Florida Coalition for Legal Reform

Proposed Bill on Tort Reform

Submitted to
The Florida Legislature
January 24, 2005

Researched and Drafted by

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"Striving for an Equitable Legal System"

Florida Coalition for
Legal Reform

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TO: **THE HONORABLE JEB BUSH, GOVERNOR, STATE OF FLORIDA**
THE HONORABLE ALLAN BENSE, SPEAKER,
THE FLORIDA HOUSE OF REPRESENTATIVES
THE HONORABLE TOM LEE, PRESIDENT, THE FLORIDA SENATE

COPY TO: **THE HONORABLE MEMBERS OF THE FLORIDA LEGISLATURE**
THE HONORABLE MEMBERS OF THE FLORIDA SUPREME COURT
THE HONORABLE BUSINESS LEADERS

SUBJECT: **TORT REFORM BILL & LEGAL RESEARCH FOR THE 2005 SESSION OF THE FLORIDA LEGISLATURE**

DATE: **JANUARY 24, 2005**

This is to respectfully submit the enclosed bill and legal research relating to the issue of tort reform for consideration by the 2005 regular session of The Florida Legislature.

This proposal is submitted on behalf of the Florida Coalition for Legal Reform, a working group of over forty (40) state, national and multinational corporations and associations which has brought together experts in the law from the business community who have the common goal of a more equitable legal system in Florida which provides "justice to all."

This book has two parts. **Part I** (pages 1 - 111) is the proposed bill. **Part II** (all after page 111) is the legal research relating to the provisions contained in the bill and more. Members of the Coalition and other business leaders will be contacting members of the Legislature on an individual basis with regard to the proposals contained in this bill. We respectfully request that the Legislature enact these reforms during the 2005 regular session to truly provide "justice to all" in Florida.

Respectfully submitted,

Florida Coalition for Legal Reform

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TABLE OF CONTENTS

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Associated Industries of Florida

An Act relating to civil actions; creating s. 768.1382, F.S.; limiting liability for certain public and private entities providing street lights, security lights, or other similar illumination; providing that certain entities do not owe duty to the public to provide, operate, or maintain illumination; providing for exceptions; prohibiting certain findings of fault or responsibility of an entity not a party to litigation; creating section 40.10, F.S.; stating the intent for citizens to serve on juries; creating section 40.012, F.S.; providing guidelines for postponement of jury service; amending s. 40.013, F.S.; revising provisions for disqualification for jury service; creating s. 40.014, F.S.; defining circumstances in which a person may be excused from jury service; amending s. 40.23, F.S.; revising methods for jury summons; creating s. 40.25, F.S.; establishing lengthy trial fund; amending s. 40.271, F.S.; establishing protections of employment for individuals performing jury service; creating Chapter 774, F.S.; amending Title XLV by adding a new chapter; defining various terms; protecting product sellers from liability in product liability actions; amending s. 768.81; revising apportionment of damages; amending section 768.72; revising provision with respect to claims for punitive damages; amending section 768.725; providing criteria for imposition of punitive damages; repealing s. 69.081, F.S.; amending s. 768.1256, F.S.; providing additional provisions to the government rules defense; repealing s. 768.1257; amending s. 95.031, F.S.; revising time bars for commencing certain legal actions; amending s. 95.11, F.S.; revising certain time bars relative to certain legal actions; amending s. 768.0710, F.S.; providing criteria for liability of business owners when injuries or loss caused by intentional acts of a third-party; creating s. 46.10, F.S.; creating the Class Actions Improvement Act; establishing criteria and requirements for filing class action lawsuits; amending s. 395.0191, F.S.; expanding a hospital's authority to discipline members of the medical staff of the hospital; providing a presumption of reasonable action under certain circumstances; specifying absence of monetary liability of a licensed facility for certain disciplinary actions; amending s. 415.1111, F.S.; requiring medical negligence claims against certain health care providers to be brought under medical malpractice provisions; amending s. 458.320, F.S.; specifying that such section does not create any duty or legal obligation for hospitals or ambulatory surgical centers; amending s. 768.78, F.S.; providing legislative findings and intent relating to providers of emergency services and care and public hospitals and affiliations with not-for-profit colleges and universities with medical schools and other health care practitioner educational programs; amending s. 766.1115, F.S.; specifying nonapplicability to certain affiliation agreements or contracts to provide certain comprehensive health care services protected by sovereign immunity; amending s. 768.28, F.S.; expanding a definition of the term "employee" to include certain health care providers; providing sovereign immunity protection to certain colleges, universities, and medical schools providing comprehensive health care services to patients at public hospitals under certain circumstances; including employees of medical schools under such immunity; providing definitions; providing an exception; providing that persons or entities providing emergency services and care shall be agents of the state for purposes of establishing personal immunity in certain situations; requiring reimbursement of the state for certain costs and payments under certain circumstances; providing sanctions; creating s. 877.025, F.S.; prohibiting the solicitation of specified legal business for a profit; providing criminal penalties; prohibiting attorneys from advertising services for business for a profit unless permitted

by law; providing a definition; prohibiting attorneys from initiating contact for the purpose of soliciting legal business for a profit; providing civil penalties providing for equitable relief; creating s. 473.325, F.S.; relating to individuals or firms practicing public accountancy; limiting liability for damages in civil actions involving claim or defense of fraud; amending s. 337.162, F.S.; establishing limits on liability of certain highway, road and street contractors; amending s. 768.77, F.S.; removing punitive damages from itemized jury verdict information; amending s. 324.021(9), F.S.; clarifying liability of motor vehicle owners for damages caused by permissive users or lessees; amending s. 768.76, F.S.; providing notification to jurors of collateral sources of benefits available to the claimant; amending section 768.28, F.S.; providing for a limit on liability of law enforcements officers or sheriffs and employing law enforcement agencies pursuing fleeing persons; amending section 768.36, F.S.; clarifying proper apportionment of fault in motor vehicle collisions; amending s. 90.105, F.S.; providing for a hearing on qualifications of expert witnesses; amending s. 90.702, F.S.; providing criteria for use of expert testimony; amending s. 90.704, F.S.; providing for consideration of expert opinion testimony; creating s. 481.250, F.S.; establishing time bars for certain legal actions against licensed architects or engineers; creating s. 481.251, F.S.; requiring a certificate of merit be filed upon commencement of certain legal actions for damages against licensed architects and engineers; amending s. 768.138, F.S.; providing defense for electric utilities and their personnel in certain actions; amending s. 624.155, F.S.; expressing circumstances when an insured may bring an action against an insurer; amending s. 627.4137, F.S.; providing criteria for disclosure of certain information; creating s. 46.100; providing for dismissal of any civil action upon showing of fraud by the plaintiff in any aspect of the lawsuit; amending s. 90.5055, F.S.; providing additional protections for companies engaging in internal audits; amending section 768.79, F.S.; providing for settlement of lawsuits between parties; creating s. 768.82, F.S.; providing for a claimant’s right to fair compensation in tort actions; amending s. 95.11, F.S.; establishing time when injury arises; establishing legislative intent; creating s. 768.38, F.S.; creating definitions; creating s. 768.39, F.S.; establishing minimum medical requirements for filing certain asbestos claims; creating s. 768.40, F.S.; establishing required filings in actions related to asbestos claims; creating s. 768.41, F.S.; defining time bars for claims relating to non-malignant conditions; creating s. 768.42, F.S.; establishing factors for consideration of premises liability in relation to asbestos claims; creating s. 768.43, F.S.; limiting scope of operation; creating s. 768.44, F.S.; specifying a plaintiff's burden of proof in tort actions involving exposure to asbestos; creating s. 768.45, F.S.; prescribing the requirements for shareholder liability for asbestos claims under the doctrine of piercing the corporate veil; amending s. 766.118, F.S.; creating provision for nursing facilities in certain legal actions; amending s. 766.202, F.S.; including nursing home facilities in definitions involving certain legal actions; providing for severability; providing for application; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 768.1382, Florida Statutes, is created to read:

768.1382 Street lights and other similar illumination; limitation on liability.--Neither the state, any of the state's officers, agencies, or instrumentalities, any political subdivision, as defined in s. 1.01, nor any electric utility, as defined in s. 366.02(2), that provides or operates or maintains street lights, security lights, or other similar illumination shall be held liable for any civil damages for injury or death affected or caused by the adequacy or failure of illumination of such lights, regardless of whether the adequacy or failure of illumination is alleged or demonstrated to have contributed in any manner to the injury or death, unless such liability was expressly assumed by written contract. No such entity that provides, operates, or maintains a manner of illumination as described in this section owes a duty to the public to provide, operate, or maintain the illumination in any manner, except that such a duty may be expressly assumed by written contract. In any civil action for damages arising out of personal injury or wrongful death when an entity's fault regarding the maintenance of street lights is at issue, if the entity responsible for maintaining the street lights is not a party to the litigation, the entity shall not be deemed or found in such action to be in any way at fault or responsible for the injury or death that gave rise to the damages.

Section 2. Section 40.010, Florida Statutes, is hereby created to read:

"40.010. Full participation on petit juries of all citizens.--

It is the policy of this state that all qualified citizens have an obligation to serve on petit juries when summoned by the courts of this state, unless excused."

Section 3**.** Section 40.012, Florida Statutes, is hereby enacted to read:

"40.012. Postponement of petit jury participation.--

(1) Individuals scheduled to appear for jury service have the right to postpone the date of their initial appearance for jury service one time only. When requested, postponements shall be granted, provided that:

(a) The juror has not previously been granted a postponement;

(b) The prospective juror appears in person or contacts the clerk of the court by telephone, electronic mail, or in writing to request a postponement; and

(c) Prior to the grant of a postponement with the concurrence of the clerk of the court, the prospective juror fixes a date certain on which he or she will appear for jury service that is not more than six months after the date on which the prospective juror originally was called to serve and on which date the court will be in session.

(2) A subsequent request to postpone jury service may be approved by a judicial officer only in the event of an extreme emergency, such as a death in the family, sudden grave illness, a natural disaster or a national emergency in which the prospective juror is personally involved, that could not have been anticipated at the time the initial postponement was granted. Prior to the grant of a second postponement, the prospective juror must fix a date certain on which the individual will appear for jury service within six months of the postponement on a date when the court will be in session."

Section 4. Section 40.013, Florida Statutes, is hereby amended to read:

40.013. Persons disqualified or excused from jury service.--

(1) No person who is under prosecution for any crime, or who has been convicted in this state, any federal court, or any other state, territory, or country of bribery, forgery, perjury, larceny, or any other offense that is a felony in this state or which if it had been

committed in this sate would be a felony, unless restored to civil rights, shall be qualified to serve as a juror.

~~(2)(a) Neither the Governor, nor Lieutenant Governor, not any Cabinet officer, nor clerk of court, or judge shall be qualified to be a juror.~~

~~(b) Any full-time federal, state, or local law enforcement officer or such entities' investigative personnel shall be excused from jury service unless such persons choose to serve.~~

(2)~~(3)~~ No person interested in any issue to be tried therein shall be a juror in any cause; but no person shall be disqualified from sitting in the trial of any suit in which the state or any county or municipal corporation is a party by reason of the fact that such person is a resident or taxpayer within the state or such county or municipal corporation.

~~(4) Any expectant mother and any parent who is not employed full time and who has custody of a child under 6 years of age, upon request, shall be excuse from jury service~~.

(3)~~(5)~~ ~~A presiding judge may, in his or her discretion, excuse a practicing attorney, a practicing physician, or a person who is physically inform from jury service, except that~~ N~~n~~o person shall be excused from service on a civil trial solely on the basis that the person is deaf or hearing impaired, if that person wishes to serve, unless the presiding judge makes a finding that consideration of the evidence presented requires auditory discrimination or that the timely progression of the trial will be considerably affected thereby. However, nothing in this subsection shall affect a litigant's right to exercise a peremptory challenge.

~~(6) A person may be excused from jury service upon a showing of hardship, extreme inconvenience, or public necessity~~.

(4)~~(7)~~ A person who was summoned and who reported as a prospective juror in any court in that person's county of residence within 1 year before the first day for which the person is being considered for jury service is exempt from jury service for 1 year from the last day of service.

(5)~~(8)~~ A person 70 years of age or older shall be excused from jury service upon request. A person 70 years of age or older may also be permanently excused from jury service upon written request. A person who is permanently excused from jury service may subsequently request, in writing, to be included in future jury lists provided such person meets the qualifications required by this chapter.

~~(9) Any person who is responsible for the care of a person who, because of mental illness, mental retardation, senility, or other physical or mental incapacity, is incapable of caring for himself or herself, shall be excused from jury service upon request~~."

Section 5**.** Section 40.014, Florida Statutes, is hereby created to read:

40.014. Excuses from petit jury service.--

An individual may apply to be excused from jury service for a period of up to 24 months, instead of seeking a postponement when either:

(1) The prospective juror has a mental or physical condition that causes him or her to be incapable of performing jury service. The juror, or the juror's personal representative, must provide the court with documentation from a physician licensed to practice medicine verifying that a mental or physical condition renders the person unfit for jury service for a period of up to 24 months.

(2) Jury service would cause undue or extreme physical or financial hardship to the prospective juror or a person under his or her care or supervision.

(a) A judge of the court for which the individual was called to jury service shall make undue or extreme physical or financial hardship determinations. The authority to make these determinations is delegable only to court officials or personnel who are authorized by the laws of this state to function as members of the judiciary.

(b) A person asking to be excused based on a finding of undue or extreme physical or financial hardship must take all actions necessary to have obtained a ruling on that request by no later than the date on which the individual is scheduled to appear for jury duty.

(3) For purposes of this Act, "undue or extreme physical or financial hardship" is limited to circumstances in which an individual would:

(a) Be required to abandon a person under his or her personal care or supervision due to the impossibility of obtaining an appropriate substitute caregiver during the period of participation in the jury pool or on the jury; or

(b) Incur costs that would have a substantial adverse impact on the payment of the individual's necessary daily living expenses or on those for whom he or she provides the principle means of support; or

(c) Suffer physical hardship that would result in illness or disease.

(4) "Undue or extreme physical or financial hardship" does not exist solely based on the fact that a prospective juror will be required to be absent from his or her place of employment.

(5) A person asking a judge to grant an excuse based on "undue or extreme physical or financial hardship" shall be required to provide the judge with documentation, such as, but not limited to, federal and state income tax returns, medical statements from

licensed physicians, proof of dependency or guardianship, and similar documents, which the judge finds to clearly support the request to be excused. Failure to provide satisfactory documentation shall result in a denial of the request to be excused.

(6) After 24 months, a person excused from jury service shall become eligible once again for qualification as a juror unless the person was excused from service permanently. A person is excused from jury service permanently only when the deciding judge determines that the underlying grounds for being excused are of a permanent nature.

Section 6. Section 40.23, Florida Statutes, is amended to read:

40.23. Summoning jurors.--

(1) The clerk of the court shall generate a venire as prescribed in s. 40.221 and shall summon the persons named in such venire to attend court as jurors at least 14 days prior to the sitting of such court by mailing to each person so named in the venire a written notice, addressed to his or her place of residence, and placing such notice in the United States mail with sufficient postage to carry the same. Upon order of the court, jurors may be summoned with less than 14 days' notice.

~~(2) The jury service of any person who has been summoned may be postponed for a period not to exceed 6 months upon written or oral request. The request may specify a date or period of time to which service is to be postponed and, if so, shall be given consideration when the assignment of the postponed date of jury service is made.~~

(2)~~(3)~~ Any person who is duly summoned to attend as a juror in any court and who fails to attend without having obtained a postponement or exemption according to the provisions of this section ~~any sufficient excuse~~ shall ~~pay a fine not to exceed $100,~~

~~which fine shall be imposed by the court to which the juror was summoned, and, in addition, such failure may be considered a contempt of court~~ have committed a misdemeanor in the second degree and be subject to fines or imprisonment in accordance with the laws of this state."

Section 7. Section 40.25, Florida Statutes, is hereby created and reads:

40.25. Lengthy trial fund.--

The Supreme Court shall promulgate rules to establish a Lengthy Trial Fund that shall be used to provide full or partial wage replacement or wage supplementation to jurors who serve as petit jurors for more than ten days.

(1) The court rules shall provide for the following:

(a) The selection and appointment of an Administrator for the fund.

(b) Procedures for the administration of the Fund, including payments of salaries of the Administrator and other necessary personnel.

(c) Procedures for the accounting, auditing and investment of money in the Lengthy Trial Fund.

(d) A report by the highest court of the State on the administration of the Lengthy Trial Fund in its annual report on the judicial branch, setting forth the money collected for and disbursed from the fund.

(2) Notwithstanding any other fees collected under state law, each trial court in the state shall collect from each attorney who files a civil case, unless otherwise exempted under the provisions of this section, a fee of $20 per case to be paid into the Lengthy Trial Fund. A lawyer will be deemed to have "filed a case" at the time the first pleading or other filing on which an individual lawyer's name appears is submitted to the court for

filing and opens a new case. All such fees shall be forwarded to the Administrator of the Lengthy Trial Fund for deposit.

(3) The Administrator shall use the fees deposited in the Lengthy Trial Fund to pay full or partial wage replacement or supplementation to jurors whose employers pay less than full regular wages when the period of jury service lasts more than ten days.

(4) The court may pay replacement or supplemental wages of up to $300 per day per juror beginning on the eleventh day of jury service. In addition, for any jurors who qualify for payment by virtue of having served on a jury for more than ten days, the court may, upon finding that such service posed a significant financial hardship to a juror, even in light of payments made with respect to jury service after the tenth day, award replacement or supplemental wages of up to $100 per day from the fourth to the tenth day of jury service.

(5) Any juror who is serving or has served on a jury that qualifies for payment from the Lengthy Trial Fund, provided the service commenced on or after the effective date of this Act, may submit a request for payment from the Lengthy Trial Fund on a form that the Administrator provides. Payment shall be limited to the difference between the state paid jury fee and the actual amount of wages a juror earns, up to the maximum level payable, minus any amount the juror actually receives from the employer during the same time period. This payment shall be paid in addition to any other compensation that a juror may receive according to the laws of this state.

(a) The form shall disclose the juror's regular wages, the amount the employer will pay during the term of jury service starting on the eleventh day and thereafter, the

amount of replacement or supplemental wages requested, and any other information the Administrator deems necessary for proper payment.

(b) The juror also shall be required to submit verification from the employer as to the wage information provided to the Administrator, for example, the employee's most recent earnings statement or similar document, prior to initiation of payment from the Fund.

(c) If an individual is self-employed or receives compensation other than wages, the individual may provide a sworn affidavit attesting to his or her approximate gross weekly income, together with such other information as the Administrator may require, in order to verify weekly income.

(6) The following attorneys and causes of action are exempt from payment of the Lengthy Trial Fund fee:

(a) Government attorneys entering appearances in the course of their official duties;

(b) *Pro se* litigants;

(c) Cases in small claims court or the state equivalent thereof; or

(d) Claims seeking social security disability determinations; individual veterans' compensation or disability determinations; recoupment actions for government backed educational loans or mortgages; child custody and support cases; actions brought *in forma pauperis;* and any other filings designated by rule that involve minimal use of court resources and that customarily are not afforded the opportunity for a trial by jury."

Section 8. Section 40.271, Florida Statutes, is amended to read:

40.271 Jury service.-- and employment protection.--

(1) No person summoned to serve on any grand or petit jury in this state, or accepted to serve an any grand or petit jury in this state, shall be dismissed from employment for any cause or otherwise be subject to any adverse employment action because of the nature or length of service upon such jury.

(2) Threats of dismissal from employment for any cause or threats of any adverse employment action, by an employer or his or her agent to any person summoned for jury service in this state, because of the nature or length upon such jury may be deemed a contempt of court from which the summons issued.

(3) A civil action by the individual who has been dismissed may be brought in the courts of this state for any violation of this section, and said individual shall be entitled to collect not only compensatory damages, but, in addition thereto, punitive damages and reasonable attorney fees for violation of this act.

(4) An employee may not be required or requested to use annual, vacation, or sick leave for time spent responding to a summons for jury duty, time spent participating in the jury selection process or for time spent actually serving on a jury. Nothing in this provision shall be construed to require an employer to provide annual, vacation, or sick leave to employees under the provisions of this statute who otherwise are not entitled to such benefits under company policies.

(5) A court shall automatically postpone and reschedule the service of a summoned juror of an employer with five of fewer full-time employees, or their equivalent, if another employee of that employer is summoned to appear during the same period. Such postponement will not effect an individual's right to one automatic postponement under section 40.012."

Section 9. Chapter 774, Florida Statutes is hereby created as follows:

Chapter 774. – Product Liability Protection for Product Sellers.

Sec. 774.101 – Definitions. As used in this section:

(1) "Product liability action" means any civil claim or action for harm caused by a product, regardless of the theory on which the claim is based.

(2) "Harm" means death; personal injury; physical damage to property other than to the product itself; economic loss, including the loss of earnings or other benefits related to employment, medical expenses, lost support and services, funeral and burial costs, loss of business or employment opportunities, and medical monitoring, as permitted under applicable law; noneceonomic loss, including pain and suffering, mental anguish, disfigurement, loss of capacity for the enjoyment of life, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, humiliation, fear of future injury, or increased risk of disease, as permitted under applicable law. The term does not include direct, incidental, or consequential pecuniary loss to, or resulting from damage to, the product, or nonphysical damage to property other than the product.

(3) "Manufacturer" means any person who, in the course of a business conducted for that purpose; designs, makes, constructs, formulates, produces, fabricates, assembles, packages, or labels any product or component part of a product, or engages another to do so. The term does not include independent product designers whose services are contracted for by the manufacturer if such designers are not otherwise engaged in the business of selling products.

(4) "Person" means any individual, corporation, company, association, firm, partnership, society, organization, joint stock company, or any other entity.

(5) "Product" means any tangible personal property distributed commercially.

(6) "Seller" means a person or entity, including a retailer, distributor, wholesaler, or lessor that is regularly engaged in the selling or leasing of a product.

Sec. 774.102 – General rule; seller liable as a manufacturer.

(1) GENERAL RULE. – No product liability action may be maintained or commenced against a product seller unless the product seller:

(a) made an express warranty as to the product and the failure of the product to conform to that warranty caused the person's harm;

(b) produced, designed, designated, or provided the plans or specifications for the manufacture or preparation of the product;

(c) altered, modified, assembled, failed to maintain, packaged, labeled, or installed the product in a manner that caused the person's harm;

(d) violated a statutory or regulatory requirement when it sold the product, including any violation of Florida's "dram shop" statute, Fla. Stat. § 768.125; or

(e) negligently entrusted or supplied the product for the use of another whom the product seller knew or should have known would be likely to sue the product in a manner that posed an unreasonable risk of physical harm to the user or others.

(2) SELLER LIABLE AS A MANUFACTURER. – Notwithstanding subsection (1), a product seller may be liable as a manufacturer if:

(a) the manufacturer has no identifiable agent, facility, or other presence in the United States;

(b) the manufacturer is not subject to service of process in any state in which the action could have been brought and service cannot be secured by a long-arm statute;

(c) the manufacturer is otherwise immune from suit; or

(d) the court determines that the person is or would be unable to enforce a judgment against the manufacturer. For purpose of this paragraph, the statute of limitations applicable to a claim asserting the liability of a product seller shall be tolled from the date of the filing of a complaint against the manufacturer to the date that judgment is entered against the manufacturer.

Section 10. Section 768.81, F.S., is hereby amended to read:

768.81. Comparative fault

(1) *DEFINITION.* --As used in this section, "economic damages" means past lost income and future lost income reduced to present value; medical and funeral expenses; lost support and services; replacement value of lost personal property; loss of appraised fair market value of real property; costs of construction repairs, including labor, overhead, and profit; and any other economic loss which would not have occurred but for the injury giving rise to the cause of action.

(2) *EFFECT OF CONTRIBUTORY FAULT.* --In an action to which this section applies, 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.

(3) *APPORTIONMENT OF DAMAGES.* --In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's

percentage of fault and not on the basis of the doctrine of joint and several liability.~~,~~ ~~except as provided in paragraphs (a), (b), and (c):~~

~~(a) Where a plaintiff is found to be at fault, the following shall apply:~~

~~1. Any defendant found 10 percent or less at fault shall not be subject to joint and several liability.~~

~~2. For any defendant found more than 10 percent but less than 25 percent at fault, joint and several liability shall not apply to that portion of economic damages in excess of $ 200,000.~~

~~3. For any defendant found at least 25 percent but not more than 50 percent at fault, joint and several liability shall not apply to that portion of economic damages in excess of $ 500,000.~~

~~4. For any defendant found more than 50 percent at fault, joint and several liability shall not apply to that portion of economic damages in excess of $ 1 million.~~

~~For any defendant under subparagraph 2., subparagraph 3., or subparagraph 4., the amount of economic damages calculated under joint and several liability shall be in addition to the amount of economic and noneconomic damages already apportioned to that defendant based on that defendant's percentage of fault.~~

~~(b) Where a plaintiff is found to be without fault, the following shall apply:~~

~~1. Any defendant found less than 10 percent at fault shall not be subject to joint and several liability.~~

~~2. For any defendant found at least 10 percent but less than 25 percent at fault, joint and several liability shall not apply to that portion of economic damages in excess of $ 500,000.~~

~~3. For any defendant found at least 25 percent but not more than 50 percent at fault, joint and several liability shall not apply to that portion of economic damages in excess of $ 1 million.~~

~~4. For any defendant found more than 50 percent at fault, joint and several liability shall not apply to that portion of economic damages in excess of $ 2 million.~~

~~For any defendant under subparagraph 2., subparagraph 3., or subparagraph 4., the amount of economic damages calculated under joint and several liability shall be in addition to the amount of economic and noneconomic damages already apportioned to that defendant based on that defendant's percentage of fault.~~

~~(c) With respect to any defendant whose percentage of fault is less than the fault of a particular plaintiff, the doctrine of joint and several liability shall not apply to any damages imposed against the defendant.~~

~~(d) In order to allocate any or all fault to a nonparty, a defendant must affirmatively plead the fault of a nonparty and, absent a showing of good cause, identify the nonparty, if known, or describe the nonparty as specifically as practicable, either by motion or in the initial responsive pleading when defenses are first presented, subject to amendment any time before trial in accordance with the Florida Rules of Civil Procedure.~~

~~(e) In order to allocate any or all fault to a nonparty and include the named or unnamed nonparty on the verdict form for purposes of apportioning damages, a defendant must prove at trial, by a preponderance of the evidence, the fault of the nonparty in causing the plaintiff's injuries.~~

(4) *APPLICABILITY.*

(a) This section applies to negligence cases. For purposes of this section, "negligence cases" includes, but is not limited to, civil actions for damages based upon theories of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories, including actions for negligence against any defendant for failure to prevent commission of an intentional tort by another. In determining whether a case falls within the term "negligence cases," the court shall look to the substance of the action and not the conclusory terms used by the parties.

(b) This section does not apply to any action brought by any person to recover actual economic damages resulting from pollution, to any action based upon an intentional tort, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by chapter 403, chapter 498, chapter 517, chapter 542, or chapter 895.

(5) Notwithstanding anything in law to the contrary, in an action for damages for personal injury or wrongful death arising out of medical malpractice, whether in contract or tort, when an apportionment of damages pursuant to this section is attributed to a teaching hospital as defined in s. 408.07, the court shall enter judgment against the teaching hospital on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability.

Section 11. Section 768.72, F.S., is hereby amended to read:

§ 768.72. Pleading in civil actions; claim for punitive damages

(1) In any civil action, no claim for punitive damages shall be permitted, except in cases described in section 768.735 or if ~~unless~~ there is a reasonable showing by

evidence in the record ~~or proffered by the claimant~~ which proves the defendant was intoxicated at the time of the injury as described in s. 768.736. ~~would provide a reasonable basis for recovery of such damages.~~ The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted.

(2) A defendant may be held liable for punitive damages only if the trier of fact, ~~based on clear and convincing evidence,~~ finds that the defendant was personally guilty of intentional misconduct or intoxicated ~~gross negligence~~. As used in this section, the term:

(a) "Intentional misconduct" means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.

~~(b) "Gross negligence" means that the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.~~

(3) In the case of an employer, principal, corporation, or other legal entity, punitive damages may be imposed for the conduct of an employee or agent only if the conduct of the employee or agent meets the criteria specified in subsection (2) and:

(a) The employer, principal, corporation, or other legal entity actively and knowingly participated in such conduct;

(b) The officers, directors, or managers of the employer, principal, corporation, or other legal entity knowingly condoned, ratified, or consented to such conduct; or

~~(c) The employer, principal, corporation, or other legal entity engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.~~

(4) The provisions of this section shall be applied to all causes of action arising after the effective date of this act.

Section 12. Section 768.725, is hereby amended to read:

Section 768.725. Punitive damages; burden of proof

In all civil actions, the plaintiff must establish at trial, by clear and convincing evidence, its entitlement to an award of punitive damages. ~~The "greater weight of the evidence" burden of proof applies to a determination of the amount of damages.~~

Section 13. Section 69.081 is hereby repealed

Section 14. Section 768.1256, F.S., is amended as follows:

§ 768.1256. Government rules defense

(1) In a product liability action brought against a manufacturer or seller for harm allegedly caused by a product, there is a rebuttable presumption that the product is not defective or unreasonably dangerous and the manufacturer or seller is not liable if, at the time the specific unit of the product was sold or delivered to the initial purchaser or user, the aspect of the product that allegedly caused the harm:

(a) Complied with federal or state codes, statutes, rules, regulations, or standards relevant to the event causing the death or injury;

(b) The codes, statutes, rules, regulations, or standards are designed to prevent the type of harm that allegedly occurred; and

(c) Compliance with the codes, statutes, rules, regulations, or standards is required as a condition for selling or distributing the product.

~~(2) In a product liability action as described in subsection (1), there is a rebuttable presumption that the product is defective or unreasonably dangerous and the manufacturer or seller is liable if the manufacturer or seller did not comply with the federal or state codes, statutes, rules, regulations, or standards which:~~

~~(a) Were relevant to the event causing the death or injury;~~

~~(b) Are designed to prevent the type of harm that allegedly occurred; and~~

~~(c) Require compliance as a condition for selling or distributing the product.~~

(2) ~~(3)~~ This section does not apply to an action brought for harm allegedly caused by a drug that is ordered off the market or seized by the Federal Food and Drug Administration.

Section 15. Section 768.1257 is hereby repealed.

Section 16. Section 95.031 is hereby amended as follows:

Section 95.031. Computation of time Except as provided in subsection (2) and in s. 95.051 and elsewhere in these statutes, the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues. (1) A cause of action accrues when the last element constituting the cause of action

occurs. For the purposes of this chapter, the last element constituting a cause of action on an obligation or liability founded on a negotiable or nonnegotiable note payable on demand or after date with no specific maturity date specified in the note, and the last element constituting a cause of action against any endorser, guarantor, or other person secondarily liable on any such obligation or liability founded on any such note, is the first written demand for payment, notwithstanding that the endorser, guarantor, or other person secondarily liable has executed a separate writing evidencing such liability. (2) (a) An action founded upon fraud under s. 95.11(3), including constructive fraud, must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any event an action for fraud under s. 95.11(3) must be begun within ~~12~~ 5 years after the date of the commission of the alleged fraud, regardless of the date the fraud was or should have been discovered. (b) An action for products liability under s. 95.11(3) must be begun within the period prescribed in this chapter, with the period running from the date that the facts giving rise to the cause of action were discovered, or should have been discovered with the exercise of due diligence, rather than running from any other date prescribed elsewhere in s. 95.11(3), except as provided within this subsection. Under no circumstances may a claimant commence an action for products liability, including a wrongful death action or any other claim arising from personal injury or property damage caused by a product, to recover for harm allegedly caused by a product with an expected useful life of 10 years or less, if the harm was caused by exposure to or use of the product more than 12 years

after delivery of the product to its first purchaser or lessee who was not engaged in the business of selling or leasing the product or of using the product as a component in the manufacture of another product. All products, except those included within subparagraph 1. or subparagraph 2., are conclusively presumed to have an expected useful life of 10 years or less.

1. Aircraft used in commercial or contract carrying of passengers or freight, vessels of more than 100 gross tons, railroad equipment used in commercial or contract carrying of passengers or freight, and improvements to real property, including elevators and escalators, are not subject to the statute of repose provided within this subsection.

2. Any product not listed in subparagraph 1., which the manufacturer specifically warranted, through express representation or labeling, as having an expected useful life exceeding 10 years, has an expected useful life commensurate with the time period indicated by the warranty or label. Under such circumstances, no action for products liability may be brought after the expected useful life of the product, or more than 12 years after delivery of the product to its first purchaser or lessee who was not engaged in the business of selling or leasing the product or of using the product as a component in the manufacture of another product, whichever is later.

3. With regard to those products listed in subparagraph 1., except for escalators, elevators, and improvements to real property, no action for products liability may be brought more than ~~20~~ 5 years after delivery of the product to its first purchaser or lessor who was not engaged in the business of selling or leasing the product or of using the product as a component in the manufacture of another product. However, if the manufacturer specifically warranted, through express representation or labeling, that the

product has an expected useful life exceeding ~~20~~ 5 years, the repose period shall be the time period warranted in representations or label.

(c) The repose period prescribed in paragraph (b) ~~does not apply~~ applies even if the claimant was exposed to or used the product within the repose period, but an injury caused by such exposure or use did not manifest itself until after expiration of the repose period.

