HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1513 Civil Justice Reform
SPONSOR(S): Brown
TIED BILLS: **IDEN./SIM. BILLS:** HB 1315

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Governmental Operations Committee	5 Y, 2 N	Garner	Everhart
2) Judiciary Committee			
3) State Administration Council			
4)			
5)			

SUMMARY ANALYSIS

HB 1513 makes a number of changes with respect to Florida's civil justice system. These changes include:

- Entitlement of the defendant to dismissal in a civil trial for damages if there is evidence demonstrating that the plaintiff engaged in fraudulent or deceptive activity in any aspect of the lawsuit.
- Repeal of the "dangerous instrumentality doctrine" as it relates to the vicarious liability of a motor vehicle owner for accidents occurring as a result of operation of that owner's motor vehicle.
- Limitation of the availability of the statutory civil action for bad faith conduct on the part of liability insurers in settling insurance claims to only the insured, and preemption of the common law cause of action.
- Restoration of the premises liability common law principles as they existed prior to the Florida Supreme Court's 2001 decision in Owens v. Publix Supermarkets.
- Codification of products liability principles which limit liability of entities in the chain of distribution of defective products which cause injury. Under the changes, only those entities that are actually at fault are liable.
- Repeal of the rebuttable presumption under the government rules defense that a product is defective or unreasonably dangerous if the manufacturer or seller did not comply with pertinent federal or state laws or regulations.
- Provision of immunity to government entities and electric utilities from liability for damages, injury or death resulting from an accident caused by failure or inadequacy of illumination from street lights, security lights, or other similar illumination.
- Restoration of the law concerning the duty of care owed to the public by a law enforcement officer who is engaged in pursuit of a fleeing felon to its state prior to the Florida Supreme Court's 1992 decision in City of Pinellas Park v. Brown.
- Requirement that the jury be informed of the total of all collateral source amounts paid to or for the benefit of a claimant in a civil action for damages so that it may set off that amount from its judgment.
- Provision for payment of plaintiff's attorney's fees when the parties to an action for damages reach a settlement without the assistance of their attorneys.
- Repeal of the use of joint and several liability for the purpose of apportioning economic damages

The bill provides that any of its provisions or applications that are found to be invalid are severable, and that the remaining provisions and applications are to be given effect. The bill takes effect upon becoming law, and the changes are operative in civil actions accruing on or after the effective date.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote personal responsibility

The bill reduces the ability of plaintiffs to hold persons or entities accountable for damages that were not, in fact, caused by those persons or entities. It does this by limiting products liability to those entities that were actually at fault for the injury to the plaintiff, by reducing the opportunities that plaintiffs have to reach motor vehicle owners through the dangerous instrumentality theory of vicarious liability, and increasing the burden of proof on plaintiffs in "slip and fall" cases, among other things.

B. EFFECT OF PROPOSED CHANGES:

Dismissal of Civil Actions Due to Fraud

Present Situation

Currently, Florida tort law does not contain a statutory provision providing for the dismissal of a cause of action due to fraud. However, Florida appellate courts have long “recognized and enforced the principle that a party who has been guilty of fraud or misconduct in the prosecution or defense in a civil proceeding should not be continued to employ the very institution it has subverted to achieve [its] ends.”[1] The Fifth District has observed that a court has the “power to dismiss an action as the sanction for fraud . . . because no litigant has the right to trifle with the court.”[2]

In the case Cox v. Burke, the Fourth District Court of Appeal has provided an analytical framework for determining whether or not a litigant has committed a fraud on the court.[3] In Cox, the plaintiff provided the defendants with false and misleading information about her identity, her driver's license and social security numbers, and about injuries sustained prior to her medical malpractice claim. The Court noted:

> The requisite fraud on the court occurs where “it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense.” When reviewing a case for fraud, the court should "consider the proper mix of factors" and carefully balance a policy favoring adjudication on the merits with competing policies to maintain the integrity of the judicial system. Because “dismissal sounds the ‘death knell of the lawsuit,’ courts must reserve such strong medicine for instances where the defaulting party's misconduct is correspondingly egregious.” The trial court has the inherent authority, within the exercise of sound judicial discretion, to dismiss an action when a plaintiff has perpetrated a fraud on the court, or where a party refuses to comply with court orders. Because dismissal is the most severe of all possible sanctions, however, it should be employed only in extreme circumstances.[4]

[1] Hanono v. Murphy, 723 So.2d 892, 895 (Fla. 3d DCA 1998). See also Carter v. Carter, 88 So.2d 153 (Fla. 1956); Ashwood v. Patterson, 49 So.2d 848 (Fla. 1951); Savino v. Florida Drive In Theatre Management, Inc., 697 So.2d 1011 (Fla. 4th DCA 1997); Kornblum v. Schneider, 609 So.2d 138 (Fla. 4th DCA 1992).
[2] Brown v. Allstate Insur. Co., 838 So.2d 1264 (Fla. 5th DCA 2003).
[3] See Cox v. Burke, 706 So.2d 43 (Fla. 5th DCA 1998).
[4] Id. at 46. (Citations omitted).

The Court concluded that the plaintiff forfeited her right to have her case heard by engaging in activities that interfered with the judicial system's ability to adjudicate the case on the merits and with the opposing parties' ability to present a defense.

Generally, Florida courts have held that in order to sustain a finding of fraud, a court must have clear and convincing evidence.[5] The appellate courts review the trial judge's decision under an abuse of discretion standard.[6] The Florida Supreme Court has noted that a trial court abuses its discretion "only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court."[7]

Effect of HB 1513

HB 1513 creates s. 46.100, F.S., providing for dismissal of a civil action in the event that a defendant can demonstrate by a preponderance of the evidence that the plaintiff in the action has engaged in any fraudulent or deceptive activity in any aspect of the lawsuit which is the subject of damages sought from the defendant. The bill provides that a motion for dismissal on these grounds must be ruled on by the judge in a timely manner.

If the defendant making such a motion for dismissal prevails, he or she may recover compensatory, consequential, and punitive damages subject to the limitations provided in Part II of Chapter 768 concerning damages for negligence. In addition, the prevailing defendant may recover costs incurred in litigating the cause of action against anyone convicted of, or entering a plea agreement for, insurance fraud under s. 817.234, F.S. associated with a claim for damages or other benefits.

Vicarious Liability/Dangerous Instrumentality Doctrine

Present Situation

In 1999, the Legislature limited the damages awardable under Florida's common law "dangerous instrumentality doctrine," which, at that time allowed a motor vehicle owner to be held liable for injuries caused by the negligence of anyone entrusted to use the motor vehicle. The common law principle was first stated in the case of Southern Cotton Oil Co. v. Anderson, 86 So. 629 (Fla. 1920), and stood for nearly 80 years before the doctrine was modified by the Florida Legislature in 1999.[8] The changes made to the law at that time limited the vicarious liability of a motor vehicle owner or a rental company that rents or leases motor vehicles. The change provided that unless there is a showing of negligence or intentional misconduct on the part of a motor vehicle owner or rental company that rents or leases motor vehicles for a period of 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 $500,000 in economic damages which must be reduced by amounts actually recovered from the operator or insurance of the lessee or operator.

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[5] See John T. Kolinski, Fraud on the Court as a Basis for Dismissal with Prejudice or Default: An Old Remedy has New Teeth, 78 Fla. Bar. J. 16, 17 (Feb. 2004).
[6] See Hogan v. Dollar Rent A Car Systems, 783 So.2d 1211 (Fla. 4th DCA 2001) (holding that the trial court did not abuse its discretion in dismissing the case since fraud permeated the entire proceeding). Cf. Hanono, 723 So. 2d at 895 (finding that the trial judge abused his discretion by failing to order dismissal of the case with prejudice where the plaintiff was found guilty of committing perjury at his pre-trial deposition).
[7] White v. State, 817 So.2d 799, 805 (Fla. 2002).
[8] Ch. 99-225, L.O.F.

The law was also changed in 1999 to apply these same vicarious liability limitations to owners (who are natural persons) who lend their motor vehicles to permissive users, and to exclude owners of motor vehicles that are used for the owner's commercial activity, other than rental companies that rent or lease motor vehicles, from the limits on vicarious liability. The term "rental company" was 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. The 1999 changes also exempted commercial vehicles transporting hazardous materials unless a lessee agrees in writing to not use the vehicle for such purpose, or the lessee or other user operates the vehicle with minimum insurance of $5,000,000 combined property damage and personal injury coverage.

