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 2228
SPONSOR:	Judiciary Committee and Senator Webster
SUBJECT:	Asbestos-Related Claims
DATE:	April 14, 2005 REVISED:

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			BI	**Withdrawn**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

I. Summary:

This committee substitute limits the liability of successor corporations that have assumed asbestos-related liabilities as the result of a merger or consolidation that occurred prior to January 1, 1972. The liability of the successor corporations is limited to the adjusted fair market value of the total gross assets of the merged or consolidated corporation on the date of the merger or consolidation.

This committee substitute creates unnumbered sections of the Florida Statutes.

II. Present Situation:

Liability for Asbestos Claims

Asbestos is a defective product for which those who profit from its sale and distribution are liable for damages.[1, 2] Products liability cases involving asbestos claims first appeared in appellate opinions in the early 1980's in Florida.[3] The damages available to a plaintiff for an asbestos claim are described below.

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[1] *See Celotex Corporation v. Pickett*, 490 So. 2d 35, 36 (Fla. 1986).

[2] *Samuel Friedland Family Enterprises v. Amoroso*, 630 So. 2d 1067, 1068 (Fla. 1994).

[3] *Vilardebo v. Keene Corp.*, 431 So. 2d 620 (Fla. 3d DCA 1983) appears to be the earliest Florida appellate opinion on an asbestos injury claim. The opinion in *Florida State Hospital v. Potter*, 391 So. 2d 322 (Fla. 1980) implies that asbestos claims could be made under the workers compensation laws by at least 1980. The first asbestos products liability suit was *Tomplait v. Combustion Engineering, Inc.*, No. C.A. 5402 (E.D. Tex. 1967). Ronald L. Motley and Susan Nial, *A Critical Analysis of the Brickman Administrative Proposal: Who Declared War on Asbestos Victims' Rights?*, 13 CARDOZO L. REV. 1919, 1933-1934 (April 1992).

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Compliance with Occupational Safety and Health Act (OSHA) standards does not diminish and satisfy, as a matter of law, the common-law duty to warn of the dangers of asbestos products. Moreover, strict liability is available to plaintiffs in asbestos-related personal injury litigation. A plaintiff in an asbestos litigation is entitled to proceed to trial on a strict liability claim so long as the claim does not duplicate the negligence claim.

A plaintiff suffering from asbestosis cannot recover damages from the manufacturer of the asbestos product for the plaintiff's enhanced risk of contracting cancer in the future, although if the plaintiff should actually contract cancer in the future, the rule against splitting causes of action would not bar the plaintiff from bringing a second action seeking damages for the cancer. The plaintiff's right to sue for cancer damages if and when he or she contracts that disease is reserved.

However, a plaintiff who can prove inhalation of asbestos may recover damages for negligent infliction of emotional distress suffered as a result of his or her fear of cancer. As a general rule, no recovery can be had for emotional distress where the emotional distress does not flow from some physical injury the plaintiff sustained in impact. The inhalation of asbestos fibers constitutes an impact so as to allow recovery. Thus, a plaintiff who already suffers from asbestosis can recover for the mental distress he or she suffers as a result of his or her fear of contracting cancer, because there was an immediate and direct physical impact and injury.[4]

Successor Liability

Under s. 607.1106, F.S., when two corporations merge, the surviving corporation retains all the assets and liabilities of both corporations.[5] As a result, successor corporations assume the asbestos-related liabilities of merged corporations, even liabilities for punitive damages.[6] The policy underlying the rule imposing liability on successor corporations for punitive damages of merged corporations "may well deter other corporations from seeking to merge with other companies which have engaged in reckless conduct detrimental to the public health."[7]

[4] Judy E. Zelin, J.D., 41A Fla. Jur 2d Products Liability s. 123 (Database updated February 2005) (citations omitted).
[5] Section 607.1106, F.S., states in part:

> (1) When a merger becomes effective:
> (a) Every other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases;
> (b) The title to all real estate and other property, or any interest therein, owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment;
> (c) The surviving corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each corporation party to the merger; . . .

[6] *Celotex Corporation v. Pickett*, 490 So. 2d 35 (Fla. 1986).
[7] *Id.* at 38.

