HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 201 Negligence
SPONSOR(S): O'Toole
TIED BILLS: None **IDEN./SIM. BILLS:** SB 142

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Woodburn	Bond
2) Judiciary Committee			

SUMMARY ANALYSIS

Crashworthiness cases are a subset of product liability claims in which the plaintiff claims that a defect in the manufacture or design of an automobile caused or enhanced injuries suffered during an automobile accident. There is a majority and minority view amongst the various federal and state courts interpreting the application of the crashworthiness doctrine. The majority view allows the jury to hear evidence relating to the cause of the initial automobile accident and to apportion fault amongst the named parties, including the plaintiff. The minority view, which Florida courts currently follow, does not allow juries to hear evidence relating to the initial cause of the automobile accident.

The bill changes the apportionment of damages in products liability cases in which a plaintiff alleges an additional or enhanced injury (e.g., crashworthiness cases). More specifically, the statute would require Florida courts to follow the majority view and require the jury in these cases to consider the fault of all persons who contributed to the accident when apportioning fault among the parties who contributed to the accident.

This bill may have a minimal nonrecurring expense to the State court system. The bill does not appear to have a fiscal impact on local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Contributory Negligence and Comparative Negligence in Florida

Prior to 1973, Florida courts followed the legal doctrine of contributory negligence in tort actions.[1] Contributory negligence is a defense against a claim of negligence which provides that if a plaintiff is responsible in any way for his or her injury the plaintiff will not be able to recover any damages from the defendant.[2] For example, if the plaintiff was five percent responsible for the accident and the defendant was ninety-five percent responsible, the plaintiff would not be able to recover any damages from the defendant since he or she was partly responsible.

The Florida Supreme Court, in *Hoffman v. Jones*, retreated from the application of contributory negligence and adopted pure comparative negligence.[3] The court reasoned that:

> . . . the most equitable result that can ever be reached by a court is the equation of liability with fault. Comparative negligence does this more completely than contributory negligence, and we would be shirking our duty if we did not adopt the better doctrine.[4]

The doctrine of comparative negligence is now codified in Florida law. The law provides that "any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery."[5] Current law explicitly provides that the comparative fault principles apply in products liability actions.[6] Under comparative negligence, if the plaintiff is five percent liable and the defendant is ninety-five percent, the plaintiff's awarded damages will be reduced by his or her amount of liability, in this case, five percent.

The legal doctrine of joint and several liability evolved with contributory negligence.[7] The application of joint and several liability allows a plaintiff to collect the full amount of damages against one of the defendants in a multiple defendant case.[8] For example, if one defendant was thirty-five percent at fault and the other defendant was sixty-five percent at fault, the plaintiff could recover the total amount of damages from either defendant regardless of the amount at fault.

Following the culmination of additional reforms to the application of joint and several liability, in 2006 the Legislature generally repealed the application of joint and several liability for negligence actions.[9] It amended s. 768.81, F.S., to provide, subject to limited exceptions, for apportionment of damages in negligence cases according to each party's percentage of fault, rather than under joint and several liability.[10]

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[1] *Louisville and Nash Railroad Company v. Yniestra*, 21 Fla. 700 (Fla. 1886) (Case in which Florida adopted contributory negligence)
[2] "The contributory negligence doctrine, which evolved from an 1809 English case, is described as an 'all or nothing rule' for the plaintiff" *Smith v. Dep't of Insurance*, 507 So.2d 1080, 1090 (Fla. 1987) (Describing English case *Butterfield v. Forester*, 103 Eng.Rep. 926 (K.B. 1809).
[3] *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).
[4] *Id*. at 438.
[5] Section 768.81(2), F.S.
[6] Section 768.81(4)(a), F.S.
[7] *Id*. at 1091.
[8] *Id*.
[9] Chapter 2006-6, s. 1, Laws of Fla.
[10] Section 768.81(3), F.S.