(d) The repose period prescribed within paragraph (b) is tolled for any period during which the manufacturer through its officers, directors, partners, or managing agents had actual knowledge that the product was defective in the manner alleged by the claimant and took affirmative steps to conceal the defect. Any claim of concealment under this section shall be made with specificity and must be based upon substantial factual and legal support. Maintaining the confidentiality of trade secrets does not constitute concealment under this section.

Section 17. Paragraph (c) of subsection (3) of section 95.11, Florida Statutes, is amended to read:

Section 95.11 Limitations other than for the recovery of real property.--Actions other than for recovery of real property shall be commenced as follows:

(3) WITHIN FOUR YEARS.--

(c) An action founded on the design, planning, or construction of an improvement to real property, with the time running from the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his

or her employer, whichever date is latest; except that, when the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. In any event, the action must be commenced within ~~15~~ 5 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest.

Section 18. Section 768.0710 is hereby amended as follows:

Section 768.0710. Burden of proof in claims of negligence involving transitory foreign objects or substances against persons or entities in possession or control of business premises

(1) The person or entity in possession or control of business premises owes a duty of reasonable care to maintain the premises in a reasonably safe condition for the safety of business invitees on the premises, which includes reasonable efforts to keep the premises free from transitory foreign objects or substances that might foreseeably give rise to loss, injury, or damage.

(2) In any civil action for negligence involving loss, injury, or damage to a business invitee as a result of a transitory foreign object or substance on business premises, the claimant shall have the burden of proving that:

(a) The person or entity in possession or control of the business premises owed a duty to the claimant;

(b) The person or entity in possession or control of the business premises acted negligently by failing to exercise reasonable care in the maintenance, inspection, repair, warning, or mode of operation of the business premises. Actual or constructive notice of the transitory foreign object or substance is not a required element of proof to this claim. However, evidence of notice or lack of notice offered by any party may be considered together with all of the evidence; and

(c) The failure to exercise reasonable care was a legal cause of the loss, injury, or damage.

(3) Notwithstanding any provision of this section, any person or entity in possession or control of business premises is not liable for any damages to the claimant if such loss, injury, or damage to a business invitee are the result of the intentional or criminal acts of a third party.

Section 19. Title. Sections 46.10-46.16, F.S., shall be known and may be cited collectively as the Class Action Improvements Act.

Section 20. Section 46.10, F.S., is hereby created to read:

Section 46.10 – Prerequisites to a Class Action. One or more members of a call of Florida residents may sue as representative parties on behalf of all members of the class on if (1) the class is so numerous that joinder of all members is impracticable, (2) there are question of law or fact as to which the court or jury could reasonably reach conclusions or findings applicable to all class members, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the

representative parties will fairly and adequately protect the interests of the class, ~~and~~ (5) the class is defined so as to permit the identification of class members before and merits adjudications occur, and (6) non-residents may join in the class in case of a sudden accident or natural event culminating in an accident that results in death or injury incurred at a specific location.

Section 21. Section 46.11 is hereby created to read:

Section 46.11 - Class Actions Maintainable.

(1)An action may be maintained as a class action if the prerequisites of section 46.10 are satisfied, and the prosecution of separate actions by or against individuals members of the class would create a risk of any of the following:

(a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(b) adjudications with respect to individual members of the class which would be as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(c) the party seeking to maintain the class action does not seek any monetary relief and the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

(2) If no provisions from subsection (1) occur, a class action may also be maintained if the court finds all of the following:

(a) that the questions of law or fact as to which the court or jury could reasonably reach conclusions or findings applicable to all class members predominate over any questions affecting only individual members,

(b) that the evidence likely to be admitted at trial regarding the elements of the claims for which certification is sought and of the defenses the elements of the claims for which certification is sought and of the defenses thereto is substantially the same as to all class members, and

(c) that a class action is superior to any and all other available methods for the fair and efficient adjudication of the controversy.

(3)In determining if a class action is permitted, the court shall consider only the following matters pertinent to the findings:

(a) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(b) the extent, nature, and maturity of any litigation concerning the controversy already commenced by or against members of the class;

(c) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify maintaining the case as a class action;

(d) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(e) the difficulties likely to be encountered in the management of a class action; and

(f) the extent to which the allegations at issue are subject to the jurisdiction of federal or state regulatory agencies.

Section 22. Section 46.12 is hereby created to read:

Section 46.12 -- Determination by Order Whether Class Action to be Maintained; Notice; Judgment.

(1) When practicable after the commencement of an action brought as a class action, the court shall, after hearing, determine by order whether it is to be so maintained. An order under this subsection may be altered, amended, or withdrawn at any time before the decision on the merits.

(2) If the court finds that the action should be maintained as a class action, it shall certify the action accordingly on the basis of a written decision setting forth all reasons why the action may be so maintained and describing all evidence in support of the determination.

(3) A court shall not certify that an action may be maintained as a class action unless, on the basis of a full record on the relevant issues, the proponents proffer clear and convincing evidence that the action complies with all requirements for such certification. Any doubt as to whether this burden has been met shall be resolved in favor of denying class certification. The court shall decertify a class action upon any showing that an action has ceased to satisfy the applicable prerequisites for maintaining the case as a class action.

(4) There shall be a rebuttable presumption against the maintenance of a class action as to claims for which class members would have to prove knowledge, reliance, or causation on an individual basis.

(5) The determination that an action may be maintained as a class action shall not relieve any member of the class from the burden of proving all elements of the member's cause of action, including individual injury and the amount of damages.

(6) In any class action maintained under this section, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall include:

(a) a general description of the action, including the relief sought, and the names of the representative parties;

(b) a statement of the right of a member of the class to be excluded from the action by submitting an election to be excluded, including the manner and time for exercising the election;

(c) a description of possible financial consequences for the class;

(d) a general description of any counterclaim or notice of intent to assert a counterclaim by or against members of the class, including the relief sought;

(e) a statement that the judgment, whether favorable or not, will bind members of the class who are not excluded from the action;

(f) a statement that any member of the class may intervene in the action and designate separate counsel;

(g) the address of counsel to whom members of the proposed class may direct inquiries; and

(h) other information that the court deems appropriate.

(7) The plaintiff shall bear the expense of the notification required by the foregoing subsection. The court may require other parties to the litigation to cooperate in securing the names and addresses of the persons within the class for the purpose of providing individual notice, but any costs incurred by the party in providing such cooperation shall be paid initially by the party claiming the class action. Upon termination of the action, the court may allow as taxable costs all or part of the expenses incurred by the prevailing party.

(8) The judgment in an action maintained as a class action under this section, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under this section, whether or not favorable to the class, shall include and specify or describe those to whom the notice was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(9) When appropriate, a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

Section 23. Section 46.13 is hereby created to read:

Section 46.13 - Orders in Conduct of Actions.

In the conduct of action to which this section applies, the court may make appropriate orders specified as follows:

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed entry of judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims and defenses, or otherwise to come into the action;

(3) imposing conditions on the representative parties or on intervenors;

(4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; and

(5) dealing with similar procedural matters.

Section 24. Section 46.14 is hereby created to read:

Section 46.14 - Dismissal or Compromise.

(1) A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(2) Before approving the dismissal or a compromise of an action that the court has determined may be maintained as a class action, the court shall hold a hearing to determine whether the terms of the proposed dismissal or compromise are fair,

reasonable and adequate for the class. At such hearing, all parties to the action, including member of the class, shall be permitted an opportunity to be heard as the court may direct.

Section 25. Section 46.15 is hereby created to read:

Section 46.15 – Discovery. Representative parties and intervenors are subject to discovery in the same manner as parties in other civil actions. Other class members are subject to discovery in the same manner as persons who are not parties, but may be required by the court to submit to discovery procedures applicable to the representative parties and intervenors.

Section 26. Section 46.16 is hereby created to read:

Section 46.16 – Appeals**.** The courts of appeals shall hear appeals from orders of district courts granting or denying class action certification under this section if a notice of appeal is filed within ten days after entry of the order.

Section 27. Subsections (7)-(10) of section 395.0191, Florida Statutes, are renumbered as subsections (8)-(11), respectively, a new subsection (7) is added to said section and present subsection (7) is amended, to read:

395.0191 Staff membership and clinical privileges.—

(7) A licensed facility shall establish internal protocols for the revocation or suspension of staff privileges or other disciplinary actions against a member of the medical staff, relating to staff membership or clinical privileges. A licensed facility acting in accordance

with its internal protocols is presumed to have acted reasonably under the circumstances absent clear and convincing evidence to the contrary.

(8)~~(7)~~ There shall be no monetary liability on the part of, and no cause of action for injunctive relief or damages shall arise against, any licensed facility, its governing board or governing board members, medical staff, or disciplinary board or against its agents, investigators, witnesses, or employees, or against any other person, for any action arising out of or related to carrying out the provisions of this section including the revocation or suspension of staff privileges or other disciplinary action, absent intentional fraud.

Section 28. Section 415.1111, Florida Statutes, is amended to read:

415.1111 Civil actions.--A vulnerable adult who has been abused, neglected, or exploited as specified in this chapter has a cause of action against any perpetrator and may recover actual and punitive damages for such abuse, neglect, or exploitation. The action may be brought by the vulnerable adult, or that person's guardian, by a person or organization acting on behalf of the vulnerable adult with the consent of that person or that person's guardian, or by the personal representative of the estate of a deceased victim without regard to whether the cause of death resulted from the abuse, neglect, or exploitation. The action may be brought in any court of competent jurisdiction to enforce such action and to recover actual and punitive damages for any deprivation of or infringement on the rights of a vulnerable adult. A party who prevails in any such action may be entitled to recover reasonable attorney's fees, costs of the action, and damages. The remedies provided in this section are in addition to and cumulative with other legal

and administrative remedies available to a vulnerable adult. Notwithstanding the foregoing, any civil action for damages against any licensee or entity who establishes, controls, conducts, manages, or operates a facility licensed under part II of chapter 400 relating to its operation of the licensed facility shall be brought pursuant to s. 400.023, or against any licensee or entity who establishes, controls, conducts, manages, or operates a facility licensed under part III of chapter 400 relating to its operation of the licensed facility shall be brought pursuant to s. 400.429. Such licensee or entity shall not be vicariously liable for the acts or omissions of its employees or agents or any other third party in an action brought under this section. Notwithstanding the provisions of this section, any claim against a health care provider as defined in s. 766.202(4) that qualifies as a claim for medical negligence as defined in s. 766.106(1)(a) shall be brought pursuant to chapter 766.

Section 29. Subsection (9) of section 458.320, Florida Statutes, is renumbered as subsection (10), and a new subsection(9) is added to said section, to read:

458.320 Financial responsibility.—

(9) Nothing in this section creates any duty or legal obligation on the part of any entity licensed pursuant to chapter 395.

Section 30. Section 768.78 is amended to read:

Legislative findings and intent.-- (1) EMERGENCY SERVICES AND CARE.—

(a) The Legislature finds and declares it to be of vital importance that emergency services and care be provided by hospitals, physicians, and emergency medical services providers to every person in need of such care.

(b) The Legislature finds that emergency services and care providers are critical elements in responding to disaster and emergency situations that might affect our local communities, state, and country. (c) The Legislature recognizes the importance of maintaining a viable system of providing for the emergency medical needs of the state's residents and visitors.

(d) The Legislature and the Federal Government have required such providers of emergency medical services and care to provide emergency services and care to all persons who present themselves to hospitals seeking such care.

(e) The Legislature finds that the Legislature has further mandated that prehospital emergency medical treatment or transport may not be denied by emergency medical services providers to persons who have or are likely to have an emergency medical condition.

(f) Such governmental requirements have imposed a unilateral obligation for emergency services and care providers to provide services to all persons seeking emergency care without ensuring payment or other consideration for provision of such care.

(g) The Legislature also recognizes that emergency services and care providers provide a significant amount of uncompensated emergency medical care in furtherance of such governmental interest.

(h) The Legislature finds that a significant proportion of the residents of this state who are uninsured or are Medicaid or Medicare recipients are unable to access needed health care because health care providers fear the increased risk of medical malpractice liability.

(i) The Legislature finds that such patients, in order to obtain medical care, are frequently forced to seek care through providers of emergency medical services and care.

(j) The Legislature finds that providers of emergency medical services and care in this state have reported significant problems with both the availability and affordability of professional liability coverage.

(k) The Legislature finds that medical malpractice liability insurance premiums have increased dramatically and a number of insurers have ceased providing medical malpractice insurance coverage for emergency medical services and care in this state. This has resulted in a functional unavailability of medical malpractice insurance coverage for some providers of emergency medical services and care.

(l) The Legislature further finds that certain specialist physicians have resigned from serving on hospital staffs or have otherwise declined to provide on-call coverage to hospital emergency departments due to increased medical malpractice liability exposure created by treating such emergency department patients.

(m) It is the intent of the Legislature that hospitals, emergency medical services providers, and physicians be able to ensure that patients who might need emergency medical services treatment or transportation or who present themselves to hospitals for emergency medical services and care have access to such needed services.

(2) PUBLIC HOSPITALS AND AFFILIATIONS WITH NOT-FOR-PROFIT COLLEGES AND UNIVERSITIES WITH MEDICAL SCHOOLS AND OTHER HEALTH CARE PRACTITIONER EDUCATIONAL PROGRAMS.—

(a) The Legislature finds that access to quality, affordable health care for all residents of this state is a necessary goal for the state and that public hospitals play an essential role in providing access to comprehensive health care services.

(b) The Legislature further finds that access to quality health care at public hospitals is enhanced when public hospitals affiliate and coordinate their common endeavors with medical schools. These affiliations have proven to be an integral part of the delivery of more efficient and economical health care services to patients of public hospitals by offering quality graduate medical education programs to resident physicians who provide patient services at public hospitals. These affiliations ensure continued access to quality comprehensive health care services for residents of this state and therefore should be encouraged in order to maintain and expand such services.

(c) The Legislature finds that when medical schools affiliate or enter into contracts with public hospitals to provide comprehensive health care services to patients of public hospitals, they greatly increase their exposure to claims arising out of alleged medical malpractice and other allegedly negligent acts because some colleges and universities and their medical schools and employees do not have the same level of protection against liability claims as governmental entities and their public employees providing the same patient services to the same public hospital patients.

(d) The Legislature finds that the high cost of litigation, unequal liability exposure, and increased medical malpractice insurance premiums have adversely impacted the ability

of some medical schools to permit their employees to provide patient services to patients of public hospitals. This finding is consistent with the report issued in April 2002 by the American Medical Association declaring this state to be one of 12 states in the midst of a medical liability insurance crisis. The crisis in the availability and affordability of medical malpractice insurance is a contributing factor in the reduction of access to quality health care in this state. In the past 15 years, the number of public hospitals in this state has declined significantly. In 1988, 33 hospitals were owned or operated by the state and local governments or established as taxing districts. In 1991, that number dropped to 28. In 2001, only 18 remained, 7 of these concentrated in 1 county. Thus, 11 public hospitals serve the other 66 counties of this state. If no corrective action is taken, this health care crisis will lead to a continued reduction of patient services in public hospitals.

(e) The Legislature finds that the public is better served and will benefit from corrective action to address the foregoing concerns. It is imperative that the Legislature further the public benefit by conferring sovereign immunity upon colleges and universities, their medical schools, and their employees when, pursuant to an affiliation agreement or a contract to provide comprehensive health care services, they provide patient services to patients of public hospitals.

(f) It is the intent of the Legislature that colleges and universities that affiliate with public hospitals be granted sovereign immunity protection under s. 768.28, Florida Statutes, in the same manner and to the same extent as the state and its agencies and political subdivisions. It is also the intent of the Legislature that employees of colleges and universities who provide patient services to patients of a public hospital be immune from

lawsuits in the same manner and to the same extent as employees and agents of the state and its agencies and political subdivisions and, further, that they not be held personally liable in tort or named as a party defendant in an action while performing patient services except as provided in s. 768.28(9)(a), Florida Statutes.

Section 31. Subsection (11) of section 766.1115, Florida Statutes, is amended to read:

766.1115 Health care providers; creation of agency relationship with governmental contractors.--

(11) APPLICABILITY.--This section applies to incidents occurring on or after April 17, 1992. This section does not apply to any health care contract entered into by the Department of Corrections which is subject to s. 768.28(10)(a). This section does not apply to any affiliation agreement or contract entered into by a medical school to provide comprehensive health care services to patients at public hospitals which affiliation agreement or contract is subject to s. 768.28(10)(f). Nothing in this section in any way reduces or limits the rights of the state or any of its agencies or subdivisions to any benefit currently provided under s. 768.28.

Section 32. Paragraph (b) of subsection (9) of section 768.28, Florida Statutes, is amended, and paragraphs (f) and (g) are added to subsection (10) of said section, to read:

768.28 Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions; indemnification; risk management programs.--

(9)

(b) As used in this subsection, the term:

1. "Employee" includes any volunteer firefighter.

2. "Officer, employee, or agent" includes, but is not limited to:~~,~~

a. Any health care provider when providing services pursuant to s. 766.1115~~,~~

b. Any member of the Florida Health Services Corps, as defined in s. 381.0302, who provides uncompensated care to medically indigent persons referred by the Department of Health~~, and~~

c. Any public defender or her or his employee or agent, including, among others, an assistant public defender and an investigator.

d.(I) Any college or university or its medical school that enters into an affiliation agreement or a contract to allow its employees to provide comprehensive health care services to patients treated at public statutory teaching hospitals, any other health care facilities owned or used by a governmental entity, or any other locations under contract with the governmental entity to provide comprehensive health care services to public hospital patients pursuant to paragraph (10)(f).

(II) Any faculty member or other health care professional, practitioner, or ancillary caregiver or employee of a college or university or its medical school that enters into an affiliation agreement or a contract to provide comprehensive health care services with a

public hospital or its governmental owner and who provides such services to patients of public hospitals pursuant to paragraph (10)(f).

(10)

(f)1. Any medical school that has entered into an affiliation agreement or contract to allow employees of the medical school to provide patient services to patients treated at a public hospital, together with such employees, shall be deemed agents of the governmental entity for purposes of this section and shall be immune from liability for torts in the same manner and to the same extent as the state and its agencies and subdivisions while providing patient services.

2. For purposes of this paragraph, the term:

a. "Employees" means faculty, health care professionals, practitioners, and ancillary caregivers and employees of a medical school.

b. "Medical school" means any not-for-profit college or university with a medical, dental, or nursing school, or any other academic programs of medical education accredited by any association, agency, council, commission, or accrediting body recognized by this state as a condition for licensure of its graduates.

c. "Patient services" means:

(I) Any comprehensive health care services, as defined in s. 641.19(4), including related administrative services to patients of a public hospital.

(II) Supervision of interns, residents, and fellows providing any patient services to patients of a public hospital.

(III) Access to participation in medical research protocols.

d. "Public hospital" means a statutory teaching hospital and any other health care facility owned or used by the state, a county, a municipality, a public authority, a special taxing district with health care responsibilities, or any other local governmental entity, or at any location under contract with the governmental entity.

3. No such employee or agent of such colleges or universities or their medical schools shall be personally liable in tort or named as a party defendant in any action arising from the provision of any patient services to patients of a public hospital, except as provided in paragraph (9)(a).(g) Except for persons or entities that are otherwise covered under this section, any emergency medical technician, paramedic, or licensee as defined in 401.23, or any health care provider as defined in s. 766.202(4) providing emergency services and care pursuant to s. 395.1041, s. 395.401, or s. 401.45 shall be considered agents of the state and the Department of Health, and shall reimburse the state for the actual costs of defending any claim and for any amounts paid by the state in payment of a settlement or judgment arising out of the claim up to the liability limits set forth in this section. Any person or entity who fails to reimburse the state as required shall be subject to license revocation and shall be responsible for all subsequent payments by the state in resolving the underlying cause of action, including any amounts paid pursuant to a claims bill, and for all costs and attorney fees incurred by the state in recovering the original reimbursement amount due and the subsequent payments owed.

Section 33. Section 877.025, Florida Statutes, is created to read:

877.025 Solicitation of for-profit legal services relating to medical negligence or retainers therefor; penalty.—

(1) The Legislature has determined that legal advertising that solicits business by inciting a person to file a suit alleging medical negligence destroys the personal responsibility of individuals, fosters frivolous litigation, and demeans the practice of law. This form of solicitation has created a crisis in the state's judicial system, thus creating a compelling state interest in the limited regulation of advertising as set forth in this section.

(2) It is unlawful for any person or her or his agent, employee, or any person acting on her or his behalf to solicit or procure through solicitation, directly or indirectly, legal business for a profit, relating to the filing of a claim of medical negligence, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal service for a profit, or to make it a business to solicit or procure such business, retainers, or agreements.

(3) It is unlawful for any person in the employ of or in any capacity attached to any hospital, sanitarium, police department, wrecker service or garage, prison, or court, or for persons authorized to furnish bail bonds, investigators, photographers, or insurance or public adjusters, to communicate directly or indirectly with any attorney or person acting on such attorney's behalf for the purpose of aiding, assisting, or abetting such attorney in the solicitation of legal business for a profit or the procurement through solicitation of a retainer, written or oral, or any agreement authorizing the attorney to perform or render legal services for a profit relating to allegations of medical negligence.

(4) It is unlawful to advertise, using any form of electronic or other media, in a manner that solicits legal business for a profit by urging a person to consider bringing legal action relating to medical negligence.

(5) The term "solicit" means to entreat, request, or incite another to use the services of an attorney or a law firm. In any advertisement subject to this section, the term "solicit" does not mean, include, or prohibit a statement by the attorney, or an appearance, picture, or voice of the attorney who states in such advertisement only the following information:

(a) The name of an attorney or a law firm;

(b) The field of practice of such attorney or law firm, including the prices charged, so long as expressly permitted by rule 4-7.2 of the rules regulating The Florida Bar;

(c) The right of an injured or aggrieved person to seek redress if such person's rights have been violated;

(d) A public service type announcement, so long as it does not entreat, request, or urge another to use the services of an attorney or law firm for the purpose of bringing legal action against another; or

(e) Those matters expressly permitted by rule 4-7.2(c)(11) of the rules regulating the Florida Bar.

(6)(a) Except for violations of subsection (2), any person violating any provision of this section commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(b) A person violating subsection (2) shall be liable for a civil penalty of $1,000 for the first offense and $10,000 for each subsequent offense and shall be subject to imposition of injunctive relief based on a presumption that there is no adequate remedy at law available to the public. For purposes of this paragraph, an offense is a single advertisement published in a single print publication or through a single electronic media outlet, regardless of the number of times or in how many issues the advertisement is republished in the same publication or through the same media outlet. The Florida Bar and the Attorney General shall have standing to enforce such penalties and, upon prevailing in such action, shall recover costs and reasonable attorney's fees.

(7) This section shall be taken to be cumulative and shall not be construed to amend or repeal any other valid law, code, ordinance, rule, or penalty now in effect.

Section 34. Section 473..325 is created to read:

(1)When an individual or firm licensed to practice public accountancy under chapter 473 is held liable for damages in a civil action arising from or related to its provision of services involving the practice of public accountancy, in which action a claim or defense of fraud is raised against the plaintiff or another party, individual or entity, and that plaintiff or other party, individual, or entity has been found to have acted fraudulently in the pending action or in another action or proceeding involving similar parties, individuals, entities and claims, and the fraud was related to the performance of the duties of the individual or firm licensed to practice public accountancy, the trier of fact shall determine:

(a) the total amount of the plaintiff's damages,

(b) the percentage of fault attributable to the fraudulent conduct of the plaintiff or other party, individual or entity contributing to the plaintiff's damages, and

(c) the percentage of fault of the individual or firm in the practice of public accountancy in contributing to the plaintiff's damages.

(2) Under the circumstances set forth in this subsection (1), individuals or firms in the practice of public accountancy shall not be required to pay damages in an amount greater than the percentage of fault attributable only to their services as so determined. This section shall not apply where a finding is made that the acts of the individual or firm in the practice of public accountancy were willful and knowing. In such an action involving the practice of public accountancy in which a claim or defense of fraud is raised, if there is pending a separate action or proceeding in which the alleged fraudulent conduct of the same party, individuals or entity against whom the claim or defense is raised is to be adjudicated or determined, the court may stay, on its own or by motion, the action involving the practice of public accountancy until the other action or proceeding is concluded or the issue of fraudulent conduct is determined in that other action.

Section 35. Section 337.162(5), F.S., is amended to read:

Section 337.162 Professional services.--Professional services provided to the department that fall below acceptable professional standards may result in transportation project delays, overruns, and reduced facility life. To minimize these effects and ensure that quality services are received, the Legislature hereby declares

that licensed professionals shall be held accountable for the quality of the services they provide to the department.

(1) If the department has knowledge or reason to believe that any person has violated the provisions of state professional licensing laws or rules, it shall submit a complaint about the violations to the Department of Business and Professional Regulation. The complaint submitted to the Department of Business and Professional Regulation and maintained by the department is confidential and exempt from s. 119.07(1).

(2) Any person who is employed by the department and who is licensed by the Department of Business and Professional Regulation and who, through the course of his or her employment, has knowledge or reason to believe that any person has violated the provisions of state professional licensing laws or rules shall submit a complaint about the violations to the Department of Business and Professional Regulation. Failure to submit a complaint about the violations may be grounds for disciplinary action pursuant to chapter 455 and the state licensing law applicable to that licensee. However, licensees under part II of chapter 475 are exempt from the provisions of s. 455.227(1)(i). The complaint submitted to the Department of Business and Professional Regulation and maintained by the department is confidential and exempt from s. 119.07(1).

(3) Any complaints submitted to the Department of Business and Professional Regulation pursuant to subsections (1) and (2) are confidential and exempt from s. 119.07(1) pursuant to chapter 455 and applicable state law.

(4) In order to inform licensed professionals of the requirements of this section, the department shall include the requirements of this section in contracts with persons licensed by the Department of Business and Professional Regulation.

A contractor who constructs or repairs a highway, road, street, or bridge for the Florida Department of Transportation is not liable to a claimant for personal injury, property damage, or death arising from the performance of the construction or repair if, at the time of the personal injury, property damage, or death, the contractor is in compliance with contract documents material to the condition or defect that was the proximate cause of the personal injury, property damage, or death.

Section 36. Section 768.77, F.S. is hereby amended to read:

Section 768.77. Itemized verdict

(1) Except as provided in subsection (2), in any action to which this part applies in which the trier of fact determines that liability exists on the part of the defendant, the trier of fact shall, as a part of the verdict, itemize the amounts to be awarded to the claimant into the following categories of damages:

(a) Amounts intended to compensate the claimant for economic losses; and

(b) Amounts intended to compensate the claimant for noneconomic losses~~; and~~

~~(c) Amounts awarded to the claimant for punitive damages, if applicable~~.

(2) In any action for damages based on personal injury or wrongful death arising out of medical malpractice, whether in tort or contract, to which this part applies in which the

trier of fact determines that liability exists on the part of the defendant, the trier of fact shall, as a part of the verdict, itemize the amounts to be awarded to the claimant into the following categories of damages:

(a) Amounts intended to compensate the claimant for:

1. Past economic losses; and

2. Future economic losses, not reduced to present value, and the number of years or part thereof which the award is intended to cover;

(b) Amounts intended to compensate the claimant for:

1. Past noneconomic losses; and

2. Future noneconomic losses and the number of years or part thereof which the award is intended to cover~~; and~~

~~(c) Amounts awarded to the claimant for punitive damages, if applicable~~.

Section 37. Section 324.021(9), F.S. is hereby amended to read:

§ 324.021. Definitions; minimum insurance required

(9) *OWNER; OWNER/LESSOR.*

(a) *Owner.* --A person who holds the legal title of a motor vehicle; or, in the event a motor vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or

in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this chapter.

(b) *Owner/lessor.* --Notwithstanding any other provision of the Florida Statutes or existing case law:

1. The lessor, under an agreement to lease a motor vehicle for 1 year or longer which requires the lessee to obtain insurance acceptable to the lessor which contains limits not less than $ 100,000/$ 300,000 bodily injury liability and $ 50,000 property damage liability or not less than $ 500,000 combined property damage liability and bodily injury liability, shall not be deemed the owner of said motor vehicle for the purpose of determining financial responsibility for the operation of said motor vehicle or for the acts of the operator in connection therewith; further, this subparagraph shall be applicable so long as the insurance meeting these requirements is in effect. The insurance meeting such requirements may be obtained by the lessor or lessee, provided, if such insurance is obtained by the lessor, the combined coverage for bodily injury liability and property damage liability shall contain limits of not less than $ 1 million and may be provided by a lessor's blanket policy.

2. The lessor, under an agreement to rent or lease a motor vehicle for a period of less than 1 year, shall be deemed the owner of the motor vehicle for the purpose of determining liability for the operation of the vehicle or the acts of the operator in connection therewith only up to $ 100,000 per person and up to $ 300,000 per incident for bodily injury and up to $ 50,000 for property damage. Notwithstanding any other provision of this subparagraph, the lessor shall not be liable for any damages caused by

a lessee committing an intentional tort or operating the motor vehicle in any manner not expressly authorized by the terms ot the lease agreement. ~~If the lessee or the operator of the motor vehicle is uninsured or has any insurance with limits less than $ 500,000 combined property damage and bodily injury liability, the lessor shall be liable for up to an additional $ 500,000 in economic damages only arising out of the use of the motor vehicle. The additional specified liability of the lessor for economic damages shall be reduced by amounts actually recovered from the lessee, from the operator, and from any insurance or self-insurance covering the lessee or operator.~~ Nothing in this subparagraph shall be construed to affect the liability of the lessor for its own negligence.

3. The owner who is a natural person and loans a motor vehicle to any permissive user shall be liable for the operation of the vehicle or the acts of the operator in connection therewith only up to $ 100,000 per person and up to $ 300,000 per incident for bodily injury and up to $ 50,000 for property damage. Notwithstanding any other provision of this subparagraph, the owner of the motor vehicle shall not be liable for any intentional torts committed by the permissive user. ~~If the permissive user of the motor vehicle is uninsured or has any insurance with limits less than $ 500,000 combined property damage and bodily injury liability, the owner shall be liable for up to an additional $ 500,000 in economic damages only arising out of the use of the motor vehicle. The additional specified liability of the owner for economic damages shall be reduced by amounts actually recovered from the permissive user and from any insurance or self-insurance covering the permissive user.~~ Nothing in this subparagraph shall be construed to affect the liability of the owner for his or her own negligence.

(c)*Application.*

1. The limits on liability in subparagraphs (b)2. and 3. do not apply to an owner of motor vehicles that are used for commercial activity in the owner's ordinary course of business, other than a rental company that rents or leases motor vehicles. For purposes of this paragraph, the term "rental company" includes only an entity that is engaged in the business of renting or leasing motor vehicles to the general public and that rents or leases a majority of its motor vehicles to persons with no direct or indirect affiliation with the rental company. The term also includes a motor vehicle dealer that provides temporary replacement vehicles to its customers for up to 10 days.

2. Furthermore, with respect to commercial motor vehicles as defined in s. 627.732, the limits on liability in subparagraphs (b)2. and 3. do not apply if, at the time of the incident, the commercial motor vehicle is being used in the transportation of materials found to be hazardous for the purposes of the Hazardous Materials Transportation Authorization Act of 1994, as amended, 49 U.S.C. ss. 5101 et seq., and that is required pursuant to such act to carry placards warning others of the hazardous cargo, unless at the time of lease or rental either:

a. The lessee indicates in writing that the vehicle will not be used to transport materials found to be hazardous for the purposes of the Hazardous Materials Transportation Authorization Act of 1994, as amended, 49 U.S.C. ss. 5101 et seq.; or

b. The lessee or other operator of the commercial motor vehicle has in effect insurance with limits of at least $ 5,000,000 combined property damage and bodily injury liability.

Section 38. Section 768.76, F.S., is hereby amended to read:

Section 768.76. Collateral sources of indemnity

(1) In any action to which this part applies in which liability is admitted or is determined by the trier of fact and in which damages are awarded to compensate the claimant for losses sustained, the jury shall be informed of the total of all amounts which have been paid for the benefit of claimant or which are otherwise available to the claimant from all collateral sources and the court shall reduce the amount of such award by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources; however, there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists. Such reduction shall be offset to the extent of any amount which has been paid, contributed, or forfeited by, or on behalf of, the claimant or members of the claimant's immediate family to secure her or his right to any collateral source benefit which the claimant is receiving as a result of her or his injury.

(2) For purposes of this section:

(a) "Collateral sources" means any payments made to the claimant, or made on the claimant's behalf, by or pursuant to:

1. The United States Social Security Act, except Title XVIII and Title XIX; any federal, state, or local income disability act; or any other public programs providing medical expenses, disability payments, or other similar benefits, except those prohibited by federal law and those expressly excluded by law as collateral sources.

2. Any health, sickness, or income disability insurance; automobile accident insurance that provides health benefits or income disability coverage; and any other

similar insurance benefits, except life insurance benefits available to the claimant, whether purchased by her or him or provided by others.

3. Any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services.

4. Any contractual or voluntary wage continuation plan provided by employers or by any other system intended to provide wages during a period of disability.

(b) Notwithstanding any other provision of this section, benefits received under Medicare, or any other federal program providing for a Federal Government lien on or right of reimbursement from the plaintiff's recovery, the Workers' Compensation Law, the Medicaid program of Title XIX of the Social Security Act or from any medical services program administered by the Department of Health shall not be considered a collateral source.

(3) In the event that the fees for legal services provided to the claimant are based on a percentage of the amount of money awarded to the claimant, such percentage shall be based on the net amount of the award as reduced by the amounts of collateral sources and as increased by insurance premiums paid.