Asbestos

The term "asbestos" refers to "a group of minerals that occur naturally as bundles of fibers which can be separated into thin threads."[8] Asbestos has been used in North America since the late 1800s for strengthening cement and for insulation and fireproofing.[9] Asbestos fibers can break into a dust that is easily inhaled and swallowed.[10] Persons who have been exposed to asbestos are at an increased risk for asbestosis, lung cancer, and other cancers.[11] Symptoms from exposure to asbestos may not appear for 10 to 40 years after exposure.[12]

In June 1972, the Occupational Safety and Health Administration (OSHA) first promulgated final standards on asbestos exposure in the workplace.[13] In the late 1970s, the federal government began banning the use of asbestos in products. Since 1989, all new uses for asbestos have been banned.[14]

III. Effect of Proposed Changes:

This committee substitute limits the liability of successor corporations that have assumed asbestos-related liabilities as the result of a merger or consolidation that occurred prior to January 1, 1972. Additionally, the limitation on successor liability only applies to successor corporations that have not continued in the asbestos business of the merged or consolidated corporation. The liability of the eligible successor corporations is limited to the adjusted fair market value of the total gross assets of the merged or consolidated corporation on the date of the merger or consolidation. The committee substitute, however, does not limit the amount of funds that may be available under an insurance policy, workers' compensation law, or obligations under the National Labor Relations Act.

The committee substitute permits the determination of the fair market value of a merged or consolidated corporation's total gross assets through any reasonable method. The amount of funds available under the committee substitute to pay asbestos claims is the total gross assets adjusted by the prime rate plus 1 percent for each calendar year since the date of the merger or consolidation. Once the available funds have been exhausted, the successor corporation has no further liability.

The committee substitute takes effect upon becoming a law and applies to actions asserting an asbestos claim in which the trial has not commenced as of the effective date.

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[8] National Cancer Institute, Asbestos Exposure: Questions and Answers, Cancer Facts 3.21 (Aug. 29, 2003), *at* http://cis.nci.nih.gov/fact/3_21.htm.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] U.S. Department of Labor, Occupational Safety and Health Administration, Occupational Exposure to Asbestos (Aug. 10, 1994) *at* http://www.osha.gov.
[14] National Cancer Institute, *supra* note 8.

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:

Case law is inconclusive as to whether this committee substitute violates s. 21, Art. I, State Const., which states: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

In *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973), the Florida Supreme Court established the following test to determine whether a statute violates the access to courts provision of the State Constitution:

> where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla.Stat. s 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Under the test, if a cause of action for asbestos products liability or personal injury did not exist before 1968, then the Legislature is free to limit remedies for asbestos injuries.

According to research discussed in the present situation of this staff analysis, the first mention of asbestos-related injuries in appellate opinions did not appear until the early 1980s. Further, the first asbestos case anywhere was not filed until 1966. As such, a cause of action for an asbestos injury did not likely occur in Florida until after the adoption of the Declaration of Rights in 1968. Although products liability actions an personal injury actions existed before 1968, a products liability or personal injury action involving asbestos likely did not exist before 1968. In *Perry v. G.M.A.C. Leasing Corp.*, 549 So. 2d 680, 682 (Fla. 2d DCA 1989), the court implies that a specific tort cause of action must have existed before 1968 before access to courts is an issue. Specifically, the court stated, the "plaintiff has not shown . . . that there ever was a common law right of action under the dangerous instrumentality doctrine in Florida against a long-term lessor

of a motor vehicle." The dangerous instrumentality doctrine, however, applied to motor vehicles before 1968.[15]
Assuming, however, that a cause of action existed before 1968, the Legislature must create a reasonable alternative to the cause of action or show an overpowering necessity for the abolishment of the cause of action.

The committee substitute does not create an alternative to asbestos causes of action. The committee substitute does assert that the Legislature finds an overpowering necessity to preserve the viability of successor corporations that have never manufactured, sold, or distributed asbestos or asbestos products.

The Legislature's findings have not always been upheld by the courts. *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987) involved a $450,000 cap on non-economic damages that could be received by a tort victim. The stated purpose of the cap on damages was to abate a financial crisis in the insurance industry. The Court ultimately found that the cap denied access to courts and was unconstitutional

In contrast, in *University of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993), the Court upheld caps on non-economic damages in medical malpractice actions when a party requests arbitration. In *Echarte*, the Court noted that a legislative task force had engaged in extensive fact finding on medical malpractice and agreed that the Legislature had shown an overpowering necessity for the caps.[16]

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This committee substitute limits the liability of successor corporations that have assumed asbestos-related liabilities as the result of a merger or consolidation that occurred prior to January 1, 1972. As a consequence, the committee substitute limits the amount of compensation available to compensate those with asbestos claims.

C. Government Sector Impact:

This committee substitute may reduce the amount of asbestos litigation in the courts.

VI. Technical Deficiencies:

None.

[15] *See, e.g., Allstate Ins. Co. v. American Cas. Co. of Reading, Pa.*, 200 So. 2d 587 (Fla. 3d DCA 1967).
[16] *University of Miami v. Echarte*, 618 So. 2d 189, 196 (Fla. 1993)

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.