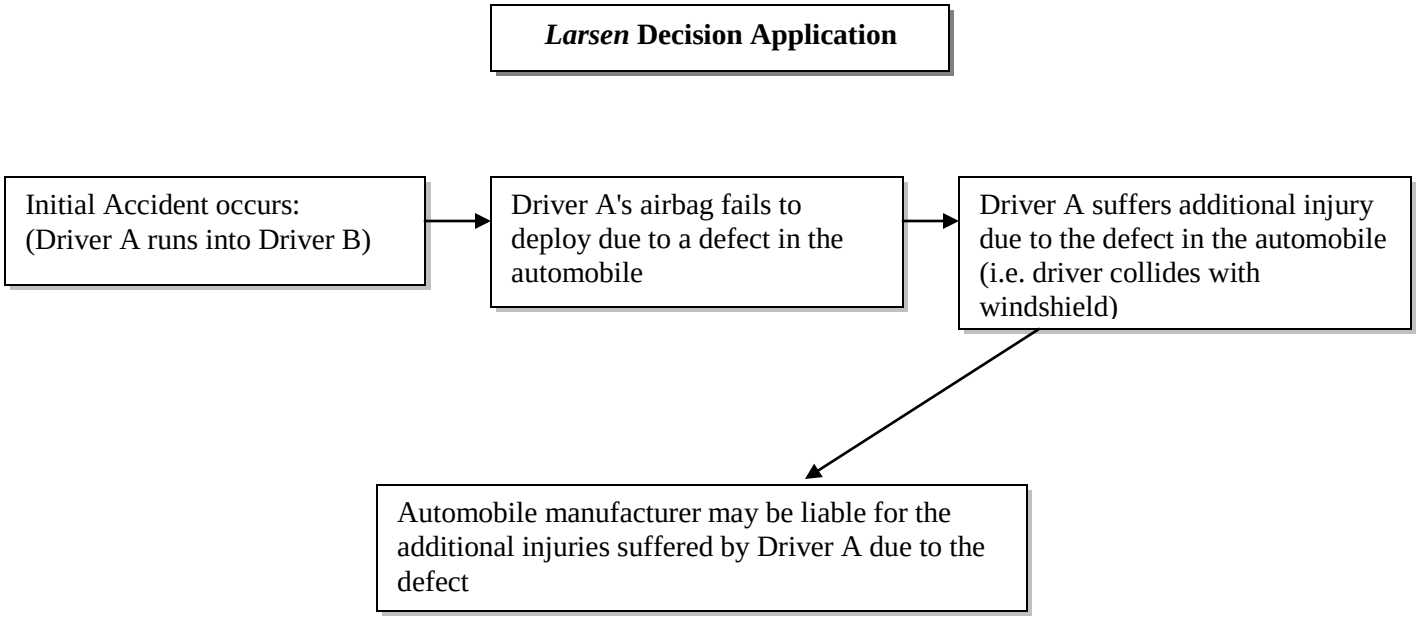
Evolution of Crashworthiness Doctrine

Larsen Decision

Prior to 1968, courts in the United States did not allow those injured in automobile accidents to hold automobile manufacturers liable for injuries sustained where the negligence of the driver or a third party caused the accident, including scenarios in which an automobile defect contributed to the injuries sustained.[11] This changed with the U.S. Court of Appeal Eighth Circuit's decision in *Larsen v. General Motors Corp*.[12]

In *Larsen*, the plaintiff was injured after a head-on collision that caused the steering mechanism to strike the plaintiff in the head. The federal court held that, because automobile accidents involving collisions are often inevitable and foreseeable, manufacturers have a duty to exercise reasonable care in designing vehicles for the safety of users.[13]

When faced with the practical application of the crashworthiness doctrine, many jurisdictions continue to grapple with whether a defendant automobile manufacturer may introduce evidence of, or assert as a defense, the comparative fault or contributory negligence of the driver or a third party in causing the initial collision.[14] Some state courts have concluded that "introduction of principles of negligence into what would otherwise be a straightforward product liability case is not allowed."[15] Conversely, a majority of courts have allowed defendants to introduce evidence of the driver's or a third party's negligence in causing the initial collision.[16]



[11] Schwartz, Victor E., *Fairly Allocating Fault Between a Plaintiff whose Wrongful Conduct Caused a Car accident and a Automobile Manufacturer Whose Product Allegedly "Enhanced" the Plaintiff's Injuries.* Available on file with the House of Representatives Civil Justice Subcommittee.
[12] *Larsen v. General Motors Corp*., 391 F.2d 495 (8th Cir. 1968).
[13] *Id*. at 502.
[14] Mary E. Murphy, Annotation, *Comparative Negligence of Driver as Defense to Enhanced Injury, Crashworthiness, or Second Collision Claim*, 69 A.L.R. 5TH 625, 625 (1999).
[15] *Id.*
[16] *Id.*