(4) A provider of collateral sources that has a right of subrogation or reimbursement that has complied with this section shall have a right of reimbursement from a claimant to whom it has provided collateral sources if such claimant has recovered all or part of such collateral sources from a tortfeasor. Such provider's right of reimbursement shall be limited to the actual amount of collateral sources recovered by the claimant from a

tortfeasor, minus its pro rata share of costs and attorney's fees incurred by the claimant in recovering such collateral sources from the tortfeasor. In determining the provider's pro rata share of those costs and attorney's fees, the provider shall have deducted from its recovery a percentage amount equal to the percentage of the judgment or settlement which is for costs and attorney's fees.

(5) Any disputes between the claimant and the provider as to the actual amount of collateral sources recovered by the claimant from a tortfeasor shall be subject to determination by a court of competent jurisdiction. In determining the actual amount of collateral sources recovered, the court shall give consideration to any offset in the amount of settlement or judgment for any comparative negligence of the claimant, limitations in the amount of liability insurance coverage available to the tortfeasor, or any other mitigating factors which the court deems equitable and appropriate under the circumstances.

(6) A claimant shall send the provider of any collateral sources, by certified or registered mail, notification of claimant's intent to claim damages from the tortfeasor. If the claimant has filed suit against the tortfeasor at the time such notice is sent, a copy of the complaint against the tortfeasor should be sent along with such notice. Such notice must include a statement that the provider of collateral sources will waive any right to subrogation or reimbursement unless it provides the claimant or claimant's attorney a statement asserting payment of benefits and right of subrogation or reimbursement within 30 days following receipt of the claimant's notification to the collateral sources provider.

(7) Within 30 days after receipt of the claimant's notification of intent to claim damages from the tortfeasor, the provider of collateral sources must provide the claimant or claimant's attorney a statement asserting its payment of collateral sources benefits and right of subrogation or reimbursement. Failure of the provider of collateral sources to provide such statement to the claimant or claimant's attorney within the 30-day period shall result in waiver of any claim to subrogation or reimbursement by the provider with respect to any such collateral sources. No right of subrogation or reimbursement shall exist for a provider of collateral sources that has waived its right of subrogation or reimbursement pursuant to this subsection.

(8) Reimbursement of a collateral sources provider pursuant to this section shall satisfy such collateral sources provider's right of subrogation or reimbursement. The provider shall have no right of subrogation or reimbursement for collateral sources payments made after the date of waiver, settlement, or judgment.

(9) A collateral source provider claiming a right of subrogation or reimbursement under this section shall cooperate with the claimant by producing such information as is reasonably necessary for the claimant to prove the nature and extent of the value of the collateral sources provided. The failure of the collateral source provider to cooperate may be taken into account by the court in determining the right to or the amount of the reimbursement asserted.

Section 39. Expressing legislative findings and intents; Section 768.28 is amended as follows:

WHEREAS, Section 13 of Article 10 of the Florida Constitution grants the legislature the authority to waive sovereign immunity; and

WHEREAS, in 1973 the legislature, exercising that authority, adopted section 768.28, Fla. Stat., and

WHEREAS, it has been the intent of the legislature that such waiver provisions be strictly construed; and

WHEREAS, it has been brought to the legislature's attention that judicial interpretations have provided that law enforcement agencies may be held liable for the actions of a person fleeing from a law enforcement officer even though the officer has no control over the actions of the fleeing person; and

WHEREAS, the intent of the legislature is to provide that law enforcement officers and their employing agencies should have no liability for injuries caused by the person fleeing the officer in a pursuit; and

WHEREAS, law enforcement officers perform a valuable function in protecting the public from harm and must of necessity, from time to time, apprehend those who violate the law and who through flight from apprehension place members of the public at risk; and

WHEREAS, the legislature finds it necessary to balance the risks of harm to the public with the need to apprehend persons as long as the apprehension and pursuit are accomplished within proper and rational bounds and law enforcement operates with due care; and

WHEREAS, it is the intent if the legislature to overrule the decision in City of Pinellas Park v. Brown, 604 So.2d 1222 (Fla. 1992) and to return to the state of the law to that

existing when the Court issued its opinion in City of Miami v. Horne, 198 So. 2d 10 (Fla, 1967);

NOW THEREFORE,

Subsection (9)(d) of Section 768.28, Fla. Stat. is created to read:

768.28 Waiver of sovereign immunity and tort actions recovery limits; limitation on attorney's fees; statute of limitations; exclusions; indemnification; risk management programs. –

(9)(d) No sheriff or law enforcement officer as defined in s. 943.10 (1), employed by any county, municipality, state agency or any political subdivision of the state, nor the employing agency as defined in s. 943.10 (4), shall be held liable for any civil damages for injury or death affected or caused by a person or persons fleeing from a law enforcement officer, when the pursuit of that person is conducted in a reasonable manner and the person fleeing is reasonably believed to have committed a violation of the laws of this state. The sheriff or law enforcement officer shall not be liable for any injuries or death affected or caused by the person being pursued even though the pursuit may have contributed to the injuries so long as the pursuit was conducted in a reasonable manner which did not involve negligence, careless or wanton conduct on the part of the sheriff or law enforcement officer.

Section 40. Section 768.36, F.S., is amended as follows:

768.36 Alcohol or drug defense.--

(1) As used in this section, the term:

(a) "Alcoholic beverage" means distilled spirits and any beverage that contains 0.5 percent or more alcohol by volume as determined in accordance with s. 561.01(4)(b).

(b) "Drug" means any chemical substance set forth in s. 877.111 or any substance controlled under chapter 893. The term does not include any drug or medication obtained pursuant to a prescription as defined in s. 893.02 which was taken in accordance with the prescription, or any medication that is authorized under state or federal law for general distribution and use without a prescription in treating human diseases, ailments, or injuries and that was taken in the recommended dosage.

(2) In any civil action, a plaintiff may not recover any damages for loss or injury to his or her person or property if the trier of fact finds that, at the time the plaintiff was injured:

(a) The plaintiff was under the influence of any alcoholic beverage or drug to the extent that the plaintiff's normal faculties were impaired or the plaintiff had a blood or breath alcohol level of 0.08 percent or higher; and

(b) As a result of the influence of such alcoholic beverage or drug the plaintiff was more than 50 percent at fault for his or her own harm.

(3) In any civil action alleging that a product was not sufficiently crashworthy, the defendant shall be entitled to a full apportionment of fault, specifically including the individual who caused or contributed to the initial collision.

Section 41. Section 90.105, F.S., is hereby amended to read:

90.105 Preliminary questions.--

(1)Except as provided in subsection (2), the court shall determine preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence.

(2)When the relevancy of evidence depends upon the existence of a preliminary fact, the court shall admit the proffered evidence when there is prima facie evidence sufficient to support a finding of the preliminary fact. If prima facie evidence is not introduced to support a finding of the preliminary fact, the court may admit the proffered evidence subject to the subsequent introduction of prima facie evidence of the preliminary fact.

(3)Hearings on the admissibility of confessions shall be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be similarly conducted when the interests of justice require or when an accused is a witness, if he or she so requests.

(4) Hearings shall be held on the qualifications of a witness to testify as an expert and the scope of such testimony in accordance with s. 90.702 and s.90.704. The court shall allow sufficient time for a hearing on such a motion, outside the presence of the jury if such a motion is made during trial, and shall promptly rule on such motion.

Section 42. Section 90.702, F.S., is hereby amended to read:

90.702 Testimony by experts.—

If scientific, technical, or other specialized knowledge will assist the trier of fact ~~in understanding~~ to understand the evidence or ~~in determining~~ to determine a fact in issue,

a witness qualified as an expert by knowledge, skill, experience, training, or education may testify ~~about it~~ thereto in the form of an opinion or otherwise, if (1)the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. ~~; h~~ However, the opinion is admissible only if it can be applied to evidence at trial.

Section 43. Section 90.704, F.S., is hereby amended to read:

90.704 Basis of opinion testimony by experts.—

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the hearing or trial. If ~~the facts or data~~ ~~are~~ of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject ~~subject to support the opinion expressed~~, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect..

Section 44. Section 481.250 is hereby created to read:

Section 481.250 – Time bars to actions for certain legal damages

(1)Except as otherwise provided herein, no action to recover damages for injury to a person or for wrongful death or for damages to property, nor any statute for contribution

or indemnity for the damages sustained on account of such injury or wrongful death or damage to property arising from any defect, error or omission in the structure or improvement resulting from the design, planning, supervision or observation of construction, or construction of an improvement to real property shall be brought against a registered architect licensed under this chapter or professional engineer licensed under chapter 471 more than seven years after the substantial completion of such improvement.

(2)If by reason of such defect, an injury to the person or an injury causing wrongful death or an injury to property occurs during the seventh year after substantial completion, an action to recover damages for such injury or wrongful death or damage to property may be brought within one year after the date on which such injury occurred, but in no event may such action be brought more than eight years after the substantial completion of the improvement.

(3)The limitations prescribed herein shall not be asserted by way of defense by any owner, tenant or other person in actual possession or control of such improvement where the improvement constitutes the proximate cause of injury or death.

(4)For purposes of this section an improvement shall be deemed to be “substantially completed” when the construction is sufficiently complete so that an improvement may be utilized by its owners or lawful possessor for the purposes intended. In case of a phased project with more than one substantial completion date, the seven-year period of limitations for actions involving systems designed to serve the entire project shall begin at the substantial completion of the earliest phase.

Section 45. Section 481.251 is hereby created to read:

Section 481.251 – Certificate of Merit

(1)In any action for damages alleging professional negligence by a registered architect, licensed under this chapter or professional engineer licensed under chapter 471, the plaintiff shall be required to file with the complaint an affidavit of a third party registered architect or professional engineer competent to testify and practicing in same profession as defendant, which affidavit shall be set forth specifically at least one negligent act, error or omission claimed to exist and the factual basis for each such claim. The third-party professional engineer or registered architect shall be licensed in this state and actively engaged in the practice of architecture or engineering.

(2)The contemporaneous filing requirements of Section 1 shall not apply to any case in which the period of limitation will expire within 10 days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of a third party registered architect or professional engineer could not be prepared. In such cases, the plaintiff shall have 30 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause, extend such time as it shall determine justice requires.

(3)The defendant shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of such affidavit.

(4)The plaintiff's failure to file the affidavit in accordance with section 1 and 2 may result in dismissal with prejudice of the complaint against the defendant.

(5)This statute shall not be construed to extend any applicable limitation of repose.

Section 46. Section 481.255 is hereby created to read:

Section 481.255 – Limitation of liability for contractors, architects, and engineers; mold and mold damage.--

Unless the parties otherwise agree in writing, no contractor, architect, or engineer licensed under the laws of this state shall be liable for any personal injury, property damage, or any other damage, loss, or claim related to mold or mold damage not caused by defects in workmanship or design. The limitation of liability shall also apply to real estate licensees under part I, ch. 475 representing contractors.

Section 47. Section 768.138 is hereby amended to read:

Section 768.138. -- Interruption of electric utility service by order of law enforcement; immunity

The good-faith compliance by an electric utility, as defined in s. 366.02, or the utility's personnel, with a law enforcement or judicial order to interrupt or disconnect electric service at a location for the purpose of aiding law enforcement personnel in the performance of their constitutes an absolute defense for the electric utility and its personnel to any civil, criminal, or administrative action arising out of such interruption or disconnection, as long as the electric utility and its personnel exercise reasonable care in their actions. However, this provision does not create a duty of care where none existed prior to the enactment of this section. This section shall also apply to any action arising out of the failure to yield right of way by a motor vehicle operator in an area impacted by disconnection or interruption of electric service.

Section 48. Section 624.155 , F.S. is hereby amended to read:

Section 624.155 Civil Remedy

(1) ~~Any person~~ An Insured may bring a civil action against an insurer when such person is damaged:

(a) By a violation of any of the following provisions by the insurer:

1.Section 626.9541(1)(i), (o), or (x);

2.Section 626.9551;

3.Section 626.9705;

4.Section 626.9706;

5.Section 626.9707; or

6. Section 627.7283.

(b) By the commission of any of the following acts by the insurer:

1. Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests interests and the interests of all other policyholders. However, both the insured and any person asserting any demand for such settlement owes a similar duty to the insurer to cooperate fully with the insurer; and it shall be a defense to any action under this section if the court finds that the insured or other person demanding settlement:

a. failed to cooperate fully in facilitating the settlement;

b. imposed or adhered to time limits or other conditions on settlement without at that time demonstrating to the insurer valid reasons that such time limits or other conditions were reasonable and necessary, and that such reasons were totally unrelated to the possibility of obtaining damages under this section; or

c. lacked authority to make the demand or to accept the amount demanded in full settlement of all claims asserted in the demand ;

2. Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made; or

3. Except as to liability coverages, failing to promptly settle claims, when the obligation to settle a claim has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

Notwithstanding the provisions of the above to the contrary, ~~a person~~ an insured pursuing a remedy under this section need not prove that such act was committed or performed with such frequency as to indicate a general business practice.

(2)Any party may bring a civil action against an unauthorized insurer if such party is damaged by a violation of s. 624.401 by the unauthorized insurer.

(3) (a) As a condition precedent to bringing an action under this section, the department and the authorized insurer must have been given ~~60~~ 90 days' written notice of the violation. If the department returns a notice for lack of specificity, the ~~60~~ 90-day time period shall not begin until a proper notice is filed.

(b)The notice shall be on a form provided by the department and shall state with specificity the following information, and such other information as the department may require:

1. The statutory provision, including the specific language of the statute, which the authorized insurer allegedly violated.

2. The specific facts and circumstances giving rise to the violation, including facts and circumstances pertinent to each factor started in subsection (11); and the identity of all parties who have made claims against the insured for the occurrence giving rise to the claim and any documentation pertaining to these.

3. The name of any individual involved in the violation.

4. Reference to specific policy language that is relevant to the violation, if any. If the person bringing the civil action is a third party claimant, she or he shall not be required to reference the specific policy language if the authorized insurer has not provided a copy of the policy to the third party claimant pursuant to written request.

5. A statement that the notice is given in order to perfect the right to pursue the civil remedy authorized by this section.

6. A detailed description of the specific dollar amounts that are due and unpaid under each available coverage and how these are calculated, and of any other actions requested to cure the violation.

(c) Within ~~20~~ 30 days of receipt of the notice, the department ~~may~~ shall return any notice that does not provide the specific information required by this section, and the department shall indicate the specific deficiencies contained in the notice. A determination by the department to return a notice for lack of specificity shall be exempt from the requirements of chapter 120.

(d) No action shall lie if, within ~~60~~ 90 days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected.

(e) The authorized insurer that is the recipient of a notice filed pursuant to this section shall report to the department on the disposition of the alleged violation.

(f) The applicable statute of limitations for an action under this section shall be tolled for a period of ~~65~~ 95 days by the mailing of the notice required by this subsection or the mailing of a subsequent notice required by this subsection.

(4) Upon adverse adjudication at trial or upon appeal, the authorized insurer shall be liable for damages, together with court costs and reasonable attorney's fees incurred by the plaintiff. The insurer's liability for its insured's attorney's fees shall not exceed 25% of the difference between any amount the insurer offered voluntarily prior to suit and the award of damages.

(5) No punitive damages shall be awarded under this section unless the acts giving rise to the violation occur with such frequency as to indicate a general business practice and these acts are:

(a)Willful, wanton, and malicious;

(b)In reckless disregard for the rights of any insured; or

(c) In reckless disregard for the rights of a beneficiary under a life insurance contract.

Any person who pursues a claim under this subsection shall post in advance the costs of discovery. Such costs shall be awarded to the authorized insurer if no punitive damages are awarded to the plaintiff.

(6) This section shall not be construed to authorize a class action suit against an authorized insurer or a civil action against the commission, the office, or the department or any of their employees, or to create a cause of action when an authorized health insurer refuses to pay a claim for reimbursement on the ground that the charge for a service was unreasonably high or that the service provided was not medically necessary.

(7) In the absence of expressed language to the contrary, this section shall not be construed to authorize a civil action or create a cause of action against an authorized insurer or its employees who, in good faith, release information about an insured or an insurance policy to a law enforcement agency in furtherance of an investigation of a criminal or fraudulent act relating to a motor vehicle theft or a motor vehicle insurance claim.

(8) The bad faith civil remedy specified in this section ~~does not preempt any~~ preempts all other ~~remedy or cause~~ remedies and causes of action provided for pursuant to any other statute or pursuant to the common law of this state. ~~Any person may obtain a judgment under either the common-law remedy of bad faith or this statutory remedy, but shall not be entitled to a judgment under both remedies~~. This section shall not be construed to create a common-law cause of action. The damages recoverable pursuant to this section shall include those damages which are a reasonably foreseeable result of a specified violation of this section by the authorized insurer and may include an award or judgment in an amount that exceeds the policy limits. Such damages shall not exceed amount of financial loss that the insured will foreseeably and actually pay as a result of the insurer's violation. The rendition of a judgment against a liability insured shall not raise any presumption or inference that an insured will foreseeably and actually pay such loss, except to the extent it is proven that the insured has or is reasonably expected to have assets from which such judgment is expected to be paid.

(9) In all actions for bad faith against a insurer relating to liability insurance coverage, the burden of proof shall be clear and convincing evidence of an unreasonable refusal

to settle. ~~and in determining whether the insurer could and should have settled the claim within the policy limits had it acted fairly and honestly towards its insured with due regard for her or his interest:~~

(a)An insurer shall not be held in bad faith for failure to pay its policy limits if it tenders its policy limits by the earlier of either:

1. The 210th day after service of the complaint in the negligence action upon the insured. The time period specified in this subparagraph shall be extended by an additional 60 days if the court in the bad faith action finds that, at any time during such period and after the 150th day after service of the complaint, the claimant provided new information previously unavailable to the insurer relating to the identity or testimony of any material witnesses or the identity of any additional claimants or defendants, if such disclosure materially alters the risk to the insured of an excess judgment; or

2. The 60th day after the conclusion of all of the following:

a. Deposition of all claimants named in the complaint or amended complaint.

b. Deposition of all defendants named in the complaint or amended complaint, including, in the case of a corporate defendant, deposition of a designated representative.

c. Deposition of all of the claimants' expert witnesses.

d. The initial disclosure of witnesses and production of documents.

When there are multiple claimants seeking compensation from the same defendant compensation for damages arising from the same occurrence which in the aggregate

is in excess of policy limits, such defendant’s insurer shall not be held in bad faith for failure to pay its policy limits if it tenders its policy limits to the court for apportionment to the claimants within the time frame set forth herein.

(b)Either party may request that the court enter an order finding that the other party has unnecessarily or inappropriately delayed any of the events specified in subparagraph (a) 2. If the court finds that the claimant was responsible for such unnecessary or inappropriate delay, subparagraph (a)1. shall not apply to the insurer's tendering of policy limits. If the court finds that the defendant or insurer was responsible for such unnecessary or inappropriate delay, subparagraph (a) 2. shall not apply to the insurer's tendering of policy limits.

(c) If any party to an action alleging negligence amends its witness list after service of the complaint in such action, that party shall provide a copy of the amended witness list to the insurer of the defendant.

(d) The fact that the insurer did not tender policy limits during the time periods specified in this subsection shall not be admissible as evidence that the insurer acted in bad faith.

(10) When an insurer does not tender its policy limits under subsection (9), the trier of fact, in determining whether an insurer has acted in bad faith, shall only consider:

(a) The insurer's willingness to negotiate with the claimant in anticipation of settlement.

(b)The propriety of the insurer's methods of investigating and evaluating the claim.

(c)Whether the insurer timely informed the insured of an offer to settle within the limits of coverage, the right to retain personal counsel, and the risk of litigation.

(d)Whether the insured denied liability or requested that the case be defended after the insurer fully advised the insured as to the facts and risks.

(e)Whether the claimant imposed any condition, other than the tender of the policy limits, on the settlement of the claim.

(f)Whether the claimant provided relevant information to the insurer on a timely basis.

(g)Whether and when other defendants in the case settled or were dismissed from the case.

(h)Whether there were multiple claimants seeking, in the aggregate, compensation in excess of policy limits from the defendant or the defendant's insurer.

(i)Whether the insured misrepresented material facts to the insurer or made material omissions of fact to the insurer.

(j) Other matters that constitute defenses or limitations to actions or damages that are specified in this section.

(11) An insurer that tenders policy limits shall be entitled to a release of its insured if the claimant accepts the tender.

Section 49. Section 627.4137, F.S., is hereby amended to read:

Section 627.4137 Disclosure of certain information required.—

(1)Each insurer which does or may provide liability insurance coverage to pay all or a portion of any claim which might be made shall provide, within 30 days of the written request of the claimant, a statement, under oath, of an authorized representative of the insurer ~~corporate officer or the insurer's claims manager or superintendent~~ setting forth the following information with regard to each known policy of insurance, including excess or umbrella insurance:

(a)The name of the insurer, and

(b)The name of each insured, and

(c)The limits of the liability coverage, and

(d) A statement of any policy or coverage defense which such insurer reasonably believes is available to such insurer at the time of filing such statement, or

(e) A copy of the policy.

In addition, the insured, or her or his insurance agent, upon written request of the claimant or the claimant's attorney, shall disclose the name and coverage of each known insurer to the claimant and shall forward such request for information as required by this subsection to all affected insurers. The insurer shall then supply the information required in this subsection to the claimant within 30 days of receipt of such request.

(2)The statement required by subsection (1) shall be amended immediately upon discovery of facts calling for an amendment to such statement.

Section 50. Section 46.100 is hereby created to read:

46.100 Dismissal due to fraud

In any civil action, the defendant shall be entitled to dismissal upon a motion therefore with evidence demonstrating that the plaintiff engaged in any fraudulent or deceptive activity in any aspect of the lawsuit which is the subject of the damages sought from the defendant. Such motion for motion for dismissal shall be granted based upon a based on a preponderance of the evidence. The judge shall rule on such motions in a timely manner.

(2)A defendant prevailing in such action under subsection (1)may recover compensatory, consequential, and punitive damages subject to the requirements and limitations of part II of chapter 768, and attorney's fees and costs incurred in litigating a cause of action against any person convicted of, or who, regardless of adjudication of guilt, pleads guilty or nolo contendere to insurance fraud under s. 817.234, associated with a claim for damages or other benefits.

Section 51. Section 90.5055 is hereby amended to read:

90.5055 Accountant-client privilege.--

(1) For purposes of this section:

(a) An "accountant" is a certified public accountant or a public accountant.

(b) A "client" is any person, public officer, corporation, association, or other organization or entity, either public or private, who consults an accountant with the purpose of obtaining accounting services.

(c) A communication between an accountant and the accountant's client is "confidential" if it is not intended to be disclosed to third persons other than:

1. Those to whom disclosure is in furtherance of the rendition of accounting services to the client.

2. Those reasonably necessary for the transmission of the communication.

(2) A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications with an accountant when such other person learned of the communications because they were made in the rendition of

accounting services to the client. This privilege includes other confidential information obtained by the accountant from the client for the purpose of rendering accounting advice.

(3) The privilege may be claimed by:

(a) The client.

(b) A guardian or conservator of the client.

(c) The personal representative of a deceased client.

(d) A successor, assignee, trustee in dissolution, or any similar representative of an organization, corporation, or association or other entity, either public or private, whether or not in existence.

(e) The accountant, but only on behalf of the client. The accountant's authority to claim the privilege is presumed in the absence of contrary evidence.

(4) There is no accountant-client privilege under this section when:

(a) The services of the accountant were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or should have known was a crime or fraud.

(b) A communication is relevant to an issue of breach of duty by the accountant to the accountant's client or by the client to his or her accountant.

(c) A communication is relevant to a matter of common interest between two or more clients, if the communication was made by any of them to an accountant retained or consulted in common when offered in a civil action between the clients.

(5) For purposes of this section, an accountant may also include an internal auditor, whether employed or retained by the person, whose reports are generated to aid in making valid business decisions or evaluations of a business performance.

Section 52. Section 768.79 is hereby amended to read:

768.79 Offer of judgment and demand for judgment; settlement between the parties.--

(1) In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him or on the defendant's behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award. Where such costs and attorney's fees total more than the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the plaintiff's award. If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand. If rejected, neither an offer nor demand is admissible in subsequent litigation, except for pursuing the penalties of this section.

(2) The making of an offer of settlement which is not accepted does not preclude the making of a subsequent offer. An offer must:

(a) Be in writing and state that it is being made pursuant to this section.

(b) Name the party making it and the party to whom it is being made.

(c) State with particularity the amount offered to settle a claim for punitive damages, if any.

(d) State its total amount.

The offer shall be construed as including all damages which may be awarded in a final judgment.

(3) The offer shall be served upon the party to whom it is made, but it shall not be filed unless it is accepted or unless filing is necessary to enforce the provisions of this section.

(4) An offer shall be accepted by filing a written acceptance with the court within 30 days after service. Upon filing of both the offer and acceptance, the court has full jurisdiction to enforce the settlement agreement.

(5) An offer may be withdrawn in writing which is served before the date a written acceptance is filed. Once withdrawn, an offer is void.

(6) Upon motion made by the offeror within 30 days after the entry of judgment or after voluntary or involuntary dismissal, the court shall determine the following:

(a) If a defendant serves an offer which is not accepted by the plaintiff, and if the judgment obtained by the plaintiff is at least 25 percent less than the amount of the offer, the defendant shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served, and

the court shall set off such costs in attorney's fees against the award. When such costs and attorney's fees total more than the amount of the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the award to the plaintiff.

(b) If a plaintiff serves an offer which is not accepted by the defendant, and if the judgment obtained by the plaintiff is at least 25 percent more than the amount of the offer, the plaintiff shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served.

For purposes of the determination required by paragraph (a), the term "judgment obtained" means the amount of the net judgment entered, plus any postoffer collateral source payments received or due as of the date of the judgment, plus any postoffer settlement amounts by which the verdict was reduced. For purposes of the determination required by paragraph (b), the term "judgment obtained" means the amount of the net judgment entered, plus any postoffer settlement amounts by which the verdict was reduced.

(7)(a) If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.

(b) When determining the reasonableness of an award of attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:

1. The then apparent merit or lack of merit in the claim.

2. The number and nature of offers made by the parties.

3. The closeness of questions of fact and law at issue.

4. Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.

5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.

6. The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.

(8) Evidence of an offer is admissible only in proceedings to enforce an accepted offer or to determine the imposition of sanctions under this section.

(9) Nothing in this section shall restrict the ability of parties to enter into any settlement agreements or release agreements discharging liability in exchange for an amount of consideration agreed to by the parties. In the event the parties reach such agreement without the assistance of their respective attorneys, an attorney fee shall be payable to the plaintiff's attorney for the amount not to exceed twenty-five percent of the agreed to consideration for the settlement and release, regardless of any other contractual arrangement for attorney fees that may exist.

Section 53. Section 768.82 is hereby created to read:

Section 768.82 -- Claimant's right to fair compensation.

In any liability claim arising under this chapter involving a contingency fee, the claimant is entitled to receive no less than 70% of the first $250,000.00 in all damages received

by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of $250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants.

Section 54. Section 95.11, F.S. is hereby be amended to read:
Section 95.11

95.11 Limitations other than for the recovery of real property.--Actions other than for recovery of real property shall be commenced as follows:

(4)

(h) For purposes of this section, a cause of action for bodily injury caused by exposure to asbestos in any of its chemical forms arises upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has been injured by such exposure, or upon the date on which, by the exercise or reasonable diligence, the plaintiff should have become aware that the plaintiff had been injured by the exposure, whichever date occurs first.

Section 55.

The Legislature makes the following statement of findings and intent:

WHEREAS Asbestos claims have created an increased amount of litigation in state and federal courts that the United States Supreme Court has characterized as "an elephant mass" of cases.

WHEREAS The current asbestos personal injury litigation system is unfair and inefficient, imposing a severe burden on litigants and taxpayers alike. A recent RAND study estimates that a total of fifty-four billion dollars have already been spent on asbestos litigation and the costs continue to mount. Compensation for asbestos claims has risen sharply since 1993. The typical claimant in an asbestos lawsuit now names sixty to seventy defendants, compared with an average of twenty named defendants two decades ago. The RAND Report also suggests that at best, only one-half of all claimants have come forward and at worst, only one-fifth have filed claims to date. Estimates of the total cost of all claims range from two hundred to two hundred sixty-five billion dollars. Tragically, plaintiffs are receiving less than forty-three cents on every dollar awarded, and sixty-five per cent of the compensation paid, thus far, has gone to claimants who are not sick.

WHEREAS The extraordinary volume of nonmalignant asbestos cases continue to strain federal and state courts.

WHEREAS Today, it is estimated that there are more than two hundred thousand active asbestos cases in courts nationwide. According to a recent RAND study, over six hundred thousand people have filed asbestos claims for asbestos-related personal injuries through the end of 2000.

WHEREAS Today, Florida has become a haven for asbestos claims and, as a result, is one of the top state court venues for asbestos filings.

WHEREAS One Florida company, Bingham Insulation & Supply, has been named in 3,000 current lawsuits

WHEREAS It is estimated that active asbestos lawsuits total 4,000 in Broward County, 1,750 in Miami-Dade County, 1,500 in Palm Beach County 1,600 in Hillsborough County, and 800 to 1,000 in Duval County

WHEREAS Nationally, asbestos personal injury litigation has already contributed to the bankruptcy of more than seventy companies, including nearly all manufacturers of asbestos textile and insulation products, and the ratio of asbestos-driven bankruptcies is accelerating.

WHEREAS Joseph Stiglitz, Nobel award-winning economist, in "The Impact of Asbestos Liabilities on Workers in Bankrupt Firms," calculated that bankruptcies caused by asbestos have already resulted in the loss of up to sixty thousand jobs and that each displaced worker in the bankrupt companies will lose, on average, an estimated twenty-five thousand to fifty thousand dollars in wages over the worker's career, and at least a quarter of the accumulated pension benefits.

WHEREAS W.R. Grace & Company, headquartered in Boca Raton, Florida filed for Chapter 11 in order to deal with its rising asbestos-litigation woes. Grace saw asbestos claims against it soar 81% in 2001 .

WHEREAS The Legislature recognizes that the vast majority of Florida asbestos claims are filed by individuals who do not suffer from an asbestos-related impairment. According to a Tillinghast-Towers Perrin study, ninety-four per cent of the fifty-two thousand nine hundred asbestos claims filed in 2000 concerned claimants who are not sick. As a result, the Legislature recognizes that reasonable medical criteria are a necessary response to the asbestos litigation crisis in this state. Medical criteria will expedite the resolution of claims brought by those sick claimants and will ensure that

resources are available for those who are currently suffering from asbestos-related illnesses and for those who may become sick in the

WHEREAS The cost of compensating exposed individuals who are not sick jeopardizes the ability of defendants to compensate people with cancer and other serious asbestos-related diseases, now and in the future; threatens savings, retirement benefits, and jobs of the state's current and retired employees; adversely affects the communities in which these defendants operate; and impairs Ohio's economy.

WHEREAS The public interest requires the deferring of claims of exposed individuals who are not sick in order to preserve, now and for the future, defendants' ability to compensate people who develop cancer and other serious asbestos-related injuries and to safeguard the jobs, benefits, and savings of the state's employees and the well being of the Florida economy.

WHEREAS In enacting sections 768.38 to 768.45 , it is the intent of the Legislature to: (1) give priority to those asbestos claimants who can demonstrate actual physical harm or illness caused by exposure to asbestos; (2) fully preserve the rights of claimants who were exposed to asbestos to pursue compensation should those claimants become impaired in the future as a result of such exposure; (3) enhance the ability of the state's judicial systems and federal judicial systems to supervise and control litigation and asbestos-related bankruptcy proceedings; and (4) conserve the scarce resources of the defendants to allow compensation of cancer victims and others who are physically impaired by exposure to asbestos while securing the right to similar compensation for those who may suffer physical impairment in the future.

WHEREAS It is the intent of the Florida Legislature in enacting section 768.44 in this act to establish specific factors to be considered when determining whether a particular plaintiff's exposure to a particular defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss. The consideration of these factors involving the plaintiff's proximity to the asbestos exposure, frequency of the exposure, or regularity of the exposure in tort actions involving exposure to asbestos is consistent with the factors listed by the court in *Lohrmann v. Pittsburgh Corning Corp.,.* 782 F.2d 1156 (4th Cir. 1986). The Legislature by its enactment of those factors intends to clarify and define for judges and juries that evidence which is relevant to the common law requirement that plaintiff must prove proximate causation. The *Lohrmann* standard provides litigants, juries, and the courts of Florida an objective and easily applied standard for determining whether a plaintiff has submitted evidence sufficient to sustain plaintiff's burden of proof as to proximate causation. Where specific evidence of frequency of exposure, proximity and length of exposure to a particular defendant's asbestos is lacking, summary judgment is appropriate in tort actions involving asbestos because such a plaintiff lacks any evidence of an essential element necessary to prevail. To submit a legal concept such as a "substantial factor" to a jury in these complex cases without such scientifically valid defining factors would be to invite speculation on the part of juries, something that the Legislature has determined not to be in the best interests of Florida and its courts.

Section 56. Section 768.38 is hereby created as follows:

<u>Section 768.38. – Definitions</u>

<u>As used in sections 768.38 to 768.44 :</u>

(1) "AMA guides to the evaluation of permanent impairment" means the American medical association's guides to the evaluation of permanent impairment (fifth edition 2000) as may be modified by the American medical association.

(2) "Asbestos" means chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos, actinolite asbestos, and any of these minerals that have been chemically treated or altered.

(3) "Asbestos claim" means any claim for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos. "Asbestos claim" includes a claim made by or on behalf of any person who has been exposed to asbestos, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to person, risk of disease or other injury, costs of medical monitoring or surveillance, or any other effects on the person's health that are caused by the person's exposure to asbestos.