Effects of HB 1513

The changes enacted in 1999 represent the state of the law today with respect to vicarious liability and the dangerous instrumentality doctrine. HB 1513 repeals the "dangerous instrumentality doctrine," and repeals the limitations to vicarious liability under that doctrine which were enacted in 1999. The bill replaces the doctrine with a new "negligent entrustment rule" concerning the operation of motor vehicles. Under this rule, a person or entity that negligently entrusts the use of a vehicle to a third party may be liable for any personal injuries that occur as a result of the negligent operation of the vehicle by the third party if the entrusting party knew or had reason to know that the third party would use the vehicle in such a manner as to create an unreasonable risk of harm to others.

Under the dangerous instrumentality doctrine, a plaintiff would be required only to prove that the owner consented to the use of the motor vehicle by the operator, and that the person operating the vehicle did so negligently in a way that injured the plaintiff. Under the new negligent entrustment rule provided by the bill, before vicarious liability would extend to the owner of the vehicle, a defendant would likely be required to demonstrate:

- That the operator of the vehicle was incompetent to operate the vehicle;
- That the owner knew or should have known of the incompetence;
- That operation of the vehicle was authorized (entrusted); and
- That the driver's negligence caused the accident.

Bad Faith Actions Against Insurers

Present Situation

[Portions of the Report of the Governor's Select Task Force on Healthcare Professional Liability Insurance are excerpted liberally to provide background on the current state of the law regarding bad faith causes of action against insurers]

In 2002, the Governor's Select Task Force on Healthcare Professional Liability Insurance studied the history of medical malpractice and the perceived medical malpractice crisis in Florida, heard extensive testimony from healthcare providers and malpractice victims at hearings throughout the state, read hundreds of letters from concerned citizens, and conducted its own independent research of published studies and relevant literature. The result of the work of the Task Force is a 345-page report detailing its findings and recommendations. In the report's chapter on insurance reform, the Task Force addressed issues surrounding the "bad faith" cause of action that is available to the insured and third parties against insurers who act fraudulently or in bad faith in the conduct of the insured's defense. The Task Force examined whether a bad faith cause of action should be limited to a right of the insured and not extend to third party claimants. The Task Force also examined whether criteria or standards should be established for insurer conduct that constitutes bad faith and the duty of good faith when dealing with an insured, and limited to protect the assets of the insured from judgment.

In Florida, there are two causes of action for bad faith claims by third parties to the insured/insurer relationship. One of these causes of action arises out of common law and is therefore a creation of judicial case law. The other cause of action arises out of judicial interpretation of statute. At its fundamental core, the bad faith cause of action is intended to promote the following purposes:[9]

- To economically protect the defendant insured from an excess judgment when the insurer has control of the defense and settlement;
- To make available to injured persons specified dollar limits that are available as compensation; and
- To encourage insurers to behave responsibly by making them liable for the financial damage that is caused by their breach of good faith duties.

By judicial interpretation of both the common law bad faith cause of action and the statutory law bad faith cause of action, "any person aggrieved" may sue an insurer for the insurer's alleged improper conduct. Accordingly, in Florida, an insurer can be held liable to pay an entire judgment against its insured even when the judgment exceeds the limits of the insurance for which the insured has contracted.

In Thompson v. Commercial Union Ins. Co. of New York, the Florida Supreme Court declared: "It is established in Florida that an insured has the right to sue and recover damages against his own insurer for an excess of judgment on the basis of fraud or bad faith in the conduct of the insured's defense by the insurer."[10] The Thompson court also extended the third-party beneficiary doctrine to allow injured plaintiffs to directly sue a defendant's insurer "for recovery of the judgment in excess of the policy limits, based upon the alleged fraud or bad faith of the insurer in the conduct or handling of the suit."[11] This extension had the effect of enlarging the limits of liability of the insurer beyond those in the stated insurance policy at issue.[12] Since Thompson, the law in Florida has placed very few limits on that liability.

In 1980, the Florida Supreme Court decided the case of Boston Old Colony Ins. Co. v. Gutierrez.[13] That case explains many of the principles on which the cause of action by a third party against an insurer for bad faith exists and outlines the Court's understanding of the problems raised by such cause of action. In Boston Old Colony, the plaintiff and defendant were involved in a head-on collision. Both men claimed that the accident was the other's fault. Brown, the defendant in the original case, had a liability policy that covered him up to a limit of $10,000 in damages. However, because of Brown's recollection of the accident and some corroborating evidence, Boston Old Colony hired an accident reconstruction expert to further investigate the cause of the accident. That expert determined that Gutierrez, the plaintiff in the original suit, was on the wrong side of the road at the time of the accident impact. Despite this evidence, Boston Old Colony's adjuster knew that there was still a question of Brown's liability and that Gutierrez's injuries were extensive. Therefore, there was a possibility of an excess judgment in the case. The adjuster warned Brown of these matters and suggested that an offer to settle the case be made. Brown refused. He had counterclaimed against Gutierrez for his own injuries and did not want to make the admission of fault that is implied in an offer to settle. Boston Old Colony then had Brown execute a "hold harmless" agreement, in which Brown assumed responsibility for any excess judgment.[14]

Before the trial, Gutierrez offered to take the policy limits of $10,000 in settlement of his claim against Brown. Boston Old Colony responded by denying liability. Then, Brown settled his counterclaim

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[9] See 2002 Report of the Governor's Select Task Force on Healthcare Professional Liability Insurance, p. 309 (citing Vincent Rio, J.D., testimony, Nov. 22, 2002, pgs. 116-117.

[10] Thompson v. Commercial Union Ins. Co. of New York, 250 So.2d 259, 260 (Fla. 1971); see also Auto Mutual Indemnity Co. v. Shaw, 184 So.2d 713 (Fla. 1969).

[11] Id. at 264.

[12] Id. at 260 (quoting Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969)).

[13] Boston Old Colony Ins. Co. v. Gutierrez, 386 So.2d 783 (Fla. 1980).

[14] Id. at 784.

against Gutierrez and his insurer. Boston Old Colony offered Gutierrez the policy limits as settlement of the claim. Gutierrez refused. The trial resulted in a judgment against Brown for $1,400,000. Gutierrez then sued Boston Old Colony, alleging bad faith on its part because of its failure to settle the claim for policy limits when it had the opportunity. Gutierrez prevailed and obtained a judgment against Boston Old Colony for $1,400,000.[15]

The question before the Florida Supreme Court was whether the common law in Florida (as set forth in Thompson) authorized "a bad faith action against an insurance company when that company [had] refused to settle a claim at the express direction of its own insured who obtains a settlement of his claim and the insurance company thereafter offers to settle for its policy limits before trial?"[16] The court answered "no."

In analyzing this issue, the court noted that "[a]n insurer, in handling the defense of claims against its insured, has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business."[17] The insurer assumes a duty to exercise "such control and made such decisions in good faith and with due regard for the interests of the insured" when the insured surrenders all control over the handling of the claim, including all decisions in the litigation and settlement to the insurer.[18]

This good faith duty obligates the insurer to advise the insured of settlement opportunities, of the probable outcome of the litigation, of the possibility of an excess judgment, and of any steps the insured might take to avoid such a judgment. The insurer "must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so."[19]

Justice Alderman wrote specifically to voice his opinion on the issues of the bad faith cause of action in the Boston Old Colony case. He opined that an injured plaintiff should not be allowed to sue the defendant's insurer for bad faith failure to settle a claim. According to Justice Alderman, the good faith duty to settle is between insurer and insured. "In the 'Alice-in-Wonderland' world created by the [common law] rule, it is to the injured party's benefit if the insurer breaches its duty to its insured and to his detriment if there is no breach."[20] This result exists because "if the insurer settles, the plaintiff will receive no more than the policy limits, but if it does not, the plaintiff may end up with both the policy limits and an excess judgment."[21] Accordingly, the common law rule induces a plaintiff not to settle.[22]

While in Boston Old Colony, the Florida Supreme Court found that the third party (Gutierrez) had failed to prove bad faith on the part of the insurer (Boston Old Colony), the Court continued to extend the common law cause of action itself to persons beyond the insured/insurer contract relationship. Furthermore, the same result has been reached by the courts with respect to the statutory cause of action for bad faith by an insurer.[23]

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[15] Id. at 784-785.
[16] Boston Old Colony Ins. Co. v. Gutierrez, 386 So.2d 784 (Fla. 1980).
[17] Id. at 785.
[18] Id.
[19] Id.
[20] Id. at 786 (Alderman, J., concurring specially).
[21] Id.
[22] Id.; see also Judge Carroll, in Canal Insurance Company of Greenville, South Carolina v. Sturgis, 114 So.2d 469 (Fla. 1st DCA 1959), aff'd, 122 So.2d 313 (Fla. 1960):

> No one can today question the legal right of the insured to sue the insurer for negligence or bad faith in failing to settle a claim within the policy limits for, if he has had to pay a part of the judgment, he had indeed suffered damages because of such failure of the insurer; but, when the judgment creditor directly so sues the insurer for an amount above such limits, a vastly different situation exists in the eyes of the law. The judgment creditor has not suffered because of the insurer's failure, but has, if anything, gained thereby. The judgment creditor would be in an anomalous position, for typically he would be claiming damages for the insurer's failure to settle the case for much less than the verdict he himself actually won.

