HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 333 Immunity from Civil Liability
SPONSOR(S): Simmons
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1394

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary		Jaroslav	Havlicak
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

It is unclear whether, under current law, the fast-food industry could be held liable for the weight-related health effects of their products, as several lawsuits filed in other states seek for them to be.

This bill provides immunity from civil liability for personal injury or wrongful death to manufacturers, distributors and sellers of foods or nonalcoholic beverages intended for human consumption, to the extent that that liability is premised on weight gain, obesity, or a health condition related to weight gain or obesity, resulting from long-term consumption of those foods or nonalcoholic beverages. "Long-term" is defined in this bill to mean the cumulative effect of multiple instances over a period of time and not a single or isolated instance.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

1. Reduce government?	Yes[x]	No[]	N/A[]
2. Lower taxes?	Yes[]	No[]	N/A[x]
3. Expand individual freedom?	Yes[x]	No[]	N/A[]
4. Increase personal responsibility?	Yes[x]	No[]	N/A[]
5. Empower families?	Yes[]	No[]	N/A[x]

For any principle that received a "no" above, please explain:

B. EFFECT OF PROPOSED CHANGES:

Present Situation

In recent years, and especially in light of successful litigation against manufacturers of tobacco products, lawsuits have begun being filed against the fast-food industry alleging health-related injuries due to weight gain, generally in tandem with allegations of deceptive or misleading trade practices. It has been suggested that, like tobacco and alcohol, fast food is primarily a "hedonic" (pleasure-producing) product, which causes ill health effects, and the producers and sellers of which engage in targeted advertising.[1] While conceding that, unlike tobacco or alcohol, fast food is not physically addictive, they do in some cases allege that it is "intrinsically harmful."[2]

The most prominent of these lawsuits have been filed in New York[3] and California, and they have all either been dismissed or remain currently pending: no court in the country has yet ruled that fast-food companies may be held liable for weight-related effects of their products. It does not appear that any court in Florida has yet even been asked to address the issue.

Proposed Changes

This bill provides immunity from civil liability for personal injury or wrongful death to manufacturers, distributors and sellers of foods or nonalcoholic beverages intended for human consumption, to the extent that that liability is premised on weight gain, obesity, or a health condition related to weight gain or obesity, resulting from long-term consumption of those foods or nonalcoholic beverages. "Long-term" is defined in this bill to mean the cumulative effect of multiple instances over a period of time and not a single or isolated instance.

C. SECTION DIRECTORY:

Section 1. Creates new s. 768.37, F.S., eliminating civil causes of action premised on obesity or related health conditions resulting from long-term consumption of foods or nonalcoholic beverages.

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[1] *See* John Alan Cohan, *Obesity, Public Policy, and Tort Claims Against Fast-Food Companies*, 12 WIDENER L. J. 103 (2003); Will Evans, "Vets of Tobacco Wars Take Aim at Fast Food: Lawsuits Blaming Restaurants for Obesity Appear to Represent a New Trend," SACRAMENTO BEE, Feb. 24, 2003, at A1; Shelly Branch, "Obese America: Is Fast Food the Next Tobacco?", WALL ST. J., June 13, 2002, at B-1; Robert F. Cochran, *From Cigarettes to Alcohol: The Next Step in Hedonic Product Liability?*, 27 PEPP. L. REV. 701 (2000). *But see* Kevin P. Allen, *Litigating Against Guilty Pleasures*, 5 No. 21 LAWYERS J. 6 (October 17, 2003).

[2] *See* Cohan, *supra* at 111.

[3] *See, e.g.*, *Pelman v. McDonald's Corp.*, 237 F.Supp.2d 512 (S.D.N.Y. 2003).

Section 2. Provides an effective date of upon becoming a law, applying to all claims filed 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:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

It is unclear whether the economic impact of this bill would be direct enough to be described under this heading; however, see "Fiscal Comments" below for indirect economic effects.

D. FISCAL COMMENTS:

By immunizing manufacturers, distributors and sellers of food and nonalcoholic beverages of liability, it would likely reduce their costs, especially in terms of insurance premiums. That, in turn, could mean lower prices to consumers of their products. This effect would be significantly limited, however, by the fact that such defendants could still be held liable outside Florida.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

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." Because this bill immunizes potential defendants from liability, it is possible that it may violate this access to courts provision.

In *Kluger v. White*,[4] 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.[5] 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.[6] 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.

The court applied the *Kluger* test in *Smith v. Department of Insurance*.[7] In 1986, the Legislature passed comprehensive tort reform legislation that included a cap of $450,000 on noneconomic damages.[8] The cap on damages was challenged on the basis that it violated the access to courts provision of the state constitution. The Florida Supreme Court found that a right to sue for unlimited noneconomic damages existed at the time the constitution was adopted.[9] The *Smith* court held that the Legislature had not provided an alternative remedy or commensurate benefit in exchange for limited the right to recover damages and noted that the parties did not assert that an overwhelming public necessity existed.[10] Accordingly, the court held that the $450,000 cap on noneconomic damages violated the access to courts provision of the Florida Constitution.

Because this bill eliminates causes of action, a litigant could argue that it likewise denies him or her access to the courts. Because no Florida court has ever addressed the question of tortious liability for health effects of long-term food or beverage consumption, a court confronted with the issue would first have to determine whether such a cause of action could nonetheless have been pursued under Florida law before the adoption of the access to courts provision in 1968. Should a court find no, the judicial inquiry would end at that point, and this bill's provisions would be allowed to stand. But it is also possible that a court could hold that pre-1968 Florida law would have allowed such suits, in which case this bill would have to withstand the *Kluger* test. Especially given its lack of legislative findings, it is possible that it would not be able to do so.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

It is not clear what the difference between a "single" and an "isolated" instance might be, or if there is a difference.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

N/A

[4] 281 So. 2d 1 (Fla. 1973).
[5] *See* ch. 71-252, s. 9, L.O.F.
[6] *See Kluger* at 4.
[7] 507 So. 2d 1080 (Fla. 1987).
[8] *See* ch. 86-160, s. 59, L.O.F.
[9] *See Smith* at 1087.
[10] *See id.* at 1089.