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HOUSE OF REPRESENTATIVES
COMMITTEE ON
CIVIL JUSTICE & CLAIMS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT

BILL #: HB 3871

RELATING TO: Product Liability

SPONSOR(S): Committee on Civil Justice & Claims

COMPANION BILL(S): None

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

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I. SUMMARY:

This bill is one of several bills produced as a result of extensive hearings conducted by the Committee on Civil Justice and Claims between September 15, 1997 and February 17, 1998. These hearings dealt with many aspects of the tort system and focused, in particular, upon the impact of tort litigation on small business.

This bill amends s. 95.031, F.S., by establishing a 12-year statute of repose for commencing a civil action for product liability. This time period begins to run upon the date of delivery of the product to the original purchaser or lessee. The 12-year limitation does not apply if the manufacturer knew of a defect and concealed or attempted to conceal the defect.

In addition, this bill creates s. 768.1256, F.S. This section establishes a government rules defense for product liability actions. If a manufacturer or seller of a product complies with statutory standards or agency rules, the manufacturer or seller would operate under a rebuttable presumption that no liability exists in connection with the product. Failure to comply with statutory standards or agency rules, on the other hand, would not raise a presumption of liability.

Finally, this bill provides that a drug manufacturer or seller cannot be held liable for producing or distributing a “defective or unreasonably dangerous” product if the drug was approved by the United States Food and Drug Administration and if the seller or manufacturer complied with labeling requirements. This immunity can be overcome through several exceptions.

This bill will not result in any increase in fees or taxes and would slightly reduce the case load of the courts.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Product liability involves the liability of manufacturer's, distributors, and sellers for harms caused by defective products. Product liability actions are based upon three theories: negligence, breach of warranty, and strict liability. Often, claims are brought under several theories in combination.

Three categories of defects may result in the imposition of liability: manufacturing flaws, design defects, and marketing defects. Manufacturing flaws are inadvertent defects, which occur in certain product units, and which make those units more dangerous than other product units produced by the same manufacturer. Design defects, by contrast, are flaws shared by all the product units within a product line. Marketing defects consist of failures to provide adequate warnings, directions, or labeling.

1. **Time Limits on Filing Actions** - Statutes of limitation and statutes of repose require parties to institute actions within specific time fames. Chapter 95, F.S., sets forth statutes of limitation and statutes of repose for several civil causes of action. Section 95.11, F.S., addresses civil actions "other than for recovery of real property." It requires that actions, based on written contracts or instruments and mortgage foreclosures, be commenced within five years from the time the cause of action accrues. Section 95.11, F.S., also provides a four-year statute of limitation for product liability actions. Negligence actions, certain personal injury actions, actions to recover personal property, and several other types of claims must also be commenced within four years from the time the cause of action accrues. Finally, a two-year limit applies to wrongful death actions, certain malpractice actions, and actions based upon libel or slander.

    a. **Right of Access to the Courts** - Article I, Section 21 of the Florida Constitution states: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." As a general rule, statutes of limitation and statutes of repose do not infringe upon the right of access to the courts. See Carr v. Broward County, 541 So.2d 92 (Fla. 1989); Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985). In Damiano v. McDaniel, M.D., 689 So.2d 1059 (Fla. 1997), the Florida Supreme Court found that the medical malpractice statute of repose did not violate the right of access to the courts, even though the plaintiff's injury did not manifest itself within the statutory four-year period following the incident which caused the injury. However, the Florida Supreme Court has occasionally invalidated statutes of limitation and repose as violative of the open courts provision, particularly in cases where such restrictions operated to deprive injured plaintiffs of a meaningful forum or remedy. Owens-Corning Fiberglas Corp. v. Rivera, 683 So.2d 154 (Fla. 3d DCA 1996); Owens-Corning Fiberglas Corp. v. Crane, 683 So.2d 552 (Fla. 3d DCA 1996); Owens-Corning Fiberglas Corp. v. Corcoran, 679 So.2d 291 (Fla. 3d DCA 1996); Diamond v. E.R. Squibb & Sons, Inc., 397 So.2d 671 (Fla. 1981); Batilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1980); Overland Construction Co., Inc. v. Sirmons, 369 So.2d 572 (Fla. 1979). In other instances, judicial decisions have narrowed statutes of limitation and repose based upon retroactive application or due process concerns. E.g., Wiley v. Roof, 641 So.2d 66 (Fla. 1994).

