SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Judiciary Committee

BILL:	CS/SB 2568
SPONSOR:	Senators Webster and Clary
SUBJECT:	Limitations on Liability for Products
DATE:	April 26, 2005 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Siebert	Cooper	CM	**Favorable**
2.	Brown	Maclure	JU	**Fav/CS**
3.				
4.				
5.				
6.				

I. Summary:

This committee substitute provides civil immunity from product liability to sellers of products. This committee substitute contains definitions of the terms “seller” and “sealed container.”

A products liability action based on strict liability may be dismissed against a seller when another defendant, including the manufacturer, is named in the action, and from whom total damages may be recovered, provided that the seller purchased and sold the product in the same sealed container, unless:

- The seller knew, or had reason to know, of the defect or dangerous condition;
- The seller altered, modified, or installed the product;
- The seller provided the plans or specifications for the manufacturer in preparation of the product;
- The seller is a subsidiary of the manufacturer or the manufacturer is a subsidiary of the seller;
- The seller sold the product after the expiration date listed on the product or after it was under a safety recall;
- The product was manufactured, in whole or in part, outside of the United States.

The seller’s motion to dismiss must be accompanied by an affidavit representing the following:

- The product was made, in whole or in part, in the United States;
- The seller received, stored, displayed and sold the product in a sealed container and did not have a reasonable opportunity to inspect;
- The seller did not know, or have reason to know, of the defect or dangerous condition;

- The seller did not alter, modify, or install the product, or provide plans or specifications to be used in making the product;
- Neither the seller nor the manufacturer is the subsidiary of the other;
- The seller sold the product prior to its listed expiration date; and
- The seller is not aware of any fact or circumstance upon which a verdict may be reached against that seller.

Parties have 60 days to conduct discovery, extendable upon good cause. If no party provides evidence that would make the defendant seeking dismissal liable based on a status other than a seller, the court is required to dismiss the case without prejudice.

If the manufacturer does not have an identifiable agent in the United States, is not subject to personal jurisdiction, or is otherwise immune from suit, the seller may be subject to product liability.

This committee substitute provides an effective date of July 1, 2005, and applies to all causes of action accruing on or after that date.

This committee substitute creates section 768.1259, Florida Statutes.

II. Present Situation:

Products Liability Generally

Product liability refers to actions for injuries suffered as the result of a defective product. 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 a "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.

Courts historically employed a variety of approaches to defective product cases. First, courts relied 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 be made against the injured plaintiff's immediate seller because actions based on breach of warranty require privity, or a contractual relationship between the injured buyer and the seller.

Courts also applied the doctrine of res ipsa loquitur, which enables a plaintiff to reach the jury with circumstantial evidence only. Under the doctrine's most accepted formulation, the following conditions are required: (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.[1] However, as the product was almost always out of the

[1] *See generally*, Prosser and Keeton on The Law of Torts, § 39 at 244 (5th ed. 1984).

defendant's hands and had passed through several other entities before reaching the plaintiff, the exclusive control requirement could never be met.

Courts eventually shed these theories and began to impose strict liability in tort on parties within the chain of distribution, including manufacturers, wholesalers, distributors, and retailers, among others. The theory behind strict liability for product defect is explained as follows:

- Assuming that tort law creates safety incentives, imposing strict liability on manufacturers for harm facilitates greater investment in product safety than does fault-based liability which may actually relieve sellers of their proportionate responsibility, due to the difficulty in proving fault;
- As between those involved in the chain of distribution, such as wholesalers and retailers, and end users, product sellers are thought to be better positioned to insure against loss, as sellers can pay damages and then seek indemnity from manufacturers; and
- To reduce risk exposure under a strict liability model, sellers and wholesalers will seek out and work with the most reputable and financially stable manufacturers in the industry.[2]

Florida adopted strict liability as the appropriate standard to apply in product liability cases against manufacturers in 1976, in the case of *West v. Caterpillar Tractor Company, Inc.*[3] Here, the court justified its application as follows:

> The manufacturer, by placing on the market a potentially dangerous product for use and consumption and by inducement and promotion encouraging the use of these products, thereby undertakes a certain and special responsibility toward the consuming public who may be injured by it.[4]

In changing the standard to one of strict liability, the court held, the burden is removed from the user in having to prove specific acts of negligence.[5]

In a products liability case based on strict liability, a product is determined to be defective if it is in a condition that is unreasonably dangerous to the consumer. Products are generally considered defective when they contain a manufacturing defect, a design defect, or a defect due to inadequate instructions or warnings.[6]

In deciding whether a product is defectively designed, Florida courts typically apply either the consumer expectations test or the risk-utility test, and sometimes consider both in one case. Under the consumer expectations test, "a product is unreasonably dangerous because of its design if the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the