[23] See, e.g., Auto-Owners Ins. Co. v. Conquest, 658 So.2d 928 (Fla. 1995), State Farm Fire & Casualty Co. v. Zebrowski, 706 So.2d 275 (Fla. 1997).

Section 624.155, F.S., describes who may bring a civil action for bad faith and outlines the Insurance Code violations that subject the insurer to such suits. The section states that "'[a]ny person may bring a civil action against an insurer when such person is damaged [by the enumerated provisions of the Insurance Code]."[24] In 1995, the Florida Supreme Court interpreted the phrase, "any person" in the context of a third-party bad faith claim against an insurer.[25] The court concluded that these words were "precise and their meaning unequivocal. By choosing this wording the legislature has evidenced its desire that all persons be allowed to bring civil suit when they have been damaged by [statutorily enumerated acts of the insurer."[26]

The Task Force report pointed out that:

> Even though the Supreme Court interpreted "any person" to include those people beyond the insured/insurer contractual relationship, the court recognized the premonition of other courts that such an interpretation of this phrase would achieve an unreasonable result. Permitting a third party such a cause of action against the insurer any time the insurer allegedly failed to settle in good faith could result in undesirable social and economic effects (such as multiple litigation, unwarranted bad faith claims, coercive settlements, excessive jury awards, and escalating insurance, legal, and other transaction costs).[27]

In addition to a cause of action under s. 624.155(1)(a), F.S., as interpreted in Auto-Owners Ins. Co. v. Conquest,[28] a bad faith cause of action also exists under s. 624.155(1)(b), F.S. This provision states, in pertinent part, as follows:

> (1) Any person may bring a civil action against an insurer when such person is damaged:
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> * * *
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> (b) By the commission of any of the following acts by the insurer:
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> 1. Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests;
> 2. Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made; or
> 3. Except as to liability coverages, failing to promptly settle claims, when the obligation to settle a claim has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

In 1997, the Florida Supreme Court interpreted this additional cause of action in s. 624.155(1)(b), F.S., and reasoned as follows:

> In subsection (1)(a) there are no specified limitations upon claims for violation of any of the enumerated statutes. However, in subsection (b), the cause of action is predicated on the failure of the insurer to act "fairly and honestly toward its insured and with due regard for his interest." The duty runs only to the insured.

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[24] S. 624.155(1)(a), F.S.
[25] See Auto-Owners Ins. Co. v. Conquest, 658 So.2d 928 (Fla. 1995).
[26] Id. at 929.
[27] Id. at 930 (quoting Cardenas v. Miami-Dade Yellow Cab Co., 538 So.2d 491, 496 (Fla. 3d DCA 1989)).
[28] Auto-Owners Ins. Co. v. Conquest, 658 So.2d 928 (Fla. 1995).

> Therefore, in the absence of any excess judgment, a third-party plaintiff cannot demonstrate that the insurer breached a duty toward its insured.[29]

Accordingly, s. 624.155(1)(b), F.S., allows a third party to sue a liability insurer for bad faith, without an assignment by the insured when the third party obtains a judgment in excess of the insured's policy limits. This result provides the bases for alleging a breach of duty to the insured.

While the Boston Old Colony case discussed above was decided in favor of the defendant insurer, the case demonstrates various issues facing insurers in fulfilling their obligations to defend their insureds.

First, insurers must remember that, despite their best efforts on behalf of their insured, they are still subject to a bad faith claim brought by the injured third party. Because the claim is brought after the jury returns a verdict in excess of policy limits against the insured, and given the inherent sympathy afforded to the injured plaintiff in many cases, the insurer faces a rather daunting obstacle in defending a bad faith action. Such a defense can require the insurer to maintain that, despite the plaintiff's serious injuries, and with the hindsight knowledge that the underlying suit resulted in a large jury award that exceeded the insured's policy limits, the insurer not only acted reasonably in not settling the underlying suit, but continues to act appropriately in refusing to pay the jury's award.

Second, the insurer has a duty to try to settle the case where a reasonably prudent person facing the prospect of paying the total judgment would do so. This is the simple negligence standard and makes the insurer's position more untenable. At least two standard jury instructions used by Florida judges[30] charge the jury with the task of determining whether, under the totality of the circumstances, the insurer was reasonable in deciding to proceed to trial, rather than settle the claim. This standard, combined with the statutory "reasonable person" standard, seems to guarantee the success of a bad faith claim submitted to a jury, given its hindsight regarding the outcome of the already-decided underlying case.

The third issue from Boston Old Colony comes from language at the close of the Supreme Court's opinion there:

> By way of caveat, we point out that the "hold harmless" agreement in this case was not a determining factor in our decision. An insurer with control over defense and settlement must at all times act in good faith, and it may not insulate itself from a bad faith excess judgment by simply obtaining a hold harmless agreement from its insured.[31]

Accordingly, even when an insurer acts at the insistence of the insured in refusing to settle the claim, an insurer is still susceptible to a bad faith judgment against it. An insurer must operate as a fiduciary in the insured's best interest but the insurer cannot defer to the insured's wishes regarding settlement of the case.[32]

An insurer can also be liable in bad faith for delays in offering policy limits, failing to disclose policy limits, and failing to inform the insured of settlement overtures. Liability still attaches for these omissions when the third-party plaintiff refuses settlement offers so long as there was an opportunity to settle the case at some point in the claim process.[33] For example, the Third District Court of Appeal decided a case in which an insured's daughter seriously injured a pedestrian in a car accident. The pedestrian's attorney contacted the insurer and requested disclosure of the insured's policy limit. But, the attorney never made a specific monetary demand. Ultimately, the insurer tendered an offer of policy limits, despite the injured pedestrian's lack of demand. The offer was rejected. At trial, the jury

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[29] State Farm Fire & Casualty Co. v. Zbrowski, 706 So.2d 275, 277 (Fla. 1997).
[30] See Fla. Std. Jury Instr. MI 3.1, 3.2.
[31] Boston Old Colony Ins. Co. v. Gutierrez, 386 So.2d 783, 786 (Fla. 1980).
[32] See Vincent Rio, J.D., testimony, Nov. 22, 2002, pgs. 120-121.
[33] See Powell v. Prudential Property & Casualty Ins. Co., 584 So.2d 12)Fla. 3d DCA 1991), rev. denied, 598 So.2d 77 (Fla. 1992).

returned a verdict against the insured for $250,000. The insured filed suit against his insurer, alleging bad faith. The Third District Court found bad faith and noted:

> Any question about the possible outcome of a settlement effort should be resolved in favor of the insured; the insurer has the burden to show not only that there was no realistic possibility of settlement within policy limits, but also that the insured was without the ability to contribute to whatever settlement figure that the parties could have reached. [Citations omitted]. Whether the insurer's delay in disclosing the policy limits foreclosed settlement negotiations and prevented an offer to settle is a relevant and material fact.[34]

Thus, there is an affirmative duty on the part of the insurer to seek settlement of a claim against the insured within the policy limits. When the insurer fails to obtain a settlement, it then has the burden of demonstrating that the plaintiff would not have accepted a settlement offer within policy limits at any time.

