

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

---

Prepared By: The Professional Staff of the Commerce Committee

---

BILL: SB 2438

INTRODUCER: Senator Posey

SUBJECT: Informed consent for spaceflight

DATE: March 24, 2008

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Earlywine	Cooper	CM	<b>Favorable</b>
2.	_____	_____	JU	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

---

**I. Summary:**

This bill provides that a spaceflight entity is not liable for injury to or death of a spaceflight participant resulting from the inherent risks of spaceflight launch activities, so long as the required warning is given to and signed by the participant. This bill provides that a participant or participant's representative may not recover from a spaceflight entity for the loss, damage, or death of the participant resulting exclusively from any of the inherent risks of spaceflight activities if the spaceflight entity pleads the affirmative defense of assumption of the risk of spaceflight activities by the participant. The immunity provided by this bill does not apply if the spaceflight entity:

- Commits gross negligence or willful or wanton disregard for the safety of the participant;
- Has actual knowledge or reasonably should have known of a dangerous condition; or
- Intentionally injures the participant.

The limitation on liability is in addition to any other limitation of legal liability that might otherwise be provided by law.

This bill creates section 331.501 of the Florida Statutes.

**II. Present Situation:**

Florida has an infrastructure of \$7 billion in aerospace assets at Cape Canaveral and an additional \$2 billion at the proposed Jacksonville Spaceport.<sup>1</sup> Florida's aerospace industry is

---

<sup>1</sup> [http://www.spaceflorida.gov/news/12-5-07\\_palm.php](http://www.spaceflorida.gov/news/12-5-07_palm.php) (last visited March 21, 2008).

comprised of hundreds of companies and thousands of workers across the state. Human space flight operations bring 68 billion into the State annually and employ 30,000 people.<sup>2</sup>

### **Federal Law**

President Bush signed the Commercial Space Launch Amendments Act of 2004 (Space Launch Act) into law on December 23, 2004.<sup>3</sup> The Space Launch Act enacted protections for space tourism businesses such as the “fly at your own risk” clause that allows a licensed party to carry space flight participants only if they “inform the space flight participant in writing about the risks of the launch and reentry, including the safety record of the launch or reentry vehicle type...”<sup>4</sup> After being fully informed, the participant must also give written consent.<sup>5</sup> The Space Launch Act includes the commercial human space flight industry in a temporary indemnification and insurance scheme that requires businesses to purchase insurance, but provides government indemnification up to \$1.5 billion beyond the insurance cap<sup>6</sup> shielding them from high insurance costs due to the risk of a catastrophic event.

### **Other States**

In 2007, Virginia adopted legislation<sup>7</sup> intended to provide immunity from liability for spaceflight activities. The Virginia law<sup>8</sup> includes all space activity – suborbital or beyond (orbital). The Virginia law applies to launch services or reentry services as defined by the federal Space Launch Act.<sup>9</sup> The Space Launch Act defines these services as:

- “Launch services” means activities involved in the preparation of a launch vehicle, payload, crew (including crew training), or space flight participant for launch; and the conduct of a launch.
- “Reentry services” means activities involved in the preparation of a reentry vehicle and payload, crew (including crew training), or space flight participant, if any, for reentry; and the conduct of a reentry.<sup>10</sup>

Further, the Virginia law provides immunity from “for a participant injury resulting from the risks of space flight activities.”<sup>11</sup>

---

<sup>2</sup> [http://www.spaceflorida.gov/news/11-01-07\\_Bigelow.php](http://www.spaceflorida.gov/news/11-01-07_Bigelow.php) (last visited March 21, 2008).

<sup>3</sup> 49 U.S.C.A. §§ 70101-70305.

<sup>4</sup> 49 U.S.C.A. § 70105(b)(5).

<sup>5</sup> 49 U.S.C.A. § 70105(b)(5)(C).

<sup>6</sup> 49 U.S.C.A. §§ 70112-13.

<sup>7</sup> 2007 Va. Acts 893.

<sup>8</sup> Va. Code § 8.01-227.8, § 8.01-227.9, and § 8.01-227.10.

<sup>9</sup> Va. Code § 8.01-227.8.

<sup>10</sup> 49 U.S.C.A. § 70102(6) and (14).

<sup>11</sup> Va. Code § 8.01-227.9.