(4) "Asbestosis" means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos fibers.

(5) "Board-certified internist" means a medical doctor who is currently certified by the American board of internal medicine.

(6) "Board-certified occupational medicine specialist" means a medical doctor who is currently certified by the American board of preventive medicine in the specialty of occupational medicine.

(7) "Board-certified oncologist" means a medical doctor who is currently certified by the American board of internal medicine in the subspecialty of medical oncology.

(8) "Board-certified pathologist" means a medical doctor who is currently certified by the American board of pathology.

(9) "Board-certified pulmonary specialist" means a medical doctor who is currently certified by the American board of internal medicine in the subspecialty of pulmonary medicine.

(10) "Certified B-reader" means an individual qualified as a "final" or "B-reader" as defined in 42 C.F.R. section 37.51(b), as amended.

(11) "Certified industrial hygienist" means an industrial hygienist who has attained the status of diplomate of the American academy of industrial hygiene subject to compliance with requirements established by the American board of industrial hygiene.

(12) "Certified safety professional" means a safety professional who has met and continues to meet all requirements established by the board of certified safety professionals and is authorized by that board to use the certified safety professional title or the CSP designation.

(13) "Civil action" means all suits or claims of a civil nature in a state or federal court, whether cognizable as cases at law or in equity or admiralty. "Civil action" does not include any of the following:

(a) A civil action relating to any workers' compensation law;

(b) A civil action alleging any claim or demand made against a trust established pursuant to 11 U.S.C. section 524(g);

(c) A civil action alleging any claim or demand made against a trust established pursuant to a plan of reorganization confirmed under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. Chapter 11.

(14) "Exposed person" means any person whose exposure to asbestos or to asbestos-containing products is the basis for an asbestos claim under section 768.39 .

(15) "FEV1" means forced expiratory volume in the first second, which is the maximal volume of air expelled in one second during performance of simple spirometric tests.

(16) "FVC" means forced vital capacity that is maximal volume of air expired with maximum effort from a position of full inspiration.

(17) "ILO scale" means the system for the classification of chest x-rays set forth in the international labour office's guidelines for the use of ILO international classification of radiographs of pneumoconioses (2000), as amended.

(18) "Lung cancer" means a malignant tumor in which the primary site of origin of the cancer is inside the lungs, but that term does not include mesothelioma.

(19) "Mesothelioma" means a malignant tumor with a primary site of origin in the pleura or the peritoneum, which has been diagnosed by a board-certified pathologist, using standardized and accepted criteria of microscopic morphology and appropriate staining techniques.

(20) "Nonmalignant condition" means a condition that is caused or may be caused by asbestos other than a diagnosed cancer.

(21) "Pathological evidence of asbestosis" means a statement by a board-certified pathologist that more than one representative section of lung tissue uninvolved with any

other disease process demonstrates a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic asbestos bodies and that there is no other more likely explanation for the presence of the fibrosis.

(22) "Physical impairment" means a nonmalignant condition that meets the minimum requirements specified in paragraph (2) of section 768.39, lung cancer of an exposed person who is a smoker that meets the minimum requirements specified in paragraph (3) of section 768.39 or a condition of a deceased exposed person that meets the minimum requirements specified in paragraph (4) of section 768.39 .

(23) "Plethysmography" means a test for determining lung volume, also known as "body plethysmography," in which the subject of the test is enclosed in a chamber that is equipped to measure pressure, flow, or volume changes.

(24) "Predicted lower limit of normal" means the fifth percentile of healthy populations based on age, height, and gender, as referenced in the AMA guides to the evaluation of permanent impairment.

(25) "Premises owner" means a person who owns, in whole or in part, leases, rents, maintains, or controls privately owned lands, ways, or waters, or any buildings and structures on those lands, ways, or waters, and all privately owned and state-owned lands, ways, or waters leased to a private person, firm, or organization, including any buildings and structures on those lands, ways, or waters.

(26) "Competent medical authority" means a medical doctor who is providing a diagnosis for purposes of constituting prima-facie evidence of an exposed person's physical impairment that meets the requirements specified in section 768.39 and who meets the following requirements:

(a) The medical doctor is a board-certified internist, pulmonary specialist, oncologist, pathologist, or occupational medicine specialist.

(b) The medical doctor is actually treating or has treated the exposed person and has or had a doctor-patient relationship with the person.

(c) As the basis for the diagnosis, the medical doctor has not relied, in whole or in part, on any of the following:

(i) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition in violation of any law, regulation, licensing requirement, or medical code of practice of the state in which that examination, test, or screening was conducted;

(ii) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that was conducted without clearly establishing a doctor-patient relationship with the claimant or medical personnel involved in the examination, test, or screening process;

(iii) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that required the claimant to agree to retain the legal services of the law firm sponsoring the examination, test, or screening.

(iv) The medical doctor spends not more than twenty-five per cent of the medical doctor's professional practice time in providing consulting or expert services in connection with actual or potential tort actions, and the medical doctor's medical group,

professional corporation, clinic, or other affiliated group earns not more than twenty per cent of its revenues from providing those services.

(27) "Radiological evidence of asbestosis" means a chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader as at least 1/1 on the ILO scale.

(28) "Radiological evidence of diffuse pleural thickening" means a chest x-ray showing bilateral pleural thickening graded by a certified B-reader as at least B2 on the ILO scale and blunting of at least one costophrenic angle.

(29) "Regular basis" means on a frequent or recurring basis.

(30) "Smoker" means a person who has smoked the equivalent of one-pack year, as specified in the written report of a competent medical authority pursuant to sections 768.39 and 768.40 during the last fifteen years.

(31) "Spirometry" means the measurement of volume of air inhaled or exhaled by the lung.

(32) "Substantial contributing factor" means both of the following:

(a) Exposure to asbestos is the predominate cause of the physical impairment alleged in the asbestos claim.

(b) A competent medical authority has determined with a reasonable degree of medical certainty that without the asbestos exposures the physical impairment of the exposed person would not have occurred.

(33) "Substantial occupational exposure to asbestos" means employment for a cumulative period of at least five years in an industry and an occupation in which, for a

substantial portion of a normal work year for that occupation, the exposed person did any of the following:

(a) Handled raw asbestos fibers;

(b) Fabricated asbestos-containing products so that the person was exposed to raw asbestos fibers in the fabrication process;

(c) Altered, repaired, or otherwise worked with an asbestos-containing product in a manner that exposed the person on a regular basis to asbestos fibers;

(d) Worked in close proximity to other workers engaged in any of the activities described in paragraph (33)(a), (b), or (c) of this section in a manner that exposed the person on a regular basis to asbestos fibers.

(34) "Timed gas dilution" means a method for measuring total lung capacity in which the subject breathes into a spirometer containing a known concentration of an inert and insoluble gas for a specific time, and the concentration of the inert and insoluble gas in the lung is then compared to the concentration of that type of gas in the spirometer.

(35) "Tort action" means a civil action for damages for injury, death, or loss to person. "Tort action" includes a product liability claim that is subject to section 95.11. "Tort action" does not include a civil action for damages for a breach of contract or another agreement between persons.

(36) "Total lung capacity" means the volume of air contained in the lungs at the end of a maximal inspiration.

(37) "Veterans' benefit program" means any program for benefits in connection with military service administered by the veterans' administration under title 38 of the United States Code.

(38) "Workers' compensation law" means Chapter 440 of the Florida Statutes.

Section 57. Section 768.39 is hereby created to read:

Section 768.39 – Requirements for Bringing Cause of Action;

(1) For purposes of section 95.11 and sections 768.39 to 768.43, "bodily injury caused by exposure to asbestos" means physical impairment of the exposed person, to which the person's exposure to asbestos is a substantial contributing factor.

(2) No person shall bring or maintain a tort action alleging an asbestos claim based on a nonmalignant condition in the absence of a prima-facie showing, in the manner described in paragraph (1) of section 768.40 , that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(a) Evidence verifying that a competent medical authority has taken a detailed occupational and exposure history of the exposed person from the exposed person or, if that person is deceased, from the person who is most knowledgeable about the exposures that form the basis of the asbestos claim for a nonmalignant condition, including all of the following:

(I) All of the exposed person's principal places of employment and exposures to airborne contaminants;

(II) Whether each principal place of employment involved exposures to airborne contaminants, including, but not limited to, asbestos fibers or other disease causing dusts, that can cause pulmonary impairment and, if that type of exposure is involved, the general nature, duration, and general level of the exposure.

(b) Evidence verifying that a competent medical authority has taken a detailed medical and smoking history of the exposed person, including a thorough review of the exposed person's past and present medical problems and the most probable causes of those medical problems;

(c) A diagnosis by a competent medical authority, based on a medical examination and pulmonary function testing of the exposed person, that all of the following apply to the exposed person:

(I) The exposed person has a permanent respiratory impairment rating of at least class 2 as defined by and evaluated pursuant to the AMA guides to the evaluation of permanent impairment.

(II) That the exposed person has asbestosis or diffuse pleural thickening, based at a minimum on radiological or pathological evidence of asbestosis or radiological evidence of diffuse pleural thickening. The asbestosis or diffuse pleural thickening described in this paragraph, rather than solely chronic obstructive pulmonary disease, is a substantial contributing factor to the exposed person's physical impairment, based at a minimum on a determination that the exposed person has any of the following:

(A) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal;

(B) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal;

(C) A chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader at least 2/1 on the ILO scale.

(III) If the exposed person has a chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader as only a 1/0 on the ILO scale, then in order to establish that the exposed person has asbestosis, rather than solely chronic obstructive pulmonary disease, that is a substantial contributing factor to the exposed person's physical impairment the plaintiff must establish that the exposed person has both of the following:

(A) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal;

(B) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal.

(3) No person shall bring or maintain a tort action alleging an asbestos claim based upon lung cancer of an exposed person who is a smoker, in the absence of a prima-facie showing, in the manner described in paragraph (1) of section 768.40 , that the exposed person has a physical impairment, that the physical impairment is a result of a

medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(a) A diagnosis by a competent medical authority that the exposed person has primary lung cancer and that exposure to asbestos is a substantial contributing factor to that cancer;

(b) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the exposed person's first exposure to asbestos until the date of diagnosis of the exposed person's primary lung cancer. The ten-year latency period described in this paragraph is a rebuttable presumption, and the plaintiff has the burden of proof to rebut the presumption.

(c) Either of the following:

(I) Evidence of the exposed person's substantial occupational exposure to asbestos;

(II) Evidence of the exposed person's exposure to asbestos at least equal to 25 fiber per cc years as determined to a reasonable degree of scientific probability by a scientifically valid retrospective exposure reconstruction conducted by a certified industrial hygienist or certified safety professional based upon all reasonably available quantitative air monitoring data and all other reasonably available information about the exposed person's occupational history and history of exposure to asbestos.

(4) If a plaintiff files a tort action that alleges an asbestos claim based upon lung cancer of an exposed person who is a smoker, alleges that the plaintiff's exposure to asbestos was the result of living with another person who, if the tort action had been filed by the other person, would have met the requirements specified in paragraph (3) of this section, and alleges that the plaintiff lived with the other person for the period of time specified in paragraph (33) of section 768.38 , the plaintiff is considered as having satisfied the requirements specified in paragraph (3) of this section.

(5) No person shall bring or maintain a tort action alleging an asbestos claim that is based upon a wrongful death, as described in sections 768.16 – 768.26 of an exposed person in the absence of a prima-facie showing, in the manner described in paragraph (1) of section 768.40 , that the death of the exposed person was the result of a physical impairment, that the death and physical impairment were a result of a medical condition, and that the deceased person's exposure to asbestos was a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(a) A diagnosis by a competent medical authority that exposure to asbestos was a substantial contributing factor to the death of the exposed person;

(b) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the deceased exposed person's first exposure to asbestos until the date of diagnosis or death of the deceased exposed person. The ten-year latency period described in this paragraph is a rebuttable presumption, and the plaintiff has the burden of proof to rebut the presumption.

(c) Either of the following:

(I) Evidence of the deceased exposed person's substantial occupational exposure to asbestos;

(II) Evidence of the deceased exposed person's exposure to asbestos at least equal to 25 fiber per cc years as determined to a reasonable degree of scientific probability by a scientifically valid retrospective exposure reconstruction conducted by a certified industrial hygienist or certified safety professional based upon all reasonably available quantitative air monitoring data and all other reasonably available information about the deceased exposed person's occupational history and history of exposure to asbestos.

(6) If a person files a tort action that alleges an asbestos claim based on a wrongful death, as described in section 768.19 , of an exposed person, alleges that the death of the exposed person was the result of living with another person who, if the tort action had been filed by the other person, would have met the requirements specified in paragraph (5) of this section, and alleges that the exposed person lived with the other person for the period of time specified in paragraph (33) of section 768.38 in order to qualify as a substantial occupational exposure to asbestos, the exposed person is considered as having satisfied the requirements specified in paragraph (5) of this section.

(7) No court shall require or permit the exhumation of a decedent for the purpose of obtaining evidence to make, or to oppose, a prima-facie showing required under paragraph (5) of this section regarding a tort action of the type described in that paragraph.

(8) No prima-facie showing is required in a tort action alleging an asbestos claim based upon mesothelioma.

(9) Evidence relating to physical impairment under this section, including pulmonary function testing and diffusing studies, shall comply with the technical recommendations for examinations, testing procedures, quality assurance, quality control, and equipment incorporated in the AMA guides to the evaluation of permanent impairment and reported as set forth in 20 C.F.R. Pt. 404, Subpt. P, App. 1, Part A, Sec. 3.00 E. and F., and the interpretive standards set forth in the official statement of the American thoracic society entitled "lung function testing: selection of reference values and interpretive strategies" as published in American review of respiratory disease, 1991:144:1202-1218.

(G) All of the following apply to the court's decision on the prima-facie showing that meets the requirements of paragraphs (2), (3), or (5) of this section:

(a) The court's decision does not result in any presumption at trial that the exposed person has a physical impairment that is caused by an asbestos-related condition.

(b) The court's decision is not conclusive as to the liability of any defendant in the case.

(c) The court's findings and decisions are not admissible at trial.

(d) If the trier of fact is a jury, the court shall not instruct the jury with respect to the court's decision on the prima-facie showing, and neither counsel for any party nor a witness shall inform the jury or potential jurors of that showing.

Section 58. Section 768.40 is hereby created to read:

Section 768.40 – Required Filings

(1) The plaintiff in any tort action who alleges an asbestos claim shall file, within thirty days after filing the complaint or other initial pleading, a written report and supporting test results constituting prima-facie evidence of the exposed person's physical impairment that meets the minimum requirements specified in paragraphs (2), (3), or 5) of section 768.39 , whichever is applicable. The defendant in the case shall be afforded a reasonable opportunity, upon the defendant's motion, to challenge the adequacy of the proffered prima-facie evidence of the physical impairment for failure to comply with the minimum requirements specified in paragraph (2), (3), or (5) of section 768.39 . The defendant has one hundred twenty days from the date the specified type of prima-facie evidence is proffered to challenge the adequacy of that prima-facie evidence. If the defendant makes that challenge and uses a physician to do so, the physician must meet the requirements specified in paragraph (26) of section 768.38 .

(2) With respect to any asbestos claim that is pending on the effective date of this section, the plaintiff shall file the written report and supporting test results described in paragraph (1) of this section within one hundred twenty days following the effective date of this section. Upon motion and for good cause shown, the court may extend the one hundred twenty-day period described in this paragraph.

(3)For any cause of action that arises before the effective date of this section, the provisions set forth in paragraphs (2), (3), and (5) of section 768.39 are to be applied unless the court that has jurisdiction over the case finds both of the following:

(a) A substantive right of a party to the case has been impaired.

(b) That impairment is otherwise in violation of Section 10 of Article I, Florida Constitution.

(4) If a finding under paragraph (1) of this section is made by the court that has jurisdiction over the case, then the court shall determine whether the plaintiff has failed to provide sufficient evidence to support the plaintiff's cause of action or the right to relief under the law that is in effect prior to the effective date of this section.

(5) If the court that has jurisdiction of the case finds that the plaintiff has failed to provide sufficient evidence to support the plaintiff's cause of action or right to relief under paragraph (1) of this section, the court shall administratively dismiss the plaintiff's claim without prejudice. The court shall maintain its jurisdiction over any case that is administratively dismissed under this paragraph. Any plaintiff whose case has been administratively dismissed under this paragraph may move to reinstate the plaintiff's case if the plaintiff provides sufficient evidence to support the plaintiff's cause of action or the right to relief under the law that was in effect when the plaintiff's cause of action arose.

(6) If the defendant in an action challenges the adequacy of the prima-facie evidence of the exposed person's physical impairment as provided in paragraph (1) of this section, the court shall determine from all of the evidence submitted whether the proffered prima-facie evidence meets the minimum requirements specified in paragraph (2), (3), or (5) of section 768.39 . The court shall resolve the issue of whether the plaintiff has made the prima-facie showing required by paragraph (2), (3), or (5) of section 768.39 by applying the standard for resolving a motion for summary judgment.

(7) The court shall administratively dismiss the plaintiff's claim without prejudice upon a finding of failure to make the prima-facie showing required by paragraph (2), (3), or (5) of section 768.39. The court shall maintain its jurisdiction over any case that is

administratively dismissed under this paragraph. Any plaintiff whose case has been administratively dismissed under this paragraph may move to reinstate the plaintiff's case if the plaintiff makes a prima-facie showing that meets the minimum requirements specified in paragraph (2), (3), or (5) of section 768.39 .

Section 59. Section 768.41, F.S., is hereby created to read:

Sec. 768.41 – Time Bars to Claims for Non-Malignant Conditions

(1) Notwithstanding any other provision , with respect to any asbestos claim based upon a nonmalignant condition that is not barred as of the effective date of this section, the period of limitations shall not begin to run until the exposed person has a cause of action for bodily injury pursuant to section 95.11. An asbestos claim based upon a nonmalignant condition that is filed before the cause of action for bodily injury pursuant to that section arises is preserved for purposes of the period of limitations.

(2) An asbestos claim that arises out of a nonmalignant condition shall be a distinct cause of action from an asbestos claim relating to the same exposed person that arises out of asbestos-related cancer. No damages shall be awarded for fear or risk of cancer in any tort action asserting only an asbestos claim for a nonmalignant condition.

(3) No settlement of an asbestos claim for a nonmalignant condition that is concluded after the effective date of this section shall require, as a condition of settlement, the release of any future claim for asbestos-related cancer.

Section 60. Section 768.42 is hereby created to read:

Section 768.42 – Premises Liability for Asbestos Claims

(1) The following apply to all tort actions for asbestos claims brought against a premises owner to recover damages or other relief for exposure to asbestos on the premises owner's property:

(a) A premises owner is not liable for any injury to any individual resulting from asbestos exposure unless that individual's alleged exposure occurred while the individual was at the premises owner's property.

(b) If exposure to asbestos is alleged to have occurred before January 1, 1972, it is presumed that a premises owner knew that this state had adopted safe levels of exposure for asbestos and that products containing asbestos were used on its property only at levels below those safe levels of exposure. To rebut this presumption, the plaintiff must prove by a preponderance of the evidence that the premises owner knew or should have known that the levels of asbestos in the immediate breathing zone of the plaintiff regularly exceeded the threshold limit values adopted by this state and that the premises owner allowed that condition to persist.

(c) A premises owner is presumed to be not liable for any injury to any invitee who was engaged to work with, install, or remove asbestos products on the premises owner's property if the invitee's employer held itself out as qualified to perform the work. To rebut this presumption, the plaintiff must prove by a preponderance of the evidence that at the time of the exposure to asbestos that is alleged the premises owner had actual knowledge of the potential dangers of the asbestos products at the time of the alleged exposure that was superior to the knowledge of both the invitee and the invitee's employer.

(d) A premises owner that hired a contractor before January 1, 1972, to perform the type of work at the premises owner's property that the contractor was qualified to perform cannot be liable for any injury to any individual resulting from asbestos exposure caused by any of the contractor's employees or agents on the premises owner's property unless the premises owner directed the activity that resulted in the injury or gave or denied permission for the critical acts that led to the individual's injury.

(e) If exposure to asbestos is alleged to have occurred on or after January 1, 1972, a premises owner is not liable for any injury to any individual resulting from that exposure caused by a contractor's employee or agent on the premises owner's property unless the plaintiff establishes the premises owner's intentional violation of an established safety standard that was in effect at the time of the exposure and that the alleged violation was in the plaintiff's breathing zone and was the proximate cause of the plaintiff's medical condition.

(2) As used in this section:

(a) "Threshold limit values" means that, for the years 1946 through 1971, the concentration of asbestos in a worker's breathing zone did not exceed the following maximum allowable exposure limits for the eight-hour time-weighted average airborne concentration:

(I) Asbestos: five million particles per cubic foot;

(II) Cadmium: 0.10 milligrams per cubic meter;

(III) Chromic acid and chromates (calculated as chromic oxide): 0.10 milligrams per cubic meter;

(IV) Lead: 0.15 milligrams per cubic meter;

(V) Manganese: 6.0 milligrams per cubic meter;

(VI) Mercury: 0.10 milligrams per cubic meter;

(VII) Zinc oxide: 15.0 milligrams per cubic meter;

(VIII) Chlorinated diphenyls: 1.0 milligram per cubic meter;

(IX) Chlorinated naphthalenes (trichlornaphthalene): 5.0 milligrams per cubic meter;

(X) Chlorinated naphthalenes (pentachlornaphthalene): 0.50 milligrams per cubic meter.

(b) "Established safety standard" means that, for the years after 1971, the concentration of asbestos in the breathing zone of a worker does not exceed the maximum allowable exposure limits for the eight-hour time-weighted average airborne concentration as promulgated by the occupational safety and health administration (OSHA) in effect at the time of the alleged exposure.

(c) "Employee" means an individual who performs labor or provides construction services pursuant to a construction contract as defined in section 713.01, or a remodeling or repair contract, whether written or oral, if at least ten of the following criteria apply:

(I) The individual is required to comply with instructions from the other contracting party regarding the manner or method of performing services.

(II) The individual is required by the other contracting party to have particular training.

(III) The individual's services are integrated into the regular functioning of the other contracting party.

(IV) The individual is required to perform the work personally.

(V) The individual is hired, supervised, or paid by the other contracting party.

(VI) A continuing relationship exists between the individual and the other contracting party that contemplates continuing or recurring work even if the work is not full time.

(VII) The individual's hours of work are established by the other contracting party.

(VIII) The individual is required to devote full time to the business of the other contracting party.

(IX) The person is required to perform the work on the premises of the other contracting party.

(X) The individual is required to follow the order of work set by the other contracting party.

(XI) The individual is required to make oral or written reports of progress to the other contracting party.

(XII) The individual is paid for services on a regular basis, including hourly, weekly, or monthly.

(XIII) The individual's expenses are paid for by the other contracting party.

(XIV) The individual's tools and materials are furnished by the other contracting party.

(XV) The individual is provided with the facilities used to perform services.

(XVI) The individual does not realize a profit or suffer a loss as a result of the services provided.

(XVII) The individual is not performing services for a number of employers at the same time.

(XVIII) The individual does not make the same services available to the general public.

(XIX) The other contracting party has a right to discharge the individual.

(XX) The individual has the right to end the relationship with the other contracting party without incurring liability pursuant to an employment contract or agreement.

Section 61. Section 768.49 is hereby created to read:

Section 768.43 – Scope of Operation

(1) Nothing in sections 768.39 to 768.43 is intended to do, and nothing in any of those sections shall be interpreted to do, either of the following:

(a) Affect the rights of any party in bankruptcy proceedings;

(b) Affect the ability of any person who is able to make a showing that the person satisfies the claim criteria for compensable claims or demands under a trust established pursuant to a plan of reorganization under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. Chapter 11, to make a claim or demand against that trust.

(2) Sections 768.38 to 768.43 shall not affect the scope or operation of any workers' compensation law or veterans' benefit program or the exclusive remedy of subrogation under the provisions of that law or program and shall not authorize any lawsuit that is barred by any provision of any workers' compensation law.

(3) Except as provided in paragraph (5) of section 768.39 and in other provisions that relate to the application of that paragraph and the procedures and criteria it contains, nothing in sections 768.39, 768.40, 768.41, and 768.43 is intended, and nothing in any of those sections shall be interpreted, to affect any wrongful death claim, as described in section 768.19 .

Section 62. Section 768.44, F.S., is hereby created to read:

Section 768.44 – Burden of Proof

(1) If a plaintiff in a tort action alleges any injury or loss to person resulting from exposure to asbestos as a result of the tortious act of one or more defendants, in order to maintain a cause of action against any of those defendants based on that injury or loss, the plaintiff must prove that the conduct of that particular defendant was a substantial factor in causing the injury or loss on which the cause of action is based.

(2) A plaintiff in a tort action who alleges any injury or loss to person resulting from exposure to asbestos has the burden of proving that the plaintiff was exposed to asbestos that was manufactured, supplied, installed, or used by the defendant in the action and that the plaintiff's exposure to the defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss. In determining whether exposure to a

particular defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss, the trier of fact in the action shall consider, without limitation, all of the following:

(a) The manner in which the plaintiff was exposed to the defendant's asbestos;

(b) The proximity of the defendant's asbestos to the plaintiff when the exposure to the defendant's asbestos occurred;

(c) The frequency and length of the plaintiff's exposure to the defendant's asbestos;

(d) Any factors that mitigated or enhanced the plaintiff's exposure to asbestos.

(3) This section applies only to tort actions that allege any injury or loss to person resulting from exposure to asbestos and that are brought on or after the effective date of this section.

Section 63. Section 768.45 is hereby created to read:

Section 768.45 – Piercing the Corporate Veil

(1) A holder has no obligation to, and has no liability to, the covered entity or to any person with respect to any obligation or liability of the covered entity in an asbestos claim under the doctrine of piercing the corporate veil unless the person seeking to pierce the corporate veil demonstrates all of the following:

(a) The holder exerted such control over the covered entity that the covered entity had no separate mind, will, or existence of its own.

(b) The holder caused the covered entity to be used for the purpose of perpetrating, and the covered entity perpetrated, an actual fraud on the person seeking to pierce the corporate veil primarily for the direct pecuniary benefit of the holder.

(c) The person seeking to pierce the corporate veil sustained an injury or unjust loss as a direct result of the control described in paragraph (A)(1) of this section and the fraud described in paragraph (A)(2) of this section.

(2) A court shall not find that the holder exerted such control over the covered entity that the covered entity did not have a separate mind, will, or existence of its own or to have caused the covered entity to be used for the purpose of perpetrating a fraud solely as a result of any of the following actions, events, or relationships:

(a) The holder is an affiliate of the covered entity and provides legal, accounting, treasury, cash management, human resources, administrative, or other similar services to the covered entity, leases assets to the covered entity, or makes its employees available to the covered entity.

(b) The holder loans funds to the covered entity or guarantees the obligations of the covered entity.

(c) The officers and directors of the holder are also officers and directors of the covered entity.

(d) The covered entity makes payments of dividends or other distributions to the holder or repays loans owed to the holder.

(e) In the case of a covered entity that is a limited liability company, the holder or its employees or agents serve as the manager of the covered entity.

(3) The person seeking to pierce the corporate veil has the burden of proof on each and every element of the person's claim and must prove each element by a preponderance of the evidence.

(4) Any liability of the holder described in paragraph (A) of this section for an obligation or liability that is limited by that paragraph is exclusive and preempts any other obligation or liability imposed upon that holder for that obligation or liability under common law or otherwise.

(5) This section is intended to codify the elements of the common law cause of action for piercing the corporate veil and to abrogate the common law cause of action and remedies relating to piercing the corporate veil in asbestos claims. Nothing in this section shall be construed as creating a right or cause of action that did not exist under the common law as it existed on the effective date of this section.

(6) This section applies to all asbestos claims commenced on or after the effective date of this section or commenced prior to and pending on the effective date of this section.

(7) This section applies to all actions asserting the doctrine of piercing the corporate veil brought against a holder if any of the following apply:

(a) The holder is an individual and resides in this state.

(b) The holder is a corporation organized under the laws of this state.

(c) The holder is a corporation with its principal place of business in this state.

(d) The holder is a foreign corporation that is authorized to conduct or has conducted business in this state.

(e) The holder is a foreign corporation whose parent corporation is authorized to conduct business in this state.

(f) The person seeking to pierce the corporate veil is a resident of this state.

(8) As used in this section, unless the context otherwise requires:

(a) "Affiliate" and "beneficial owner" have the same meanings as in section 607.0901 .

(b) "Asbestos" has the same meaning as in section 768.38 .

(c) "Asbestos claim" means any claim, wherever or whenever made, for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos. "Asbestos claim" includes any of the following:

(I) A claim made by or on behalf of any person who has been exposed to asbestos, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to person, risk of disease or other injury, costs of medical monitoring or surveillance, or any other effects on the person's health that are caused by the person's exposure to asbestos;

(II) A claim for damage or loss to property that is caused by the installation, presence, or removal of asbestos.

(d) "Corporation" means a corporation for profit, including the following:

(I) A domestic corporation that is organized under the laws of this state;

(II) A foreign corporation that is organized under laws other than the laws of this state and that has had a certificate of authority to transact business in this state or has done business in this state.

(e) "Covered entity" means a corporation, limited liability company, limited partnership, or any other entity organized under the laws of any jurisdiction, domestic or foreign, in which the shareholders, owners, or members are generally not responsible for the debts and obligations of the entity. Nothing in this section limits or otherwise affects the liabilities imposed on a general partner of a limited partnership.

(f) "Holder" means a person who is the holder or beneficial owner of, or subscriber to, shares or any other ownership interest of a covered entity, a member of a covered entity, or an affiliate of any person who is the holder or beneficial owner of, or subscriber to, shares or any other ownership interest of a covered entity.

(g) "Piercing the corporate veil" means any and all common law doctrines by which a holder may be liable for an obligation or liability of a covered entity on the basis that the holder controlled the covered entity, the holder is or was the alter ego of the covered entity, or the covered entity has been used for the purpose of actual or constructive fraud or as a sham to perpetrate a fraud or any other common law doctrine by which the covered entity is disregarded for purposes of imposing liability on a holder for the debts or obligations of that covered entity.

(h) "Person" has the same meaning as in section 607.01401.

Section 64. Section 766.118, F.S., is hereby amended to read:

766.118 Determination of noneconomic damages.--

(1) DEFINITIONS.--As used in this section, the term:

(a) "Catastrophic injury" means a permanent impairment constituted by:

1. Spinal cord injury involving severe paralysis of an arm, a leg, or the trunk;

2. Amputation of an arm, a hand, a foot, or a leg involving the effective loss of use of that appendage;

3. Severe brain or closed-head injury as evidenced by:

a. Severe sensory or motor disturbances;

b. Severe communication disturbances;

c. Severe complex integrated disturbances of cerebral function;

d. Severe episodic neurological disorders; or

e. Other severe brain and closed-head injury conditions at least as severe in nature as any condition provided in sub-subparagraphs a.-d.;

4. Second-degree or third-degree burns of 25 percent or more of the total body surface or third-degree burns of 5 percent or more to the face and hands;

5. Blindness, defined as a complete and total loss of vision; or

6. Loss of reproductive organs which results in an inability to procreate.

(b) "Noneconomic damages" means noneconomic damages as defined in s. 766.202(8).

(c) "Practitioner" means any person licensed under chapter 400, chapter 458, chapter 459, chapter 460, chapter 461, chapter 462, chapter 463, chapter 466, chapter 467, or chapter 486 or certified under s. 464.012. "Practitioner" also means any association, corporation, firm, partnership, or other business entity under which such practitioner practices or any employee of such practitioner or entity acting in the scope of his or her employment. For the purpose of determining the limitations on noneconomic damages

set forth in this section, the term "practitioner" includes any person or entity for whom a practitioner is vicariously liable and any person or entity whose liability is based solely on such person or entity being vicariously liable for the actions of a practitioner.

(2) LIMITATION ON NONECONOMIC DAMAGES FOR NEGLIGENCE OF PRACTITIONERS.--

(a) With respect to a cause of action for personal injury or wrongful death arising from medical negligence, or nursing home negligence, of practitioners, regardless of the number of such practitioner defendants, noneconomic damages shall not exceed $500,000 per claimant. No practitioner shall be liable for more than $500,000 in noneconomic damages, regardless of the number of claimants.

(b) Notwithstanding paragraph (a), if the negligence resulted in a permanent vegetative state or death, the total noneconomic damages recoverable from all practitioners, regardless of the number of claimants, under this paragraph shall not exceed $1 million. In cases that do not involve death or permanent vegetative state, the patient injured by medical negligence may recover noneconomic damages not to exceed $1 million if:

1. The trial court determines that a manifest injustice would occur unless increased noneconomic damages are awarded, based on a finding that because of the special circumstances of the case, the noneconomic harm sustained by the injured patient was particularly severe; and

2. The trier of fact determines that the defendant's negligence caused a catastrophic injury to the patient.

(c) The total noneconomic damages recoverable by all claimants from all practitioner defendants under this subsection shall not exceed $1 million in the aggregate.

(3) LIMITATION ON NONECONOMIC DAMAGES FOR NEGLIGENCE OF NONPRACTITIONER DEFENDANTS.--

(a) With respect to a cause of action for personal injury or wrongful death arising from medical negligence, or nursing home negligence, of nonpractitioners, including facilities licensed under chapter 400, regardless of the number of such nonpractitioner defendants, noneconomic damages shall not exceed $750,000 per claimant.