b. **Statutes of Limitation** - Statutes of limitation are generally shorter than statutes of repose. They involve less finality and are procedural in nature. They restrict only the remedy available to a particular plaintiff and do not operate as a limitation upon the underlying substantive right of action. Courts view statutes of limitation as affirmative defenses that the opponent of a claim must assert and prove in order to receive the protection offered under the statute. If the opponent of a claim fails to plead that the statute of limitations has expired, the defense is waived, and the claim may proceed through the courts. Statutes of limitation are predicated on public policy and are designed to encourage plaintiffs to assert their cause of action with reasonable diligence while witnesses are available and while memories of events are fresh. Statutes of limitation also shield defendants against the need to defend stale claims which could disadvantage the defendant at trial. Statutes of limitation usually run from the time at which a cause of action accrues. Currently, s. 95.11, F.S., provides a four-year statute of limitation for product liability actions.

c. **Statutes of Repose** - Statutes of repose are generally longer and involve a greater degree of finality than statutes of limitation. Courts construe a cause of action rescinded by a statute of repose as if the right to sue never existed in the first place. Statutes of repose permanently lay a cause of action to rest and deprive the court of the power to hear the plaintiff's claim. According to the Florida Supreme Court:

> Rather than establishing a time limit within which action must be brought, measured from the time of accrual of the cause of action, these provisions cut off the right of action after a specified time measured from the delivery of a product or the completion of work. They do so regardless of the time of the accrual of the cause of action or of notice of the invasion of a legal right. Bauld v. J.A. Jones Construction Co., 357 So.2d 401, 402 (Fla. 1978).

Statutes of repose generally rest upon overriding public purposes. Words of finality, such as "in no event shall an action be commenced more than 12 years after the incident out of which the cause of action accrued," indicate that the Legislature intended to create a statute of repose.

Currently, in Florida, no statute of repose restricts suits for injuries caused by defective products. This means that plaintiffs can bring an action for product liability 25 or even 50 years after the product was manufactured or sold.

Florida courts have had several occasions to review the constitutionality of statutes of repose. In Carr v. Broward County, 541 So. 2d 92 (Fla. 1989), the Florida Supreme Court recognized that the Legislature could properly take into account the difficulties of defending against a stale fraud claim when imposing a statute of repose. In Diamond v. E. R. Squibb and Sons, Inc., 397 So.2d 671 (Fla. 1981), the Florida Supreme Court construed a 12-year statute of repose for products liability actions (no longer in effect), and carved out an exception for the drug diethylstilbestrol (DES). DES caused injuries that remained latent for many years after the drug was ingested. By the time the injuries became apparent, the 12-year statute of repose had expired. The court held that applying the statute to DES cases would violate Article I, section 21 of the State Constitution, which guarantees access to the courts for redress of injuries. When the Florida Supreme Court later upheld the constitutionality of the statute

of repose in general, it preserved the exception for DES cases. See Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985). In a recent case construing the old statute of repose, the Third District Court of Appeal relied on Diamond to create a similar exception for asbestos cases. Owens-Corning Fiberglass Corp. v. Corcoran, 679 so.2d 691 (Fla. 3d DCA 1996).

2. **Compliance with Government Rules and Statutes** - As noted above, product liability actions can be based upon three distinct theories: negligence, breach of warranty, and strict liability. The general standard of care which applies to negligence actions is reasonable care under the circumstances. Under this standard, the defendant is judged by what could be expected of a reasonable entity under like circumstances. For actions based upon breach of warranty, the manufacturer's duties depend upon the performance levels promised in the warranty. Under some circumstances, however, the manufacturer's duties may be defined by general warranties of merchantability or by limited warranties or fitness for a particular purpose. Strict liability actions require that when the product left the seller's control, it was in a "defective condition unreasonably dangerous to the user or consumer," that it reached the plaintiff without any substantial change in its condition, and that the defect resulted in damages to the plaintiff.

