litigation as one of the main reasons for the bankruptcy filing.<sup>19</sup> By the end of the 1990's there were 18 more filings. Since January 1, 2000, there have been 22 more bankruptcies citing asbestos-related costs as a reason for the bankruptcy.<sup>20</sup>

### **Model and Other State Legislation**

The American Legislative Exchange Council (ALEC) drafted model legislation to address successor asbestos-related liability, the Successor Asbestos-Related Liability Fairness Act. The model legislation would limit the financial liability of the successor corporation to an amount equal to what the predecessor's total gross assets would be worth today. The successor corporation would receive credit for the settlements and judgments it has paid or committed to pay since the merger. The legislation would only apply to the predecessor's wrongdoing, and would not limit the liability for the successor corporation's own torts. Therefore, the successor may still be held liable to the full extent of its own assets for harm the successor corporation does itself.

Other states have passed legislation to address asbestos litigation. Ohio, Mississippi, and Texas passed laws as part of each state's tort reform legislation. Pennsylvania passed a similar law as part of its corporate law legislation. Currently, other states are also considering similar legislation to limit the liability for successor corporations.

### **III. Effect of Proposed Changes:**

**Section 1** provides that the number of asbestos related claims is on the rise. In turn, this may affect the viability of companies that have never manufactured, sold, or distributed asbestos or asbestos products and are liable only as successor corporations. Therefore, it is in the public interest, to limit the successor corporation's liability under these circumstances.

**Section 2** provides definitions.

"Asbestos claims" means any claim for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos, including:

- The health effects of exposure to asbestos;
- Any claim made by or on behalf of a person exposed to asbestos, or a representative, spouse, parent, child, or other relative of the person; and
- Any claim for damage or loss caused by the installation, presence, or removal of asbestos.

"Corporation" means a corporation for profit, including a domestic corporation organized under the laws of this state, or a foreign corporation organized under another state's laws.

"Successor" means a corporation that assumes or incurs, or has assumed or incurred, successor asbestos-related liabilities.

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

“Successor asbestos-related liabilities” means any liabilities, which are related in any way to asbestos claims and were assumed or incurred by a corporation as a result of or in connection with a merger or consolidation, or the plan of merger or consolidation, with or into another corporation, or which are related in any way to asbestos claims based on the exercise of control or the ownership of stock of the corporation before the merger or consolidation. The term includes liabilities that, after the time of the merger or consolidation for which the fair market value of total gross assets is determined under section 4 of this act, were or committed to be paid or otherwise discharged, by or on behalf of the corporation, or by a successor of the corporation, or by or on behalf of a transferor, in connection with settlements, judgments, or other discharges in this state or another jurisdiction.

“Transferor” means a corporation from which successor asbestos-related liabilities are or were assumed or incurred.

**Section 3** provides the limitations on asbestos-related liabilities, as provided for in section 4, apply only to a successor corporation as of January 1, 1972, or to the successor of that corporation.

The limitations do not apply to the following:

- Workers’ compensation benefits paid by or on behalf of an employer to an employee under ch. 440, F.S., or a comparable workers' compensation law of another jurisdiction;
- Any claim against a corporation that does not constitute a successor asbestos-related liability;
- An insurance corporation, as defined in s. 717.101, F.S.; or
- Any obligations under the National Labor Relations Act, as amended, or under any collective bargaining agreement.

**Section 4** provides that the cumulative successor corporation’s asbestos-related liabilities are limited to the fair market value of the predecessor’s total gross assets at the time of the merger or consolidation. If the predecessor assumed or incurred successor asbestos-related liabilities in connection with a prior merger or consolidation, the fair market value is determined at the time of that earlier merger or consolidation.

**Section 5** provides that a corporation may establish the fair market value by any reasonable method given the circumstances to include:

- By reference to the going concern value of the assets or to the purchase price attributable to or paid for the assets in an arm’s-length transaction; or
- In the absence of other readily available information from which fair market value can be determined, by reference to the value of the assets recorded on a balance sheet.

This section also provides that included in total gross assets are intangible assets, and the aggregate coverage under any applicable liability insurance issued to the predecessor, if the

insurance has been collected or is collectible to cover successor asbestos-related liabilities. There is an exception for compensation liabilities arising from workers' exposure to asbestos during the course of their employment by the predecessor.