(b) Notwithstanding paragraph (a), if the negligence resulted in a permanent vegetative state or death, the total noneconomic damages recoverable by such claimant from all nonpractitioner defendants under this paragraph shall not exceed $1.5 million. The patient injured by medical negligence, or nursing home negligence, of a nonpractitioner defendant may recover noneconomic damages not to exceed $1.5 million if:

1. The trial court determines that a manifest injustice would occur unless increased noneconomic damages are awarded, based on a finding that because of the special circumstances of the case, the noneconomic harm sustained by the injured patient was particularly severe; and

2. The trier of fact determines that the defendant's negligence caused a catastrophic injury to the patient.

(c) Nonpractitioner defendants are subject to the cap on noneconomic damages provided in this subsection regardless of the theory of liability, including vicarious liability.

(d) The total noneconomic damages recoverable by all claimants from all nonpractitioner defendants under this subsection shall not exceed $1.5 million in the aggregate.

(4) LIMITATION ON NONECONOMIC DAMAGES FOR NEGLIGENCE OF PRACTITIONERS PROVIDING EMERGENCY SERVICES AND CARE.--Notwithstanding subsections (2) and (3), with respect to a cause of action for personal injury or wrongful death arising from medical negligence of practitioners providing emergency services and care, as defined in s. 395.002(10), or providing services as provided in s. 401.265, or providing services pursuant to obligations imposed by 42 U.S.C. s. 1395dd to persons with whom the practitioner does not have a then-existing health care patient-practitioner relationship for that medical condition:

(a) Regardless of the number of such practitioner defendants, noneconomic damages shall not exceed $150,000 per claimant.

(b) Notwithstanding paragraph (a), the total noneconomic damages recoverable by all claimants from all such practitioners shall not exceed $300,000.

The limitation provided by this subsection applies only to noneconomic damages awarded as a result of any act or omission of providing medical care or treatment, including diagnosis that occurs prior to the time the patient is stabilized and is capable of receiving medical treatment as a nonemergency patient, unless surgery is required as a result of the emergency within a reasonable time after the patient is stabilized, in which case the limitation provided by this subsection applies to any act or omission of providing medical care or treatment which occurs prior to the stabilization of the patient following the surgery.

(5) LIMITATION ON NONECONOMIC DAMAGES FOR NEGLIGENCE OF NONPRACTITIONER DEFENDANTS PROVIDING EMERGENCY SERVICES AND CARE.--Notwithstanding subsections (2) and (3), with respect to a cause of action for personal injury or wrongful death arising from medical negligence of defendants other than practitioners providing emergency services and care pursuant to obligations imposed by s. 395.1041 or s. 401.45, or obligations imposed by 42 U.S.C. s. 1395dd to persons with whom the practitioner does not have a then-existing health care patient-practitioner relationship for that medical condition:

(a) Regardless of the number of such nonpractitioner defendants, noneconomic damages shall not exceed $750,000 per claimant.

(b) Notwithstanding paragraph (a), the total noneconomic damages recoverable by all claimants from all such nonpractitioner defendants shall not exceed $1.5 million.

(c) Nonpractitioner defendants may receive a full setoff for payments made by practitioner defendants.

The limitation provided by this subsection applies only to noneconomic damages awarded as a result of any act or omission of providing medical care or treatment, including diagnosis that occurs prior to the time the patient is stabilized and is capable of receiving medical treatment as a nonemergency patient, unless surgery is required as a result of the emergency within a reasonable time after the patient is stabilized, in which case the limitation provided by this subsection applies to any act or omission of providing medical care or treatment which occurs prior to the stabilization of the patient following the surgery.

(6) SETOFF.--In any case in which the jury verdict for noneconomic damages exceeds the limits established by this section, the trial court shall reduce the award for noneconomic damages within the same category of defendants in accordance with this section after making any reduction for comparative fault as required by s. 768.81 but before application of a setoff in accordance with ss. 46.015 and 768.041. In the event of a prior settlement or settlements involving one or more defendants subject to the limitations of the same subsection applicable to a defendant remaining at trial, the court shall make such reductions within the same category of defendants as are necessary to ensure that the total amount of noneconomic damages recovered by the claimant does not exceed the aggregate limit established by the applicable subsection. This subsection is not intended to change current law relating to the setoff of economic damages.

(7) ACTIONS GOVERNED BY SOVEREIGN IMMUNITY LAW.--This section shall not apply to actions governed by s. 768.28.

Section 65. Section 766.202, F.S., is hereby amended to read:

766.202 Definitions; ss. 766.201-766.212.--As used in ss. 766.201-766.212, the term:

(1) "Claimant" means any person who has a cause of action for damages based on personal injury or wrongful death arising from medical negligence.

(2) "Collateral sources" means any payments made to the claimant, or made on his or her behalf, by or pursuant to:

(a) The United States Social Security Act; any federal, state, or local income disability act; or any other public programs providing medical expenses, disability payments, or other similar benefits, except as prohibited by federal law.

(b) Any health, sickness, or income disability insurance; automobile accident insurance that provides health benefits or income disability coverage; and any other similar insurance benefits, except life insurance benefits available to the claimant, whether purchased by him or her or provided by others.

(c) Any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services.

(d) Any contractual or voluntary wage continuation plan provided by employers or by any other system intended to provide wages during a period of disability.

(3) "Economic damages" means financial losses that would not have occurred but for the injury giving rise to the cause of action, including, but not limited to, past and future medical expenses and 80 percent of wage loss and loss of earning capacity to the extent the claimant is entitled to recover such damages under general law, including the Wrongful Death Act.

(4) "Health care provider" means any hospital, ambulatory surgical center, or mobile surgical facility as defined and licensed under chapter 395; a birth center licensed under chapter 383; a nursing home facility licensed under chapter 400; any person licensed under chapter 400, chapter 458, chapter 459, chapter 460, chapter 461, chapter 462, chapter 463, part I of chapter 464, chapter 466, chapter 467, or chapter 486; a clinical lab licensed under chapter 483; a health maintenance organization certificated under

part I of chapter 641; a blood bank; a plasma center; an industrial clinic; a renal dialysis facility; or a professional association partnership, corporation, joint venture, or other association for professional activity by health care providers.

(5) "Investigation" means that an attorney has reviewed the case against each and every potential defendant and has consulted with a medical expert and has obtained a written opinion from said expert.

(6) "Medical expert" means a person duly and regularly engaged in the practice of his or her profession who holds a health care professional degree from a university or college and who meets the requirements of an expert witness as set forth in s. 766.102.

(7) "Medical negligence" means medical malpractice, and shall include nursing home negligence, whether grounded in tort or in contract.

(8) "Noneconomic damages" means nonfinancial losses that would not have occurred but for the injury giving rise to the cause of action, including pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other nonfinancial losses to the extent the claimant is entitled to recover such damages under general law, including the Wrongful Death Act.

(9) "Periodic payment" means provision for the structuring of future economic damages payments, in whole or in part, over a period of time, as follows:

(a) A specific finding of the dollar amount of periodic payments which will compensate for these future damages after offset for collateral sources shall be made. The total dollar amount of the periodic payments shall equal the dollar amount of all such future damages before any reduction to present value.

(b) The defendant shall be required to post a bond or security or otherwise to assure full payment of these damages awarded. A bond is not adequate unless it is written by a company authorized to do business in this state and is rated A+ by Best's. If the defendant is unable to adequately assure full payment of the damages, all damages, reduced to present value, shall be paid to the claimant in a lump sum. No bond may be canceled or be subject to cancellation unless at least 60 days' advance written notice is filed with the court and the claimant. Upon termination of periodic payments, the security, or so much as remains, shall be returned to the defendant.

(c) The provision for payment of future damages by periodic payments shall specify the recipient or recipients of the payments, the dollar amounts of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made.

Section 66. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

Section 67. This act shall take effect upon becoming a law and shall apply to causes of action that accrue on or after the effective date.

Stiles, Taylor & Grace, P.A.

General Counsel
to

Associated Industries of Florida

Reforming Florida's Future:
An Overview of the Need for Tort Reform in the Sunshine State

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This article was prepared to give an overview of tort reform needs in Florida and in anticipation of significant efforts by Associated Industries of Florida to enact significant tort reform during the 2005 and 2006 sessions of the Florida Legislature. This article contains only some of the tort issues that Florida businesses are dealing with and is not all-inclusive. It is intended to assist Florida's business leaders in developing legislative goals for the future.

For any business leader in Florida, the rising costs of increased litigation in many areas of their companies are all too familiar. This article highlights litigation "hot topics" that affect specific industries and threaten to expand across all lines of business.

Section One focuses on the expanded legal definition of duty that the utility companies have been dealt over the past decade by the Florida Supreme Court. Because the definition of duty in negligence involves an element of fact finding and principles of law, this problem is beginning to extend into other industries and could be potentially devastating for Florida's overall business climate.

several liabilities because the corporate defendants can be easily located and forced to pay plaintiffs for any damages awarded, unlike the perpetrators of the intentional act, who are frequently subjects of the criminal justice system and have little or no means to pay for the damages they inflict. Retailers are also frequently sued and held liable for product defects about which they had no knowledge, no responsibility and no control.

This section discusses the need for additional insurance bad faith reform in Florida. Virtually any litigated case brings with it the risk of a bad faith lawsuit which drives the cost of the litigation and forces many insurers to settle before a thorough investigation can be completed. The Florida Legislature recently addressed bad faith in medical malpractice and should expand these protections to other lines of liability insurance.

Although the Legislature has repealed many of the statutes that previously made nursing homes one of the most attractive target for plaintiff's lawyers, additional protections are needed to ensure that Florida's most vulnerable citizens can receive and medical and attendant care they need at an affordable cost. Additional caps on damages and other reforms are still needed to attract insurers back to Florida's nursing home market and make this care more affordable.

Car rental companies and automobile dealers that loan cars to customers for test drives or for use while awaiting service and repairs should not be responsible for injuries caused by the negligence of the individuals driving their vehicles, particularly when those individuals violate the terms of the rental or loan agreement

The Florida Legislature created two theories of law for use primarily in products liability cases when it passed the Tort Reform Act of 1999. These are frequently referred to as the state of the art defense and the government rules defense. However, the state of the art defense has not yet been interpreted by the courts as applying to the manufacturer as a defense or being available to a plaintiff as a cause of action. Because of this ambiguity the current law needs to be strengthened and refined to provide more protection to manufacturers from frivolous lawsuits.

Additionally, the government rules defense provides significant protection for manufacturers who adhere to all government regulations in creating its products. Such compliance demonstrates a level of care that should be sufficient to avoid liability, particularly in face of unwarranted litigation. This rule must remain in the statutes, without weakening from the judicial system.

This November, over 60% of Florida's voters supported the passage of Constitutional Amendment 3. Constitutional Amendment 3 limits recovery by attorneys in medical malpractice claims. In states with similar measures, such as California, insurance rates have fallen significantly. Although Constitutional Amendment 3 is self-executing, it is very likely will face challenge in the state's courts.

The right to a jury trial is a fundamental tenet of the American judicial system, yet there is very little incentive for citizens to serve on juries and almost no penalty for failure or refusal to serve. This is one factor that could explain some of the extraordinary and inexplicable jury verdicts handed out against Florida businesses in the past decades. The Jury Patriotism Act was recently developed by the American Legislative Exchange Council to promote jury service and should be adopted in Florida.

Any plaintiff that perpetrates fraud on the court in any aspect of her lawsuit alleged against any defendant should be forever barred from bringing a cause of action relative to such alleged injuries.

Many companies are unable to make valid business decisions or evaluations of the performance of the company as a whole or its individual employees. Florida's courts have failed to provide companies with adequate protections over their internal working or audit papers to properly run their business without fear of expensive litigation relative to their business decisions. Additional protections in the evidence code should be created to protect the right of companies to conduct internal audits.

Reforming Florida's Future:
An Overview of the Need for Tort Reform in the Sunshine State

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INTRODUCTION

The cost of the U.S. tort system in 2001 was $205 billion or $721 per citizen. This "tort tax" increased to $809 per person by 2002, yet the system returns less than $0.22 per dollar for actual economic loss to plaintiffs. See Tillinghast-Towers Perrin., U.S. Tort Costs: 2002 Update, (2002).

The key question raised by the rise of tort lawsuits is whether litigation should continued to be used by plaintiff attorneys as a tool of governance. Should our democratic society rely on litigation rather than our representative government to shape public policy?

The Florida Legislature operates in the public spotlight and contains a system of accountability through elections and term limits. Individuals and groups with differing perspectives have adequate opportunities for input and the ultimate social and economic policies of the state are made by representatives who do not have a direct financial interest in the outcomes. One of the most fundamental principles of our nation's form of government is the separation of powers doctrine. However, this is in great jeopardy if public policy continues to be mandated by the courts rather than created by the Legislature. Bear in mind that the judiciary is the least politically accountable branch of government.

Several tort reform considerations must begin immediately in order for Florida's economic prosperity to continue and expand in the future.

I. Judicial Expansion of Duty: The Source of Crisis in Utility Litigation

Justice Cordozo memorialized the framework for negligence law in the United States in the seminal ruling in Palsgraf v. Long Island Railroad, 162 N.E. 99,100 (N.Y. 1928): "[T]he orbit of the danger as disclosed to the eye of reasonable vigilance [is] the orbit of the duty." Under the law that has subsequently developed on this subject over the past six decades the "orbit" has been significantly expanded when business entities are alleged to conduct their operations in a negligent manner. The extent of duty or responsibility of an individual or entity to others is essentially a matter of perceived risk. The Palsgraf opinion succinctly states: "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." Id. Unfortunately, the courts have continually expanded the definition of "apprehension" over the years, particularly in cases with corporate defendants.

Foreseeability should not be confused with duty, yet this is exactly the legal mis-standard that the Florida Supreme Court has created and imposed on Florida's businesses. Negligence needs to be defined in statute. Without such statutory guidance the courts are free to apply this label to virtually any situation, often times resulting in huge jury verdicts and damage awards that ultimately rob businesses of the opportunity to function in a predictable legal environment and, if left unchecked, will eventually cripple Florida's economy.

A body of case law from the state's highest court has been developed over the past 10-15 years which basically imposes an unrealistic duty on businesses to protect any individual from virtually any harm that could occur – even if there is no legal, contractual or other relationship between the business and the individual.

In 1992, the Supreme Court issued an opinion in McCain v. Florida Power Corp., 593 So. 2d 500 (Fla. 1992), which expanded utility companies duty to protect individuals from harm and sparked an onslaught of jury verdicts against utility corporations. In McCain, the jury awarded $175,000 to the plaintiff, including a 30% reduction for the plaintiff's own negligence. On appeal the Second District Court of Appeal ruled that the injury was not foreseeable by Florida Power and that Florida Power had no duty to protect the plaintiff since the injury suffered was not foreseeable. However, the Supreme Court ruled that even if a specific injury was not foreseeable, the utility "was under a duty to take reasonable actions to prevent the general type of injury that occurred." Id. at 502. Although the jury award was not exorbitant in this particular case, the imposition by the Court on the utility to shoulder a greater than usual duty of care has opened the flood gates of litigation and cost Florida's utility industry hundreds of millions in awards, settlements, legal fees and litigation expenses.

Based on the McCain ruling, Florida's utility companies have been faced with lawsuits testing the boundaries of their newly–defined legal duties. They have been held liable for injuries in which plaintiffs engaged in illegal activities and were injured, see Florida Power & Light Co. v. Periera, 705 So. 2d 1359 (Fla. 1998), and for injuries in which it had no notice, due to pre-arranged procedures with the contractor and construction work being done in a specified location at a particular time. See Pacheco v. Florida Power & Light Co., 784 So. 2d 1159 (Fla. 3d DCA 2001).

In Clay Elec. Coop. v. Johnson Inc., 873 So. 2d 1182 (Fla. 2003) the Supreme Court held that a utility company has a legal duty to third parties, who are not their customers, for accidents occurring in areas where their street lights are not properly working due to alleged failure of the utility company to maintain the street light. Since this ruling, the courts have heard several other cases relative to the general duty the utility company has to the public.

One such case is Felsen v. Florida Power & Light Co., 881 So. 2d 585 (Fla. 3d DCA 2004) in which the plaintiff sued the utility alleging that dim lighting over a parking lot caused her to trip and fall. However, the streetlight was installed in 1951 and the parking lot was not built until 1968, at which time the municipal owner of the parking lot took over complete responsibility for its lighting. The Court ruled in favor of the utility company in this particular instance, but this case serves as an excellent example of the frivolous nature of lawsuits that

companies are now forced to defend, incurring significant costs which ultimately undermine their ability to provide service to Florida's residents and businesses in the most cost effective manner.

The Supreme Court is currently considering the case of Florida Power & Light Co. v. Goldberg, 856 So. 2d 1011 (Fla. 3d DCA. 2002), review granted, 870 So. 2d 821 (Fla. 2004), in which the plaintiff was fatally injured in a traffic accident at a Dade County intersection where the traffic signal was not working. The electricity was turned off at the signal in order to repair service to a pole 150 feet away that had earlier been struck by lightning. The plaintiff alleged that the utility company had breached some duty to the plaintiff by turning off the street light and creating a "foreseeable zone of risk" even though that action was required by its obligation to maintain service to its customer. The plaintiff received a $37 million verdict at trial court, but the Third District Court of Appeal reduced the award to $10 million – the amount alleged in suit. The Supreme Court heard oral arguments on the case in early October 2004 and will likely render its opinion after the end of the current term. Regardless of the outcome, the utility company has already incurred significant legal fees and costs for simply defending its actions of doing its proper business against the claim of a third party to which it has no relationship.

II. Reform Class Action Litigation

Since 1997 studies have reported that corporations have seen class action suits filed against them increase anywhere from 300% to 1000%. See Deborah R. Hensler, Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation, 11 DUKE J. COMP. & INT'L. L. 179 (2001). These lawsuits are frequently used to force companies to pay money – most of which goes to attorneys and not to the plaintiffs – under circumstances in which no wrong has occurred. The following concepts are believed to be true by most business leaders in the country:

- Damage class actions are solely the creatures of class action attorneys' entrepreneurial incentives.

- It is easy to detect non-meritorious class actions – and most suits are non-meritorious.

- The benefits of class actions accrue primarily to the lawyers who bring them.
- Transaction costs far outweigh the benefits to the class and to society.
- Existing rules are not adequate to insure that class actions serve their publicly-stated goals.

Supra at 206.

Defendants have significant cost factors when determining whether to litigate or negotiate both class action and mass tort cases. The cost of defending a class action case versus several individual cases should typically be lower by virtue of consolidation. However, the larger class action creates an incentive for the plaintiffs' attorney to more aggressively pursue the

case, thereby increasing legal defense costs. The outcome of a jury trial for large numbers of individuals is also quite uncertain and the possibility of media attention in addition to the allegations of wrong doing may have an impact on stock prices, future job creation, employee advancement, business growth, community outreach and many other aspects of the business culture. These factors are all necessary considerations in determining if a case should be settled or tried.

1. Evolution of Class Action Litigation into Mass Tort Litigation

Class action was traditionally used when one plaintiff represented a large number of similarly situated, and frequently absent parties. The class action was beneficial when the individual claims were relatively small and the individuals could not easily obtain representation or find the individual pursuit worthwhile. The class though was large enough to force the defendant to cease its harmful activities. This effectively allowed for regulation of private businesses through the judicial system.

More recently, the class action lawsuit has evolved and expanded to many plaintiffs alleging more significant damage; these plaintiffs are easily able to obtain legal representation against the defendant business entity. The individuals initiate their own lawsuits before a class is certified. The mass tort action can also create significant conflict of interest because there are so many similar lawsuits being pursued at one time but none of the plaintiffs are bound to the settlement or ruling achieved in any of the other cases.[1] See generally Karen A. Geduldig, Note, Casey at the Bat: Judicial Treatment of Mass Tort Litigation, 29 HOFSTRA L. REV. 309 (2000).

When a group of plaintiffs are aggregated and settlements are negotiated – whether through mass tort litigation or through class action – the ultimate outcome rarely, if ever, involves the individual plaintiff. Lawyers representing large numbers of plaintiffs typically negotiate an administrative schedule for payment of damages. Some plaintiffs may hire lawyers to represent them for the administration of the damages and the lawyers are free to charge the plaintiffs a full rate, even though they are working on behalf of many other individuals to achieve the same result. Additionally, lawyers are free to settle the case of one client at the expense of another client's individual case. Some lawyers settle a large number of cases at less than full value in order to create time to work on a different set of cases that may become more lucrative. In many of these situations, the individual plaintiff has virtually no control over the outcome of their lawsuit.

[1] "Like class actions, mass torts involve people injured in a similar manner. Most mass torts are individual tort actions that are consolidated by state courts for efficiency purposes. Class actions cannot be brought as individual actions, because while the damage to the class as a whole is significant, the damage to any individual is relatively small. Because mass torts involve physical injuries, damages tend to be higher and vary more between plaintiffs." Democratic Policy Committee, Section 1751: The Class Action Fairness Act of 2003 at http://www.democrats.senate.gov Examples of mass tort litigation include asbestos claims, large business anti-trust claims, breast implant claims, and large scale disaster claims (such as chemical plant explosions, airplane crashes, and building fires).

So far only three states (Alabama, Louisiana and Ohio) have enacted laws limiting class actions – primarily by creating ways to limit the certification of the class – and no states have addressed the need for mass tort litigation reform.

2. Social Policy Torts

This term is frequently used to describe coordinated litigation which seeks industry-wide changes in business practices in addition to large monetary awards for plaintiffs and their attorneys. See generally Deborah Hensler, The New Social Policy Torts: Litigation as a Legislative Strategy: Some Preliminary Thoughts on a New Research Project, 51 DEPAUL L. REV. 493 (2001). Many private attorneys and public officials coordinate these litigious efforts. Some recent examples are suits against the tobacco industry, gun manufacturers, asbestos manufacturers, insurance companies and managed care organizations.[2] Historically, in 1966 many members of the Civil Rules Advisory Committee sought to influence social policy by pursuing what became known as "social impact litigation." See Hensler, 11 DUKE J. OF COMP. & INT'L. L. at 207. The difference in today's social policy tort though is primarily based in the large fees that plaintiffs attorneys receive, compared to the attorneys of the 1960's who accepted less than full market wages for the opportunity to pursue their policy agenda.

Tobacco manufacturers were able to defend themselves successfully through the decades against hundreds of individual lawsuits. Additionally, in the 1980's the tobacco companies successfully defended attacks from some mass tort law firms pooling resources, including the first class action certified against them. However, when the state attorneys pursued litigation on behalf of the states, the end result was a settlement reaching over $240 billion to all the states. See id. at 208. Most states' attorney generals hired private attorneys who were mass tort and class action specialists under contingency contracts promising 10%-25% attorney fees. The private lawyers representing the first states to settle were awarded $8.2 billion in attorney fees. See id. at 209.

3. Asbestos Related Litigation

Similarly, asbestos manufacturers have had to defend themselves against many lawsuits.[3] The RAND Corporation estimates that over 600,000 individuals have filed claims against thousands of defendants for asbestos-related injuries through the end of 2000. See Stephen Carroll, et. al., RAND Institute for Civil Justice Report, Asbestos Litigation Costs and Compensation: An Interim Report, DB-397-ICJ at 6 (2002). A total of $54 billion dollars has

[2] Insurance experts have noted an increase in mold related litigation. Plaintiff's attorneys are moving mold litigation into the class action context by suing on behalf of all residents or tenants of multiple-occupant buildings that have a pervasive mold problem.

[3] Asbestos is a name given to a group of six fibrous minerals that occur naturally in the environment. Asbestos is a human carcinogen that mainly affects the lungs and the membrane that surrounds the lungs. There are two types of cancers that are commonly associated with asbestos: mesothelioma (which is a cancer of the lining surrounding the lung or abdominal cavity) and lung cancer. Asbestos related cancers often do not develop immediately, but rather over a number of years.

been spent on asbestos litigation; approximately 65% of compensation has been awarded to non-malignant plaintiffs. See id. at 7. The RAND Corporation estimates that future asbestos litigation will cost businesses at least $38 billon dollars. See id. at 14. The Insurance Information Institute predicts that asbestos-related losses may "eventually reach as much as $65 billion, more than the combined total for the September 11 terrorist attacks and Hurricane Andrew." Insurance Information Institute, Hot Topics: Asbestos Liability at www.iii.org/media/hottopics/insurance/asbestos.

From 1966 through the end of the 1970s, approximately 950 asbestos related cases were filed in federal courts. See id. This number rose dramatically in the first half of the 1980s, as approximately 10,000 cases were filed between 1980-1984. See id. It is difficult to ascertain the number of cases filed on the state level, as state courts do not categorize cases by type. A lull in litigation occurred between 1995-1998, but by 1999 a new wave in litigation occurred due to the following factors:

1. New trial strategies which concentrate less on lawyers going after manufacturers, and more on companies who had used asbestos in some business related activity;

2. Increase in filings by individuals with little or no disability;

3. The specialization in asbestos related litigation in a few law firms; and

4. Migration of cases to jurisdictions with juries more favorable to plaintiffs.

See id. See also Carroll, Supra at 21. Many major corporations such as Armstrong World Industries, Pittsburgh Corning and Owens Corning have had to file for Chapter 11 bankruptcy due to asbestos litigation. The economic impact of asbestos litigation on business is significant as many affected businesses pay an "asbestos litigation penalty" when raising capital "which significantly increases the costs of borrowing and in some instances makes it impossible for companies to raise capital to fund productive investments." Insurance Information Institute, Supra. Thus, litigation has the effect of reducing economic growth by some estimates as much as $2.4 billion dollars yearly. See id. Additionally, it is believed that asbestos related litigation costs the nation approximately 30,000 jobs annually. See id.

Congress has attempted to address the problem of asbestos related litigation several times over the past 15 years through legislation which would have streamlined the litigation process. However, the Asbestos Health Hazards Compensation Act (1989) and the Fairness in Asbestos Compensation Act (1998) never made it out of committee. On June 2, 2004, Ohio passed the Asbestos Victims Fairness Act which provided much needed asbestos lawsuit reform to that state. The bill establishes objective medical standards to distinguish those who are sick with asbestos-related diseases from those who are not. Additionally, the bill ensures that those who are truly sick have timely access to the courts, as only plaintiffs who meet medical standards are allowed to bring claims. Additionally, the bill preserves the right of individuals who are not

sick, but have been exposed to asbestos bring a claim in the future in their health becomes impaired. Florida should consider adopting similar legislation. A comparison of the new Ohio tort reform bill with current Florida law is included in Appendix A.

4. Forum Shopping

In mass tort litigation many lawsuits are filed in multiple jurisdictions around the country. Because the cases center around a common rule of law and possibly set of facts or actions by the defendant, the plaintiffs frequently ask the judiciary to allow all cases to be heard by one judge or in one jurisdiction. This type of forum shopping frequently forces a defendant company to settle most of the cases in order to avoid collection in one jurisdiction which could result in a class certification. In 1968 the Judicial Panel on Multi-District Litigation was created to decide these jurisdiction matters. Since 1978, the number of motions the Panel considered has increased over 100% and between 1990-1999 it granted 71% of the motions it heard. Many state judges are also very lax in applying criteria for certifying a class.

Many trial lawyers spend considerable effort looking for "magic jurisdictions" defined by one prominent plaintiff attorney in the tobacco litigation as those venues "where the judiciary is elected with verdict money." The American Tort Reform Association has compiled a report of the worst judicial areas in the country which includes Miami-Dade County as a "judicial hellhole," characterized by its systemic failure to uphold core principles of law. See American Tort Reform Association, Bringing Justice to Judicial Hellholes (2003).

The most egregious jurisdictions frequently allow forum shopping, improper class certifications, mass tort actions, "exemption" from actual injury to award damages, expedited trials for certain plaintiff attorneys and cozy relationships between the judges and trial bar. The Miami-Dade County venue has brought about some of the highest jury awards in the country including multi-million dollar awards of punitive damages in instances where the jury found the plaintiff suffered no economic damage. This area was also the source of the largest jury verdict in U.S. history of $145 billion to a class of smokers awarded against R.J. Reynolds. See Engle v. R.J. Reynolds Tobacco, 2000 WL 33534572 (Fla. Cir. Ct. 2000). However, that ruling was overturned by the Third District which identified numerous improprieties at the trial level, including improper class certification and violation of the defendant's due process rights. See Liggett Group, Inc. v. Engle, 853 So. 2d 434 (Fla. 3d DCA 2003), review granted, 873 So. 2d 1222 (Fla. 2004).

5. Necessary judicial reform measures for class action cases

Transaction costs include all actual costs to the defendant – including, but not limited to, plaintiff attorney fees, defense fees, legal expenses, and settlement administration costs. Transaction costs do not include the potential and often astronomical loss of revenue or business a defendant suffers as an indirect result of the far reaching class action litigation. Judicial reform of class action and mass tort litigation is the only way these costs can be minimized or controlled.

The rules and case law set in the U.S. to prevent the self-serving representation of class action plaintiff attorneys too often fail. These measures work best only when the judge should be forced to:

1. Require attorneys to report case status and likely outcome to all members of a class,

2. Provide close judicial scrutiny of all details of negotiated settlements,

3. Enlist outside perspective from uninterested parties as to the fairness and of the settlement proposals,

4. Provide judicial determination of the attorney fees to avoid potential collusion between the various legal representatives involved,

5. Evaluate fairness of attorney fees in relationship to actual benefits created by the lawsuit with no incentive to file frivolous or weak lawsuits, and

6. Judicially monitor of the distribution of settlement funds after the agreement is reached.

Judges will need additional authority, jurisdiction and resources to implement such measures crucial to the fair administration of class action and mass tort suits. In Florida this will require both substantive legislative reforms and adequate appropriations.

III. Joint and Several Liability Reform

The common law rule makes each and every defendant in a lawsuit liable for the entire amount of the plaintiff's damages regardless of the degree of fault of any individual defendant. This is commonly called the "deep pocket" rule. This theory is applied to economic damages in tort actions in Florida. It is problematic in cases where the primary or most responsible tort feasor is bankrupt or otherwise judgment proof as well as in cases where the plaintiff settles with one defendant but subsequently is awarded a greater amount of damages. In such instances the settling defendant is still responsible for the difference between the settlement amount and the award.

This rule incentivizes plaintiffs and their attorneys to search out the most financially viable defendant against whom a cause of action can be generated. This rule should be replaced with a system that holds the defendant liable only for that portion of damages caused by its own individual negligence.

The Florida Legislature last addressed this law in 1999. At that time the following multi-tiered approach for limiting joint and several liabilities for economic damages were created:

If Plaintiff is also at fault, each defendant is responsible as follows:

- Defendant 10% or less at fault = no joint liability
- Defendant 10% - 25% at fault = joint liability limited to $200,000
- Defendant 25% - 50% at fault = joint liability limited to $500,000
- Defendant more than 50% at fault = joint liability limited to $1,000,000

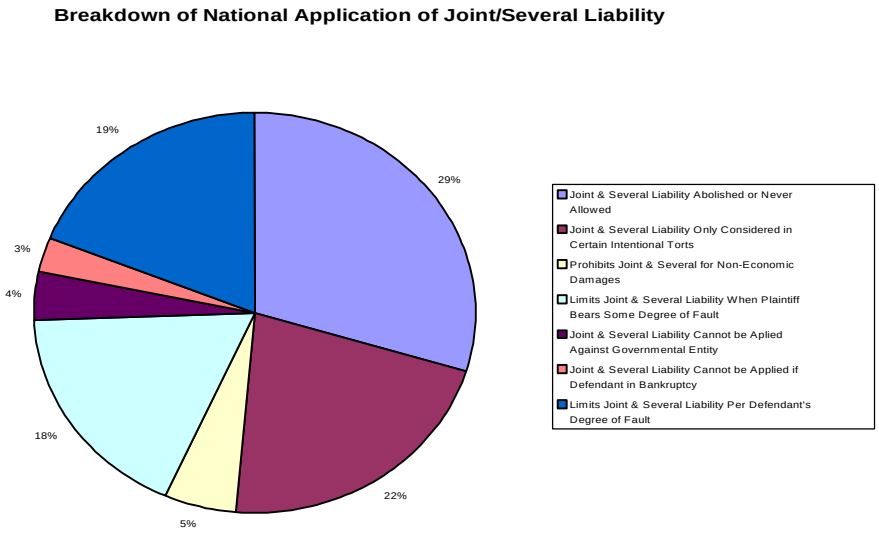
If Plaintiff is NOT at fault, each defendant is responsible as follows:

- Defendant 10% or less at fault = no joint liability
- Defendant 10% - 25% at fault = joint liability limited to $500,000
- Defendant 25% - 50% at fault = joint liability limited to $1,000,000
- Defendant more than 50% at fault = joint liability limited to $2,000,000

See §768.81, Fla. Stat. (2000).

Despite this statutory change, though, Florida businesses are still frequently faced with lawsuits that cost millions of dollars to defend and often result in juries finding any way possible to award the plaintiff a large sum of money simply because a "deep pocket" defendant exists.

Joint and several liability needs to be abolished in Florida. Below is a breakdown of how other states handle this legal theory, including 29% of states that do not allow this theory to be applied against any defendants – businesses or individuals.



IV. Reform of Non-Economic and Punitive Damages

Non-economic damages are the only damages that are not capped in Florida; these damages are only capped in medical malpractice cases. These damages provide compensation for pain and suffering, emotional distress and loss of consortium. Non-economic damages do not have an absolute cash value, are very subjective and frequently based almost entirely on the jury's sympathies or bias. These damages were limited in 1999 and further limited in 2003 for medical malpractice cases to $500,000 per plaintiff against a practitioner and $750,000 against a non-practitioner. See §766.118, Fla. Stat. (2004).