## Exculpatory Clauses<sup>12</sup>

Exculpatory clauses extinguish or limit liability of a potentially culpable party through the use of disclaimer, assumption of risk and indemnification clauses as well as releases of liability. Exculpatory clauses will be enforced as long as the language is clear and unequivocal.<sup>13</sup> These same concepts apply to indemnification agreements, which shift liability for damages to another party, and to releases of liability.<sup>14</sup> On the other hand, exculpatory clauses that extinguish liability for intentional torts or reckless harm will generally be declared null and void.<sup>15</sup>

### III. Effect of Proposed Changes:

**Section 1** creates s. 331.501, F.S., to provide that a spaceflight entity is not liable for injury to or death of a spaceflight participant resulting from the inherent risks of spaceflight launch activities, so long as the required warning is given to and signed by the participant. The bill provides that a participant or participant's representative may not recover from a spaceflight entity for the loss, damage, or death of the participant resulting exclusively from any of the inherent risks of spaceflight activities if the spaceflight entity pleads the affirmative defense of assumption of the risk of spaceflight activities by the participant. The immunity provided by the bill does not apply if the injury was proximately caused by the spaceflight entity and the spaceflight entity:

- Commits gross negligence or willful or wanton disregard for the safety of the participant;
- Has actual knowledge or reasonably should have known of a dangerous condition; or
- Intentionally injures the participant.

To receive the immunity, the spaceflight entity must have each participant sign the required warning statement. The warning statement must contain, at a minimum, the following statement:

“WARNING: Under Florida law, there is no liability for an injury to or death of a participant in a spaceflight activity provided by a spaceflight entity if such injury or death results from the inherent risks of the spaceflight activity. Inherent risks of spaceflight activities include, among others, risks of injury to land, equipment, persons, and animals, as well as the potential for you to act in a negligent manner that may contribute to your injury or death. You are assuming the risk of participating in this spaceflight activity.”

The limitation on liability is in addition to any other limitation of legal liability that might otherwise be provided by law.

This section defines the following terms:

<sup>12</sup> The information under this heading was gleaned from “The Great Escape - HOW TO DRAFT EXCULPATORY CLAUSES THAT LIMIT OR EXTINGUISH LIABILITY,” Steven B. Lesser, Fla. B. J., (Nov. 2001).

<sup>13</sup> *University Plaza Shopping Center, Inc. v. Stewart*, 272 So. 2d 507 (Fla. 1973); *Theis v. J & J Racing Promotions*, 571 So.2d 92 (Fla. 2d D.C.A. 1990), *rev'd*, 581 So. 2d 168 (Fla. 1991); *Tout v. Hartford Accident and Indemnity Co.*, 390 So. 2d 155 (Fla. 3d D.C.A. 1980); *Ivey Plants, Inc. v. F.M.C. Corp.*, 282 So. 2d 205 (Fla. 4th D.C.A. 1973), *cert. denied*, 289 So. 2d 731 (Fla. 1974).

<sup>14</sup> *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co.*, 374 So. 2d 487, 489 (Fla. 1979); *Middleton v. Lomaskin*, 266 So. 2d 678 (Fla. 3d D.C.A. 1972).

<sup>15</sup> *Fuentes v. Owen*, 310 So. 2d 458 (Fla. 3d D.C.A. 1975); *Mankap Enterprises, Inc. v. Wells Fargo Alarm Services, Inc.*, 427 So. 2d 332 (Fla. 3d D.C.A. 1983).

- “Participant” means any person, passenger, or crew member participating in spaceflight activities.
- “Spaceflight activities” means any activities necessary or antecedent to preparing, launching, carrying, or landing a participant on a suborbital flight.
- “Spaceflight entity” means any public or private entity holding a United States Federal Aviation Administration launch, reentry, operator, or launch site license for suborbital flight.
- “Suborbital flight” means a flight that is not intended to complete an orbit around the earth and that has any portion of its intended flight path at an altitude equal to or greater than 62.5 miles above the earth’s mean sea level.

**Section 2** provides an effective date of July 1, 2008.

#### **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 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.” 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.” 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 enjoyed by the people of Florida and, if so, that it has not provided a reasonable alternative for redress and that there is not an “overpowering public necessity” for eliminating the right. This right could be implicated if a court were to find that the bill abolishes a right of access to the courts that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution.

It is unlikely that a cause of action exists presently for injury or death caused exclusively by the “inherent risks” of suborbital spaceflight. Commercial suborbital spaceflight did not exist in 1968 and therefore, there would not have been a related cause of action that existed. However, the tort of negligence is a common law tort and it could be argued that, if suing under a negligence theory, a cause of action did exist.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

This bill would limit a spaceflight entity from liability for injury to or death of a spaceflight participant resulting from the inherent risks of spaceflight launches activities, so long as the required warning is given to and signed by the participant.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.