

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 737

Informed Consent for Spaceflight

SPONSOR(S): Simmons

TIED BILLS:

IDEN./SIM. BILLS: SB 2438

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Committee on Constitution & Civil Law	7 Y, 0 N	Thomas	Birtman
2) Safety & Security Council			
3) Policy & Budget Council			
4) _____			
5) _____			

SUMMARY ANALYSIS

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

This bill does not appear to have a fiscal impact on state or local government.

The bill takes effect on October 1, 2008.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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DATE: 3/13/2008

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote personal responsibility - The bill provides protection from civil liability to a spaceflight entity for injury to or death of a participant resulting from the inherent risks of spaceflight launch activities.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Florida has an infrastructure of \$7 billion in aerospace assets and an additional \$2 billion in assets at the proposed Jacksonville Spaceport. Florida's aerospace industry is comprised of some 1000 companies and thousands of workers across the state. Human space flight operations are a critical part of Florida's economy – bringing \$1.68 billion into the State annually and employing 30,000 people. However, there is growing competition from 13 other states, including nine states with spaceports. Florida has aerospace-related industry in 47 of its 67 counties. The global space industry is expected to bring in \$220 billion in revenue in 2007, up from \$207 billion last year. A concern for Florida is what will happen to the state's 9,300 aerospace workers between the retirement of the space shuttle fleet in 2010 and launches of the next-generation shuttle in 2013 to 2015.¹

Space Florida is the principal organization charged by the Florida Legislature with promoting and developing Florida's aerospace industry.² As reported by Space Florida:

Florida is the premier launch site for the aerospace industry. With our current infrastructure, competitive edge, and talented workforce, Florida is the natural state to establish an international aerospace spaceport. As home to one of only five commercially licensed spaceports in the United States, Florida has the ability to host commercial, civil and military space operations.

Increasing interest in capturing the aerospace business has some states stepping up their recruiting efforts and incentive plans. These states include California, Virginia, Colorado, Texas and New Mexico. We must aggressively retain and grow our state's aerospace industry to compete in this race.

In order to preserve the vibrant commercial aerospace industry and Florida's workforce, we must firmly position operations in Florida to capture the market of commercial launch business, and more importantly, service the International Space Station (ISS) for NASA. The United States portion of ISS has been designated a National Lab and offers Florida not only space-related support opportunities but also research opportunities in the unique space environment for Florida universities and companies.

[Florida must] maintain our competitive edge by recruiting new space and aerospace businesses to Florida, retaining those businesses being lured by other states, and

¹ This information was gleaned from the website of Space Florida at <http://www.spaceflorida.gov> (last visited on March 10, 2008).

² Section 331.302, F.S.

assisting existing businesses with incentives and other support to expand their presence in Florida; limit the liability of commercial launch firms and their subcontractors who provide human spaceflight services from Florida launch sites; and help Florida attract commercial launch providers and their subcontractors by limiting liability for human Space flight services from Florida launch sites.³

Federal Law

President Bush signed the Commercial Space Launch Amendments Act of 2004 (Space Launch Act) into law on December 23, 2004.⁴ 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...”⁵ After being fully informed, the participant must also give written consent.⁶ 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 cap⁷ shielding them from high insurance costs due to the risk of a catastrophic event.

Other States

In 2007, Virginia adopted legislation⁸ that is the model for HB 737. The Virginia law⁹, however, is not limited to suborbital space activity, but 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.¹⁰ The Space Launch Act defines these services as:

“launch services” means—

- (A) activities involved in the preparation of a launch vehicle, payload, crew (including crew training), or space flight participant for launch; and
- (B) the conduct of a launch.

“reentry services” means—

- (A) activities involved in the preparation of a reentry vehicle and payload, crew (including crew training), or space flight participant, if any, for reentry; and
- (B) the conduct of a reentry.¹¹

Further, the Virginia law does not provide immunity from “the inherent risks of spaceflight”, but rather “for a participant injury resulting from the risks of space flight activities.”¹²

³ From white paper submitted on March 7, 2008, by Space Florida and on file with the Committee on Constitution & Civil Law.