Majority View

A majority of states have adopted the view that a manufacturer's fault in causing additional or enhanced injuries may be reduced by the fault of a plaintiff or third party who caused or contributed to the primary collision.[17] For example, in a Delaware crashworthiness case, the plaintiff's automobile was struck by another vehicle when the plaintiff allegedly failed to stop at a stop sign.[18] As a result, the automobile's airbag deployed and crushed the plaintiff's fingers. The defendant automobile manufacturer argued that the plaintiff's recovery should be reduced by his comparative fault in failing to stop at the stop sign and causing the initial accident. The court concluded that the cause of the initial accident is a proximate cause of the subsequent collision and the resulting enhanced injuries to the plaintiff's fingers. The court further opined that:

> "[i]t is obvious that the negligence of a plaintiff who causes the initial collision is one of the proximate causes of all of the injuries he sustained, whether limited to those the original collision would have produced or including those enhanced by a defective product in the second collision."[19]

Some courts following the majority position have reasoned that, in crashworthiness cases, the person causing the initial collision may be liable for the subsequent negligence of the automobile manufacturer because any enhanced injuries resulting from the second collision are foreseeable consequences of the first collision.[20] For example, in an Alaska crashworthiness case, the court allowed the automobile manufacturer to assert that its liability for a defective seatbelt system should be reduced because the initial head-on collision was caused by a third party.[21] The court sided with the manufacturer, citing that "[a]n original tortfeasor is considered a proximate cause, as a matter of law, of injuries caused by subsequent negligen[ce]" of the manufacturer of the defective product.[22]

Other courts holding the majority view have also ruled that "general fairness and public policy considerations require that the fault of the original tortfeasor be considered in apportioning liability for enhanced injuries."[23] Courts have also recognized that the application of comparative fault in crashworthiness cases enhances the public's interest in deterring drivers from driving negligently.[24]

Minority View

A minority of courts have adopted the theory that, because an automobile manufacturer is solely responsible for any product defects, the manufacturer should also be solely liable for the enhanced injuries caused by those defects. The minority position results from "a stricter construction of the crashworthiness doctrine that treats each collision as a separate event with independent legal causes and injuries."[25] Further reasoning behind the minority view is that a manufacturer maintains a duty to anticipate the foreseeable negligence of users of the automobile, as well as the foreseeable negligence of third parties.[26]

One federal court applied the minority view in a crashworthiness case and ruled that:

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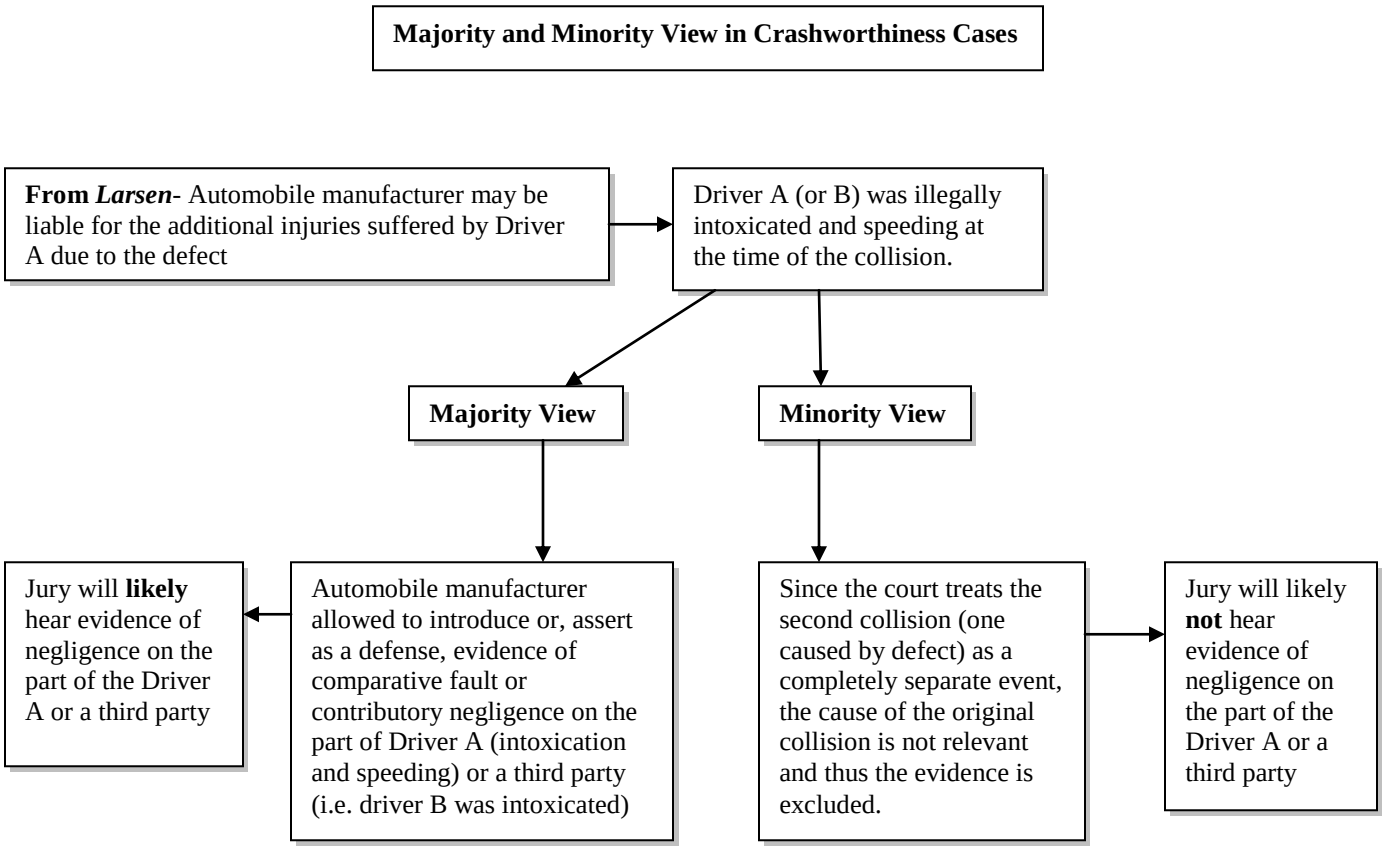
[17] Edward M. Ricci et al., *The Minority Gets It Right: The Florida Supreme Court Reinvigorates the Crashworthiness Doctrine in D'Amario v. Ford*, 78 FLA. B.J. 14, 14 (June 2004). Some of the states recognizing the majority view include: Alaska, Arkansas, California, Colorado, Delaware, Louisiana, Indiana, North Carolina, North Dakota, Oregon, Tennessee, Washington, Wyoming, and Iowa.
[18] *Meekins v. Ford Motor Co.*, 699 A.2d 339 (Del. Super. Ct. 1997).
[19] *Id.* at 346.
[20] Ricci, *supra* note 9, at 18.
[21] *General Motors Corp. v. Farnsworth*, 965 P.2d 1209 (Alaska 1998).
[22] *Id.* at 1217-18
[23] Ricci, *supra* note 9, at 18 (citing W*hitehead v. Toyota Motor Corp.*, 897 S.W.2d 684, 695 (Tenn. 1995)).
[24] *Moore v. Chrysler Corp.*, 596 So. 2d 225, 238 (La. Ct. App. 1992).
[25] Ricci, *supra* note 9, at 18.
[26] Schwartz, *supra* note 1, at 10.

> Because a collision is presumed, and enhanced injury is foreseeable as a result of the design defect, the triggering factor of the accident is simply irrelevant. . . . Further, the alleged negligence causing the collision is legally remote from, and thus not the legal cause of, the enhanced injury caused by a defective part that was supposed to be designed to protect in case of a collision.[27]

A federal district court in Ohio excluded evidence of a driver's intoxication at the time of the accident in a products liability action against the automobile manufacturer.[28] In addition to ruling that the probative value of the evidence of intoxication was outweighed by the danger that the jury could misuse the information, the court reasoned that it was foreseeable that front-end collisions occur and that an automobile manufacturer is under an obligation under Ohio law to use reasonable care in designing vehicles that do not expose a user to unreasonable risks.[29]

The rationale underlying the minority view may also flow from a public policy belief that allowing manufacturers to avoid or reduce their liability through application of comparative fault will reduce the manufacturer's incentive to design a safe automobile for consumer use.[30] One court opined that "[a] major policy behind holding manufacturers strictly liable for failing to produce crashworthy vehicles is to encourage them to do all they reasonably can do to design a vehicle which will protect a driver in an accident."[31]



[27] *Jimenez v. Chrysler Corp.*, 74 F. Supp. 2d 548, 566 (D.S.C. 1999), *reversed in part and vacated*, 269 F.3d 439 (4th Cir. 2001).
[28] *Mercurio v. Nissan Motor Corp.*, 81 F. Supp. 2d 859 (N.D. Ohio 2000).
[29] *Id.* at 861.
[30] Ricci, *supra* note 9, at 18-20.
[31] *Id.* at 20 (quoting *Andrews v. Harley Davidson, Inc.*, 769 P.2d 1092, 1095 (Nev. 1990)).