[2] Restatement (Third) of Torts: Prod. Liab. § 2 at 1-2 (3rd ed. 1998) Pg. 1-2.
[3] 336 So.2d 80 (Fla. 1976).
[4] *Id.* at 86.
[5] *Id.* at 90.
[6] Michael Kane, *Strictly Speaking About Ephedra: A Baseball Tragedy Helping to Define the Dynamic Between Warning Defect and Design Defect*, 12 Vill. Sports & Ent.L.J. 97, 104 (2005).

manufacturer."[7] The risk-utility test, alternatively, requires that the utility of the product be balanced against the risk it creates. Where the court finds that risk outweighs utility, the product design is defective.[8]

Duty to Warn

The duty to warn principle provides that commercial sellers may be liable if reasonable instructions and warnings about risks of injury from certain products are not given. Sellers down the chain of distribution are required to warn when it is feasible to do so. The type of warning varies, and if the end users are children, more obvious warnings may be required. Warnings may also be needed when a danger is more latent and is only evident during use or consumption of the product.[9]

The Florida Supreme Court has not expressly adopted a standard jury instruction for a strict liability failure to warn, such that the courts authorize different instructions on a duty to warn.[10]

State of the Art Defense

Defendants are authorized to assert a "state of the art" defense, indicating that the design of the product at issue conforms with what is standard in the industry, either that it incorporated the safest and most advanced technology available at the time, or that it employed scientific "cutting edge" technology. The court also permits the defendant to introduce evidence that an alternative design was not feasible based on industry practice at that time.[11]

Product Liability Law, Florida Statutes

Under Florida's strict product liability law, manufacturers, distributors and sellers can be held liable for a plaintiff's injury if the product is in a condition that is unreasonably dangerous. A product is unreasonably dangerous if the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer or if the risk of danger in the design of the product outweighs the benefits.

Florida law authorizes a manufacturer or seller defendant to raise a government rules defense by introducing evidence that the product complied with government regulations.[12] 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.[13]

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[7] *Id.* at 104.
[8] *Id.* at 104-105.
[9] Rest. (Third) of Torts, *supra* note 3, at 13-14.
[10] Kane, *supra* note 7, at 109.
[11] *Id.* at 6.
[12] s. 768.1256(1), F.S.
[13] *Id.*

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.[14]

The defense further 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 relevant law or standards.[15] The converse is also provided. If it is demonstrated that the manufacturer or seller did not comply with relevant law, then a rebuttable presumption exists that the product is defective or unreasonably dangerous.[16]

Additionally, Florida law provides for a "state-of-the-art" defense for certain products liability claims. In an action brought against the manufacturer of a product based on a design defect, the trier of fact must consider the scientific and technical knowledge that existed at the time that the product was manufactured.[17]

Florida's Statute of Repose

Florida law imposes a limitation on the time during which a cause of action can arise. Previously, manufacturers and retailers of products had almost unlimited exposure for alleged defective products, even if the product was well past its useful life. Now, under the statute of repose, an action related to an alleged defective product is generally subject to a four-year statute of limitation,[18] and the four years begins to run from the date that the facts giving rise to the cause of action were or should have been discovered through due diligence.[19] In any event, the action must be commenced within 12 years after the delivery of a product with an expected useful life of ten years or less.[20] Under this statute, most products are conclusively presumed to have an expected useful life of ten years or less.[21]

Certain products, including specified aircraft, railroad equipment, and elevators and escalators are not subject to the statute of repose.[22] Also, the repose period does not apply if the claimant was exposed or used the product within the repose period, but the injury did not manifest itself until after the repose period.[23] Also, the statute of repose is tolled for any periods during which a manufacturer has actual knowledge of a product's defect as alleged by the claimant, yet takes affirmative steps to conceal the defect.[24]

[14] *Id.* at (3).
[15] *Id.* at (1).
[16] *Id.* at (2).
[17] s. 768.1257, F.S.
[18] s. 95.11(3), F.S.
[19] s. 95.031(2)(b), F.S.
[20] *Id.*
[21] *Id.*
[22] s. 95.031(2)(b)1., F.S.

[23] s. 95.031(2)(c), F.S.
[24] s. 95.031(2)(d), F.S.

Personal Jurisdiction

A plaintiff's showing that a product causing injury in a particular state was manufactured by the defendant and shipped to the state through the ordinary course of commerce is sufficient to defeat a motion to dismiss based on lack of jurisdiction.[25] The court must subsequently find, however, the presence of minimum contacts to enforce service of process through long-arm jurisdiction on an out-of-state manufacturer.[26] A general assertion that a manufacturer could foresee that his product would be used in a particular state and that he derived some indirect economic benefit from its use is insufficient to prove minimum contacts.[27] Rather, the plaintiff must show that the non-resident defendant engaged in some action purposefully directed toward the forum state.[28]

III. Effect of Proposed Changes:

This committee substitute contains the following definitions:

- Seller: a person who sells a product as a retailer, distributor, or wholesaler, or who otherwise transfers a product to another for compensation.
- Sealed container: a box, container, package, wrapping, encasement, or housing that covers a product rendering it unreasonable to expect a seller to detect or discover that the product is dangerous or defective.