Based on the situation outlined above, the Governor's Select Task Force on Healthcare Professional Liability Insurance found that there existed a problem with the state of the law in Florida with respect to the issue of bad faith actions. According to the Task Force report:

> The problem is that the cost of settlement made under the veil of the bad faith law in Florida is a major factor in raising loss costs that insurers must pay and, in turn, in raising [liability] insurance premiums. The problem stems from the fact that third parties can sue the insurer for bad faith, when the good-faith duty is owned by the insurer to the insured. There is no corresponding good faith duty that extends from the insurer to injured plaintiffs who are not party of the insured/insurer contractual relationship. The law on bad faith is lacking in logical standards that constitute (or at least evidence) bad faith on the part of an insurer. Finally, a limitation on the amount of damages for which an insurer would be liable would promote consistency and predictability in the market.
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> The Task Force finds calculating the damages recoverable in an action for bad faith based on the actual damages caused by the insurer would have several beneficial effects. First, this calculation would allow insurers to honor requests from well-informed insureds that prefer that actions be defended rather than settled because of the threat now posed by Florida bad faith standards and calculations of damages. Second, this calculation would enable insurers to more effectively resist the coercive effect of these standards and measurements of damage, which raise the costs of settlements and premiums. The assets of insureds would remain fully protected. The protection of assets that are replaced by insurance may logically be expected to encourage the purchase of insurance.[35]

The Task Force Report went on to make the following five recommendations:

- The Legislature should restore the insured as the owner of the bad faith cause of action. The common law cause of action, as outlined by the Supreme Court in 1980 should be legislatively cured so that the Florida Legislature preempts that rule and only insureds, not third-party plaintiffs, can bring a bad faith cause of action against its insurer. In addition, s. 624.155, F.S., should be amended to also limit the proper party in a bad faith cause of action to the insured only.

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[34] Id. at 14-15.
[35] 2002 Report of the Governor's Select Task Force on Healthcare Professional Liability Insurance, p. 323.

- The Legislature should articulate standards of what constitutes bad faith on the part of an insurer.
- The Legislature should require that the maximum liability for bad faith be calculated as the amount of damages that were actually caused by the acts of bad faith, limited by the amount of the reachable assets of the insured.
- The Legislature should require that, if an insurer is found to be in bad faith or settles a case for bad faith, the Department of Financial Services Office of Insurance Regulation be notified of such finding.
- The Florida Department of Financial Services Office of Insurance Regulation should conduct an investigation into the specific allegations of the insurer and into the insurer's general practices and should take necessary action against the insurer to punish and prevent future bad faith practices.

Effects of HB 1513

HB 1513 addresses the findings and recommendations of the Task Force. Specifically, the bill provides that the statutory civil remedy in a bad faith action provided by s. 624.155, F.S., is available only to an insured rather than "any person." The bill preempts all other remedies and causes of action for extra-contractual damages for failure to settle an insurance contract. This change eliminates the common law cause of action outlined in Thompson v. Commercial Union Ins. Co. of New York. Furthermore, the bill limits damages recoverable pursuant to an action for bad faith to actual damages which are reasonably foreseeable, and forecloses any presumption or inference that the rendition of a judgment against an insured will foreseeably result in actual damages, unless the insured has assets against which the judgment creditor could assert a lien. Currently, recovery is not limited to actual damages, but is based on the amount of the judgment exceeding policy limits. The satisfaction of a judgment rendered against an insurer, under the provisions of the bill, will not satisfy the underlying judgment against the insured. The bill also provides that the evidentiary standard for the cause of action is proof by clear and convincing evidence of an unreasonable refusal to settle.

HB 1513 also creates a duty in the insured, and any other person asserting a demand for settlement, that is owed to the insurer to cooperate fully with the insurer. The bill provides a defense to the bad faith civil action where the court finds that the insured or other person demanding settlement:

- Failed to cooperate fully in facilitating the settlement;
- Imposed or adhered to time limits or other conditions on settlement without demonstrating to the insurer valid reasons that such time limits or other conditions were reasonable and necessary and that such reasons were totally unrelated to the possibility of obtaining damages via action for bad faith; or
- Lacked authority to make the demand or to accept the amount demanded in full settlement of all claims, including liens, arising from the occurrence.

HB 1513 also requires that a person bringing action for bad faith notify the insurer and the Office of Insurance Regulation in writing at least 90 days prior to commencement of the suit. Currently, such condition must be carried out at least 60 days prior to commencement of the action. The extension is intended to allow the insurance company a sufficient opportunity to cure any violation that led the insured to pursue the action.

In addition, HB 1513 establishes time periods, or "safe harbor," enabling an insurer to evaluate a demand for policy limits. Under this safe harbor provision, the insurer is not liable for excess judgment if the insurance company tenders policy limits within 210 days after service of the complaint or 60 days after specified actions in the discovery process have occurred, whichever time is earlier. The bill provides that the safe harbor period is unavailable if it is found that either party, the insurer or insured, unreasonably delayed settlement. Pursuant to the bill, these time limitations may not be admissible as evidence that the insurer acted in violation of s. 624.155, F.S.

The bill provides that, where the aggregate compensation sought by claimants exceeds policy limits, the insurer shall not be held liable for extra-contractual damages for failure to pay its policy limits if the insurer makes a timely written offer of its policy limits to all known claimants in exchange for release of all claims against the insured, or if the insurer tenders such limits to the court for apportionment to the claimants.

The bill also establishes factors to be considered by the trier of fact in determining whether the insurance company violated the excess liability protections. These factors include:

- The insurer's willingness to negotiate with the claimant in anticipation of settlement.
- The propriety of the insurer's methods of investigating and evaluating the claim.
- Whether the insurer timely informed the insured of an offer to settle within the limits of coverage, the right to retain personal counsel, and the risk of litigation.
- Whether the insured denied liability or requested that the case be defended after the insurer fully advised the insured as to the facts and risks.
- Whether the claimant imposed any condition, other than the tender of policy limits, on settlement of the claim.
- Whether the claimant provided all relevant information to the insurer on a timely basis.
- Whether and when other defendants in the case settled or were dismissed from the case.
- Whether there were multiple claimants seeking, in the aggregate, compensation in excess of policy limits from the defendant or the defendant's insurer.
- Whether the insured claimant misrepresented material facts to the insurer or made material omissions of fact to the insurer.
- Other matters that constitute defenses or limitations to actions or damages that are specified in this section.

Finally, the bill provides that an insurer that tenders policy limits is entitled to a release from duties imposed by the contractual relationship if the claimant accepts the tender offer.

Premises Liability

<u>Present Situation</u>

The current law concerning the burden of proof in claims of negligence involving transitory foreign objects or substances against a person or entity in possession or control of business premises was enacted by the Legislature in 2002.[36] That law provided standards relating to the standard of care and burden of proof in premises liability cases involving an injury to a business invitee that is caused by a transitory foreign object or substance. Specifically, the current law states that a person in possession or control of a business premises owes a duty to business invitees to exercise reasonable care to maintain the premises in a reasonably safe condition. The law provides that the injured business invitee has the burden of proof to prove by a greater weight of the evidence that:

- The business premises owner or operator owed a duty to the business invitee;
- The business premises owner or operator acted negligently by failing to exercise reasonable care in the maintenance, inspection, repair, warning, or mode of operation of the business premises; and
- The failure to exercise reasonable care was the legal cause of the loss, injury, or damage to the business invitee.

The law further provides that actual or constructive notice of the transitory foreign object or substance is not a required element of proof to the claim.

[36] Ch. 2002-285, L.O.F.

The genesis of this law enacted in 2002 arose due to a Florida Supreme Court ruling in a case involving a grocery store shopper who slipped and fell on a piece of banana lying on the floor.[37] In Owens v. Publix Supermarkets, the Supreme Court changed Florida common law precedent in slip and fall cases by shifting the burden to the business owner to establish that he or she exercised reasonable care under the circumstances and by eliminating the requirement that the business invitee (claimant) establish that the owner had constructive knowledge of the existence of the transitory foreign object (the banana in the Owens case).

This change in the law reversed that portion of the Supreme Court's ruling that placed the burden of proof on the business owner to prove that he or she exercised reasonable care and was not negligent once the claimant showed that he or she fell on a transitory foreign object or substance. However, the enactment preserved the mode of operation theory[38] of liability expressly recognized in Owens and preserved that portion of the ruling which protected the claimant from having to prove that the business owner had actual or constructive knowledge of the transitory foreign object or substance. With these exceptions, the enactment essentially returned premises liability law with respect to the shifting of burden of proof to its pre-Owens status.