Crashworthiness in Florida

Prior to 2001, Florida courts generally applied comparative fault principles in crashworthiness cases where the injury was caused by the initial collision or was an enhanced injury caused by a subsequent collision.[32] For example, in *Kidron, Inc. v. Carmona*,[33] a mother and child brought a wrongful death action for the death of the father in a collision with a truck that had stalled, as well as an action against the manufacturer of the truck alleging strict liability for the manufacturer's design of the rear under-ride guard.[34] The court held that "principles of comparative negligence should be applied in the same manner in a strict liability suit, regardless of whether the injury at issue has resulted from the primary or secondary collision."[35] The court further recognized that:

> . . . fairness and good reason require that the fault of the defendant and of the plaintiff should be compared with each other with respect to all damages and injuries for which the conduct of each party is a cause in fact and a proximate cause.[36]

As a result, the court concluded that the decedent's negligence in failing to avoid the collision should be considered along with the manufacturer's liability in the design of the truck, as well as any other entity or person who contributed to the accident regardless of whether that entity was joined as a party.[37]

In 2001, the Florida Supreme Court retreated from the application of comparative fault and the holding in *Kidron, Inc.*, and adopted the minority view in crashworthiness cases. The seminal decision in *D'Amario v. Ford Motor Company* precludes the jury[38] from apportioning fault to a party contributing to the cause of the initial collision when considering liability for enhanced injuries resulting from a second collision.[39]

In its examination of liability and admissibility of evidence in these cases, the Florida Supreme Court concluded that the "principles of comparative fault involving the causes of the first collision do not generally apply in crashworthiness cases."[40] In reaching its conclusion, the court compared crashworthiness cases to medical malpractice actions in which the cause of an initial injury that may require medical treatment is not ordinarily considered as a legal cause of enhanced injuries resulting from subsequent negligent treatment.[41] The court further noted that:

> . . . unlike automobile accidents involving damages solely arising from the collision itself, a defendant's liability in a crashworthiness case is predicated upon the existence of a distinct and second injury caused by a defective product, and assumes the plaintiff to be in the condition to which he is rendered after the first accident. No claim is asserted, however, to hold the defendant liable for that condition. Thus, crashworthiness cases involve separate and distinct injuries–those caused by the initial collision, and those subsequently caused by a second collision arising from a defective product.[42]

The court held that the focus in crashworthiness cases is the enhanced injury; therefore, consideration of the conduct that allegedly caused the enhanced and secondary injuries is pivotal, not the conduct

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[32] Schwartz, *supra* note 1, at 6.
[33] *Kidron, Inc. v. Carmona*, 665 So. 2d 289 (Fla. 3d DCA 1995).
[34] *Id.*
[35] *Id.* at 292.
[36] *Id.*
[37] *Id.* at 293.
[38] Most trials are in front of a jury, but the parties may opt to waive a jury trial and elect to try the case before a judge, but the legal standards are the same.
[39] *D'Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2001).
[40] *D'Amario*, 806 So. 2d at 441.
[41] *Id.* at 435. In addition, the court recognized that in medical malpractice actions, an initial tortfeasor who causes an injury is not to be considered a joint tortfeasor. *Id.*
[42] *Id.* at 436-47.

that gave rise to the initial accident.[43] As a result, the court concluded that admission of evidence related to the intoxication of the non-party drivers, which caused the initial collisions, unduly confused the jury and shifted the focus away from determining causation of the enhanced injuries.[44]

Effect of Proposed Changes

The bill changes the apportionment of damages in products liability cases in which a plaintiff, involved in an accident, alleges an additional or enhanced injury caused by a defective product (e.g., crashworthiness cases). More specifically, the jury in these cases must consider the fault of all persons who contributed to the accident when apportioning fault between or among them which effectively changes Florida to the majority opinion in crashworthiness cases.