   a. **Effect of Violation of Rule or Statute** - Violation of statutes or rules aimed at preventing the type of harm visited upon the plaintiff can construed as "negligence per se." deJesus v. Seaboard Coast Line R.R. Co., 281 So.2d 198 (Fla. 1973). Where the standard of care is defined by a statute, failure to adhere to the standards encompassed by the statute constitutes negligence as a matter of law. It should be noted, though, that if the violation of the rule or statute was not the proximate or contributing cause of the plaintiff's injury, then proof of the violation of the statute becomes irrelevant. See Periera v. Florida Power & Light Co., 680 So.2d 617 (Fla. 4th DCA 1996). The Restatement (Second) of Torts provides:

      s. 286. WHEN STANDARD OF CONDUCT DEFINED BY LEGISLATION OR REGULATION WILL BE ADOPTED.--The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose if found to be exclusively or in part
      (a) to protect a class of person which includes the one whose interest is invaded, and
      (b) to protect the particular interest which is invaded, and
      (c) to protect that interest against the kind of harm which has resulted, and
      (d) to protect that interest against the particular hazard from which the harm results.

   b. **Effect of Adherence to Rule or Statute** - As a general rule, government rules and statutes set minimum safety guidelines for the protection of the public. While violations of such provisions may lead to a finding of negligence per se, the manufacturer or seller is not insulated from liability by following government rules and regulations. Other types of guidelines, such as customary practices, industry standards, and advances in scientific or technical may be taken into account when assessing the potential liability of a manufacturer or seller. Moreover, it is the risk reasonably to be perceived by the introduction and sale of a product which delineates the manufacturer's obligation to produce a reasonably safe product. In a product liability case, therefore, a manufacturer's compliance with government rules and standards is rarely determinative. In many situations, no guidelines apply, or those that do apply are not specifically

tailored to prevent the type of harm sustained by the plaintiff. Even where the product meets applicable regulations, courts still must still resolve questions related to whether the cost savings and utility of the product outweigh the risk inherent in its design or, whether the product meets the reasonable expectations of consumers. Nevertheless, where relevant, compliance with government rules or statutes may be admissible as evidence that the defendant was not negligent or did not produce a defective product.

c. **Treatment of Drug Manufacturers** - The Restatement (Second) of Torts, in section 402A, addresses the special liability of a seller or manufacturer for physical harm to a consumer. Comment "k" provides that:

> There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself unvariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the high degree of risk which they involve. Such a product properly prepared, and accompanied by proper directions and warning, is not defective, or is it unreasonably dangerous. . . . The seller of such products . . . is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

B. EFFECT OF PROPOSED CHANGES:

1. **Statute of Repose** - This bill establishes a 12-year statute of repose which applies to all product liability actions. The time period begins to run upon the date of delivery of the product to the original purchaser or lessee. This provision would operate in conjunction with s. 95.11, F.S., which provides a four-year statute of limitation for product liability actions. The 12-year limitation would not apply if the manufacturer knew of a defect and concealed or attempted to conceal the defect.

2. **Government Rules Defense** - This bill creates a government rules defense which pertains to product liability actions. If the manufacturer or seller of a product complies with statutory standards or agency rules, the manufacturer or seller would operate under a rebuttable presumption that no liability exists in connection with the product. Apparently, this presumption would apply to actions in strict liability, negligence, and breach of warranty, although it is uncertain how the presumption would be construed in connection with actions based upon express or implied warranties. According to the bill, failure to comply with statutory standards or agency rules would not raise a presumption of liability.

3. **Drug Manufacturer's Affirmative Defense** - This bill provides that, in a product liability action, a drug manufacturer or seller may raise an affirmative defense of compliance with government rules. According to the bill, a drug is not "defective or unreasonably dangerous", if it was approved by the United States Food and Drug Administration (FDA) and if meets labeling requirements. This affirmative defense would not be available where the manufacturer or seller makes false representations to the FDA or bribes an FDA official. Also, this immunity would not apply once the

FDA has withdrawn its approval or issued an order to withdraw the drug from the market.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

Because this bill would create a presumption that a manufacturer or seller of a product, who complies with government regulations, is not liable to a plaintiff who has allegedly been injured by the product, it would place increased importance upon the interpretation of certain statutes and rules. Simultaneously, it would place decreased importance on common law mechanisms such as the “reasonable person” standard or the “consumer expectations” standard.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

N/A

(3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

This bill may reduce the ability of certain plaintiffs to successfully pursue a civil action for damages against product manufacturers or sellers.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

This bill would remove some financial risk associated with the introduction, production, and sale of products. The statute of repose would promote stability by limiting perpetual exposure to liability following the sale of a product. The

government rules defense would provide greater certainty as to the rights of plaintiffs and the responsibilities of manufacturers. Finally, because this bill has the potential to restrict litigation, it could encourage innovation and spur the development of new and potentially useful products. This could benefit consumers in the form of price reductions and greater choice.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

This bill would reduce the ability certain plaintiffs to collect damages from product manufacturers and sellers if these entities comply with government regulations.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Amends s. 95.031, F.S., creates s. 768.1256, F.S.

