

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote Personal Responsibility: The bill limits a successor corporation's asbestos-related liabilities, incurred by way of a merger or consolidation with another corporation, to the fair market value of the total gross assets of the predecessor corporation.

B. EFFECT OF PROPOSED CHANGES:

Background

Asbestos-related claims are the subject of the longest running mass tort litigation in the history of the United States.¹ As of January 2003, 6,000 companies from 75 different industries had been named as defendants in asbestos-related claims,² and at least 61 companies had filed for bankruptcy protection due to asbestos liabilities at a cost of 60,000 lost jobs.³ Since asbestos litigation began, an estimated \$70 billion has been spent on litigation costs and compensation, with claimants receiving roughly \$0.43 per dollar spent.⁴

The United States Supreme Court has recognized that asbestos litigation has become an "elephantine mass of...cases."⁵ In *Amchem Products, Inc. v. Windsor*, the Court concluded that effective asbestos litigation reform required legislation that would create an asbestos dispute-resolution scheme.⁶ Congress has made attempts to reform asbestos litigation over the last several years.

The general rule recognized by the Florida courts is that a successor corporation is not liable for torts committed by a predecessor entity prior to the successor's acquisition.⁷ However, this immunity does not protect a successor corporation if: (1) the successor expressly or impliedly assumes the obligations of the predecessor entity; (2) the transaction is a de facto merger, as governed by s. 607.1101, F.S.; (3) the successor is a mere continuation of the predecessor; or (4) the transaction is a fraudulent effort to avoid the predecessor's liabilities.⁸

If liable under Florida law, a successor entity may be ordered to pay compensatory or punitive damages under the justification that a successor corporation that voluntarily chooses to merge accepts the "bad will" along with the "good will" of the predecessor.⁹ The underlying objective of this approach is to deter corporations from merging with entities engaged in reckless conduct detrimental to public health.¹⁰

Current law places no limit on successor-related liabilities; consequently, a successor corporation could be liable for up to the entire value of its total gross assets, even if the liability was incurred by merging with a less valuable predecessor. For example, if Corporation P is liable for asbestos injuries and its

¹ The Asbestos Litigation Crisis by the Numbers, The American Insurance Association Advocate, January 3, 2003. See also Asbestos Litigation Costs and Compensation, RAND Institute for Civil Justice, Sept. 2002.

² *Id.*

³ Joseph Stiglitz, Jonathon Orszag, & Peter Orszag, The Impact of Asbestos Liabilities on Workers in Bankrupt Firms, Dec. 2002., available at <http://www.aiadc.org/Files/Public/StiglitzReport.pdf>.

⁴ Asbestos Litigation Costs and Compensation: An interim report, RAND Institute for Civil Justice, 2002 (updated 2003).

⁵ *Ortiz v. Fireboard Corp.*, 527 U.S. 821 (1999).

⁶ 521 U.S. 591, 598 (1997). See also *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135, 166 (2003).

⁷ *Bernard v. Kee Manufacturing Co. Inc.*, 409 So.2d 1047, 1049 (Fla. 1982).

⁸ *Id.* See also Fla. Stat. § 607.1106 (2004), outlining the effect of a merger or share exchange, including successor liability.

⁹ *Celotex Corp. v. Pickett*, 490 So.2d 35, 38 (Fla. 1986).

¹⁰ *Id.*

total gross assets equal \$1 billion, its liability could extend up to \$1 billion. If, however, Corporation P merges with Corporation S, which is worth \$15 billion, Corporation S now assumes Corporation P's asbestos liabilities up to its total value of gross assets, \$15 billion, regardless of Corporation P's value at the time of the merger.

Proposed Changes

This bill proposes to limit a successor corporation's asbestos-related liabilities, if that corporation became a successor before January 1, 1972, to the adjusted fair market value of the total gross assets of the predecessor at the date of the merger or consolidation. An asbestos-related claim would include: any claim made by or on behalf of any person exposed to asbestos, or a representative or relative of such a person, for injury alleged to have been caused by exposure to asbestos; or a claim for damage or loss caused by the installation, presence, or removal of asbestos.

Determination of the fair market value of total gross assets may be made by any reasonable method. The fair market value is to be adjusted annually by the prime rate (as reported by the first edition of the Wall Street Journal each calendar year) plus one percent.

$$\text{EXAMPLE: Liability Cap} = \text{PFMV}^{11} + [(\text{PFMV})(\text{Prime Rate} + 1\%)]^*$$

*adjusted annually from the date of the merge

This annual adjustment will continue until the value of the predecessor's total gross assets is exceeded by the cumulative amounts of successor asbestos-related liabilities paid, or committed to be paid, on behalf of the corporation or predecessor.

| | Predecessor Fair Market Value | Successor Fair Market Value | Successor Liability after merger |
|-----------------------------|-------------------------------|-----------------------------|----------------------------------|
| Current Law | \$1 million | \$15 million | \$16 million |
| | \$3 million | \$7 million | \$10 million |
| HB0785 Proposed Legislation | \$1 million | \$15 million | \$1 million * |
| | \$3 million | \$7 million | \$3 million * |

* adjusted annually from the date of the merge

The bill takes effect upon becoming a law and applies to any civil action asserting an asbestos claim in which the trial has not commenced as of the effective date of the bill.

C. SECTION DIRECTORY:

Section 1. Provides Legislative Findings and Intent.

Section 2. Provides definitions for "asbestos claim," "corporation," "successor," "successor asbestos-related liabilities," and "transferor."

Section 3. Provides that the bill applies only under certain circumstances.

Section 4. Provides limitations on a successor corporation's asbestos-related liabilities.