A 2004 report by the Pennsylvania Senate Judiciary Committee compared the status of limitations on damages in all 50 states. It found that 26 states have limits on non-economic damages, and 6 of those – Colorado, Indiana, Louisiana, Nevada, New Mexico and Virginia, limit total damages – both economic and non-economic. In medical malpractice cases, 18 states have caps and another 8 states have caps on non-economic damages in all tort actions. See Commonwealth of PA. Senate Judiciary Committee, Summary of State Laws Caps on Non-Economic Damages (2004).

Each of the eight states has their own nuances, but none impose non-economic damages greater than $1 million. Having a cap on non-economic damages provides businesses with a predictable measure on which they can base their defense effort when faced with litigation. Caps for non-economic damages in Florida should be extended to all tort actions, in a manner similar to the caps we now have for medical malpractice cases.

Punitive damages, on another hand, are just as erratic and could jeopardize some fundamental constitutional rights if not better controlled for the future. These damages have no basis in the plaintiff's economic or non-economic losses. They can have devastating effects, similar to a criminal punishment, on the civil defendant's business and reputation as well as their bottom line and ability to continue operations in Florida or elsewhere.

United States Supreme Court Justice O'Connor succinctly stated the problem punitive damages have on the marketplace in her dissent in Pacific Mutual Life Insurance Company v. Haslip, 499 U.S. 1 (1991). She stated that punitive damages "have a devastating potential for harm" if imposed indiscriminately. Id. at 43 (O'Connor, J., dissenting). When states allow juries to award punitive damages with little or no constraint, "they encourage inconsistent and unpredictable results by inviting juries to rely on private beliefs and personal predilections. Juries are permitted to target unpopular defendants, penalize unorthodox or controversial views and redistribute wealth. Multimillion dollar losses are inflicted on a whim." Id.

In 1992, the Supreme Court indicated in Gordon v. State, 608 So. 2d 800 (Fla. 1992), that the Legislature has the responsibility for establishing policy on many aspects of litigation reform, including punitive damages. Since that ruling, though, the Legislature has enacted only one limitation on punitive damages in civil torts, which occurred in 1999. At that time it only restricted repetitive punitive damage awards for a single course of conduct. See §768.725, Fla. Stat. (1999). Most business leaders view this change as only a first step in controlling the rampant litigation costs the possibility of punitive damages places on business owners. Since that

time juries have still awarded significant punitive damages awards. For example, in 1996, a Hillsborough County jury awarded a $300,000,000.00 punitive damage award in a wrongful death case involving the improper storage and disposal of hazardous waste. See Perez v. William Recht Co., Inc., Docket No. 92-8983 (Fla. Cir. Ct. 1995). To date, the company has not made any payments as it has filed for bankruptcy. Most recently, in Dalfo v. Wransky and H.F. Ahmansan & Co., Docket No. 98-3524 (Fla. Cir. Ct. 2000), a jury awarded a $15,000,000.00 punitive damages award in a wrongful death case involving a driver, who was intoxicated while driving a vehicle owned by his employer. This punitive damages award is one of the largest awards recorded in the state. The plaintiff has yet to collect on the punitive damages award, as responsibility for payment of the award is yet to be resolved.

Punitive damages have no economic basis and by statute are only based on the greater weight of the evidence. Practically speaking, the defendant has no way to gauge their risk of punitive damages, yet their possibility significantly increases the exposure businesses face in any tort litigation. Such unknown and ethereal costs are a considerable deterrent to many companies in deciding to operate their business in this state. The availability of punitive damages should certainly be curtailed or completely abolished.

In addition to the monetary impact, punitive damages are almost like a criminal punishment, even though the defendant commits no criminal act. As Justice O'Connor stated:

> Unlike compensatory damages, which serve to allocate and existing loss between two parties, punitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible. Hence, there is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award. The punitive character of punitive damages means that there is more than just money at stake.

Haslip, 499 U.S. at 54.

Since 1999 Florida has limited punitive damages to the greater of 4 times compensatory damages or $500,000. However, this is increased to the greater of 4 times compensatory damages or $2 million if the defendant's wrongful conduct was motivated by unreasonable financial gain or the likelihood of injury was well known. Despite these limits, there is still a significant problem with punitive damage awards, particularly in South Florida.

Seven other states (*Louisiana, Massachusetts, Nebraska, New Hampshire, Washington, Connecticut and Michigan*) have prohibitions on punitive damages and one state requires evidence beyond a reasonable doubt to prove entitlement to punitive damages. Florida's evidentiary standard is clear and convincing which is less difficult for the plaintiff to meet. Additionally, 17 states (*Alaska, Alabama, California, Georgia, Kansas, Minnesota, Mississippi, Missouri, Montana, North Carolina, Nevada, New Jersey, North Dakota, Texas, Utah, Connecticut and Kansas*) require bifurcated or separate trials for the determinations of liability and punitive damages. Only 5 states (*Georgia, Maryland, Montana, North Dakota and Utah*) allow the financial condition of the defendant to be admissible only after a finding of liability has been rendered.

Florida must closely coordinate the imposition of punitive damages in civil cases, including limiting the jury's discretion in determining award amounts, or requiring clear and convincing evidence to demonstrate that a defendant acted egregiously before punitive damages could be imposed.

V. Collateral Source Rule Reform

When defending itself against claims for damages, defendants would like to demonstrate to juries instances where the plaintiff has received compensation for the same damage from other sources. However, this rule of evidence operates to bar the defendant from introducing that information during the damages portion of the trial. Therefore, this rule effectively allows plaintiffs to recover twice or more for the same incident. The rule allows the jury to focus on punishing defendants rather than compensating or making the plaintiffs whole.

In 1986 the Legislature passed a "mandatory" offset for any damages for by recovery received from other sources. However, the Supreme Court declared the rule unconstitutional in 1987. See Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987).

Primarily through subrogation, there are now some avenues of recovery by a third party payor, but the collateral source is not typically revealed to the jury in assessing damages. The subrogation process itself, though, typically requires the filing of a lien by the other payor in order to recover partial award. In workers' compensation cases, for example, the workers' compensation carrier can recoup its expenses if the plaintiff prevails in a separate negligence action against another party. In reality, though, the legal fees and time involved can drive the cost of recoupment which and rarely yields a 100% recovery to the initial payor.

VI. Retailer Liability: Curbing the Rising Costs of Products and Parking

The need for legislation to address the growing concern of premises liability began when the Supreme Court issued its opinion in Wal-Mart/Merrill Crossings Assoc. v. McDonald, 705 So. 2d 560 (Fla. 1997). In this case the plaintiff was shot by an unknown criminal assailant in a parking lot. The victim sued the Wal-Mart and the plaza developer. At the trial, the jury was never provided with the option of placing any portion of the fault for the injuries to the criminal assailant, and all fault was placed on Wal-Mart (75%) and Merrill Crossings (25%). The trial court found that the defendants were negligent because even though the shooting was someone else's intentional act, the defendants had a duty of foreseeablility they neglected. The Supreme Court ruled that the defendants could not shift any portion of their negligence to the individual perpetrator who actually shot the plaintiff.

In 2003 the Legislature considered HB 873 which attempted to provide employers with additional guidelines for adequate security in retail parking lots that could be presented as evidence that the business fulfilled its duty to any person injured on the premises, even victims of criminal acts. This proposed legislation did not truly go far enough to protect Florida's businesses from liability for intentional acts by unrelated parties. A laundry list of adequate security measures may be a helpful tool, but only if utilizing those measures provides complete

immunity from liability – including the costly expense of a jury trial. Additionally, the application of such measures must be carefully guarded so that small businesses are not faced with extraordinary expenses to comply and avoid litigation over circumstances beyond their control or reasonable expectations.

In addition to responsibility for the actions of others in the parking lots, Florida courts also hold retailers responsible for the actions of others that result in harm to individuals through the products they purchase from the retailer. Often times, plaintiffs chose to sue only the retailer of the defective product and the manufacturer of the defective or harmful product is never held accountable for the damages. One such instance is Costco Wholesale Corp. v. Tampa Wholesale Liquor Co., Inc., 573 So. 2d 347 (Fla. 2d DCA 1990). In Costco, the plaintiff purchased a bottle of wine from Costco which ultimately proved to be defective and caused injury. Although the wine manufacturer created the defect and the harm caused, suit was brought only against Costco. The court ruled that regardless of fault and regardless that Costco had no means of obtaining knowledge of the defect, the retailer was liable for the damages because it was a party in the chain of distribution. Id. Other examples of the retailer shouldering full responsibility for a defective product include the sale of a defective lawnmower, see Visnoski v . J.C. Penney Co., 477 So. 2d 29 (Fla. 2d DCA 1985), and a child's swing set. See K-mart Corp. v. Chairs Inc., 506 So. 2d 7 (Fla. 5th DCA 1990).

As this body of case law has expanded, the damages awarded have dramatically increased. Recently a jury awarded $2.6 million against a Broward County retailer for the sale of a defective lawnmower. See Matthew Haggman, Jury Awards $2.6 Million to Boy Injured in Mower Accident, Broward Daily Bus. Rev. 20 (Jan. 26, 2004). The retailer was able to settle the case for a lower, undisclosed amount. Id. However, the cost of defending such lawsuits is expensive and has a significant impact on the bottom line. When litigation costs like this increase unnecessarily, companies are forced to make cuts in other aspects of their businesses. This has an enormous impact on the overall Florida economy when one considers the millions of jobs that retailers provide across the state. Retailers need stronger protections from liability.

VII. Insurance Bad Faith Reform

Under a liability policy, insurers defend their insureds against liability lawsuits. In this situation, the insured surrenders control of the defense to the insurer. The insurer owes a duty of good faith and fair dealing when deciding how to dispose of such lawsuits on behalf of its insured. If an insured or a third party plaintiff believes the insurer's failure to properly handle a claim caused harm, either may sue under Florida's bad faith law or under common law.

A bad faith lawsuit is a separate action filed after the initial jury decision that determined liability and damages. Damages for bad faith include the amount of the initial jury award in excess of policy limits and additional attorney's fees. In Florida it has been established by the courts since at least 1938 that a third party beneficiary may sue an insurer for damages even if they are not a formal party to the insurance contract. See Auto. Mut. Indemnity Co. v. Shaw, 184 So. 852 (Fla. 1938). Since then Florida courts have consistently held that a third party, even though not the express party to an insurance agreement is a beneficiary of the agreement and may maintain an action against the insurer. This is commonly referred to as the "Thompson Rule" following the Supreme Court's ruling in Thompson v. Commercial Union Ins. Co. of New

York, 250 So. 2d 259 (Fla. 1971). This rule has opened the flood gates of litigation for third party bad faith cases. Clearly this increases the cost of handling claims and is of great detriment to insurers. Further, it has also been formally criticized by at least one Supreme Court Justice. In Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783 (Fla. 1980), Justice Alderman issued a concurring opinion for the sole purpose of against allowing third parties to sue insurers for bad faith:

> In the "Alice-in-Wonderland" world created by the Thompson rule, it is to the injured party's benefit if the insurer breaches its duty to its insured and to his detriment if there is no breach. This is so since, if the insurer settles, the plaintiff will receive no more than the policy limits, but if it does not, the plaintiff may end up with both the policy limits and the an excess judgment….Far from encouraging settlement of controversies, which Thompson said would result from a rule permitting direct suits, the Thompson rule induces a plaintiff, as in this case, not to settle.

Id. at 786-87(Alderman, J., concurring).

Despite judicial recognition of the problems created by bad faith litigation, the courts have continued to expand the rights and benefits available in bad faith cases and limit the defenses available to insurers. Until 1995, insurers were frequently able to successfully defend many of these cases because the plaintiffs were unable to show that the insurer did not have a reasonable basis for not settling the case. However, in State Farm Mut. Auto. Ins. Co. v. LaForet, 658 So. 2d 55 (Fla. 1995) the Court ruled this "fairly debatable" standard was insufficient to overcome an allegation of bad faith. The Court adopted five factors previously promulgated by the Second and Fifth District Courts of Appeal to be applied in determining whether bad faith occurred. Id. at 62. (citing John J. Jerue Truck Broker, Inc. v. Insurance Co. of N. Am., 646 So. 2d 780 (Fla. 2d DCA 1994); Robinson v. State Farm Fire & Cas. Co., 583 So. 2d 1063 (Fla. 5th DCA 1991)). Those factors are as follows:

> (1) whether the insurer was able to obtain a reservation of the right to deny coverage if a defense were provided; (2) efforts or measures taken by the insurer to resolve the coverage dispute promptly or in such a way as to limit potential prejudice to the insureds; (3) the substance of the coverage dispute or the weight of legal authority on the coverage issue; (4) the insurer's diligence and thoroughness in investigating the facts specifically pertinent to coverage and (5) efforts made by the insurer to settle the liability claim in the face of the coverage dispute.

Id. at 63.

Although bad faith laws are important to protect insureds from potential bad acts of insurers, court interpretations of Florida's statutory bad faith law have created an imbalance in favor of plaintiff's attorneys. As a result, insurers are forced to settle claims or risk a bad faith lawsuit. Bad faith is such a powerful settlement tool that the Academy of Florida Trial Lawyers conducts seminars to teach members how to "set up" an insurer for a bad faith lawsuit. See

generally Academy of Florida Trial Lawyers, Continuing Legal Education: Workhorse Seminar for Voting Members Only at http://www. aftl.org/CLE.asp. Consequently, increased settlement costs from bad faith are considered a primary reason for the high cost of liability insurance.

The varied facets of bad faith litigation continue to develop, including whether an insurer commits bad faith if it settles too soon in cases of multiple plaintiffs, see Farinas v. Florida Farm Bureau General Insurance Company, 850 So. 2d 555 (Fla. 4th DCA 2003), or whether an insurer commits bad faith in wrongful death cases in not settling before the personal representative of the estate is named, see Infinity Ins. Co. v. Berges, 806 So. 2d 504 (Fla. 2d DCA 2001), quashed by, Berges v. Infinity Ins. Co, No. SC01-2846, slip op. (Fla. Nov. 18, 2004). In Berges, the Supreme Court recently held that an offer to settle for policy limits was valid without court approval. Additionally, the Court held that an insurance carrier's agreement within the time deadlines to pay the policy limits did not preclude a finding of bad faith for failure to settle within policy limits where the carrier failed to tender payment before the expiration of the deadline for payment. Justice Wells, in a well reasoned dissent argued that the instant case represented "an example of a bad faith claim which presents no factual evidence of bad faith claims handling, but, rather, presents a claim manipulated for the purpose for creating a bad faith cause of action." Id. at 41(Wells, J., dissenting). Justice Wells also noted that as a result of the majority's decision, "the $20,000 of insurance purchased by the insured has been converted into insurance which will pay $1,893,066 to cover the claims plus $616,200 for attorney fees plus interest. It also worked well for the insured, who paid for $20,000 of insurance and was given by the majority's opinion the benefit of more than 2.5 million of insurance." Id. at 40. In order to avoid similar cases in the future, Justice Wells concluded:

> that what is needed are express guidelines which include set time periods in which all insurers must presumptively make decisions on claims and issue payments. The guidelines should set out guidelines for payments such as for the appointment of guardians. There is also a need for defined penalties for failure to meet these time requirements rather than limitless insurance. In view of this decision, I regret that there appears to be no alternative but that the guidelines will have to be mandated by statute.

Id. at 42-43. The ongoing uncertainty and expansion of this area of law makes it difficult for insurers to develop policies and procedures in claims-handling to avoid or minimize the high cost of litigation. As such, the Legislature may want to consider Justice Wells' guidelines in drafting new statutory language.

While the law continues to be developed at the appellate courts, the verdicts at the trial level, which frequently force settlements and drive up claims costs, are overwhelming. A Seminole County jury awarded a $4.3 million verdict yielding a bad faith action against the insurer when prior to trial the insurer offered $400,000 policy limits to settle one month prior to trial but had previously offered only $275,000. See Giaccone v. State Farm Mutual Automobile Insurance Co., Docket No. 0d0-CA-1135-15-G (Fla. Cir. Ct. 2001). In Collier County, a jury rendered a $3.3 million verdict prompting bad faith litigation because the insurer offered $36,000 to settle on a policy limit of $100,000 See Saba v. Nationwide Mutual Fire Insurance Co., Docket No. 02-1885-CA (Fla. Cir. Ct. 2004). In Dade County a plaintiff alleged that the

insurance company offered its policy limits of $10,000 to settle the case, forcing the carrier to contemplate a bad faith action following a jury verdict of almost $2.9 million. See Yang v. Pieterobono, Docket No. 99-14315-CA-20 (Fla. Cir. Ct. 2000). These examples are only a small fraction of the bad faith cases constantly brewing in Florida's legal system.

In 2003, the Florida Legislature revised the bad faith law for medical malpractice insurance to help correct previous imbalances and minimize its use to coerce settlements. The new law provides factors for a jury to consider when determining whether an insurer acted in good faith while handling a claim. Additionally, the new law allows an insurer reasonable opportunity to investigate a claim before making a settlement decision. Similar reforms need to be applied to all tort cases.

VIII. Nursing Home Reforms

In May, 2001, the Legislature passed nursing home tort reform to address the onslaught of lawsuits experienced by Florida's nursing homes, which far exceeded any other state in frequency and severity. Nearly four years after passage of this law, Florida nursing homes still experience a high volume of lawsuits and liability insurers have not returned to the state.

In 2001, SB 1202 was enacted into law after numerous studies demonstrated that long term care costs in Florida were higher than any state including Texas and California. See Theresa Bourdon and Sharon Dubin, Florida Long Term General Care Liability and Professional Liability Analysis, AON, (2000). An April 2000, Florida Department of Insurance Study of nursing home liability insurance companies found that the "number and size of claims reported by these companies were fairly stable for claims with closed indemnity payments ranging from $1 to $250,000 (161 claims totaling $7.8 million in 1997; 162 claims totaling $6.8 million in 1999). However, there was a sharp increase in claims above: $250,000 (36 claims totaling $17.0 million in 1997; 61 claims totaling $29.3 million in.l999)." Bernadette Wright, Nursing Home Liabi1ity Insurance: An Overview, AARP Public Policy Institute Issue Paper, 16 (2003).

The civil enforcement in the old Chapter 400 contained several incentives for attorneys to pursue what were traditionally low dollar nursing home claims. For example, Section 400.023, Florida Statutes permitted a plaintiff to bring an action to enforce the rights of a resident and to recover actual damages, and if appropriate, punitive damages for "any deprivation or infringement on the rights of a resident." §440.023 (1), Fla; Stat. (2000). The Act by permitting attorney's fees and expenses in all cases, created a situation where nursing home facilities were being "punished above what a common law negligence claim would merit." Troy J. Crotts and Daniel Martinez, The Nursing Home Residents Act---A Good Idea Gone Bad!, 26 STETSON L. REV. 599, 611 (1996). Nursing homes became targets for lawsuit due to the statute's broad wording and the availability of unlimited compensatory damages, punitive damages, and attorneys fees awards. See Tom J. Manos, Florida's Nursing Home Reform & It's Anticipated Effect of Litigation, 75 FLA. BAR J. 18, 19 (2001).

The Legislature responded by repealing many of the legal incentives that made nursing homes more attractive to sue than other businesses in Florida by bringing its laws in parity with other Florida businesses. The new statute reduced the incentive for attorneys to bring a claim

because it eliminated the "add on" attorney's fees in cases that involved monetary damages and limited attorney's fees to $25,000 in cases where the plaintiff is seeking injunctive or administrative relief. See §400.023, Fla. Stat. (2001). These measures, combined with quality and staffing measures were intended to address the frequency of claims.

However, the current statute does not go far enough because it fails to provide nursing homes with the same medical malpractice protections that all other health care providers currently have in Florida. Thus, it does not address their vulnerability to suits because nursing homes care for a sick and frail population where people live out the final stage of their lives and unfortunately accidents occur. The nature of care that nursing homes give leaves them open to extreme awards by juries that are swayed by emotional arguments. See, e.g., Manos, Supra at 18. The vulnerability to large awards, unchecked by SB 1202 is why insurers have not returned to Florida. Since there are no caps on non-economic damages (pain and suffering), the possibility of extreme jury verdicts remains unchecked and insurers cannot make the actuarial projections to write sound liability insurance. That uncertainty is born out in the current insurance market.

A February 19, 2003 report of the Joint Select Committee on Nursing Homes found:

> *"It is clear, that many good nursing homes in Florida are facing increases in insurance premiums and difficulty in obtaining liability coverage. The requirement in CS/CS/CS/SB 1202 that facilities maintain general and professional liability coverage has resulted in some facilities purchasing minimal liability coverage, and being forced to pay premiums that exceed the face value of the policy, in order to comply with the law."*

The following year the Joint Select Committee in a March 2004 report noted that the Office of Insurance Regulation "has re-evaluated the liability insurance market and reported that there has been no appreciable change in the availability of private liability insurance over the past year."

One reason insurers have not returned is that lawsuits continue to be filed at high rates. A February 2004 AON study states: "the frequency levels for 2002 and 2003 appear to be higher than the average level of the three years leading up to tort reform." The Agency for Health Care Administration reports that between January and September 2004, the state's 680 nursing homes reported 440 notices of intent to file claims against them.

SB 1202 has not reduced litigation to a level that would attract affordable insurance. Only capping non-economic damages, like other health care providers have under medical malpractice, would have enough effect to reduce claims and bring back affordable insurance. The necessity for compensatory caps to stabilize businesses that have suffered a barrage of lawsuits is well documented. A 1993 U.S. Office of Technology Assessment study of six states' medical malpractice reform efforts concluded that "only caps on damage awards and collateral source offsets appear to consistently reduce one or more of the malpractice cost indicators." U.S. Congress, Office of the Technology Assessment, Impact of Legal Reforms on Medical Malpractice Costs, OTA-BP-H-1.19, Washington, DC: U.S. Government Printing Office (October 1993). A May 2001 Raymond James brief compliments SB 1202 but observes:

"However, the continuing exposure to unlimited compensatory damages is likely to keep most insurers from returning to the state immediately."

Prior legislation removed some of the legal incentives from trial lawyers to target nursing homes for lawsuits and went a long way to improving quality with increased staffing and other quality measures. It did not however, cap awards at a level that will assure insurers that awards would be reasonable. Without such protections neither public nor private insurance will be able to provide affordable coverage to Florida nursing homes.

IX. Immunity from Vicarious Liability or "Negligent Entrustment" for Automobile Rental Companies and Dealerships

Since 1920, automobiles have been considered a dangerous instrumentality by Florida courts, primarily due to the large number of deaths and injuries resulting from automobile accidents. See Southern Cotton Oil Co. v. Anderson, 86 So. 629 (Fla. 1920). This standard is not applied in most other states. Nevertheless, the courts have consistently held automobile owners responsible for any injuries involving vehicles they own, regardless of who is controlling the vehicle at the time of the injury. See Kraemer v. General Motors Acceptance Corp., 572 So. 2d 1363 (Fla. 1990). This liability was first extended to rental car companies in 1947. See Lynch v. Walker, 31 So. 2d 268 (Fla. 1947). It was expanded to include any car owner, regardless of the relationship between the driver and the owner, as long as the driver's negligence caused the injuries. See Susco Car Rental System v. Leonard, 112 So. 2d 832 (Fla. 1959). See also Martinez v. Hart, 270 So. 2d 438 (Fla. 3d DCA 1972).

The only real exception to this liability is theft. In Hertz Corp. v. Jackson, 617 So. 2d (Fla. 1993) the Supreme Court ruled that an owner's initial consent in loaning the vehicle to another driver can be revoked if the driver violates certain terms of the rental agreement, thereby shielding the owner from liability once the vehicle is stolen. In Hertz the lessees did not return the vehicle at the appointed time contained within the rental agreement and Hertz subsequently learned from law enforcement officers that the vehicle was leased based upon false pretenses. Id. at 1054.

There are a vast array of other contract terms that vehicle lessees frequently violate. One common scenario is allowing additional drivers, not a party to the rental contract, to operate the vehicle. When the negligence of such unauthorized drivers results in injury or death, the Florida courts have frequently held the rental company or dealership issuing a loaner car responsible for the damages. See Susco, 112 So. 2d at 835-36; Avis Rent-A-Car Systems, Inc. v. Garmas, 440 So. 2d 1311 (Fla. 3d DCA 1983).

Statutes have been adopted in California and New York that specifically relieve the vehicle owner of liability in circumstances constituting violation of the rental agreement. See generally Cal. Veh. Code Section 17150; New York Vehicle and Traffic Law section 388. However, the courts in California have still held rental companies vicariously liable for accidents if drivers not covered in the rental agreement operated the car or if the rental was secured through false representations. See Financial Indemnity Co. v. Hertz Corp., 38 Cal. Rptr. 249 (Ct. App. 1964); Tuderios v. Hertz Drivurself Stations, Inc., 160 P.2d 554 (Cal. Ct. App. 1945). In

New York, the courts have also continued to hold rental companies vicariously responsible for injuries caused by drivers acting in violation of the rental agreements on the basis that innocent victims must be able to receive damages from a financially responsible party. See Wynn v. Middleton, 584 N.Y.S. 2d 684 (App. Div. 1992).

Such rulings allow the "deep pocket" theory of recovery to govern rather than holding the at fault party responsible for his actions. This imposition of responsibility on innocent corporations is a judicial trend seen in virtually any area of business one can contemplate. The Legislature must act to stop this liberal interpretation of statutes and expressly legislate that liability cannot extend vicariously to those whose actions do not directly cause the harm suffered simply because of their perceived superior financial status.

X. Products Liability Reform

1. State of the Art Defense

Products liability litigation has driven up the cost of product liability coverage as well as the price of products. In 1999, the Legislature passed the Tort Reform Act which created two new defenses, the state-of-the-art defense and the government rules defense for manufacturers in product liability cases.

The state-of-the-art defense allows a defendant to introduce evidence that a product was not defective if it was made according to the state of the art of scientific and technical knowledge in existence at the time the product was manufactured. Florida Statute section 768.1257 provides:

> In an action based upon defective design, brought against the manufacturer of a product, the finder of fact shall consider the state of the art of the scientific and technical knowledge and other circumstances that exited at the time of manufacture, not at the time of loss or injury.

§768.1257, Fla. Stat. (2004). However, the statute does not define the term "state of the art," and as such, various definitions may apply. Courts in other states have generally defined the term as: "either industry custom or practice; the safest existing technology that has been adopted for use in manufacturing the same type of product; or cutting-edge technology." Thomas D. Sawaya, Personal Injury Law and Practice with Wrongful Death Actions § 13.12 (2005). Currently, there is no case law which interrupts this statute. The Fourth District, in a decision predating the passage of section 768.1257, implies that the term should be defined as "industry custom or practice." See Toyota Motor Co., Ltd. V. Moll, 438 So. 2d 192 (Fla. 4th DCA 1983). The term "state of the art" should be defined as "existing level of technological expertise and scientific knowledge relevant to a particular industry at the time a product is designed." Sawaya, Supra at § 13.12. This definition will protect a manufacturer from liability for a product, which was safe years ago but which currently, because of developments in the field, could be deemed defective.

Courts in some jurisdictions allow the concept to be used as a defense by allowing the manufacturer to show that its product conformed to the best available technology. Id. It appears

that the Legislature intended this statute to be used as a defense by the manufacturer. The statute should be rewritten to clarify that the state-of-the art defense can be used two ways by the manufacturer:

1. To show that the design of the product was state of the art and, therefore not defective since it complied with the best known and available technology; and/or

2. To show that the proposed alternative designed proposed by the plaintiff was not reasonably available because it goes beyond the state of the art of the technology that was available at the time the product was manufactured.

See id. By rewriting the statute to serve as a manufacturer's defense, the legislature will ensure that a manufacturer will not be liable for harm caused by a product that met the prevailing standards of performance and safety at the time it was designed.

2. Government Rules Defense

The 1999 Tort Reform Act also created the government rules defense. This defense allows a manufacturer or seller to defend itself by introducing evidence that the product complied with government regulations. See §768.1256(1), Fla. Stat. (2004). This defense is available only if the rules are relevant to the event causing the injury, the rules are designed to prevent the type of harm that occurred, and compliance with those rules is required as a condition for selling the product. See §768.1256(1)-(2), Fla. Stat. (2004) The government rules defense does not apply to drugs that are ordered off the market or seized by the Food and Drug Administration. See §768.1256(3), Fla. Stat. (2004). This statute has not been construed by the courts in Florida. Section 768.1256 should be retained in the new tort reform bill because "[t]his defense evened up the score because plaintiff lawyers were already allowed to argue the opposite: that a product should be presumed defective because it did not meet government standards." Jacquelyn Horkan, The Shadow of Firestone, Florida Business Insight (October 2000).

3. Sunshine in Litigation

In 1990 the Legislature enacted the Sunshine in Litigation Act which was designed to "address hazards to the public hidden in settlement agreements." Elizabeth E. Spainhour, Unsealing Settlements: Recent Efforts to Expose Settlement Agreements That Conceal Public Hazards, 82 N.C. L. REV. 2155, 2156 (2004). The Fourth District has noted: "The legislative staff analysis of the statute supports the conclusion that section 69.081 arose from concerns about settlements in product liability cases, where health and safety issues were implicated." Stivers v. Ford Motor Credit Co., 777 So. 2d 1023,1025-26 (Fla. 4th DCA 2000). See also Fla. H.R. Comm. on Judiciary, SB 278 (1990), Staff Analysis & Economic Impact Statement, (final Aug. 28, 1990).

The Sunshine in Litigation Statute Act is contained with section 69.081, Florida Statutes. Section 69.081 provides in part:

> no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard.

§69.801 (3), Fla. Stat. (2004). The statute also prevents the court for enforcing an order, judgment, agreement or contract "which has the purpose or effect of concealing a public hazard." §69.801 (4), Fla. Stat. (2004). A public hazard is defined as "an instrumentality, including but not limited to any device, instrument, person, procedure, product . . . that has caused and is likely to cause injury." §69.801 (2), Fla. Stat. (2004). The statute only protects trade secrets to the extent that they are not "pertinent to public hazards." §69.801 (2), Fla. Stat. (2004).

Clearly, the Act was passed with admirable goals in mind, however, the statute is so poorly drafted (usually caused by pressures on Legislators by various interest groups) that it can be interpreted to ban protective orders in most products liability cases. Section 69.801 broadly defines a public hazard as anything that "has caused and is likely to cause injury;" however, very little case law exists defining a public hazard. The District Courts of Appeal have held that asbestos and defective car tires constitute a public hazard. See Jones v. Goodyear Tire & Rubber Co., 871 So. 2d 899 (Fla. 3d DCA 2003); ACandS, Inc. v. Askew, 597 So. 2d 895, 898-99 (Fla. 1st DCA 1992). Yet, because all drugs have side effects, all makes of automobiles have been involved in crashes, and all alcoholic beverages have resulted in injuries, these items fall within the definition of public hazard. If all prescription drugs, automobiles, and alcoholic beverages are public hazards, then everything that relates to those items, such as marketing documents, formulas, and production processes are potentially information "concerning a public hazard." The Act also fails to protect trade secrets because public hazard is defined as the product, and not the allegedly dangerous characteristic of the product.

Although the statute has been largely ignored by the courts and litigants, see Ray Shaw, Sunshine in Litigation, 74 FL. BAR J. 63 (2000), the statute should be repealed because it provides great leverage to plaintiffs. The Act permits a plaintiff to bring a case and demand production of the defendant's most sensitive proprietary documents, which results in the defendant fighting production of the documents. Additionally, the Act should be repealed because of its potential effect on settlement. It has been observed that acts similar to Florida's Sunshine in Litigation Act "produce a powerful disincentive to settlement," because a "potential defendant in a products liability suit would be less likely to settle with a plaintiff where the defendant could not legally ensure that details of its product would remain secret." Spainhour, Supra at 2162.

XI. Attorney Fee Limitations On Medical Malpractice and All Tort Cases

1. Attorney Fee Limitation through Constitutional Amendment Relating to Medical Malpractice Cases

On Election Day, the voters overwhelmingly supported Constitutional Amendment 3. Constitutional Amendment 3 proposed to amend the State Constitution to provide that an injured

claimant who enters into a contingency fee agreement with an attorney in a claim for medical liability is entitled to no less than 70% of the first $250,000.00 in all damages received by the Claimant, and 90% of damages in excess of $250,000.00, exclusive of reasonable and customary costs and regardless of the number of the defendants. The Amendment is intended to be self-executing.

The full text of the Amendment provides:

> Section 1. Article I, Section 26 is created to read "Claimant's right to fair compensation." In any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70% of the first $250,000.00 in all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of $250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants. This provision is self-executing and does not require implementing legislation. This Amendment shall take effect on the day following approval by the voters.

Amendment 3, The Medical Liability Claimant's Compensation Amendment, 2004 General Election. Recently, there have been court challenges to the newly passed Constitutional Amendment 8 (Public Protection from Repeated Medical Malpractice) and Constitutional Amendment 7 (Patient's Right to Know of Adverse Medical Incidents). Although Constitutional Amendment 3 is self-executing, it very likely will face challenge in the state's courts. Opponents to Amendment 3 will likely contend that it infringes upon the right to contract, violates equal protection, and due process.

Essentially, the Amendment places a cap on attorney's fees so that patients may be able to recoup a larger share of compensation in a medical liability case. Vote Smart Florida reports that the top three contributors to support amendment were Florida Medical Association, Citizens for Tort Reform, and the American Medical Association. See Vote Smart Florida, I Vote Smart Voter Guide, at http://www.votesmartflorida.org/voterguide.asp The Florida Trial Lawyers opposed the Amendment; the organization believes that the Amendment will limit patient's access to the courts and cost taxpayers money to care for malpractice victims.