E. SECTION-BY-SECTION RESEARCH:

Section 1 Amends s. 95.031, F.S.; imposes a 12-year statute of repose on product liability actions.

Section 2 Creates s. 768.1256, F.S.; provides a government rules defense; creates a rebuttable presumption that compliance with relevant standards establishes that a defendant is not liable; states that noncompliance does not raise a presumption of liability; establishes that a manufacturer or seller of a drug has not produced a defective or unreasonably dangerous product if the manufacture or seller has gained approval from the United States Food and Drug Administration and has complied with labeling requirements; provides exceptions.

Section 3 States that any action that would not have been barred under s. 95.031(2), F.S. may be commenced before June 1, 1998, or shall be barred by the amendments contained herein.

Section 4 Establishes an effective date of October 1 of the year in which the bill is enacted.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

   N/A

3. Long Run Effects Other Than Normal Growth:

   This bill could slightly reduce the case load of the courts, because it could reduce the number of plaintiffs bringing actions against product manufacturers and sellers.

4. Total Revenues and Expenditures:

   N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

   N/A

2. Recurring Effects:

   N/A

3. Long Run Effects Other Than Normal Growth:

   N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

   This bill may reduce the ability of certain plaintiffs to successfully bring actions against product manufacturers and sellers. Persons who do not file an action within 12 years after the delivery of a product would be prohibited from bringing suit. Plaintiffs who are unable to recoup their losses through the tort system, could place an increased burden on social assistance programs and public services.

2. Direct Private Sector Benefits:

   This bill would reduce the potential liability of manufacturers and sellers of products by imposing a statute of repose and by establishing a government rules defense. Its provisions could increase the predictability of the law associated with product liability. Currently, virtually identical cases can result in highly dissimilar results. Reliance on a government rules standard, rather than the reasonable person standard, could lead to more uniform outcomes.

3. Effects on Competition, Private Enterprise and Employment Markets:

   Any reduction in civil litigation could attract new business to the state and could enhance the competitiveness of businesses already operating in the state.

D. FISCAL COMMENTS:

   None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

   This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

   This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

   This bill would not reduce the percentage of a state tax shared with counties or municipalities. Therefore, it would not contravene the requirements of Article VII, Section 18, of the state constitution.

V. COMMENTS:

Key Issues - This subsection uses a question format to stimulate debate about the joint resolution under review.

1. **Question Presented** - *Whether manufacturers and sellers of products need greater protection from civil suit in state court.*

2. **Other Policy Considerations:**

   a. Should the legislature impose a statute of repose on product liability actions? Does perpetual liability place an unfair burden on manufacturers and sellers? Should older products be judged against modern standards or standards that existed at the time of manufacture? Is a 12-year statute of repose adequate or should this period be lengthened or shortened? Would a repose period based upon the useful life of the product be workable or desirable?

   b. Should the statute of repose be subject to an exception if the injury does not manifest itself within the 12-year period? Should the repose period contain an exception related to fraudulent concealment or other types of wrongdoing on the part of the defendant? Are such exceptions already embodied in the case law?

c. Is a government rules defense desirable? Would such a defense remove incentives related to product safety? Would such a defense limit the ability of private citizens to uncover wrongdoing through court proceedings? Are government regulations, when combined with consumer awareness, media vigilance, and independent evaluations, adequate to protect consumer interests?

d. Should the government rules defense apply to all theories of product liability and to all types of product defects? Should noncompliance create a presumption of liability?

e. Is a rebuttable presumption the best standard to apply to defendants who have complied with government rules? Should the standard be elevated to a conclusive presumption, or should compliance simply be construed as evidence that the defendant has met the applicable standard of care?

f. Do drug manufacturers require special protection from liability? Is FDA approval adequate to ensure public safety under the circumstances outlined within the text of the bill?

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON CIVIL JUSTICE & CLAIMS:
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