To establish liability for negligence, a plaintiff traditionally must show that: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) the plaintiff suffered damages; and (4) the defendant's breach was the proximate cause of the damages. See e.g. Clampitt v. D.J. Spencer Sales, 786 So.2d 570, 573 (Fla. 2001) ("A plaintiff ordinarily bears the burden of proof of all four elements of negligence-duty of care, breach of that duty, causation and damages.") A premises liability case is a type of negligence case that involves an injury to a person who is on the property of another person. In Florida, the status of the person injured is the determinative factor relative to the duty of care imposed upon the property owner. Persons entering the property of another typically are classified as invitees, licensees, or trespassers.

Section 768.075(3), F.S., establishes the duty of care for property owners as far as discovered and undiscovered trespassers are concerned. Subsection (3)(b) provides that a property owner owes a duty to undiscovered trespassers to refrain from intentional misconduct, but owes no duty to warn of dangerous conditions. For discovered trespassers, subsection (3)(b) provides that property owners must refrain from gross negligence or intentional misconduct and must warn the discovered trespasser of dangerous conditions that are known to the property owner but are not readily observable by others.

Property owners in Florida owe a different standard of care to persons who are invited on the property. "Invitees" are visitors who enter the property with an objectively reasonable belief that they have been invited or are otherwise welcome on the property. See s.768.075(3)(a)1., F.S. A person who is invited to enter or remain on the property of another for a purpose directly or indirectly connected with business dealings with the property owner is classified as a business invitee. See Zipkin v. Rubin Construction Co., 418 So.2d 1040 (Fla. 4th DCA 1982). Premises owners owe a duty to invitees to maintain the premises in a reasonably safe condition. See Wood v. Camp, 284 So.2d 691 (Fla. 1973).

The Florida Supreme Court recently reconsidered the law in "slip and fall" premises liability cases. In Owens v. Publix Supermarkets, Inc., 802 So.2d 315, 317 (Fla. 2001), a shopper "slipped and fell on a discolored piece of banana lying on the floor." Owens brought a negligence action against Publix. The court discussed premises liability law in Florida as it existed prior to its decision:

> All premises owners owe a duty to their invitees to exercise reasonable care to maintain their premises in a safe condition. See, e.g., Everett v. Restaurant & Catering Corp., 738 So.2d 1015, 1016 (Fla. 2d DCA 1999). **Despite this general proposition, when a person slips and falls on a transitory foreign**

[37] Owens v. Publix Supermarkets, Inc., 802 So.2d 315, 317 (Fla. 2001).

[38] The "mode of operation" rule generally looks to a business's choice of a particular mode of operation and not events surrounding the plaintiff's accident. Owens, 802 So.2d at 325.

> **substance, the rule has developed that the injured person must prove that the premises owner had actual knowledge or constructive knowledge of the dangerous condition "in that the condition existed for such a length of time that in the exercise of ordinary care, the premises owner should have known of it and taken action to remedy it."** Colon v. Outback Steakhouse of Florida, Inc., 721 So.2d 769, 771 (Fla. 3d DCA 1998). **Constructive knowledge may be established by circumstantial evidence showing that: (1) "the dangerous condition existed for such a length of time that in the exercise of ordinary care, the premises owner should have known of the condition;" or (2) "the condition occurred with regularity and was therefore foreseeable."** Brooks v. Phillip Watts Enter, Inc., 560 So.2d 339, 341 (Fla. 1st DCA 1990). In the latter category, evidence of recurring or ongoing problems that could have resulted from operational negligence or negligent maintenance becomes relevant to the issue of foreseeability of a dangerous condition. See generally Wal-Mart Stores, Inc. v. Reggie, 714 So.2d 601, 603 (Fla. 4th DCA 1998); Nance v. Winn Dixie Stores, Inc., 436 So.2d 1075, 1076 (Fla. 3rd DCA 1983). (footnote omitted).

Owens, 802 So. 2d at 320 (emphasis added).

At a trial, after the plaintiff rests its case, the defense usually asks the court for a directed verdict. In determining whether to grant a directed verdict, the trial judge must determine whether the plaintiff "has failed to prove any facts in support of a favorable verdict and that fair minded people could not have reached a different conclusion." Bruce J. Berman, Florida Civil Procedure, § 480.3 (2001-2002 Ed.). In slip and fall cases, the determinative issue in deciding whether a directed verdict should be granted is often whether the plaintiff has presented sufficient evidence of constructive knowledge of the dangerous condition. The court in Owens discussed the problems which Florida appellate courts have encountered when trying to determine whether sufficient evidence exists to create a jury question on the issue of constructive notice. The court found that, often, the issue hinged on whether there was evidence of the condition of the transitory substance:

> Thus, with case law making constructive notice of the dangerous condition the linchpin of liability, an injured person's ability to establish constructive notice is often dependent on the fortuitous circumstance of the observed condition of the substance.

Owens, 802 So.2d at 323.

However, the court noted that in some cases, the constructive knowledge requirement is eliminated or altered. For example, the court discussed a case where it held race track owners to a higher duty of care than store owners because "a different rule applies to a place of amusement like a race track where patrons go by the thousand on the invitation of the proprietors" and because one "operating a place of amusement like a race course where others are invited is charged with a continuous duty to look after the safety of his patrons." Owens, 802 So.2d at 323 (citing Wells v. Palm Beach Kennel Club, 160 Fla. 502, 35 So.2d 720, 721 (Fla. 1948)). The court explained that while it had never extended this "mode of operation" theory to a supermarket, it had never rejected the theory. Owens, 802 So.2d at 323-324.

After the examination of law in other states, the court announced a change to Florida common law precedent in slip and fall cases:

> **…premises liability cases involving transitory foreign substances are appropriate cases for shifting the burden to the premises owner or operator to establish that it exercised reasonable care under the circumstances, eliminating the specific requirement that the customer**

> **establish that the store had constructive knowledge of its existence in order for the case to be presented to the jury.** Presumptions, which are created either judicially or legislatively and arise from considerations of fairness, public policy, and probability, are used to allocate the burden of proof. See generally Charles W. Ehrhardt, Florida Evidence § 301.1 (2000 ed.)
>
> Accordingly, we adopt the following holding to be applied to slip-and-fall cases in business premises involving transitory foreign substances. **We hold that the existence of a foreign substance on the floor of a business premises that causes a customer to fall and be injured is not a safe condition and the existence of that unsafe condition creates a rebuttable presumption that the premises owner did not maintain the premises in a reasonably safe condition.**
>
> **Thus, once the plaintiff establishes that he or she fell as a result of a transitory foreign substance, a rebuttable presumption of negligence arises. At that point, the burden shifts to the defendant to show by the greater weight of evidence that it exercised reasonable care in the maintenance of the premises under the circumstances. The circumstances could include the nature of the specific hazard and the nature of the defendant's business.**
>
> This shift away from the artificial requirement that the injured person establish how long a transitory foreign substance was on the floor of the defendant's premises makes sense from a policy viewpoint because it will prevent premises owners or operators from benefiting from their absence of record-keeping and it will increase the incentive for them to take protective measures to prevent foreseeable risks. This opinion shall be applicable to all cases commenced after the decision becomes final and those cases already commenced, but in which trial has not yet begun.
>
> We emphasize that this burden-shifting does not eliminate the plaintiff's burden of proving that the slip and fall accident was the cause of the plaintiff's injuries. We also emphasize that this holding does not render the premises owners or operators strictly liable for the injury. The ultimate question for the jury is whether the premises owner or operator exercised reasonable care in maintaining its premises in a safe condition.

Owens, 802 So.2d at 330-332 (emphasis added; footnotes omitted).

Effect of HB 1513

HB 1513 goes further than the Legislature's 2002 enactment by fully restoring the law to its state under common law principles prior to Owens. The bill codifies that common law state by removing retail establishments from that class of businesses for which the duty to patrons is determined under a so-called "mode of operation theory," and restores the pre-Owens requirement that a plaintiff prove actual or constructive knowledge. Under the provisions of the bill, when a person slips and falls on a transitory foreign substance in a retail establishment, the injured person must prove that the retail establishment had actual or constructive knowledge of the dangerous condition such that the condition existed for such a length of time that, in the exercise of ordinary care, the premises owner should have known of the condition and taken action to remedy the condition. Under the bill's provisions, constructive knowledge may be established by circumstantial evidence showing that:

(a) The dangerous condition existed for such a length of time that, in the exercise of ordinary care, the premises owner should have known of the condition; or

(b) The condition occurred with regularity and was therefore foreseeable.