For example, if a driver ran a stop sign and caused an accident and then claimed that a defect in the automobile caused enhanced injury, the jury would not be able to hear evidence relating to the driver's negligence (in this example running the stop sign). Under the proposed changes in the bill, the jury would now be required to hear evidence of the driver's negligence in order to apportion fault.

The bill reorganizes the comparative fault statute by changing the term “negligence cases” to “negligence action,” revising the definition slightly, and moving the definition of “negligence action” to the definitions subsection in the current comparative law statute. The bill also defines a “products liability action” as a civil action based upon a theory of strict liability, negligence, breach of warranty, nuisance, or similar theories for damages caused by the manufacture, construction, design, formulation, installation, preparation, or assembly of a product. This definition specifies that the term includes those claims in which the alleged injuries were greater than the injury would have been, but for the defective product. The definition of “products liability action” also provides that the substance of the claim, not the conclusory terms used by a party, determines whether an action satisfies the definition.

The bill contains legislative intent language and findings that the act is intended to be applied retroactively and overrule *D'Amario v. Ford Motor Co.* It includes a finding that the retroactive application of the act does not unconstitutionally impair vested rights, but affects only remedies, permitting recovery against all tortfeasors while lessening the ultimate liability of each consistent with the state's statutory comparative fault system.

The bill will take effect upon becoming law.

B. SECTION DIRECTORY:

Section 1 amends s. 768.81, F.S. by adding definitions.

Section 2 amends s. 25.077, F.S. by conforming cross references

Section 3 contains legislative intent.

Section 4 contains an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

[43] *Id.* at 437.

[44] The court also ruled that driving while intoxicated does not fall within the “intentional tort” exception to the comparative fault statute. *See* s. 768.81(4)(b), F.S.

2. Expenditures:

   This bill may have a minimal nonrecurring expense to the State court system. See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The Office of State Court Administrators (OSCA) evaluated an almost identical House bill last year (HB433, 2010 Reg. Sess.) and reported that the fiscal impact to the judiciary could not be determined at that time due to the unavailability of necessary data to evaluate the increase in judicial workload resulting from the requirement that the jury or judge must consider the fault of all those contributing to injuries in products liability cases where enhanced injuries are alleged.[45]

The OSCA further reported that the judiciary may experience an increase in workload related to revising the Standard Jury Instructions in civil cases to reflect the changes in apportionment of fault as written in the bill. However, OSCA reported that the fiscal impact of this workload issue was not likely to be substantial.[46]

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, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   This bill specifically applies its provisions retroactively and overrules *D'Amario v. Ford Motor Co.* Retroactive operation is disfavored by courts and generally "statutes are prospective, and will not be construed to have retroactive operation unless the language employed in the enactment is so clear it will admit of no other construction."[47] The Florida Supreme Court has articulated four issues to consider when determining whether a statute may be retroactively applied:

   - Is the statute procedural or substantive?
   - Was there an unambiguous legislative intent for retroactive application?

[45] Office of the State Courts Administrator, *Judicial Impact Statement: HB 433* (Jan. 1, 2010) (on file with the House of Representatives Civil Justice Subcommittee).
[46] *Id.*
[47] Norman J. Singer and J.D. Shambie Singer, *Prospective or retroactive interpretation,* 2 SUTHERLAND STATUTORY CONSTR. s. 41:4 (6th ed. 2009).

- Was a person's right vested or inchoate?
- Is the application of the statute to these facts unconstitutionally retroactive?[48]

The general rule of statutory construction is that a procedural or remedial statute may operate retroactively, but that a substantive statute may not operate retroactively without clear legislative intent. Substantive laws either create or impose a new obligation or duty, or impair or destroy existing rights, and procedural laws enforce those rights or obligations.[49]

Notwithstanding a determination of whether the provisions in the bill are procedural or substantive, the bill makes it clear that it is the Legislature's intent to apply the law retroactively. "Where a statute expresses clear legislative intent for retroactive application, courts will apply the provision retroactively."[50] A court will not follow this rationale, however, if applying a statute retroactively will impair vested rights, create new obligations, or impose new penalties.[51]

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A

[48] *Weingrad v. Miles*, 29 So. 3d 406, 409 (Fla. 3d DCA 2010) (internal citations omitted).
[49] *See Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994); *In re Rules of Criminal Procedure*, 272 So. 2d 65, 65 (Fla. 1972).
[50] *Weingrad*, 29 So. 3d at 410.
[51] *Id.* at 411.