This committee substitute provides that an action for products liability based on strict liability may be dismissed against a seller when another defendant, including the manufacturer, is named in the action, and from whom total damages may be recovered, provided that the seller purchased and sold the product in the same sealed container, unless:

- The seller knew, or had reason to know, of the defect or dangerous condition;
- The seller altered, modified, or installed the product;
- The seller provided the plans or specifications for the manufacturer in preparation of the product;
- The seller is a subsidiary of the manufacturer or the manufacturer is a subsidiary of the seller;
- The seller sold the product after the expiration date listed on the product or after it was under a safety recall;
- The product was manufactured, in whole or in part, outside of the United States.

The seller's motion to dismiss must be accompanied by an affidavit representing the following:

- The product was made, in whole or in part, in the United States;
- The seller received, stored, displayed and sold the product in a sealed container and did not have a reasonable opportunity to inspect;

[25] *Mason v. McCrory*, 549 So.2d 1159, 1160 (Fla. 3d DCA 1989).
[26] *Kin Yong Lung Industrial Co., Ltd., v. Temple*, 816 So.2d 663 (Fla. 2d DCA 2002).
[27] *Maschinenfabrik Seydelmann v. Altman*, 468 So.2d 286, 290 (Fla. 2d DCA 1985).
[28] *Kin Yong Lung Industrial Co., Ltd., supra* note 26, at 666.

- The seller did not know, or have reason to know of the defect or dangerous condition;
- The seller did not alter, modify, or install the product, or provide plans or specifications to be used in making the product;
- Neither the seller nor the manufacturer is the subsidiary of the other;
- The seller sold the product prior to its listed expiration date; and
- The seller is not aware of any fact or circumstance upon which a verdict may be reached against that seller.

Parties have 60 days to conduct discovery, extendable upon a good cause showing. All parties are authorized to move for a hearing on a motion to dismiss. If no party provides evidence that would make the defendant seeking dismissal liable based on a status other than a seller, the court is required to dismiss the case without prejudice.

If the manufacturer does not have an identifiable agent in the United States, is not subject to personal jurisdiction, or is otherwise immune from suit, the seller may be subject to product liability.

This committee substitute provides an effective date of July 1, 2005, and applies to all causes of action accruing on or after that date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Article I, Section 21 of the State Constitution preserves a person's right to litigate in court. The Florida Supreme Court has provided that, where a right of access to the courts for redress for a particular injury has been provided by statutory or common law pre-dating the 1968 Florida Constitution, the Legislature may not abolish a cause of action without providing a reasonable alternative, or overpowering public necessity for the abolishment is shown and there is no alternative method for meeting that public necessity. [29]

[29] *Kluger v. White*, 281 So.2d 1,4 (Fla. 1973)(The court invalidated a statute requiring a minimum of $550 in property damages arising from an automobile accident before bringing an action); *Also See generally, Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987)(The court ruled that a section of Tort Reform and Insurance Act, which placed absolute, $450,000 cap on damages that tort victim could recover for noneconomic losses, violated victim's constitutional right of access to courts).

The Legislature may not unduly or unreasonably burden or restrict access. The Florida Constitution protects only rights that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution.[30] In order to make a colorable claim of denial of access to courts, an aggrieved party must demonstrate that the Legislature has abolished a common-law right previously employed by the people of Florida and, if so, that it has provided a reasonable alternative for redress, unless there is an "overpowering public necessity" for eliminating the right and no alternative method exists.[31]

Here, the committee substitute provides that a person may not commence or maintain a civil action against a seller in a product liability action. However, the committee substitute does provide exemptions if the seller manufactured, produced, or designed the product, or altered, modified, assembled, or failed to maintain the product. Additionally, there is another exemption if manufacturer of the product does not have an identifiable agent in the United States, is not subject to personal jurisdiction in Florida, or is otherwise immune from suit. Also, a person may still file a claim against the manufacturer of the product. Therefore, there are still viable avenues for a person harmed by a defective product for relief.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

If enacted, the committee substitute is likely to have a negative impact on future plaintiffs and a positive impact on businesses. Sellers who carry products from companies that have minimal contacts with Florida are likely to benefit most from this legislation, as those companies are subject to service of process through long-arm jurisdiction.

C. Government Sector Impact:

If the amount of future litigation is reduced as a result of this committee substitute, there may be a savings in the administration of state courts.

VI. Technical Deficiencies:

This committee substitute provides that a seller may not be dismissed from a products liability action if the product was made, in whole or in part, outside of the United States. Meanwhile, the affidavit accompanying the seller's motion to dismiss requires that the seller represent that the product was made, in whole or in part, in the United States. As written, it is unclear whether the seller would be liable for products that are made partially outside the United States (which assumes that they are also partially made inside the United States).

[30] *Kluger* at 4.
[31] *Id.*

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.