In addition, HB 1513 provides that a person or entity in possession or control of a business premises is not liable for any damages to a claimant if such loss, injury, or damage to a business invitee is the result of the intentional or criminal acts of a third party.

Product Liability

Background Discussion/Current Situation

Product Liability Generally

The basic rule in products liability law, and the one that is applied by courts in Florida, is that a manufacturer is strictly liable for the harm proximately caused by those of its products shown to have been defective and unreasonably dangerous when sold new by the manufacturer.[39] This basic rule generally applies to all other commercial sellers in the chain of distribution, including wholesalers[40], and retailers.[41]

Product liability law originally required the plaintiff to show the defendant's negligence. Negligence, however, is difficult to prove in defective product cases. Typically, the manufacturer will have better access to inspection records and quality control information. Further, inspection and quality control may meet the "reasonable person" standard, since no manufacturing process is, or can be, made foolproof. A plaintiff may also have difficulty showing that the product was defective at all, or that the defect was present when the product left the manufacturer.

Throughout the history of products liability law, courts have employed a number of devices to ease the plaintiffs' burden. First, courts began to rely on the law of implied warranty, which imposes strict liability upon the seller of a product. Warranty theory, a mixture of tort and contract principles, requires the seller to produce a product free of injury-causing defects. However, implied warranty claims could only lie against the injured plaintiff's immediate seller because actions based on breach of warranty required privity, that is, a contractual relationship between the injured buyer and the seller.

Courts also employed the doctrine of res ipsa loquitur to allow plaintiffs to reach the jury on the issue of product defect. The doctrine of res ipsa loquitur enables an injured party to reach the jury with nothing more than circumstantial evidence. Under the doctrine's most accepted formulation, the following conditions are necessary: (1) the event must be one that would not ordinarily occur without someone's negligence; (2) the accident must be caused by an agency or instrumentality within the defendant's exclusive control; and (3) the plaintiff must be without voluntary action or contribution in causing the accident.[42] The application of res ipsa loquitur to product liability cases was problematic, however, because the exclusive control requirement could never be met; the product was always out of the defendant's hands and often had passed through several other entities before reaching the plaintiff.

Courts eventually shed these theories and began to impose strict liability in tort on all parties within the chain of distribution -- including manufacturers, wholesalers, distributors, and retailers, among others. The imposition of strict liability in common law was justified by the judiciary through a number of rationales: (1) those who mass-produce consumer goods are best able to absorb the cost of injuries associated with those goods since they can pass those costs on to consumers; (2) placing liability on

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[39] See generally Restatement (Second) of Torts § 402A (1965); Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960); Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825 (1973).
[40] See, e.g., Canifax v. Hercules Powder Co., 237 Cal. App. 2d 44, 50-52, 46 Cal. Rptr. 552, 556-59 (1965) (wholesaler); Cottom v. McGuire Funeral Serv., Inc., 262 A.2d 807, 809-10 (D.C. 1970) (retailer and wholesaler); Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362, 365 (Mo. 1969) (wholesaler); Walker v. Decora, Inc., 225 Tenn. 504, 514-15, 471 S.W.2d 778, 782-83 (1971) (distributor); Dippel v. Sciano, 37 Wis. 2d 443, 462, 155 N.W.2d 55, 64-65 (1967) (sales distributor).
[41] See Restatement (Second) of Torts § 402A, Comment f (1965).
[42] See generally Prosser and Keeton on The Law of Torts, § 39 at 244 (W. Keeton 5th ed. 1984).

manufacturers without fault increases the incentive for manufacturers to produce safer products; (3) requiring the plaintiff to demonstrate defendant's negligence in causing the defect imposes an intolerably high evidentiary burden; (4) plaintiffs are typically incapable of protecting themselves against defective products and should not go uncompensated when injury they could neither have foreseen nor prevented actually occurs.[43]

Some legal commentators have pointed out that "[w]hen applied to non-manufacturing sellers, the rationales for imposing strict liability weaken. Although many wholesalers and retailers are generally able to absorb the cost of injuries caused by defective products better than the average consumer, this rationale for imposing strict liability offers no principled limitations. If the goal is to pin the cost on the entity best able to bear it, there is no reason why any sufficiently well-heeled corporate defendant should not have to pay plaintiff in other areas of tort as well. Conversely, if the plaintiff is a corporate entity and the defendant is an individual, this rationale suggests that the defendant not pay."[44]

"Another problem with imposing strict liability on non-manufacturers" says commentary, "is that the incentives to market safer products may not work as well in their case. The argument in favor of imposing strict liability on all parties within the chain of a product's distribution has been that sellers can exert pressure on those manufacturers with whom they regularly deal and whose products are defective, by discontinuing, or imposing conditions on, further dealings. The problem with this argument is its critical dependence on several questionable assumptions: (1) manufacturers who most frequently pay tort judgments are turning out products that are less safe; (2) non-manufacturing sellers have sufficient knowledge to exert the desired pressure; and (3) non-manufacturing sellers have sufficient market power and choice to make their decisions count."[45]

"The final problem in imposing strict liability on all parties within the chain of a product's distribution is that typically the supplier has not caused the defect that injures the plaintiff; the defect has occurred during the manufacture of the product."[46]

Nonetheless, courts have embraced the rationale as explained in Escola v. Coca-Cola Bottling Co.[47] that liability should be imposed on the retailer as well as on the manufacturer, because the manufacturer may not be amenable to suit and because the retailer is sometimes in a position to exert pressure on the manufacturer to strive toward greater product safety.[48] Although concern for the plaintiff's right to recover has led courts to hold retailers and others in the chain of distribution strictly liable, the potential unfairness of having the retailer pay for conduct more properly charged to the manufacturer has also led them to support the retailer's, distributor's and supplier's indemnity action against a manufacturer. Under the common law, an entity in the distribution chain that has been made accountable to the plaintiff in a products liability action can seek indemnity from another entity in that distribution chain as long as that entity is actually at fault.[49] For example, a wine retailer who was found strictly liable for injuries that a customer received in opening a latently defective wine bottle brought a third-party demand for indemnity against the intermediate sellers of the product. The court held that the wine seller had no common-law indemnity action against the intermediate sellers who, like the retailer, were not at fault.[50]

A number of statutes have been enacted in the United States that modify the common law liability of marketers participating in the chain of distribution. These statutes have been described in commentary in the following manner:

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[43] Escola v. Coca-Cola Bottling Co., 150 P.2d 436, 440-43 (1944).
[44] Culhane, J., Real and Imagined Effects of Statutes Restricting the Liability of Nonmanufacturing Sellers of Defective Products, Dickinson L. Rev. at 293 (Winter 1991).
[45] Id. at 294.
[46] Id. at 294.
[47] 150 P.2d 436, 440-43 (1944).
[48] Vandemark v. Ford Motor Co., 61 Cal. 2d 256, 262, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899 (1964).
[49] Costco Wholesale Corp. v. Tampa Wholesale Liquor Co., Inc., 573 So.2d 347 (Fla. 2nd DCA 1990).
[50] Id.

Statutes that have been crafted to restrict an injured party's right to recover against ultimate sellers and suppliers generally have two components. First, the statutes relieve the seller or supplier of liability based on status as a "mere conduit," requiring instead that plaintiff make some showing that defendant had, or should have had, knowledge of the product defect. The statutes take one of three approaches to the degree of knowledge of the product defect required for liability. The most generous approach, from the seller's or supplier's point of view, frees a seller or supplier who does not have actual knowledge of the product defect. An intermediate approach is negligence-based, and establishes liability when the seller or supplier "knew or should have known" of the defect, or, more simply, when it acted with negligence. The least generous reform from the seller's or supplier's perspective relieves the seller or supplier of liability only when knowledge of the defect is presumptively impossible (or at least almost so), as when the product is in a sealed container.

