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 Judiciary Committee

BILL:	CS/SB 2438
INTRODUCER:	Judiciary Committee and Senator Posey
SUBJECT:	Informed Consent for Spaceflight
DATE:	April 9, 2008 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Earlywine	Cooper	CM	**Favorable**
2.	Daniell	Maclure	JU	**Fav/CS**
3.				
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

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 a required warning is given to and signed 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.

The bill provides that the provisions of the newly created section will expire October 2, 2018, unless reviewed and reenacted by the Legislature.

This bill creates section 331.501, Florida Statutes.

II. Present Situation:

Space Florida Act

In 2006, the Florida Legislature passed the Space Florida Act,[1] creating Space Florida "to be the single point of contact for State aerospace related activities with federal agencies, the military, state agencies, businesses, and the private sector, consolidating the roles and responsibilities of three predecessor organizations."[2] The Legislature found that the aerospace industry would support the creation of businesses and jobs within Florida, positioning the state for sustainable economic growth and prosperity.[3]

Florida has an infrastructure of $7 billion in aerospace assets at Cape Canaveral and an additional $2 billion at the proposed Jacksonville Spaceport.[4] Florida's aerospace industry is comprised of hundreds of companies and thousands of workers across the state. Human space flight operations bring $1.68 billion into the state annually and employ 30,000 people.[5] However, there is growing competition from 13 other states, including nine states with spaceports.[6]

Federal Law

Upon recognition of the value of commercial space transportation, Congress passed the Commercial Space Launch Act in 1984 to regulate future launches.[7] Afterwards, there was debate on whether space tourism is similar to commercial aviation for regulation purposes. The Columbia Accident Investigation Board found:

> Since *Sputnik*, humans have launched just over 4,500 rockets … During the first 50 years of aviation, there were over one million aircraft built. Almost all of the rockets were used only once; most of the airplanes were used more often … Aircraft seldom crash these days, but rockets still fail between two-and-five percent of the time … Because of the dangers of ascent and re-entry, because of the hostility of the space environment, and because we are still relative newcomers to this realm, operation of the Shuttle and indeed all human spaceflight must be viewed as a developmental activity … Throughout the *Columbia* accident investigation, the Board has commented on the widespread but erroneous perception of the Space Shuttle as somehow comparable to civil or

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[1] Chapter 2006-60, s. 1, Laws of Fla., codified in part II of ch. 331, F.S.
[2] Space Florida, *Annual Report Fiscal Year 2007, available at* http://www.spaceflorida.gov/docs/Space%20Florida%20Annual%20Report%2032007.pdf (last visited April 3, 2008). The three organizations that were consolidated by the Space Florida Act were Florida Space Authority, Florida Space Research Institute, and Florida Aerospace Finance Corporation. Space Florida, *History of Space Florida, available at* http://www.spaceflorida.gov/history.php (last visited April 3, 2008).
[3] Section 331.3011(1), F.S.
[4] *Steve Kohler, Space Florida President and Marshall Heard, Space Florida Consultant, met with 150 business people at the Marriott Hotel in Palm Beach Gardens*, http://www.spaceflorida.gov/news/12-5-07_palm.php (last visited April 3, 2008).
[5] *Space Florida and Bigelow Aerospace Join Forces to Explore Orbital Space Transportation Initiative*, http://www.spaceflorida.gov/news/11-01-07_Bigelow.php (last visited April 3, 2008).
[6] *Steve Kohler*, *supra* note 4.
[7] Catherine E. Parsons, *Space Tourism: Regulating Passage to the Happiest Place Off Earth*, 9 CHAP. L. REV. 493, 511 (2006).

> military air transport. They are not comparable; the inherent risks of spaceflight are vastly higher, and our experience level with spaceflight is vastly lower.[8]

On December 23, 2004, President Bush signed the Commercial Space Launch Amendments Act (Space Launch Act) into law to provide additional statutory authority for personal spaceflight in the United States.[9] 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."[10] After being fully informed, the participant must provide written consent to participate in the launch and reentry.[11]

The Space Launch Act includes the commercial human spaceflight industry in a temporary indemnification and insurance arrangement that requires businesses to purchase liability insurance, but provides government indemnification up to $1.5 billion beyond the insurance cap, shielding the businesses from high insurance costs due to the risk of a catastrophic event.[12]

In 2012, full regulatory control of the Space Launch Act will be given to the Federal Aviation Administration.[13]

Other States

In 2007, Virginia adopted legislation intended to provide immunity from liability for spaceflight activities.[14] The Virginia law applies to launch services or reentry services as defined by the federal Space Launch Act.[15] The federal 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 for reentry and the conduct of a reentry.[16]

Further, the Virginia law provides immunity "for a participant injury resulting from the risks of space flight activities."[17] The participant must be informed of the risks of spaceflight and give