Critics of the Amendment prior to its passage contended: "The association's plan seeks to bar the doors of Florida's courtrooms by making it economically unfeasible for any lawyer to take a medical malpractice case -- even when a patient is killed or left paralyzed." Alexander M. Clem, Special Report: Medical Malpractice Commentary: Amendment Attacks Constitutional Rights, Broward Daily Business Review, Vol. 45, Number 142, (June 30, 2004). A recent American Bar Association study opines that:

> a medical malpractice claim must amount to $100-200,000 simply to break even. Anything less means that, at typical rates of return, the case will be refused. The economic barriers -- the investment of time and money to establish a valid claim -- are simply too high. The report also warns that because the caps would reduce

> the number of victims who could afford a lawyer, they would then reduce optimal compensation for all victims and, in effect, reduce the deterrent effect on medical negligence.

Steve Ellman, ABA Blasts Ballot Measure, Miami Daily Business Review, Vol. 70, Number 90, (Oct. 15, 2004).

Nearly 23 states, including Indiana, New York, California, Tennessee, Utah, Delaware and Illinois, have passed legislation placing restrictions on attorney's fees in medical malpractice actions. See Richie Kemp, When Attorneys Come Back for Seconds: Increased Attorney Fees for Extraordinary Work in Medical Malpractice Cases, 25 J Legal Med. 79, 80 (2004). Both Illinois and New York allow a court to award fees in excess of statutory caps in extraordinary cases. Florida's Amendment 3 is similar to legislation passed in California in 1975.[4] See generally Jonathan J. Lewis, Putting MICRA Under the Microscope: The Case for Repealing California Civil Code Section 3333.1(A), 29 W. St. U. L. Rev. 173 The Medical Injury Compensation Reform Act (MICRA) limits jury awards for pain and suffering to $250,000 and also limits attorney fees. Cal. Bus. & Prof.Code § 6146 (2004). With regards to attorney's fees, the statute provides in relevant part:

> a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits:
>
> (1) Forty percent of the first fifty thousand dollars ($50,000) recovered.
>
> (2) Thirty-three and one-third percent of the next fifty thousand dollars ($50,000) recovered.
>
> (3) Twenty-five percent of the next five hundred thousand dollars ($500,000) recovered.

Cal. Bus. & Prof. Code § 6146 (2004). The Legislature may want to consider drafting legislation similar to section 6146 in the event that Amendment 3 is successfully challenged.

[4] "A study conducted by the RAND Corp.'s Institute of Civil Justice in Santa Monica, California, found that the 1975 California Medical Injury Compensation Reform Act (MICRA) has reduced the damages that doctors and their insurers are ordered to pay in medical malpractice lawsuits by 30 percent. The study, which reviewed 257 plaintiff verdicts, also showed that compensation to injured patients declined by 15 percent while the fees for plaintiffs' attorneys fell by 60 percent. Caps on economic damages were imposed in 45 percent of trials that ended in a victory for plaintiffs. A major effect of the law was to make plaintiffs' lawyers accept more of the cost of the litigation. The law, which was enacted when California was facing an insurance crisis, is being considered as a model for medical malpractice reform in other states." Insurance Information Institute, Medical Malpractice, http://www.iii.org/media/hottopics/insurance/medicalmal/

There have been several constitutional challenges in California to section 6146; similar challenges to Amendment 3 and any similar legislation may be duplicated in Florida.[5] In Roa v. Lodi Medical Group, Inc., 695 P.2d 164 (Cal. 1985), the California Supreme Court considered whether section 6146 violated the plaintiffs' constitutional right to due process. The plaintiffs argued that the statute violated the right to due process because it "impermissibly infringes on the right of medical malpractice victims to retain counsel in malpractice actions." Id. at 166. The Court rejected this argument, finding that the statute "does not in any way abrogate the right to retain counsel, but simply limits the compensation that an attorney may obtain when he represents an injured party under a contingency fee arrangement." Id. The Court also rejected the plaintiffs' argument that the fees provided by the statute were so low that it made it impossible for injured persons to retain an attorney. The Court noted: "The adequacy of the fees permitted by the statute is in large measure an empirical matter, and plaintiffs have made no showing to support their factual claim." Id. at 168. Additionally, the plaintiffs argued that section 6146 violated their right to equal protection because "the Legislature acted arbitrarily in selectively imposing section 6146's attorney fee limits only in medical malpractice actions." Id. at 170. The Court rejected this argument, noting that contingency fee limits in section 6146 were rationally related to "the legislative objective of reducing insurance costs." Id. at 171. The plaintiffs also argued that section 6146 violated equal protection because it places limits on fees paid to plaintiff's counsel but not those paid to defense counsel. The Court found that this argument was without merit, because the Legislature could have determined that there was a "special need" to protect plaintiffs. Id. Finally, the Court rejected the plaintiffs' separation of powers argument, noting that "legislative bodies have imposed limits on attorney fees in a variety of fields through out history." Id.

Plaintiffs in California have also argued that section 6146 violates the right to counsel. See Fineberg v. Harney & Moore, 207 Cal.Rptr. 299 (Cal. 2d 1989). In Finberg, the respondent argued that the fee limitations encompassed in section 6146 prevented injured persons from finding adequate representation. The Court rejected this argument, noting that there was no evidence that "no lawyer would undertake representation of medical malpractice plaintiffs sunder the statutory fee limitation." Id. at 303. The Court also noted that the defendant's arguments assumed "a willingness on the part of medical malpractice lawyers, as a group, to violate their duty clients." Id. Additionally, the California courts have rejected plaintiff's attempts to circumvent the limitations on attorney's fees contained in section 6146 by asking the trial court to award fees in excess of the statute or by waiving the fee limitations by contract. See Hathaway v. Baldwin Park Community Hospital, 231 Cal.Rptr. 334 (Cal. 2d 1986) (holding that a "trial court does not have the power to award extraordinary attorneys' fees under section 6146."); See also Schultz v. Harney, 33 Cal.Rptr.2d 276 (Cal. 2d 1994) (finding that a plaintiff "cannot validly waive the statutory fee limitation and is entitled to recover any fees paid beyond the statutory limit.").

[5] Other states have upheld statutes which limit attorney's fees in medical malpractice cases on equal protection, due process, and separation of powers grounds. See, e.g. DeFilipo v. Beck, 520 F.Supp. 1009 (D.Del. 1981); Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d (Ind. 1980); Newton v. Cox, 878 S.W.2d 105 (Tenn. 1994).

2. Placing the Limitation of Amendment 3 on Attorneys' Fees on all Tort Cases

The Legislature should consider legislation similar to Amendment 3 in all tort cases. By placing limits on attorney's fees in all tort cases, plaintiffs will recoup larger shares of their verdicts and plaintiffs' counsel will be discouraged from filing frivolous lawsuits. A reduction in the volume of litigation will reduce the cost of doing business in the State for business owners and insurers.

XII. Implementation of the Jury Patriotism Act

The right to a jury trial is a fundamental tenet of the American judicial system. "The purpose of a jury is to guard against the exercise of arbitrary power—to make available the common sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968). A recent news article reported that only one out of four jurors in Palm Beach County reported for jury duty. See Nicole Sterghos Brochu, "Thinking of Ignoring Jury Duty? Think Again", FLA. SUN-SENTINEL, Sept. 18, 2000 at 1B. Recently, the Fourth District upheld a trial court's finding of contempt where a prospective juror changed her answers relating to bias and prejudice solely based on the trial court's refusal to excuse her from jury duty. See Gruss v. State, 869 So. 2d 770 (Fla. 4th DCA 2004). In reaching its decision, the Court noted: "Jury duty is a badge of citizenship. It is also the cornerstone of our system of justice. If citizen jurors can avoid this duty with impunity, the system would be compromised and justice denied." Id. at 770-71. Florida is not unique; throughout the nation, juror response rates have reached "crisis levels" as in some jurisdictions, fewer than ten percent of eligible jurors report for jury duty. See Paul Rebin, et. al, Jury Disservice: Why People Avoid Jury Duty and What Florida Can Do About It, 28 NOVA LAW REV. 143, 156 fn.3 (Fall 2003).

The Jury Patriotism Act was recently developed by the American Legislative Exchange Council to promote jury service. The American Legislative Exchange Council is a bi-partisan organization compromised of over 2000 state legislators. The Jury Patriotism Act is supported by a wide-cross section of individuals, across the political spectrum and acts have been enacted in Arizona, Louisiana, and Utah. See Supra, at 146.

The Jury Patriotism Act would make several beneficial changes to Florida law to encourage jury service. The Act would lessen the burden of jury service on citizens and ensure a representative jury by requiring all people, regardless of profession or status, to serve on juries by:

- clarifying the procedure for obtaining one automatic postponement of jury service and providing for subsequent postponements in certain limited situations;

- eliminating automatic exemptions from jury service;

- defining the grounds available for an excuse based on hardship;

- providing that failure to report for jury duty is punishable as a misdemeanor;

- providing additional compensation to jurors serving on lengthy civil trials; and

- prohibiting employers from requiring jurors to use annual, vacation, or sick leave for jury service.

The Jury Patriotism Act emphasizes that it is the policy of the State that all qualified citizens have an obligation to serve on petit juries when summoned, unless excused. Additionally, the Act provides only one automatic postponement of jury service. Currently, if a Florida citizen receives a juror summons for an inconvenient time, he or she may request a postponement for a period not to exceed six months upon oral or written request. See § 40.23(2), Fla. Stat. (2003). The Act would clarify the procedure for obtaining one automatic postponement of jury service and provide for subsequent postponements of service in certain limited situations that could not have been anticipated at the time of requesting the first postponement.

The Act would also eliminate automatic exemptions from jury service. Florida law automatically excuses several groups and officials from jury service. In order to achieve the goal of universal jury service, Section 3 of the Jury Patriotism Act eliminates the automatic exemption currently extended to law enforcement officers, practicing attorneys, physicians, expectant mothers, and any parent who is not employed full time and has custody of a child less than six years of age, and persons responsible for the care of another with a mental or physical disability. See § 40.013(2), (4)-(5), (9), Fla. Stat.(2003). Rather than automatically disqualify these groups from jury service, the Act would permit them to request a hardship excuse. Finally, the Act eliminates the disqualification from jury service for the Governor, Lieutenant Governor, Cabinet officers, court clerks, and judges. See § 40.013(2), Fla. Stat. (2003).

Section 4 of the Jury Patriotism Act makes it more difficult for the privileged to avoid jury service by tightening the standard for obtaining an excuse. The Act moves away from Florida's current standard, which allows the court to grant an excuse "upon a showing of hardship, extreme inconvenience, or public necessity." See. § 40.013(6) Fla. Stat. (2003). The Act limits available excuses to three circumstances: (1) when a person would be required to abandon a person under his or her personal care or supervision due to the impossibility of obtaining an appropriate substitute caregiver during the period of participation in the jury pool or in the jury; (2) when he or she would incur costs that would have a substantial adverse impact on the payment of the individual's necessary daily living expenses or on those for whom he or she provides the principle means of support; and (3) when the prospective juror would suffer physical illness or disease. The Act also places the discretion to authorize such excuses with members of the judiciary.

Section 5 of the Jury Patriotism Act addresses the increasing number of people who simply choose to ignore jury summonses – a situation that has led to a critical shortage of jurors in some areas. Research shows that a significant number of those who do not respond to jury summonses fail to do so because they have little fear of receiving a penalty, or believe that the penalty will be minimal – a mere "slap on the wrist." Florida law provides that a person who

fails to respond to a summons shall pay a fine of not more than $100 and may be held in contempt of court. See § 40.23(2), Fla. Stat. (2003). The Act provides that a juror's failure to appear in court, or failure to obtain a postponement of service, is punishable as a "misdemeanor of the second degree." Under Florida law, a misdemeanor of the second degree is punishable by imprisonment of up to 60 days and a fine of up to $1,000. See §§ 775.081, 775.083, Fla. Stat. (2003). The intent of the legislation is to communicate to jurors the importance of jury service and to notify them that shirking one's civic obligation to serve will be punished. Under this provision, people who fail to appear for jury service will have a criminal record, a threat sufficient to deter them from simply ignoring a juror summons.

While only about four percent of trials extend beyond ten days, these cases often involve complex litigation, and present high stakes for those involved. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS 166, tbl. C-8 (2001). The lack of available compensation may be particularly troublesome for jurors who are selected to serve on lengthy civil trials. Jurors who find themselves called to serve on the rare, lengthy trial may be subject to extreme financial hardship. For this reason, when it is apparent that a trial will be long and complex, it is likely that the court will excuse many working Americans due to the financial burden jury service will place on them, their families, or their business. Current Florida law provides jurors who serve for more than three days with $30 per day upon the fourth day of jury service and thereafter. See. § 40.24(3), Fla. Stat. (2003). Unfortunately, this small juror fee is unlikely to provide any meaningful financial help to jurors.

The Lengthy Trial Fund proposed in Section 6 of the Jury Patriotism Act will make it less likely that working Americans will be excused from jury service on lengthy civil trials. The Fund would provide jurors who are not fully compensated by their employers with up to $100 per day in wage replacement or supplementation from the Fund, if the trial eventually lasts ten days or more. After the tenth day of service, jurors would be entitled to even greater compensation – up to $300 per day – for the remainder of the time that the case is in trial. The Fund, which will be fully financed through a minimal court filing fee, will have no direct financial impact on the state treasury or on employers.

Current Florida law prohibits an employer from dismissing or threatening to dismiss an employee who is called for jury service. See § 40.271, Fla. Stat. (2003). Section 7 of the Jury Patriotism Act expands upon this provision by protecting employment benefits during jury service. It provides that an employer may not require an employee to use annual, vacation, or sick leave time for the period in which he or she serves on a jury.

The proposed changes in the jury system contemplated by the Jury Patriotism Act will ensure that cases are judged by a wide cross-section of individuals representative of the community. Additionally, by ensuring the diversity of the jury selection process, the state can expect to have judgments which are fair to the business community, which will ultimately benefit the economy of the entire state.

XIII. Dismissal of Civil Action Due to Fraud

Currently, Florida tort law does not contain a statutory provision providing for the dismissal of a cause of action due to fraud. However, Florida appellate courts have long "recognized and enforced the principle that a party who has been guilty of fraud or misconduct in the prosecution or defense in a civil proceeding should not be continued to employ the very institution it has subverted to achieve her ends." Hanono v. Murphy, 723 So. 2d 892, 895 (Fla. 3d DCA 1998). See also Carter v. Carter, 88 So. 2d 153 (Fla. 1956); Ashwood v. Patterson, 49 So. 2d 848 (Fla. 1951); Savino v. Florida Drive In Theatre Management, Inc., 697 So. 2d 1011 (Fla. 4th DCA 1997); Kornblum v. Schneider, 609 So. 2d 138 (Fla. 4th DCA 1992). The Fifth District has observed that a court has the "power to dismiss an action as the sanction for fraud . . . because no litigant has the right to trifle with the court." Brown v. Allstate Insur. Co., 838 So. 2d 1264 (Fla. 5th DCA 2003).

The Fourth District has provided an analytical framework for determining whether or not a litigant has committed a fraud on the court. See Cox v. Burke, 706 So. 2d 43 (Fla. 5th DCA 1998). In Cox, the plaintiff provided the defendants with false and misleading information about her identity, her driver's license and social security numbers, and about injuries sustained prior to her medical malpractice claim. The Court noted:

> The requisite fraud on the court occurs where "it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." When reviewing a case for fraud, the court should "consider the proper mix of factors" and carefully balance a policy favoring adjudication on the merits with competing policies to maintain the integrity of the judicial system. Because "dismissal sounds the 'death knell of the lawsuit,' courts must reserve such strong medicine for instances where the defaulting party's misconduct is correspondingly egregious." The trial court has the inherent authority, within the exercise of sound judicial discretion, to dismiss an action when a plaintiff has perpetrated a fraud on the court, or where a party refuses to comply with court orders. Because dismissal is the most severe of all possible sanctions, however, it should be employed only in extreme circumstances.

Id. at 46. (Citations omitted). The Court concluded that the plaintiff forfeited her right to have her case heard by engaging in activities that interfered with the judicial system's ability to adjudicate the case on the merits and with the opposing parties' ability to present a defense.

Generally, Florida courts have held that in order to sustain a finding of fraud, a court must have clear and convincing evidence. See John T. Kolinski, Fraud on the Court as a Basis for Dismissal with Prejudice or Default: An Old Remedy has New Teeth, 78 Fla. Bar. J. 16, 17 (Feb. 2004). The appellate courts review the trial judge's decision under an abuse of discretion standard. See Hogan v. Dollar Rent A Car Systems, 783 So. 2d 1211 (Fla. 4th DCA 2001) (holding that the trial court did not abuse its discretion in dismissing the case since fraud

permeated the entire proceeding). Cf. Hanono, 723 So. 2d at 895 (finding that the trial judge abused his discretion by failing to order dismissal of the case with prejudice where the plaintiff was found guilty of committing perjury at his pre-trial deposition). The Supreme Court has noted that a trial court abuses its discretion "only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." White v. State, 817 So. 2d 799, 805 (Fla., 2002).

The Legislature should take steps to codify existing Florida case law, for such laws help to curb the filing of frivolous lawsuits which drive up the cost of doing business in the state by forcing companies to pay excessive legal expenses to fight off or settle often baseless lawsuits.

XIV. Protecting the Right of Companies to Engage in Internal Audits

Companies, institutions, and individuals often conduct internal investigations to prevent discrimination in the workplace; to insure that various rules and regulations are being followed by the company; to speak frankly at committee meetings called to evaluate treatment and care given to patients, all performed to minimize the potential for litigation, or as a means of self-improvement or self auditing.[6] Because such investigations leave a paper trail, the courts have been increasingly confronted with the question of whether such documents should be protected from disclosure. The federal courts have recognized the privilege of "self-critical analysis" or "self-evaluation" which protects disclosure of a company or institution's internal audits or analysis. The federal courts have primarily applied the "self-critical" privilege to three types of documents: hospital committee reports; internal investigatory reports; and equal opportunity forms submitted to the government under Title VII. See Note: The Privilege of Self-Critical Analysis, 96 Harv. L. Rev. 1083, 1089 (1983). However, the privilege has been extended in other areas. See, e.g., Reichhold Chemicals, Inc. v. Textron, Inc., 157 F.R.D. 522, 525 (N.D. Fla. 1994) (Citing a number of areas where the self-critical privilege has been extended).

In the seminal case of Bredice v. Doctors Hospital, Inc., 50 F.R.D. 249 (D.D.C. 1970), the self-critical analysis privilege was judicially recognized for the first time. In Bredice, a medical malpractice case, the federal district court protected the minutes of a committee meeting where hospital staff members gave frank evaluation regarding the care and treatment patients had received. The court noted:

> Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients . . . To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations.

Id. at 250. The court opined that there was an "overwhelming public interest" in protecting the free flow of information. Id. at 251.

[6]This list is not intended to be exhaustive of the issues.

As a general rule, "Florida courts have consistently held that the Bredice decision . . .has been adopted in the common law of Florida, not as a rule of privilege, but as a discretionary right of a court on the grounds of public policy." Reichhold, 157 F.R.D. at 528. See Iglesias v. It's A Living, Inc., 782 So. 2d 963 (Fla. 3d DCA 2001); Southern Bell Tel. & Tel. Co. v. Beard, 597 So. 2d 873 (Fla. 2d DCA 1992); Dade County Medical Ass'n v. Hills, 372 So. 2d 117, 121 (Fla. 3d DCA 1979); Carter v. Metro. Dade County, 253 So. 2d 920, 922 (Fla. 3d DCA 1971). In order to establish a "self-critical analysis" or internal investigations privilege, legislation is needed because Florida courts are forbidden from adopting privileges via judicial decision. "In Florida, privileges exist only by statute. See § 90.501, Fla. Stat. (1991); Procter & Gamble Co. v. Swilley, 462 So. 2d 1188, 1195 (Fla. 1st DCA 1985) (concluding that no academic privilege exists in Florida and that the court was not at liberty to create such a privilege); State v. Castellano, 460 So. 2d 480, 481 (Fla. 2d DCA 1984) (privileges in Florida are no longer created by judicial decision)." Southern Bell Tel. & Tel. Co. v. Beard, 597 So. 2d 873, 876 (Fla. 1st DCA 1992). By adopting legislation protecting internal investigations and self-critical analysis, the Legislature will protect the right of businesses to reduce their risk of litigation.

XV. Right to Cure Defects Prior to Litigation

Florida should consider adopting legislation which requires a plaintiff to allow a seller or manufacturer to cure defects prior to the institution of litigation. Currently, Florida law allows a contractor to cure defects prior to the filing of litigation. In 2003, the Florida Legislature passed SB1286 which created a process to give homeowners and construction companies the opportunity to settle legal claims related to construction defects before a lawsuit.[7] Florida Statutes 558.004 provides that a plaintiff will, at least 60 days before filing an action serve written notice on the construction professional. See § 558.004 (1), Fla. Stat. (2004). Section 558.004 further provides that the contractor has a right to the right to inspect the dwelling at least 30 days after the receipt of notice of the claim. See §558.004 (2), Fla. Stat. (2004). A plaintiff may file suit without further notice if the construction professional disputes the claim, fails to remedy the defect, or fails to respond to the plaintiff's notice of claim within the time provided. See §558.004 (6), Fla. Stat. (2004). Finally, a plaintiff must accept or reject the construction professional's offer by serving written notice of such acceptance or rejection within 45 days after receiving the offer. See §558.004 (7), Fla. Stat. (2004). If the plaintiff initiates action without first accepting or rejecting the offer, the court will abate the action upon motion until the plaintiff complies with the statute. See id. Florida law also requires pre-suit notification prior to initiating a medical malpractice action. See §766.106, Fla. Stat. (2004).

[7]In enacting section 558.004, the Legislature made several findings:

> The Legislature finds that it is beneficial to have an alternative method to resolve construction disputes that would reduce the need for litigation as well as protect the rights of homeowners. An effective alternative dispute resolution mechanism in certain construction defect matters should involve the claimant filing a notice of claim with the contractor, subcontractor, supplier, or design professional that the claimant asserts is responsible for the defect, and should provide the contractor, subcontractor, supplier, or design professional with an opportunity to resolve the claim without resort to further legal process.

§558.001, Fla. Stat. (2004)

The Legislature should adopt legislation similar to SB 1286 for all products liability cases. By adopting a pre-suit screening process for all causes of actions involving a retailer or manufacturer, business owners are provided the opportunity to resolve claims in a timely and cost efficient manner without resorting to litigation. Additionally, a pre-suit screening process would discourage non-meritorious claims and facilitate settlement in cases with legitimate claims.

XVI. Proportionate Liability for Certified Public Accountants

Under joint and several liability, a plaintiff may recover all or part of his or damages from any defendant, irrespective of the defendant's proportion of fault. Conversely, in a proportionate liability system, each co-defendant is proportionally liable for the plaintiff's harm. For example, a co-defendant that is found by a jury to be 20% responsible for a plaintiff's injury would be required to pay no more than 20% of the entire settlement. Recently, Massachusetts enacted legislation barring the application of the rule of joint and several liability in the recovery of all damages against public accountants so that an individual or firm is only liable for damages in proportion to the assigned degree of fault. See Mass. Gen. L., cc 112, §87A 3/4 (2004). Chapter 112, section 87A 3/4 also abolishes joint and several liability in cases where accountants are faulted for failing to detect fraud committed by third parties. However, the statute does not limit liability in instances where an accountant's wrongdoing is willful and knowing; in such situations joint and several liability still remains.

Legislation establishing proportionate liability helps to protect accountants for the burden of large judgments that accountants face under joint and several liability. The Massachusetts Society of Public Accountants has observed:

> A flaw with the joint and several liability standard as applied to accountants is that it tends to punish accountants for wrongs they did not commit, which they could not have avoided, and for which they should not be held accountable. Auditors are often reporting on financial documents which other parties create and over which the accountant does not exercise control. As the Massachusetts Supreme Judicial Court held in NYCAL "regardless of the effort of the auditor, the client retains effective primary control of the financial reporting process." Accountants are in a unique position—no other professional routinely performs this type of function, or is subjected to virtually unlimited liability. Requiring accountants to be held liable for inaccuracies under a joint and several liability rule unduly exposes auditors to remedial measures for wrongs

Massachusetts Society of Public Accountants, Legislative E-lert at http://www.mscpaonline.org

XVII. Spoliation of Evidence

The term spoliation of evidence refers to "a cause of action which holds someone liable for negligently or intentionally destroying material which is need as evidence in litigation." Bard D. Rockenbach, Spoliation of Evidence: A Double Edged Sword, 75 Fla. Bar. J. 10, 34 (Nov. 2001). One of the earliest cases concerning spoliation of evidence concerned a medical

malpractice action against a hospital for the negligent performance of a surgery. See Valcin v. Public Health Trust of Dade Co., 473 So. 2d 1297 (Fla. 3d DCA 1984). In Valcin, the Court found that the hospital's failure to produce a written consent form informing the plaintiff of the dangers of a surgical procedure was a breach of its statutory duty; thus, the burden of proving that the procedure was not negligently performed shifted to the hospital when the critical records were not produced.[8]

A few months later, the Third District again dealt with missing medical records in another medical malpractice case. See Bondu v. Gurvich, 473 So. 2d 1307 (Fla. 3d DCA 1984). In Bondu, the plaintiff was unable to maintain her claim for medical malpractice due to the hospital's failure to keep and maintain records relating to her husband's surgery. The court in beginning its analysis, noted that three essential elements must be present in order for the plaintiff to maintain her claim:

> (1) the existence of a duty recognized by law requiring the defendant to conform to a certain standard of conduct for the protection of others including the plaintiff;
>
> (2) a failure on the part of the defendant to perform that duty; and (3) an injury or damage to the plaintiff proximately caused by such failure.

Id. at 1312. The Court noted that an administrative regulation imposed upon the hospital the duty to maintain the requested records. The Court also noted that several California appellate courts had "recognized the existence of causes of action for negligent failure to preserve evidence for civil litigation." Id. Accordingly, the Court concluded that the claimant had stated a cause of action by alleging that the hospital breached its duty to maintain and furnish medical records upon request.

The Third District again addressed the spoliation of evidence as a cause of action in Miller v. Allstate Ins.. Co., 573 So. 2d 24 (Fla. 3d DCA 1990) and Continental Ins.. Co. v. Herman, 576 So. 2d 313 (Fla. 3d DCA 1991). In Miller, the Court considered whether a cause of action for spoliation of evidence could be based upon contract. The Court concluded that there was no difference between whether the duty to preserve evidence arose by contract or by tort, provided that a duty to preserve the evidence existed. In Continental, the Court found that the plaintiff had no cause of action for spoliation of evidence because she suffered no significant impairment in her ability to prove her claim. In reaching its decision, the Court noted that:

> the elements of a cause of action for negligent destruction of evidence are: (1) existence of a potential civil action, (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action, (3) destruction of that evidence, (4) significant impairment in the ability to prove the lawsuit, (5) a

[8] On appeal, the Supreme Court modified the Third District's holding, noting that the irrebuttable presumption established by the court violated the defendant's right to due process. See Public Health Trust v. Valcin, 507 So. 2d 596 (Fla. 1987). The Court held that instead, a rebuttable presumption of liability applied; however, the burden of proof was to be shifted to plaintiff to establish that the absence of the records hindered his ability to establish a prima facie case.

> causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages.

Id. at 315. Accord Royal & Sun Alliance v. Lauderdale Marine Ctr., 877 So. 2d 843 (Fla. 4th DCA 2004).

Generally, the courts have recognized a cause of action for spoliation of evidence where a duty to preserve evidence exists. See, e.g., Shaw v. Cambridge Integrated Serv. Group, Inc., 29 Fla. L. Weekly D2218 (Fla. 4th DCA Oct. 6, 2004) (noting that the Workers' Compensation Act imposes a duty upon employers to preserve evidence). However, recent decisions suggest that "a duty to preserve evidence may rise merely because litigation is imminent or foreseeable." Robert D. Peltz, The Necessity of Redefining Spoliation of Evidence Remedies in Florida, 29 Fla. St. U. L. Rev. 1289, 1304 (Summer 2002). See St. Mary's Hospital v. Brinson, 685 So. 2d 33 (Fla. 4th DCA 1996) (holding that where an individual knows that a potential claim for personal injuries may exist, the person has a duty to preserve evidence); Hagopian v. Publix Supermarkets, Inc., 768 So. 2d 1088 (Fla. 4th DCA 2001) (finding that a company has a duty to preserve evidence where an incident report was prepared, because such a document evidenced the company's anticipation of litigation).

The decisions in Brinson and Hagopian seem to indicate anytime an accident occurs, an business owner must preserve all evidence until a lawsuit is filed, even if the suit is filed years later. It has been observed that:

> By recognizing a duty based upon the mere knowledge of a potential lawsuit, Brinson expands the scope of spoliation. In order to be protected from a spoliation claim, people who are potential witnesses to a potential claim must understand the law, know what cause of action the eventual plaintiff might bring, and then keep the evidence necessary safe at his or her own expense. Otherwise, the witness risks being made a defendant. Insurers should either never repair automobiles involved in accidents, or repair them only after photographing and documenting the damage and then saving the repaired parts. This duty might also prohibit a grocery store from changing its floor in the area of a slip and fall accident or, perhaps, to refrain from refinishing it. Moreover, the duty to maintain all of this evidence would theoretically exist until the statute of limitations expired, even though the people responsible for maintaining the evidence would have no knowledge of any event that may have tolled the statute of limitations.
>
> This new rule places the cost and inconvenience of preparing and preserving a claim for civil litigation upon society as a whole, rather than upon the individuals who have an interest in preparing the claim or defense, and preserving the evidence related to it. Instead of imposing a duty upon every person in society, however, the better rule should be to only recognize duties to preserve evidence on the part of nonparties when such duties are created by statute, contract, or promise, or when the destruction of evidence comes during the pendency of litigation. The courts should clearly state that there is no duty on the part of nonparties to preserve evidence except under those circumstances.

Rockenbach, Supra at 37-38.

In light of the district courts' interpretation of the tort of spoliation of evidence, legislation is needed to ensure that defendants are not burdened with the responsibility of maintaining evidence indefinitely. Also is needed where there is no knowledge or duty on the part of an individual that such evidence has to be maintained.

XVIII. Sovereign Immunity for Medical Professionals in High Risk Practice Settings

Florida has long recognized the doctrine of sovereign immunity, a doctrine which protects the state and governmental officers, employees, or agents from lawsuit. Although the State's immunity is absolute and unqualified, Article X, Section 13 of the Florida Constitution permits the Legislature to waiver sovereign immunity pursuant to general law. See, e.g., Jackson v. Palm Beach County, 360 So. 2d 1 (Fla. 1st DCA 1978). Under Section 768.28, Florida Statutes, the State of Florida waives its sovereign immunity for liability to the following extent:

> Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations in this act.

§768.28 (1), Fla. Stat. (2004). The waiver of the State's immunity does not include punitive damages or claims in excess of $100,000 per person or $200,000 per incident. See §768.28 (5), Fla. Stat. (2004).

Section 768.28 further provides that "[n]o officer, employee, or agent of the state shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of his employment or function." §768.28 (9)(a), Fla. Stat. (2004). Under Section 768.28, members of the Florida Health Services Corps which provide uncompensated care to medically indigent persons, health care professionals providing services pursuant to section 766.1115, and health care providers providing services to the Department of Corrections are defined as officers, employees, or agents of the state. See §768.28 (9)(b), Fla. Stat. (2004). The Supreme Court has held that a person or entity may raise the defense of sovereign immunity only when performing the activities within the scope of an agency relationship with the State. See Dorse v. Armstrong World Industries, Inc., 513 So. 2d 1265, 1268 (Fla. 1987).

In the mid-1980's, the Legislature enacted legislation in reaction to the growing number of law suits against emergency room physicians. See Thomas R. Tedcastle and Marvin A. Dewar, Medical Malpractice: A New Treatment for an Old Illness, 16 Fla. St. U. L. Rev. 535, 591 (Fla. 1988). In 1986 the Legislature passed section 768.13 which made physicians rendering

emergency care of treatment eligible for immunity. See §768.13 (2)(b), Fla. Stat. (1986). Despite these reforms, Florida in 2003 was in the midst of a medical liability insurance crisis, as medical malpractice carriers were leaving the state and premiums were increasing drastically. In response to this crisis, the Legislature passed SB 2-D, which provided a number of reforms in the area of medical malpractice litigation. However, even after the passage of SB 2-D, physicians are reporting that medical liability insurance premiums are still extremely high. Clearly, access to quality medical care will be compromised if additional malpractice reforms are not adopted. In 2004, Representative Kimberly Berfield and Representative David Murzin introduced HB 1821 which provided sovereign immunity to providers of emergency services. HB 1821 made the following findings:

> The Legislature finds and declares it to be of vital importance that emergency services and care be provided by hospitals, physicians, and emergency medical services providers to every person in need of such care.
>
> The Legislature finds that emergency services and care providers are critical elements in responding to disaster and emergency situations that might affect our local communities, state, and country.
>
> The Legislature recognizes the importance of maintaining a viable system of providing for the emergency medical needs of the state's residents and visitors.
>
> The Legislature and the Federal Government have required such providers of emergency medical services and care to provide emergency services and care to all persons who present themselves to hospitals seeking such care.
>
> The Legislature finds that the Legislature has further mandated that prehospital emergency medical treatment or transport may not be denied by emergency medical services providers to persons who have or are likely to have an emergency medical condition.
>
> . . .
> The Legislature also recognizes that emergency services and care providers provide a significant amount of uncompensated emergency medical care in furtherance of such governmental interest.
>
> . . .
>
> The Legislature finds that providers of emergency medical services and care in this state have reported significant problems with both the availability and affordability of professional liability coverage.
>
> The Legislature finds that medical malpractice liability insurance premiums have increased dramatically and a number of insurers have ceased providing medical malpractice insurance coverage for emergency medical services and care in this

> state. This has resulted in a functional unavailability of medical malpractice insurance coverage for some providers of emergency medical services and care.
>
> The Legislature further finds that certain specialist physicians have resigned from serving on hospital staffs or have otherwise declined to provide on-call coverage to hospital emergency departments due to increased medical malpractice liability exposure created by treating such emergency department patients.

