

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 785

Limitations of Asbestos Liabilities Under Mergers or Consolidations

**SPONSOR(S):** Gelber

**TIED BILLS:**

**IDEN./SIM. BILLS:**

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary Committee	_____	Savage	Hogge
2) Business Regulation Committee	_____	_____	_____
3) Justice Council	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

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**SUMMARY ANALYSIS**

The bill creates limitations on asbestos-related liabilities of corporations that have assumed or incurred the liabilities of another corporation, as successors, by way of purchase, merger, consolidation, or court order. The bill would limit a successor corporation's liability to the fair market value of the total gross assets of the predecessor corporation, from which the asbestos-related liability originated, at the date of the merger but adjusted annually. The bill provides standards for acceptable methods to determine the fair market value of total group assets of a corporation.

The bill does not appear to have any fiscal impact on state or local governments.

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.

# 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 litigation is the longest running mass tort in the history of the United States.<sup>1</sup> As of January 2003, 6,000 companies from 75 different industries had been named as defendants in asbestos-related claims<sup>2</sup>; and at least 61 companies had filed for bankruptcy protection due to asbestos liabilities at a cost of 60,000 lost jobs.<sup>3</sup> 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.<sup>4</sup>

The United States Supreme Court has recognized that asbestos litigation has become an "elephantine mass of...cases."<sup>5</sup> In *Amchem Products, Inc. v. Windsor*, the court concluded that effective asbestos litigation reform required legislation that would create an asbestos dispute-resolution scheme.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> The underlying objective of this approach is to deter corporations from merging with entities engaged in reckless conduct detrimental to public health.<sup>10</sup>

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 total gross assets total \$1 billion, its liability could extend up to \$1 billion. If, however, corporation P merges with corporation S, which is

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<sup>1</sup> 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.

<sup>2</sup> *Id.*

<sup>3</sup> 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>

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

<sup>5</sup> *Ortiz v. Fireboard Corp.*, 527 U.S. 821 (1999).

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

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

<sup>8</sup> *Id.*; See also s. 607.1106 F.S., outlining the effect of a merger or share exchange, including successor liability

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

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

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

The bill proposes to limit a successor corporation's asbestos-related liabilities 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 to property 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	<b>\$16 million</b>
	\$3 million	\$7 million	<b>\$10 million</b>
HB0785 Proposed Legislation	\$1 million	\$15 million	<b>\$1 million *</b>
	\$3 million	\$7 million	<b>\$3 million *</b>

\* 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 definitions for "asbestos claim," "corporation," "successor," "successor asbestos-related liabilities," and "transferor."

Section 2. Provides that the bill applies only under certain circumstances.

Section 3. Provides limitations on a successor corporation's asbestos-related liabilities.

Section 4. Provides that the method of establishing the fair market value of the total gross assets of a corporation must be reasonable; provides examples.

Section 5. Provides that the fair market value of a corporation's total gross assets must be adjusted annually for purposes of the legislation; provides the method for adjustment.

Section 6. Provides that the bill shall be applied by the courts in Florida to the fullest extent permissible under the United States Constitution.

Section 7. 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.

<sup>11</sup> PFMV= Predecessor Fair Market Value

## 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 joint resolution 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.

#### 3. 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."<sup>12</sup> In *Kluger v. White*,<sup>13</sup> 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.<sup>14</sup> 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

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

<sup>13</sup> 281 So. 2d 1 (Fla. 1973).

<sup>14</sup> See ch. 71-252, s. 9, L.O.F.

abolish the right and (2) no alternative method of meeting such public necessity.<sup>15</sup> 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.<sup>16</sup> Common law provides that the government, through rule or legislation, cannot adversely affect substantive rights once such rights have vested.<sup>17</sup>

**B. RULE-MAKING AUTHORITY:**

Not applicable under this bill.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None

## **IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

N/A

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<sup>15</sup> See *Kluger* at 4.

<sup>16</sup> *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).

<sup>17</sup> *Bitterman v. Bitterman*, 714 So.2d 356 (Fla. 1998).