The statutes' second component permits the plaintiff to retain the seller or supplier as a guarantor. Reflecting concerns expressed in Escola v. Coca-Cola Bottling Co. with leaving plaintiff without remedy, most jurisdictions permit the seller or supplier to be "transformed" into a manufacturer (thus subject to strict liability) when the manufacturer is unavailable to the plaintiff. The other, and little followed, alternative is to make the plaintiff bear the risk that the manufacturer will be unavailable.[51]

Government Rules Defense

Florida's 1999 Tort Reform Act created a "government rules defense" to strict product liability by allowing a manufacturer or other entity in the chain of distribution to defend itself by introducing evidence that the product complied with government regulations.[52] The defense is only available if: (1) the government's rules are relevant to the event causing an actionable injury; (2) the rules were created to prevent the type of harm that occurred; and (3) compliance with those rules is required as a condition for selling the product.[53] The defense does not apply to drugs that are ordered off the market or seized by the United States Department of Agriculture Food and Drug Administration.[54]

The defense provides that, in a product liability action, there is a rebuttable presumption that the product is not defective or unreasonably dangerous if, at the time of sale or delivery of the product, it complies with the relevant rules.[55] However, the converse is also provided in the law. If it is demonstrated that the manufacturer or seller did not comply with relevant rules, then a rebuttable presumption exists that the product is defective or unreasonably dangerous.[56]

Effects of HB 1513

HB 1513 creates a statutory rule for product liability. The bill provides that, generally, no product liability action is available against the seller of a product unless that seller did any one of the following things:

- Made an express warranty as to the product and the failure of the product to conform to that warranty caused the person's harm;

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[51] Culhane, J., Real and Imagined Effects of Statutes Restricting the Liability of Nonmanufacturing Sellers of Defective Products, Dickinson L. Rev. at 295-297 (Winter 1991).
[52] Section 768.1256(1), F.S.
[53] Section 768.1256, F.S.
[54] Section 768.1256(3), F.S.
[55] Section 768.1256(1), F.S.
[56] Section 768.1256(2), F.S.

- Produced, designed, designated, or provided the plans or specifications for the manufacture or preparation of the product;
- Altered, modified, assembled, failed to maintain, packaged, labeled, or installed the product in a manner that caused the person's harm;
- Violated a statutory or regulatory requirement when the seller sold the product, including any violation of the law concerning liability for injury or damage resulting from intoxication; or
- Negligently entrusted or supplied the product for the use of another whom the product seller knew or should have known would be likely to use the product in a manner that posed an unreasonable risk of physical harm to the user or others.

The bill also provides that a product seller may be liable as a manufacturer for product liability under any of the following circumstances:

- The manufacturer has no identifiable agent, facility, or other presence in the United States;
- The manufacturer is not subject to service of process in any state in which the action could have been brought and service cannot be secured by a long-arm statute;
- The manufacturer is otherwise immune from suit; or
- The court determines that the person is or would be unable to enforce a judgment against the manufacturer. The bill tolls the statute of limitations for bringing a subsequent action against the product seller for the period that the action against the manufacturer that resulted in the judgment is ongoing.

In addition, the bill repeals the provision in Florida's government rules defense that creates a rebuttable presumption that a product is defective or unreasonably dangerous if the manufacturer or seller did not comply with the applicable federal or state codes, statutes, rules, regulations, or standards.

Sovereign Immunity/Immunity

Street Lights

Present Situation

The Supreme Court ruled in 2003 that a utility company has a legal duty to third parties, who are not their customers, for accidents occurring in areas where their street lights are not properly working due to alleged failure of the utility company to maintain the street light.[57] Since this ruling, the courts have heard several other cases relative to the general duty a utility company has to the public.

In Felsen v. Florida Power & Light Co.,[58] the plaintiff unsuccessfully sued the power company alleging that dim lighting over a parking lot caused her to trip and fall. In that case, the streetlight had been installed in 1951 and the parking lot had not been built until 1968 when the municipal owner of the parking lot took over complete responsibility for its lighting. Although the suit was unsuccessful, proponents of this legislation point to it as an example of frivolous lawsuits that utilities are exposed to as a result of the Supreme Court's 2003 ruling.

The Supreme Court is currently considering the case of Florida Power & Light Co. v. Goldberg[59], in which the plaintiff was fatally injured in a traffic accident at a Dade County intersection where the traffic signal was out of service. The electricity was turned off at the signal in order to repair service to a pole 150 feet away that had earlier been struck by lightning. The plaintiff alleged that the utility company had breached a duty owed to the plaintiff by turning off the street light and creating a "foreseeable zone of risk." At the trial court, the plaintiff received a $37 million verdict which was subsequently reduced by the Third District Court of Appeal to $10 million – the amount alleged in suit. The trial court found that

[57] Clay Elec. Coop. v. Johnson Inc., 873 So. 2d 1182 (Fla. 2003).
[58] 881 So. 2d 585 (Fla. 3d DCA 2004).
[59] 856 So. 2d 1011 (Fla. 3d DCA. 2002), review granted, 870 So. 2d 821 (Fla. 2004).

the utility company owed a duty because it created a foreseeable zone of risk despite the fact that the utility was required to take the action to maintain service to its customer. Although the Supreme Court will not likely render its opinion until after the end of the current term, bill proponents assert that the utility company has already incurred significant legal fees and costs defending itself against the suit.

Effects of HB 1513

HB 1513 provides immunity from liability to government actors and to electric utilities that provide, operate, or maintain street lights, security lights, or other similar illumination. The immunity is effective regardless of whether the adequacy or failure of the illumination is alleged or demonstrated to have contributed in any manner to injury or death, unless the liability was expressly assumed by written contract. The bill provides that entities protected by this immunity owe no duty to the public to provide, operate, or maintain the illumination in any manner, unless the duty is expressly assumed by written contract. The bill also provides that in any civil action for damages arising out of personal injury or wrongful death when an entity's fault regarding the maintenance of street lights is at issue, if the entity responsible for maintaining the street lights is not a party to the litigation, the entity shall not be deemed or found in such action to be in any way at fault or responsible for the injury or death that gave rise to the damages.

Eluding Law Enforcement

Present Situation

Prior to 1992, law enforcement officers and agencies were generally treated as immune from liability for injuries to third parties who were injured as a result of the actions of a suspect fleeing from pursuit. Since 1967, such cases had been governed by the rules set forth in the case, City of Miami v. Horne,[60] where the court held that the City of Miami was not liable for the death of Horne caused by a collision with a suspect who was feeing from the city police. In that case, the court said:

> We think the rule is that the officer should take such steps as may be necessary to apprehend [the] offender but, in doing so, not exceed proper and rational bounds nor act in a negligent, careless or wanton manner.
>
> **In determining whether an officer, in pursuit, has acted negligently or recklessly it is to be borne in mind that he is charged with the duty of arresting the offender and must often exceed the precautions normally imposed on individuals.**
>
> ***
>
> The rule governing the conduct of police in pursuit of an escaping offender is that he must operate his car with due care and, in doing so, he is not responsible for the acts of the offender. Although pursuit may contribute to the reckless driving of the pursued, the officer is not obliged to allow him to escape.[61]

In 1992 the Florida Supreme Court decided the case City of Pinellas Park v. Brown,[62] where the court determined that the police pursuit of a fleeing suspect created a "foreseeable zone of risk" to the public and thereby gave rise to a duty on the part of the police to exercise care in the decision to pursue the suspect and the conduct of that pursuit. The Court held that a duty exists regardless of whether a specific policy governing pursuit is in place. Ultimately, the Court concluded that the actions of police

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[60] 198 So. 2d 10 (Fla. 1967)
[61] Id. (emphasis added).
[62] 604 So. 2d 1222 (Fla. 1992).

officers engaging in hot pursuit are operational functions which are not subject to sovereign immunity if accomplished in a manner contrary to public reason and public safety.

Reacting to the majority opinion in City of Pinellas Park v. Brown, Justice Overton in a strong dissent wrote: "While a clear definitive policy in regard to car chases needs to be established by the executive and legislative branches of over government, the majority opinion goes much too far and efficiently places that policy decision solely in the judicial branch."[63] Id. at 1228 (Overton, J., dissenting).

Effects of HB 1513

The proposed legislation extends the doctrine of sovereign immunity to law enforcement officers involved in high speed chases and restores the law to its pre-City of Pinellas Park state. Specifically, the bill provides that no state or local law enforcement officer shall be held liable for any civil damages for injury or death effected or caused by a person fleeing from the officer when the pursuit of that person is conducted in a manner that did not involve willful or wanton disregard for the safety of persons or property on the part of the officer and the person fleeing is reasonably believed to have committed a felony.