HB 1821, Section 11 (Fla. 2004). In order to remedy the problems faced by Florida's medical providers, HB 1821 proposed to amend section 768.28 to extend immunity to providers of emergency services care (practitioners, hospitals, and trauma centers) by make these entities agents of the state.

There are a number of medical professionals in Florida working in high risk practice settings who do not enjoy any sort of immunity. For example, Florida does not provide tort immunity for physicians working in crisis stabilization units. A crisis stabilization unit is defined as a "program that provides an alternative to inpatient hospitalization and that provides brief, intensive services 24 hours a day, 7 days a week, for mentally ill individuals who are in an acutely disturbed state." §394.67 (5), Fla. Stat. (2004). However, crisis stabilization unit physicians are exposed to huge liability because Florida courts have routinely imposed liability on hospitals and individuals for failing to protect an individual from self-inflicted injuries. See Robinson v. Faine, 525 So. 2d 903 (Fla. 3d DCA 1987) (finding that hospital had a duty to prevent a psychiatric patient who escaped from its premises from committing suicide); See also White v. Whiddon, 670 So. 2d 131 (Fla. 1st DCA 1996) (finding that the sheriff's office had a duty of care to insure that detained teenager did not commit suicide). Florida should consider extending sovereign immunity to all medical professionals working in high risk practice settings because the state has a compelling interest in ensuring that high quality and affordable health care is available to all of Florida's citizen's and visitors.

One sure way of reducing premiums for coverage is to have a well defined maximum exposure. Such definitive language gives comfort to reinsurers when determining their exposure. Unlimited exposure with out clearly defined limitations will not reduce the cost of medical malpractice coverage.

XIX. Sovereign Immunity for Law Enforcement Officers Involved in High Speed Pursuits

Throughout the country civil cases against law enforcement officers and agencies have arisen due to injuries to third parties caused by high-speed chases by law enforcement officers in pursuit of a criminal suspect. Early court cases recognized the societal benefit regarding immunity from liability for a law enforcement officer's decision to engage in a high speed pursuit despite the inherent risk of harm to innocent persons. See City of Miami v. Horne, 198 So. 2d 10 (1967). However, in City of Pinellas Park v. Brown, 604 So. 2d 1222 (Fla. 1992), the Supreme Court placed a duty of care on law enforcement officers in high-speed pursuit. The Court reasoned that a substantial portion of the risk of injury to a foreseeable victim was being created by the police. The Court held that a duty exists regardless of whether a specific policy

governing pursuit is in place. Ultimately, the Court concluded that the actions of police officers engaging in hot pursuit are operational functions which are not subject to sovereign immunity if accomplished in a manner contrary to public reason and public safety.

The Court in reaching its decision exceeded the power granted to it by the Constitution. Justice Overton in a strong dissent wrote: "While a clear definitive policy in regard to car chases needs to be established by the executive and legislative branches of over government, the majority opinion goes much too far and efficiently places that policy decision solely in the judicial branch." Id. at 1228 (Overton, J., dissenting). See also Melissa B. Jagger, Recent Development: Police: Pursuit–High Speed Chase, 28 STET. L. REV. 886 (Winter 1999). The proposed legislation extends the doctrine of sovereign immunity to law enforcement officers involved in high speed chases and restores the law to its pre-City of Pinellas Park state.

XX. Statute of Repose

As a general rule, statutes of repose protect business from against claims brought against a company years after a product is sold.[9] Without a statute of repose, businesses are put in a difficult position because memories fade, witnesses become unavailable, and records are lost. In the 1999 Tort Reform Bill the Legislature reinstated the Statute of Repose for products liability. See §95.031, Fla. Stat. (2004). Currently, the statute of repose for construction provides for a 15 year statute of limitations for latent defects. Florida Statutes section 95.11 provides in pertinent part:

> An action founded on the design, planning, or construction of an improvement to real property, with the time running from the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest; except that, when the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. In any event, the action must be commenced within 15 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest.

§95.011 (3)(c), Fla. Stat. (2004).

In contrast, the statue of repose for manufacturers provides for a 12 year statute of limitations for manufacturers. Section 95.031, Florida Statutes, provides in relevant part:

[9] A statute of repose is similar to a statute of limitations. Statutes of limitations extinguish, after a period of time, the right to prosecute an accrued cause of action. Statutes of repose, by contrast limit liability by prohibiting a right of action after a specified time, which is measured from the date that a product is delivered or work is completed. See BLACK'S LAW DICTIONARY 1411 (7th ed. 1990).

> Under no circumstances may a claimant commence an action for products liability, including a wrongful death action or any other claim arising from personal injury or property damage caused by a product, to recover for harm allegedly caused by a product with an expected useful life of 10 years or less, if the harm was caused by exposure to or use of the product more than 12 years after delivery of the product to its first purchaser or lessee who was not engaged in the business of selling or leasing the product or of using the product as a component in the manufacture of another product.

§95.031 (2)(b), Fla. Stat. (2004).

The preamble to section 95.11(3) indicates that the Legislature enacted the statute in order to protect architects, engineers, and contractors from lawsuits filed years after a structure was completed and occupied. Specifically, the preamble states:

> WHEREAS, to permit the bringing of such actions without any limitations as to time, places the defendant in an unreasonable, if not impossible, position with respect to asserting a defense, and
>
> . . .
>
> WHEREAS, the best interest of the people of the state will be served by limiting the period of time an engineer, architect, or contractor may be exposed to potential liability after an improvement has been completed.

Laws of Florida, Chapter 80-322 at 1390. Architects and engineers face a substantial degree of liability exposure for property damage, economic damages, bodily injury and wrongful death resulting from their alleged negligence in the design improvements to real property that have been long completed and for which the architect or engineer should not be held responsible for reasons outside of their control. Once a building is constructed, neither the architect nor the engineer has the ability to enter the structure or monitor its upkeep. Additionally, neither the architect nor engineer has the right to order that repairs be made or that maintenance be performed in a manner that will ensure that the structure retains its integrity.

In light of the Legislature's original intent in enacting section 95.11 (3), and the current limitations contained in section 95.031, the Legislature should amend section 95.11 (3) to reduce the statute of repose for manufacturers, architects, engineers and contractors from 15 years to 5 years. Many states such as Virginia and Illinois have imposed a 5 year statute of repose on products liability and construction claims.

The Legislature should also consider passing legislation which requires a person desiring to file suit against an architect or engineer for professional negligence, to file with the complaint an affidavit of a third party registered architect or professional engineer setting forth at least one negligent act, error, or omission claimed to exist and the factual basis for each claim. This

requirement will reduce the numbers of frivolous law suits filed and ensure that only meritorious claims are brought to trial.

XXI. Road and Street Contractor Tort Reform

There are numerous instances of cases in Florida where contractors have been sued for construction work performed on public highways. See, e.g., Gustinger v. H.J.R., Inc., 573 So. 2d 1033 (Fla. 3d DCA 1991). Currently, Florida courts have held that construction companies are potentially liable for any latent defects in a highway, road, or street, even after the Department of Transportation has accepted responsibility for the maintenance of the project. See Edward M. Chadbourne, Inc. v. Vaughn, 491 So. 2d 551 (Fla. 1986); Brady v. State Paving Corp., 693 So. 2d 612 (Fla. 4th DCA 1997). Recently, Texas enacted code 97.002 which protects contractors who follow the Texas Department of Transportation's plans and specifications. The Legislature should consider legislation which protects contractors who build or repair highways, roads and streets in compliance with the Department of Transportation's specifications.

XXII. Preserving the Right to Settle: Barring Claims of Tortious Interference with a Contract after Parties Settle

Florida law on the elements of tortious interference with a contract or business relationship are well-established as the following: (1) the existence of a business relationship (2) the defendant's knowledge of the relationship, (3) an intentional and unjustified interference with the relationship by the defendant and (4) damage to the plaintiff as a result of the interference. See Salit v. Ruden, McCloskey, Smith, Schuster & Russell, P.A., 742 So. 2d 381, 385 (Fla. 1st DCA 1999). Historically, such cases required some covert act by the defendant to disrupt the business or contractual relationship between an attorney and her client. One significant example involves a bad faith insurance case, wherein an executive with the defendant insurer convinced the plaintiff she could receive a larger settlement if she discharged her attorney and would not have to pay him any portion of her subsequent recovery. See Bankers Multiple Line Insurance Co. v. Farish, 464 So. 2d 530 (Fla. 1985). The attorney prevailed against the defendant insurer for tortious interference in his contractual relationship with the original plaintiff primarily because he was able to prove that the executive's actions constituted an unjustified interference into the relationship between him and his client. Id.

Much more recently, however, the Fourth District has applied the elements of tortious interference much more liberally against corporate defendants. In Ingalsbe v. Stewart Agency, Inc., 869 So. 2d 30 (Fla. 4th DCA 2004), review granted, 880 So. 2d 1213 (Fla. 2004), review dismissed, 29 Fla. L. Weekly S744 (Fla. Dec. 2, 2004), the Fourth District considered a lawsuit against a car dealer in a lemon law action. The case originally went to trial and the jury awarded the consumer about $21,000 in damages. The car dealer appealed and the award was reversed to allow the dealer to put on additional evidence. Prior to the new trial, the dealer personally contacted the consumer and negotiated a settlement agreement. The ultimate agreement provided the consumer $35,000 in damages plus a 40% fee for the consumer's attorney and an additional $10,000 to the attorney for the appellate work performed. The consumer accepted this agreement and avoided the second trial. The consumer's attorney, though, rejected the tender of the attorney fee portion of the settlement and sued the dealer for tortious interference with the

business relationship between him and his client, the consumer. The attorney fee contract provided for the fee offered by the dealer as 1 of 3 possible fee arrangements. The attorney alleged that without the settlement negotiated by the parties themselves, the attorney could possibly have earned a higher fee under one of the other two alternatives.

The dealer prevailed on a motion to dismiss with the trial court holding that the attorney's suit was barred by absolute immunity. The Fourth District, however, reversed the ruling, holding that the dealer could not bind the lawyer "to an involuntary rescission of one or more of the contract's reasonable alternatives simply by committing to paying only the [fee alternative] most favorable to [d]ealer." Id. at 33.

In a dissenting opinion, Judge Gross articulated why this ruling is an infringement on parties' rights to settle lawsuits. He appropriately quoted a federal court comment on Florida's law stating:

> It is clear that an attorney never has the right to prohibit his client from settling an action in good faith. A client by virtue of a contract with his attorney is not made an indentured servant, a puppet on counsel's string, nor a chair in the courtroom. Counsel should advise, analyze, argue, and recommend, but his role is not that of an imperator whose edicts must prevail over the client's desire. He has no authoritarian settlement thwarting rights by virtue of his employment.

Id. at 35- 36 (Gross, J., dissenting) (quoting Singleton v. Foreman, 435 F.2d 962, 970 (5th Cir. 1970)).

The Fourth District ruling, however, hinders the parties' ability to settle a case without the intervention of their attorneys which has previously been established for almost 50 years as the right of all parties. See Sentco, Inc. v. McCulloh 84 So. 2d 498 (Fla. 1955). The Supreme Court accepted jurisdiction of the case and held oral argument on November 1, 2004. However, the Court in a unanimous decision, discharged jurisdiction of the case prior to rendering an opinion. The Legislature should strengthen the parties' right to settle without the fear of such intimidation from plaintiff attorneys who are clearly pursuing their own interests rather than advocating on behalf of their clients.

XXIII. Re-Establishing the Allocation of Fault for Crashworthiness Cases

Crashworthiness cases, which are also referred known "as 'secondary collision' or 'enhanced injury' cases, involve both an initial accident and a subsequent or secondary collision caused by an alleged defective condition created by a manufacturer, which is unrelated to the cause of the initial accident but which caused additional and distinct injuries beyond those suffered in the primary collision." D'Amario v. Ford Motor Co., 806 So. 2d 424, 426 (Fla. 2001). The damages sought in a crashworthiness case are not for injuries sustained in the first collision "but for those sustained in the second impact where some design defect caused by an exacerbated injury which would not have otherwise occurred as a result of the original collision." Id. (Citations omitted). In D'Amario, the vehicle drivers were intoxicated; the first collision occurred when the vehicle in which the plaintiff was a passenger struck a tree. The second

collision occurred when the car burst into flames due to an allegedly defective relay switch. The plaintiff suffered severe burns; however at trial the jury returned a verdict for the manufacturers.

The Supreme Court reversed the lower court's decision because the trial court allowed the manufacturers to introduce evidence of the drivers' intoxication. The Court found that this decision resulted in juror confusion because attention was placed on the conduct which caused the accident instead of the existence of a defect and its role in causing the enhanced injuries. Essentially, the court held that the comparative apportionment of fault did not apply in crashworthiness cases. As then Chief Justice Wells pointed out, the majority's decision did not give courts direction in cases where there is no clear line between injuries sustained as the result of the first collision and those which occurred because of the defective productive. See id. at 444 (Wells, C.J., dissenting).

It has been observed that the Supreme Court in D'Amario rewrote Chapter 768 without any analysis of statutory history or intent. See Larry Roth, The Florida Supreme Courts Needs a Second Look at Second Collision Motor Vehicle Cases, 78 Fla. Bar. J. 20, 26 (2004). Accordingly, the Legislature should pass legislation which guarantees that a defendant will be entitled to a full apportionment of fault at trial.

XXIV. Expert Evidence and Witness Reform

The admissibility of expert scientific testimony has been a focal point of tort reform in recent years. The admission of "junk science" has increased due to the tendency of trial judges to allow into court evidence built on scientifically weak studies or dubious expert witnesses. See Edward Felsenthal, Judges Can Bar 'Junk Science,' Top Court Says, Wall Street J. (Dec. 16, 1997). The Fifth District has noted:

> Florida adopts a generous standard for determining whether a witness is qualified to give expert opinion testimony. This standard is set forth in Fla. Stat. ch. 90.702 (1995): If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

Dean Witter Reynolds, Inc. v. Cichon, 692 So. 2d 313, 315 (Fla. 5th DCA 1997). In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the United States Supreme Court established guidelines for federal judges for admitting scientific evidence and expert testimony. However, Daubert is not binding on the states because it construed a federal statute, Federal Rule of Evidence 702. A recent study by Florida International University Professor Margaret Bull Kovera published in the Journal of Applied Psychology showed that 83 percent of the state's judges cannot distinguish valid scientific testimony from flawed scientific evidence. Julie Kay, Florida Judges Can't Tell the Difference Between Expert Testimony and Junk Science According to New Study by FIU Professor, BROWARD DAILY BUS. REV., Vol. 41, No. 177 (Aug. 11, 2000).

In order to address this problem, many states are adopting legislation which uses the standards for reliability and accuracy of scientific and technical evidence that the federal courts use. The Legislature should pass legislation which ensures that trial judges are forced to conduct deliberative hearings in order to ascertain the qualification of a witness to testify as an expert. Additionally, legislation is needed which requires expert testimony relating to scientific evidence to be based on sufficient facts and be the product of reliable principles. Such legislation will help Florida correct a U.S. litigation crisis that costs American consumers over $150 billion per year and adds 2.5% to the cost of every new product in America. See U.S. Senator Spencer Abraham, The Case for Legal Reform, Speech published by the California Association for Legal Reform.

CONCLUSION

A system that allows litigation to include policy-making with significant financial rewards conferred upon a few, needs to be changed to ensure a fair and equitable democratic government for all Florida's citizens. The caution of the US Supreme Court in Berger v. United States, 295 U.S. 78, 88 (1935), is as timely today as it was when it was written almost 70 years ago, "[p]rivate lawyers using the power of the state to enforce unwritten public law with incentive to increase the penalties is an attorney for the state, the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all."

With an ever expanding marketplace and newly available technology, individuals and greedy attorneys have more opportunities to organize attacks against businesses. Without significant tort reforms no industry is safe. Industries like tobacco and gun manufacturers have been targeted because plaintiff attorneys are counting on the courts bending the rules for their controversial products. Once these case law precedents are created relative to these "disfavored" industries, the law can be applied to virtually any industry including manufacturers of adult beverages, pharmaceuticals, automobiles, hospitality and entertainment industries as well as restaurant and retail outlets.

The question Florida's leaders must answer is not *IF* a governmental response is needed but *HOW* will Florida respond to these abuses of the judicial system that are crippling Florida business. We believe the above topics should serve as a preliminary road map for challenging the current tort system that has taken the place of sound legislative decision-making and is jeopardizing Florida's future.

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APPENDIX A

Appendix A

A Comparison of the New Ohio Tort Reform Bill with Current Florida Law

We have examined newly enacted Ohio Senate Bill 80 and compared it with existing Florida law and the proposals outlined in our tort reform book. The Ohio Tort Reform Statute covers the following areas:

- Specific Causes of Action
- Civil Actions Regarding Picking Agricultural Produce
- Statutes of Limitation
- Statutes of Repose
- Trial, Liability, Damages and Judgment
- Seat Belt Defense
- Wrongful Death
- Caps on Non-Economic Damages
- General Punitive and Exemplary Law Changes
- Frivolous Conduct
- Products Liability
- Asbestos Claims
- Collateral Benefits
- Attorney Contingency Fee Agreements
- Legal Consumer's Bill of Rights
- Immunity from Liability for an Owner, Lessee, or Occupant of Premises with Regard to a User of a Recreational Trail.

We have included a copy of the bill analysis for Senate Bill 80 immediately before the appendix for your review.

ANALYSIS

1. Specific causes of action

Civil Actions Regarding Agricultural Produce

Ohio Senate Bill 80 (hereinafter "SB80" or "The Bill") provides that an owner, lessee, renter or operator of an agricultural market open to the public does not extend any assurance to a person that the premises are safe from naturally occurring hazards. SB 80 further provides that immunity for owners, lessees, renters, or operators for injury, death, or loss to a person resulting from the condition of the terrain of the premises.

Similarly, Florida Statutes section 768.137 (2) provides protection to certain farmers:

> Any farmer who gratuitously allows persons to enter upon her or his own land for the purpose of removing any farm produce or crops remaining in the fields following the harvesting thereof, shall be exempt from civil liability arising out of any injury or death resulting from the nature or condition of such land or the nature, age, or condition of any such farm produce or crop.

§768.137, Fla. Stat. (2004). However, the statute does not go as far as SB80 as it does not specify that owners, lessees, renters or operators of agricultural markets are also exempt from civil liability.

Unavailability of Wrong Death Action

SB 80 prohibits the commencement of a wrongful death action if the decedent was compensated for his or her injuries prior to death if the decedent executed a valid release, and the decedent's injuries were sustained under the same circumstances that otherwise could be the basis of a civil action for wrongful death. Florida Statutes section 768.20 is not as specific, as it provides: "When a personal injury to the decedent results in death, no action for the personal injury shall survive, and any such action pending at the time of death shall abate." §768.20, Fla. Stat. (2004).

SB 80 also modifies the list of eligible persons for whom compensatory damages for loss of society of the decedent and mental anguish may be awarded by eliminating minor children from the list; the bill now provides that dependent children may bring such a cause of action. Florida Statutes section 768.21 resembles the old Ohio statute, as it allows ***any minor child*** of the decedent to bring a cause of action for loss of companionship, mental pain, and suffering. See §768.21 (3), Fla. Stat. (2004) (Emphasis added).

2. Statutes of Limitation

SB80 provides that no civil action that is based upon a cause of action that accrued in another state, country, or territory may be commenced and maintained if the statute of limitations that applies the action of the laws of that state, country or territory has expired or if the statute of limitations in Ohio for that particular cause of action has expired. Florida similarly provides: "When the cause of action arose in another state or territory of the United States, or in a foreign country, and its laws forbid the maintenance of the action because of lapse of time, no action shall be maintained in this state." §95.10 Fla. Stat. (2004).

3. Statutes of Repose

SB 80 requires that a cause of action based on a product liability, bodily injury, or injury to personal property must be brought within 2 years after the cause of action accrues; a cause

of action accrues when the injury or loss to person/property occurs. Florida Statutes section 95.11 imposes a 4 year limitation on a cause of action for bodily injury or loss of property, see §95.11 (3), Fla. Stat. (2004), and a 12 year limitation on a cause of action for products liability. See §95.031 (2)(b), Fla. Stat. (2004). Section 95.031 specifies that a cause of action "accrues when the last element constituting the cause of action occurs." §95.031 (1), Fla. Stat. (2004).

SB 80 also provides when a cause of action for bodily injury due to exposure to hazardous or toxic chemicals, ethical drugs, or ethical medical devices accrues on the date which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date by which the exercise of due diligence, the plaintiff should have know that the plaintiff has a injury related to the exposure. The Bill also modifies existing Ohio law regarding accrual of a cause of action for bodily injury incurred by a veteran due to exposure to Agent Orange, exposure to DES or other non-steroidal estrogens, and exposure to asbestos by stating that the cause of action accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff had an injury that is related to exposure, whichever date occurs first. The Florida Statutes do not specifically address this topic and this topic has not been addressed in the tort reform book.

SB 80 generally prohibits the accrual of a wrongful death action or another cause of action based on a product liability claim against the manufacturer or supplier later than 10 years from the date that the product was delivered to its first purchaser or first lessee. The Bill exempts a wrongful death action from the 10 year limitation if the manufacturer or supplier engaged in fraud with regard to the information about the product and the fraud contributed to the harm alleged. The Bill also exempts a wrongful death action from the 10 year statue of repose where the manufacturer/supplier made an express warranty as to the safety of the product. Additionally, the Bill exempts a wrongful death action or other cause of action from the 10 year statue of repose if the claimant cannot commence a products liability action due to disability; such an action may be commenced within two years after the disability is removed. Florida Statutes section 95.031 imposes a 12 year statute of repose for a cause of action based upon products liability. See §95.031 (2)(b), Fla. Stat. (2004). Section 95.031 also provides an exception from the 12 year statute of repose where the manufacturer expressly warrants that products has a useful life of more than 12 years; however, no cause of action may be brought after the expected useful life of the product. See §95.031 (2)(b)(2), Fla. Stat. (2004). The tort reform book does not address the need to reduce Florida's current statute of repose for products liability from 12 years to 10 years.

SB 80 also exempts a wrongful death or bodily injury based on a product liability claim from the 10 year statute of repose where the action is against manufacturer/suppliers of asbestos, DES, and other hazardous or toxic chemicals. The Florida Statutes do not specifically address these topics this topic and it has not been addressed in the tort reform book.

SB 80 generally prohibits a cause of action of action for bodily injury or wrongful death that arises out of a defective and unsafe condition of an improvement to real property from accruing later than 10 years from the date of the performance of the services or the furnishing of the design, planning, supervision, or construction. Finally, the Bill prohibits the 10 year statute of repose from being asserted as an affirmative defense by a defendant who engages in fraud with regard to an improvement to real property. Florida Statutes section 95.11 provides that a cause of action for bodily injury/death due to improvements to real property must be brought 15 years after the date of actual possession by the owner, the date of issuance of a certificate of occupancy, the date of abandonment of construction if not complete, or the date of completion or termination of the contract between the professional engineer, architect, or licensed contractor, whichever date is latest. See §95.11 (3)(c), Fla. Stat. (2004). Florida has not addressed the effect of fraud by a defendant attempting to assert a statute of repose defense in a case concerning real property. The tort reform book addresses the need for reduce the statue of repose for contractors from 15 years to 12 years.

4. Taxability of Damages

The Bill requires a trial court to instruct the jury regarding the extent to which an award of compensatory damages or punitive damages is not subject to federal or state income tax. Florida does not have a similar law and this topic has not been addressed in the tort reform book.

5. Seat Belt Defense

SB 80 requires the trier of fact to consider the failure to wear a seat belt as evidence of negligence or contributory negligence. The Bill also allows the trier of fact to reduce compensatory damages where the plaintiff's failure to wear a seat belt contributed to the harm alleged. Florida has long recognized the seatbelt defense. See, e.g. Ridley v. Safety Kleen Corp., 693 So. 2d 934 (Fla. 1995). Florida Statutes section 316.614 (9) provides: "A violation of the provisions of this section shall not constitute negligence per se, nor shall such violation be used as prima facie evidence of negligence or be considered in mitigation of damages, but such violation may be considered as evidence of comparative negligence, in any civil action." §316.614 (9), Fla. Stat. (2004). This topic has not been addressed in the tort reform book.

6. Caps on Non-Economic Damages

SB 80 revises Ohio's current law which only limits compensatory damages for non-economic loss in civil actions involving medical, dental, optometric, or chiropractic claims. SB 80 applies limits compensatory damages in all tort actions as follows:

- Generally, the greater of $250,000 or an amount equal to three times the plaintiff's economic loss, to a maximum of $350,000 for each plaintiff or a maximum of $500,000 for each occurrence.

- If the non-economic losses are for permanent and substantial physical deformity, loss of use of limb, or loss of a bodily organ system, or for permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities, $500,00 for each plaintiff or $1 million for each occurrence.

- The trial court has no jurisdiction to enter judgment on an award of compensatory damages for non-economic loss in excess of the bill's limits.

- The caps do not apply wrongful death actions or any other action based upon a person's death.

- The caps do not apply to tort actions that are brought against the state, or against political subdivisions of the state.

Similarly, Florida currently only caps non-economic damages in medical malpractice actions. See, e.g., §766.118, Fla. Stat. (2004). This topic is addressed in the tort reform book as we have recommended that caps for all non-economic damages to be extended to all tort actions in Florida.

7. Limitations/Caps on Punitive and Economic Damages

SB 80 requires that upon motion by any party, the bifurcation of a tort action involving compensatory damages and punitive damages. Florida law does not contain such a provision. Additionally, SB 80 only allows punitive damages to be awarded where the actions or omissions of the defendant demonstrate malice, aggravated or egregious fraud." Section 768.72 provides that a defendant may be liable for punitive damages "only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional conduct or gross negligence." §768.72 (2), Fla. Stat. (2004). The Bill further provides that punitive damages cannot be recovered unless the trier of fact returns a verdict or make a determination of the total compensatory damages recoverable by the plaintiff from the defendant. Florida law does not contain a similar provision.

SB 80 places the following caps on punitive damages:

- Limits the recovery of punitive damages to the amount of compensatory damages awarded or $100,000, whichever is greater or, if the defendant is a small employer, to the lesser amount of compensatory damages awarded or $100,000.

- Limitation on punitive damages does not apply to a tort action for bodily injury against a defendant who has been convicted of or pleaded guilty to

rape, sexual batter, unlawful sexual conduct with a minor.

- Prohibits the award of punitive damages against a defendant if the defendant files with the court a certified judgment or other evidence showing that punitive damages have already been awarded and collected in a state or federal court based on the same act or course of conduct for which the plaintiff seeks compensatory damages.

- Permits the awarding of punitive damages in subsequent tort actions involving the same act or course of conduct for which punitive damages have already been awarded if the plaintiff offers new and substantial evidence of previously undiscovered behavior of the defendant other than tin jury or loss for which compensatory damages are sought.

- Permits awarding of punitive damages in subsequent tort actions involving the same act or course of conduct for which punitive damages have already if the total amount of damages are insufficient to punish the defendant's behavior.

- Prohibits an award of prejudgment interest of punitive damages.

Florida law limits punitive damages as follows:

- Three times the amount of compensatory damages awarded to each claimant; or the sum of $500,000.

- If the trier of facts finds that the defendant's conduct was motivated solely by unreasonable financial gain, it may award four times the amount of compensatory damages or the sum of $ 2 million dollars.

See §768.73, Fla. Stat. (2004). Similar to Ohio, Florida prohibits the imposition of punitive damages against a defendant if the defendant can establish that such damages have been previously awarded in any state or federal court. See §768.73 (2)(a), Fla. Stat. (2004). Likewise, Florida permits a plaintiff to bring a subsequent civil action based on the same course of conduct if the court determines that the amount of punitive damages is insufficient to punish the defendant's behavior. See §768.73 (2)(b), Fla. Stat. (2004). Florida does not address the issue of awarding punitive damages to victims of sexual assault or awarding of prejudgment interest on punitive damages. The issue of punitive damages is addressed in the tort reform book, as we have recommended that the availability of punitive damages be curtailed of completely abolished.

8. Frivolous conduct

SB 80 expands the definition of frivolous conduct by providing for recovery of attorney's fees by a party to a civil action that is adversely affected by frivolous conduct such as the filing

of a pleading, motion or other paper in a civil action, including, but not limited to, a motion or paper filed for discovery purposes. The Bill also expands the definition of frivolous conduct to include conduct: that is for an improper purpose; that cannot be supported by a good faith argument for the establishment of new law; allegations or other factual contentions that have no evidentiary support or are not warranted by the evidence. Florida Statutes section 57.105 permits a party to recover attorney's fees where the court finds that "the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial: (1) Was not supported by the material facts necessary to establish the claim or defense; or (2) Would not be supported by the application of then-existing law to those material facts." §57.105 (1), Fla. Stat. (2004). The tort reform book does not address this topic.

9. Products Liability

SB 80 eliminates all common law product liability causes of action. The Bill also specifies that a product is defective only if at the time it left the control of the manufacturer, the foreseeable risks exceeded the benefits associated with the design. Additionally, the Bill prohibits the award of punitive damages against the manufacturer of an over the counter drug marketed pursuant to federal guidelines and generally recognized as safe and effective. Finally, the bill exempts from liability a manufacturer who has complied with applicable government standards with regard to the product's design, construction, and formulation. In the area of products liability, Florida has the state of the art defense which allows a defendant to introduce evidence that the product was not defective if it was made in accordance with the best technical knowledge in existence at the. See §768.1256, Fla. Stat. (2004). Florida also has the government rules defense, which allows the defendant to enter into evidence the fact that it applied with applicable governmental standards in manufacturing the product. See § Section 768.1257, Fla. Stat. (2004). The tort reform book addresses the need to define the term "state of art" and the need to retain the governmental rules defense.

10. Asbestos Litigation

SB 80 extensively outlines the medical criteria required to bring a claim based on a nonmalignant condition, lung cancer, and cancer of the colon, rectum, larynx, pharynx, esophagus, or stomach due to exposure to asbestos. The Bill also provides a statue of limitations for bringing such actions and limits the liabilities of certain successor corporations. Florida does not have a similar law and this topic has not been addressed in the tort reform book.

11. Collateral Benefits

SB 80 generally permits a defendant in a tort action to introduce evidence of a plaintiff's receipt of collateral benefits. Similarly, Florida law directs the court to reduce awards by the same amount the plaintiff has been compensated by other sources for the same loss. This rule is not applicable to collateral sources for which a right of subrogation exists, federal medical services benefits, or workers compensation. See § 768.76, Fla. Stat. (2004). This topic is not addressed in the tort reform book.

12. Attorney Contingency Fee Agreements

SB 80 imposes limitations on contingency fees in tort actions other than medical malpractice cases. An attorney is limited to: 35% of the first $100,000 recovered; 25% of the next $500,000 recovered; and 15% of any amounts over $600,000. Florida does not have a similar law, although the recently passed Constitutional Amendment 3 (which is discussed in the tort reform book) provides for contingency fee limitations in medical malpractice actions.

13. Legal Consumer's Bill of Rights

SB 80 requires that every attorney licensed in Ohio must attach to every written retainer agreement or contract for legal services a consumer's bills of rights which informs a consumer of his right to control his own affairs, the attorneys' duty to keep the consumer informed; promptly answer all questions; and provide the consumer with estimate of anticipated costs and fees**.** Florida does not have a similar statutory provision and this topic has not been addressed in the tort reform book.

14. Contributory Fault

SB 80 applies the doctrine of contributory fault to causes of actions brought to recovery damages from an employer for injury or death to an employee arising from the negligence of the employer**.** Florida does not have a similar statutory provision and this topic has not been addressed in the tort reform book.

15. Immunity from Liability for an Owner, Lessee, or Occupant of Premises with Regard to a User of a Recreational Trail.

The Bill provides that an owner, lessee or occupant of a premise does not owe a duty to keep the premises for entry by a user of a recreational trail. Florida does not have a similar statutory provision and this topic has not been addressed in the tort reform book.

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Stiles has served on the Florida Supreme Court Committee on Workers' Compensation Rules of Procedure; the Department of Labor and Employment Security, Division of Workers Compensation Task Force on Claims; and the task Force of Medical Claims. She was also appointed to serve on the Antitrust Revision Committee; the Joint Experience Rating Plans and Payroll Limitations Committee; the Workers' Compensation Insurance Special Study Committee, 1998; Governor Bob Martinez' Workers' Compensation Oversight Board, 1989, and Governor Bob Graham's Ride-Sharing Task Force, where she served as co=chairperson.

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Prior to attending law school, she began developing a legislative career with the Florida Senate in 1992. She has worked with the Senate Majority Office, Senate Rules Committee and the Senate Committee on Ethics, Elections and Executive Business. In addition to working on several legislative campaigns she served as a legislative assistant to former Florida Senator Dick Langley and Senator Ginny Brown-Waite.

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