**Section 6** provides that the fair market value of the total gross assets at the time of the merger or consolidation will increase annually at a rate of the prime rate as listed in the first edition of the Wall Street Journal for each calendar year since the merger or consolidation and 1 percent. If the prime rate is not listed, any "reasonable determination" of the prime rate on the first day of the year may be used. This rate may not be compounded.

After the time of the merger or consolidation for which the fair market value of total gross assets is determined, the adjustment of the fair market value of total gross assets must continue as provided under this section until the date the adjusted value is exceeded by the cumulative amounts of successor asbestos-related liabilities paid or committed to be paid by or on behalf of the corporation or predecessor, or a transferor. An adjustment of the fair market value to the total gross assets may not be applied to any liability insurance included in total gross assets as provided in section 5.

**Section 7** provides that the courts should apply this law to the fullest extent allowed under the State Constitution. This section also provides that the act is to retroactive.

**Section 8** provides that the provision and applications of the act are severable.

**Section 9** provides that the act will take effect upon becoming law.

#### **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:**

Section 21, Art. I, of the State Constitution preserves a person's right to litigate in court. The Florida Supreme Court has provided that, where a right of access to the courts for redress for a particular injury has been provided by statutory or common law predating the 1968 Florida Constitution, the Legislature may not abolish a cause of action without

providing a reasonable alternative, or overpowering public necessity for the abolishment is shown and there is no alternative method for meeting that public necessity.<sup>21</sup>

Here, it is unclear if an asbestos-related cause of action preceded the 1968 Florida Constitution because, while the first asbestos-related lawsuit was filed in Texas in 1966, most of the cases arose for the first time in the 1970's. If the cause of action is found to have predated the State Constitution, the Legislature may not be able to limit certain liabilities for asbestos-related claims 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.<sup>22</sup>

If no reasonable alternative is found, the Legislature needs to provide an overpowering public necessity to limit the liability of successor corporations in asbestos-related claims. In attempting to do so, the Legislature made a finding that the number of asbestos-related claims has increased in recent years and threatens the viability of a number of uniquely situated companies that have never manufactured, sold or distributed asbestos products. Previously, the Florida Supreme Court has held that the Legislature has the "final word" on declarations of public policy and those declarations are presumed correct.<sup>23</sup>

Further, while this act imposes limits on the cumulative recovery by asbestos claimants, it does not abolish this remedy completely. Statutes that limit damages have been upheld because the right of action at issue had been only marginally limited.<sup>24</sup> In this case, the bill places a limitation only on the amount of damages a plaintiff may collect from a successor corporation in regards to the predecessor's asbestos-related liability.

Accordingly, it cannot be definitively determined how the courts will view the limitations imposed by this bill, if challenged.

## V. Economic Impact and Fiscal Note:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

The actual direct economic impact of this bill on the private sector is indeterminate.

<sup>21</sup> *Kluger v. White*, 281 So.2d 1 (Fla. 1973)(the court invalidated a statute requiring a minimum of \$550 in property damages arising from an automobile accident before bringing an action); *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987)(the court ruled that a section of Tort Reform and Insurance Act, which placed absolute, \$450,000 cap on damages that tort victim could recover for noneconomic losses, violated victim's constitutional right to access to courts).

<sup>22</sup> *Id.*

<sup>23</sup> *University of Miami v. Echarte*, 618 So.2d 189 (Fla. 1993).

<sup>24</sup> *Chapman v. Dillon*, 415 So.2d 12 (Fla.1982)(the court ruled that threshold limits of no-fault statute provide a reasonable alternative to tort action and do not deny access to courts); *Purdy v. Gulf Breeze Enterprises, Inc.*, 403 So.2d 1325 (Fla.1981)(the court ruled that the statute requiring reimbursement of insurer for PIP benefits where insured recovers from negligent third party does not deny access to courts).

This bill limits a successor corporation's asbestos-related financial liability to the predecessor's total gross assets at the time of the merger or consolidation at what would be today's value of the assets.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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## **VIII. Summary of Amendments:**

None.

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