Damages

Collateral Sources of Indemnity

In any action for damages, the statutes require the courts to reduce the amount of an award to the claimant by the total of all amounts that have been paid for the benefit of the claimant, or which are otherwise available from collateral sources. However, this rule does not apply where the collateral source must be reimbursed or the claimants rights are subrogated to an insurer. "Collateral sources" are any payments made to the claimant, or on the claimant's behalf, and include various state and federal benefits, insurance (except life insurance), contractual payments or reimbursements for medical or health care costs, and wage continuation plans designed to continue wages during a period of disability. The courts have held that collateral sources paid to or on behalf of the claimant are inadmissible as evidence at trial when the question of liability is at issue because the fact of such payment could be prejudicial to the defendant, raising an inference that fault has already been determined.[64] Therefore, bill proponents assert, there may be circumstances when evidence of collateral sources of payment may not be brought before a jury.

HB 1513 requires that the jury be informed of the total of all amounts which have been paid for the benefit of the claimant or which are otherwise available to the claimant from all collateral sources.

Offer of Judgment and Demand for Judgment

HB 1513 provides that nothing in s. 768.79, F.S., concerning offers of judgment and demands for judgment shall restrict the abilities of the parties to enter into settlement agreements or release agreements discharging liability in exchange for consideration. However, if such agreement is reached between the parties without the assistance of the parties' respective attorneys, the bill requires the plaintiff to pay its attorney an amount up to 25 percent of the consideration received by the plaintiff in exchange for its settlement or release, regardless of any other contractual arrangement for attorney fees that exists between the plaintiff and its attorney.

Comparative Fault/Apportionment of Damages

At common law, the principle of joint and several liability requires that each defendant in a lawsuit is liable for the entire amount of the plaintiff's damages regardless of the degree of fault of any individual defendant. This is commonly called the "deep pocket" rule. This principle is applied to economic

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[63] City of Pinellas Park v. Brow, 604 So. 2d 1222 at 1228 (Overton, J., dissenting)(Fla. 1992).
[64] See, e.g., Goble v. Frohman, 848 So.2d 406 (Fla. 2nd DCA 2003).

damages in tort actions in Florida. (noneconomic damages are apportioned based on the comparative fault of the tortfeasors and the plaintiff). According to proponents of the bill, this principle can be problematic when applied in cases where the primary or most responsible tortfeasor is bankrupt or otherwise judgment proof, as well as in cases where the plaintiff settles with one defendant but subsequently is awarded a greater amount of damages. In such instances the settling defendant is still responsible for the difference between the settlement amount and the award. According to bill proponents, this rule creates an incentive to plaintiffs and their attorneys to search out the most financially viable defendant against whom a cause of action can be generated.

The Florida Legislature last addressed this issue 1999 when it limited the amount of a judgment for which joint tortfeasors are liable based on joint and several liability. The following tiered approach was enacted:

If Plaintiff is also at fault, each defendant is responsible as follows:

- Defendant 10% or less at fault = no joint liability.
- Defendant 10% - 25% at fault = joint liability limited to $200,000.
- Defendant 25% - 50% at fault = joint liability limited to $500,000.
- Defendant more than 50% at fault = joint liability limited to $1,000,000.

If Plaintiff is NOT at fault, each defendant is responsible as follows:

- Defendant 10% or less at fault = no joint liability.
- Defendant 10% - 25% at fault = joint liability limited to $500,000.
- Defendant 25% - 50% at fault = joint liability limited to $1,000,000.
- Defendant more than 50% at fault = joint liability limited to $2,000,000.

See s. 768.81, F.S.

Currently, the provisions for apportioning damages do not apply to actions based upon an intentional tort.

Bill proponents argue that despite this statutory change Florida businesses still must frequently defend against costly lawsuits in which the plaintiff seeks a defendant with the deepest pockets rather than the defendant that is most at fault.

Effects of HB 1513

HB 1513 replaces the apportionment of economic damages by the tiered approach to joint and several liability with the comparative fault method used to apportion noneconomic damages. Under this method, each defendant is responsible only for a prorated amount of the judgment based on the defendant's percentage of fault as determined by the finder of fact (jury or judge in a non-jury action). The bill also specifies that the comparative fault method of apportioning damages will apply to actions for negligence against any defendant for failure to prevent the commission of an intentional tort by another party. The bill also specifies that the method for apportioning damages does not apply to any action in which an intentional tortfeasor is sued and seeks to apportion fault to a negligent tortfeasor.

Severability

HB 1513 provides that if any provisions of the act, or its application to any person or circumstance, is held invalid, the invalidity does not affect the other provisions or applications of the act which can be given effect without the invalid provision or application. The bill declares that the provisions are severable.

Effective Date/Prospective Application

The bill provides that it shall take effect upon becoming law, but that its provisions shall apply only to those causes of action accruing on or after the effective date. A cause of action accrues on the date of the incident or occurrence of injury or damage to the plaintiff.

C. SECTION DIRECTORY:

Section 1. Creates s. 46.100, F.S., providing that the defendant in a civil action for damages is entitled to dismissal if there is evidence demonstrating that the plaintiff engaged in fraudulent or deceptive activity in any aspect of the lawsuit.

Section 2. Amends s. 324.021, F.S., repealing the "dangerous instrumentality doctrine" as it relates to the vicarious liability of a motor vehicle owner for accidents occurring as a result of operation of that owner's motor vehicle.

Section 3. Amends s. 624.155, F.S., limitating the availability of the statutory civil action for bad faith conduct on the part of liability insurers in settling insurance claims to only the insured, and preempting the common law cause of action.

Section 4. Amends s. 768.0710, F.S., restoring the premises liability common law principles as they existed prior to the Florida Supreme Court's 2001 decision in <u>Owens v. Publix Supermarkets</u>.

Section 5. Creates s. 768.1254, F.S., providing definitions applicable to statutes concerning product liability.

Section 6. Creates s. 768.1255, F.S., codifying products liability principles which limit liability of entities in the chain of distribution of defective products which cause injury. Under the changes, only those entities that are actually at fault are liable.

Section 7. Amends s. 768.1256, F.S., repealing the rebuttable presumption under the government rules defense that a product is defective or unreasonably dangerous if the manufacturer or seller did not comply with pertinent federal or state laws or regulations.

Section 8. Creates s. 768.1382, F.S., providing immunity to government entities and electric utilities from liability for damages, injury or death resulting from an accident caused by failure or inadequacy of illumination from street lights, security lights, or other similar illumination.

Section 9. Amends s. 768.28, F.S., restoring the law concerning the duty of care owed to the public by a law enforcement officer who is engaged in pursuit of a fleeing felon to its state prior to the Florida Supreme Court's 1992 decision in <u>City of Pinellas Park v. Brown</u>.

Section 10. Amends s. 768.76, F.S., requiring that the jury be informed of the total of all collateral source amounts paid to or for the benefit of a claimant in a civil action for damages so that it may set off that amount from its judgment.

Section 11. Amends s. 768.79, F.S., providing for payment of plaintiff's attorney's fees when the parties to an action for damages reach a settlement without the assistance of their attorneys.

Section 12. Amends s. 768.81, F.S., repealing of the use of joint and several liability for the purpose of apportioning economic damages.

Section 13. Provides for severability of provisions or applications held invalid.

Section 14. Provides that the bill is effective upon becoming law, and that the provisions are applicable in actions accruing on or after the effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   See FISCAL COMMENTS section below.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Many of the bill's provisions reduce the potential amounts recoverable by plaintiff's in an action for damages. Therefore, the bill could have a significant negative impact on future plaintiffs and a significant positive impact on insurance companies, utilities, retailers and other business entities. The exact impact cannot be determined at this time.

D. FISCAL COMMENTS:

Information provided by bill proponents indicates that the enactment of the provisions relating to law enforcement pursuit of felony suspects could have a significant positive fiscal impact on the Florida Sheriff's Self Insurance Fund. According to that information, prior to the decision in Pinellas Park v. Brown, the Sheriff's Fund had 21 claims resulting in payment of $537,255.93 in defense costs and indemnity payments. Since that decision, the Sheriff's Fund has had 161 claims, 55 of which are still open. So far the claims have resulted in payment of $9,999,955.10 in defense costs and indemnity payments.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.