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[8] Columbia Accident Investigation Board, Report Vol. I, at 19, 208 (Aug. 2003), *available at* http://caib.nasa.gov/news/report/pdf/vol1/full/caib_report_volume1.pdf (last visited April 6, 2008).
[9] Commercial Space Transportation, Federal Aviation Administration, *Quarterly Launch Report 4th Quarter*, SR-1 (2006). The Space Launch Act is codified in 49 U.S.C. ss. 70101-70305.
[10] 49 U.S.C. s. 70105(b)(5)(A).
[11] 49 U.S.C. s. 70105(b)(5)(C).
[12] *See* 49 U.S.C. ss. 70112-13; *see also* Catherine E. Parsons, *supra* note 7, at 513.
[13] Catherine E. Parsons, *supra* note 7, at 514.
[14] Va. Code s. 8.01-227.8, s. 8.01-227.9, and s. 8.01-227.10.
[15] Va. Code s. 8.01-227.8.
[16] 49 U.S.C. s. 70102(6) and (14).
[17] Va. Code s. 8.01-227.9.

informed consent that he is voluntarily participating in spaceflight activities.[18] All participants must sign a warning statement in substantially the following form:

> WARNING AND ACKNOWLEDGMENT: I understand and acknowledge that, under Virginia law, there is no civil liability for bodily injury, including death, emotional injury, or property damage sustained by a participant in space flight activities provided by a space flight entity if such injury or damage results from the risks of the space flight activity. I have given my informed consent to participate in space flight activities after receiving a description of the risks … pursuant to 49 U.S.C. § 70105 and 14 C.F.R. § 460.45. The consent that I have given acknowledges that the risks of space flight activities include, but are not limited to, risks of bodily injury, including death, emotional injury, and property damage. I understand and acknowledge that I am participating in space flight activities at my own risk. I have been given the opportunity to consult with an attorney before signing this statement.[19]

Exculpatory Clauses

"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."[20] The most common exculpatory clauses are the waiver of liability and assumption of risk clauses.[21] Although sometimes disfavored, exculpatory clauses will be enforced in Florida as long as the language is clear and unequivocal.[22] "'The wording of such an agreement must be so clear and understandable that an ordinary and knowledgeable party to it will know what he is contracting away.'"[23] These same concepts apply to indemnification agreements, which shift liability for damages to another party, and to releases of liability.[24] Florida case law has also found that an exculpatory clause can properly waive liability for gross negligence.[25] On the other hand, exculpatory clauses that extinguish liability for intentional torts or reckless harm will generally be declared null and void.[26]

III. Effect of Proposed Changes:

This bill 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,

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[18] *Id*.
[19] Va. Code s. 8.01-227.10.
[20] Steven B. Lesser, *How to Draft Exculpatory Clauses that Limit or Extinguish Liability*, 75 FLA. B.J. 10 (Nov. 2001).
[21] Mario R. Arango, *The Sports Chamber: Exculpatory Agreements Under Pressure*, 14 U. MIAMI ENT. & SPORTS L. REV. 1, 7-8 (1997).
[22] *See Middleton v. Lomaskin*, 266 So. 2d 678, 680 (Fla. 3d DCA 1972); *Tout v. Hartford Acc. & Indem. Co*., 390 So. 2d 155, 156 (Fla. 3d DCA 1980); *Theis v. J & J Racing Promotions*, 571 So. 2d 92, 94 (Fla. 2d DCA 1990); *Banfield v. Louis*, 589 So. 2d 441, 444 (Fla. 4th DCA 1991); *Cain v. Banka*, 932 So. 2d 575, 578 (Fla. 5th DCA 2006).
[23] Steven B. Lesser, *supra* note 20, at 12 (quoting *Fuentes v. Owen*, 310 So. 2d 458, 459-60 (Fla. 3d DCA 1975)).
[24] *See University Plaza Shopping Center, Inc. v. Stewart*, 272 So. 2d 507, 511 (Fla. 1973); *Ivey Plants, Inc. v. F.M.C. Corp*., 282 So. 2d 205, 209 (Fla. 4th DCA 1973); *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co.*, 374 So. 2d 487, 489 (Fla. 1979).
[25] *See Theis*, 571 So. 2d at 94.
[26] *See Fuentes v. Owen*, 310 So. 2d 458, 460 (Fla. 3d DCA 1975); *Mankap Enterprises, Inc. v. Wells Fargo Alarm Servs., Inc.*, 427 So. 2d 332, 334 (Fla. 3d DCA 1983).

so long as a 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. 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;[27] or
- Intentionally injures the participant.

To receive the immunity, the spaceflight entity must have each participant sign a 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. Injuries caused by the inherent risks of spaceflight activities may include, among others, 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.

While the warning statement speaks of the negligence of the participant, it does not specifically speak to the space flight entity's negligence. Based on case law, the Legislature may wish to add language to the warning statement indicating the intent to either release or indemnify the space flight entity for its own negligence or that of its employees.[28]

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

The bill defines the following terms:

- "Participant" means "any space flight participant as that term is defined in 49 U.S.C. s. 70102."[29]
- "Spaceflight activities" means "launch services or reentry services as those terms are defined in 49 U.S.C. s. 70102."[30]

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[27] The bill does not define a "dangerous condition."