Section 5. Provides that the method of establishing the fair market value of the total gross assets of a corporation must be reasonable and provides examples.

Section 6. Provides that the fair market value of a corporation's total gross assets must be adjusted annually for purposes of the legislation and provides the method for adjustment.

¹¹ The acronym PFMV means Predecessor Fair Market Value.

Section 7. Provides that the bill shall be applied by the Florida courts to the fullest extent permissible under the United States Constitution.

Section 8. Provides severability for any provision of the act which may be found invalid.

Section 9. Provides that the bill shall take effect upon becoming law, and applies to all asbestos claims filed on or after that date, as well as any pending asbestos claims.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

There could be a positive fiscal impact on corporations that have incurred potential asbestos liability by merging or consolidating with another entity, to the extent that the bill reduces the successor corporation's liability; however any positive impact on one corporation could have an equal negative impact absorbed by the corporations which remain liable for asbestos claims.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

Access to Courts

Article I, section 21 of the Florida Constitution provides: “The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.”¹² In *Kluger v. White*,¹³ the Florida Supreme Court considered the Legislature’s power to abolish causes of action. At issue in *Kluger* was a statute which abolished causes of action to recover for property damage caused by an automobile accident unless the damage exceeded \$550.¹⁴ The court determined that the statute violated the Access to Courts Provision of the State Constitution, holding that where a right to access the courts for redress for a particular injury predates the adoption of the Access to Courts Provision in the 1968 State Constitution, the Legislature cannot abolish the right without providing a reasonable alternative unless the Legislature can show (1) an overpowering public necessity to abolish the right, and (2) no alternative method of meeting such public necessity.¹⁵ Because the right to recover for property damage caused by auto accidents predated the 1968 adoption of the Declaration of Rights, the court held that the restriction on that cause of action violated the Access to Courts Provision of the State Constitution.

A litigant could argue that the bill affects a cause of action existing under Florida law before the adoption of the Access to Courts Provision in 1968. Should a court find the bill does not deny such a cause of action, the judicial inquiry would end at that point. But it is also possible that a court could hold that pre-1968 Florida law would have allowed such suits under the common-law cause of action for negligence. If so, this bill might be evaluated under the *Kluger* standard.

Retroactivity

Unless the Legislature states otherwise, legislation is presumed to operate prospectively only, especially when retrospective operation would impair existing rights.¹⁶ Common law provides that the government, through rule or legislation, cannot adversely affect substantive rights once such rights have vested.¹⁷

Prohibited Special Acts

The bill’s limitations on asbestos-related liabilities apply only to corporations that have assumed or incurred the liabilities of another corporation, as successors, by way of merger or consolidation prior to January 1, 1972. Depending on the number of corporations that fit into this class, the bill may implicate state constitutional provisions relating to special acts. Article III, section 11(a)(12) of the Florida Constitution provides: “There shall be no special law or general law of local application pertaining to ... private incorporation or grant of privilege to a private corporation.” The court has defined a special law as one relating to, or designed to operate upon, particular persons or things, or one that purports to operate upon classified persons or things when classification is not permissible or the classification adopted is illegal.¹⁸ A special law is distinguishable from a general law, which is defined as a law that operates universally throughout the state, or uniformly upon subjects as they may exist throughout the state, or uniformly within permissible classifications by population of counties or otherwise, or is a law relating to a state function or instrumentality.¹⁹ Though this issue has been rarely addressed by the Florida Supreme Court, the Court has determined that laws should

¹² See generally 10A FLA. JUR. 2D CONSTITUTIONAL LAW §§ 360-69.

¹³ 281 So.2d 1 (Fla. 1973).

¹⁴ See ch. 71-252, s. 9, L.O.F.

¹⁵ See *Kluger*, 281 So.2d at 4.

¹⁶ *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55 (Fla. 1995); *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So.2d 1352 (Fla. 1994).

¹⁷ *Bitterman v. Bitterman*, 714 So.2d 356 (Fla. 1998).

¹⁸ *Schrader v. Florida Keys Aqueduct Authority*, 840 So.2d 1050, 155 (Fla. 2003).

¹⁹ *Id.*

not be considered unconstitutional under this provision, even if initially it only applies to a single entity, so long as the statute may possibly apply to more than one entity and is related to furthering a legitimate state purpose.²⁰

B. RULE-MAKING AUTHORITY:

Not applicable under this bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

This analysis is drawn to the Committee Substitute that was adopted at the March 31, 2005, meeting of the House Judiciary Committee. The Committee Substitute differs from the bill as filed in that the Committee Substitute:

- Provides a section on Legislative Intent.
- Narrows the definition of “successor asbestos-related liabilities” to include only those liabilities assumed from merger and consolidation with a predecessor corporation (excluding liabilities assumed through asset purchase or stock purchase).
- Narrows the definition of “transferor” to include only a corporation (excluding its shareholders) from which successor asbestos-related liabilities were assumed.
- Narrows the application of the limitation on liabilities to only those corporations that became a “successor” prior to January 1, 1972.
- Provides for the severability of any provision of the act should it be found invalid, or its application to any person or circumstance invalid, so that the invalidity of the provision will not affect the remainder of the act.

On April 14, 2005, the Business Regulation Committee heard HB 785, adopted two amendments, and passed the bill favorably with a Committee Substitute. The amendments clarified that the limitations in section 4 of the bill do not apply to an insurance company or any successor that after a merger or consolidation, maintained certain business activities. The staff analysis has been updated to reflect these amendments.

²⁰ *Dept. of Legal Aff. V. Sanford-Orlando Kennel Club*, 434 So.2d 879, 882-83 (Fla. 1983).