⁴ 49 U.S.C.A. §§ 70101-70305.

⁵ 49 U.S.C.A. § 70105(b)(5).

⁶ 49 U.S.C.A. § 70105(b)(5)(C).

⁷ 49 U.S.C.A. §§ 70112-13.

⁸ 2007 Va. Acts 893.

⁹ Va. Code § 8.01-227.8, § 8.01-227.9, and § 8.01-227.10.

¹⁰ Va. Code § 8.01-227.8.

¹¹ 49 U.S.C.A. § 70102(6) and (14).

¹² Va. Code § 8.01-227.9.

Exculpatory Clauses¹³

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.¹⁴ These same concepts apply to indemnification agreements, which shift liability for damages to another party, and to releases of liability.¹⁵ On the other hand, exculpatory clauses that extinguish liability for intentional torts or reckless harm will generally be declared null and void.¹⁶

Effect of Proposed Changes

The 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. 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 defense¹⁷ 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 provided by the bill, 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."

¹³ 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).

¹⁴ *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).

¹⁵ *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).

¹⁶ *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).

¹⁷ An affirmative defense is "A defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true. The defendant bears the burden of proving an affirmative defense. Examples of affirmative defenses are duress (in a civil case) and insanity and self-defense (in a criminal case). Black's Law Dictionary (8th ed. 2004).

The limitation on liability provided by the bill 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 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 altitude equal to or greater than 62.5 miles above the earth's mean sea level.

The bill has an effective date of October 1, 2008.

C. SECTION DIRECTORY:

Section 1: Creates Part III of Chapter 331, F.S., consisting of s. 331.501, F.S., relating to informed consent for suborbital spaceflight.

Section 2: Provides an effective date of October 1, 2008.

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:

The bill is designed to encourage the expansion of the commercial space industry in Florida and therefore, serve as an economic stimulus to the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill 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.

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." 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."¹⁸ 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.¹⁹ 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.²⁰ However, it is unlikely that a cause of action exists presently for injury or death caused exclusively by the "inherent risks" of suborbital spaceflight.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Members may want to consider if the term "antecedent" on line 22 is too broad when applied to the definition of "spaceflight activities."

Members may want to consider removing the word "launch" on line 34. On lines 34 and 35, the bill uses the term "space launch activities" - but elsewhere in the bill the term "spaceflight activities" is used. This appears to be inconsistent.

¹⁸ Fla. Jur. 2d., s. 360.

¹⁹ *Kluger v. White*, 281 So.2d 1, 4 (Fla. 1973).

²⁰ The enactment of the Declaration of Rights of the Florida Constitution was part of Florida's new constitution of 1968 and occurred when it was ratified by the electorate on November 5, 1968.

It appears that the phrase on lines 74 and 75 – “Inherent risks of spaceflight activities include, among others, risks of injury to land, equipment, persons, ...” – may be a bit confusing. A better phrase may be – “Injuries caused by the inherent risks of spaceflight activities may include, among others, injury to land, equipment, persons, ...”

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On March 12, 2008, the Committee on Constitution & Civil Law recommended four amendments to the bill. The amendments provide as follows:

Amendment 1:

- Expands the application of the bill from just suborbital spaceflight activities to include all spaceflight activities.
- Amends the definition of "spaceflight activities" to include only those activities necessary to preparing, launching, carrying, or landing a vehicle and any payload, crew, or participant from Earth - rather than also including those activities merely “antecedent” to such.
- Corrects a reference on lines 34 and 35 of the bill referring to “spaceflight launch activities” to read “spaceflight activities.”

Amendment 2 removes the word “gross” from line 49 of the bill in order to specifically exclude all negligence from those risks that may be included within the phrase “inherent risks of spaceflight activities.”

Amendment 3 rephrases language in the mandatory warning statement for clarity.

Amendment 4 removes the requirement in the bill that the immunity must be pled as an affirmative defense.