[28] *Compare Theis v. J & J Racing Promotions*, 571 So. 2d 92, 94 (Fla. 2d DCA 1990) (holding that exculpatory language that released the defendants from liability whether caused by "the negligence of releasees or otherwise" was specific enough to protect the defendants from their own negligence, simple or gross), *with O'Connell v. Walt Disney World Co.*, 413 So. 2d 444, 447 (Fla. 5th DCA 1982) (holding that "the only risks referred to in the agreement here were those 'inherent in horseback riding.' Therefore, this provision would not bar recovery for injuries resulting from defendant's negligence because it is not so expressly stated"), *and Van Tuyn v. Zurich American Ins. Co.*, 447 So. 2d 318, 320 (Fla. 4th DCA 1984) (finding that the scope of the release signed by the patron of "any and all claims" failed to include language manifesting the intent to release or indemnify the defendant for his own negligence).

[29] 49 U.S.C. s. 70102 defines "space flight participant" as "an individual, who is not crew, carried within a launch vehicle or reentry vehicle."

[30] For the definition of "launch services" and "reentry services" see the Present Situation section of this analysis.

- "Spaceflight entity" means "any public or private entity holding a United States Federal Aviation Administration launch, reentry, operator, or launch site license for spaceflight activities."

The bill provides that the provisions of the new section will expire October 2, 2018, unless reviewed and reenacted by the Legislature.

The bill provides an effective date of October 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:

This bill possibly implicates the right of access to the courts under article I, section 21 of the Florida Constitution by eliminating or circumscribing an individual's right of action against spaceflight entities for injuries that may occur while participating in spaceflight activities. 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."[31] Constitutional limitations were placed on the Legislature's right to abolish a cause of action in the Florida Supreme Court case *Kluger v. White*, 281 So. 2d 1 (Fla. 1973). The Court held:

> [W]here a right of access … has been provided … the Legislature is without power to abolish such a right without providing a reasonable alternative … 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.[32]

It is unclear whether the Legislature can abolish a narrow cause of action that did not pre-date the Declaration of Rights when a broader cause of action did exist prior to 1968. It

[31] 10A FLA. JUR 2D *Constitutional Law* s. 360. When analyzing an access to courts issue, the Florida Supreme Court clarified that 1968 is the relevant year in deciding whether a common law cause of action existed. *Eller v. Shova*, 630 So. 2d 537, 542 n. 4 (Fla. 1993).
[32] *Kluger*, 281 So. 2d at 4.

may be argued that since commercial suborbital spaceflight did not exist in 1968, it is unlikely that a cause of action existed at common law, or even exists presently, for injury or death caused exclusively by the "inherent risks" of suborbital spaceflight. 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, creating an access to courts issue.

There is precedent in Florida law regarding the application of exculpatory and assumption of risk clauses.[33] For example, s. 773.02, F.S., provides, in part, that:

> [A]n equine activity sponsor, an equine professional, or any other person, which shall include a corporation or partnership, shall not be liable for an injury to or the death of a participant resulting from the inherent risks of equine activities … [N]o participant nor any participant's representative shall have any claim against or recover from any equine activity sponsor, equine professional, or any other person for injury, loss, damage, or death of the participant resulting from any of the inherent risks of equine activities.

The court in *McGraw v. R & R Investments, Ltd.*, consistently construed s. 773.02, F.S., with the "legislative purpose to furnish immunity to a sponsor from liability for injuries resulting from inherent risks of equine activities in circumstances where a participant is fully aware of the sponsor's nonliability for any injury incurred by the participant in such activities."[34] It does not appear that an access to court issue has been raised in these instances.

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. This bill has the potential to limit the cost of litigation to businesses engaging in spaceflight activities.

C. Government Sector Impact:

None.

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[33] See ss. 549.09(2) and 773.02, F.S. Section 549.09(2), F.S., provides that any person operating a closed-course motorsport facility may require the signing of a liability release form, as a condition to admission. The release form puts the person on notice that certain entities cannot be held liable for negligence which proximately causes injury or property damage to the person.

[34] *McGraw*, 877 So. 2d 886, 893 (Fla. 1st DCA 2004).

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.)

CS by Judiciary on April 8, 2008:
The committee substitute:

- Aligns certain definitions with the federal law and removes the definition of "suborbital flight";
- Removes language that, in any action for damages, the spaceflight entity shall plead the affirmative defense of assumption of the risk of spaceflight activities by the participant;
- Provides that the provisions of the bill will expire October 2, 2018, unless reviewed and reenacted by the Legislature;
- Changes the effective date from July 1, 2008, to October 1, 2008; and
- Makes technical or conforming changes.

B. Amendments:

None.