SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 2124

SPONSOR: Judiciary Committee and Senator Laurent

SUBJECT: Drycleaning Solvent Cleanup Program

DATE: February 27, 2002 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Forgas	Johnson	JU	Favorable/CS
2.			AP	
3.				
4.				
5.				
6.				

I. Summary:

Currently, the Drycleaning Solvent Cleanup Program (DSCP), found in ss. 376.3078-376.319, F.S., provides to eligible drycleaning facilities and wholesale supply facilities an exemption from liability for cleanup costs, provided that the facilities meet the requirements of the law and regulations.

This committee substitute expands the civil liability immunity provisions within the Drycleaning Solvent Cleanup Program to grant civil immunity to real property owners and nearby real property owners, for property damage claims of any kind, brought by any person against the real property owner, the nearby property owner or the owner or operator of a drycleaning facility or a wholesale supply facility if certain minimal conditions are met. The provision of immunity is based on the site being deemed eligible for cleanup under the DSCP.

This committee substitute further extends the statutory immunity to real property owners and nearby real property owners who voluntarily engage in site cleanup, regardless of site eligibility under the DSCP.

This committee substitute substantially amends the following sections of the Florida Statutes: 376.301, 376.3078, 376.3079, 376.308, and 376.313.

II. Present Situation:

Drycleaning Solvent Cleanup Program

The Legislature created the Drycleaning Solvent Cleanup Program (DSCP)[ss. 376.3078-376.319, F.S.] in 1994 to provide a source of funding for rehabilitating sites and drinking water supplies contaminated by drycleaning solvents. The DSCP provides eligible drycleaning and

wholesale supply facilities freedom from liability for state and local government-mandated site cleanup costs. Such costs are paid by the state from funds generated by the drycleaning industry in the form of a two percent gross receipts tax on all drycleaners and a $5 per gallon surcharge on perchloroethylene, the halogenated solvent commonly used in the drycleaning industry. Additional revenues are generated by a $100 annual registration fee, applicable to all drycleaners, and cleanup cost deductible fees of $1,000, $5,000, or $10,000 depending upon when the drycleaner applied for program eligibility.

Owners and operators of drycleaning facilities and the owners of real property on which such facilities are located were able during the registration period for the program, to seek program eligibility by formally applying to the program and submitting to the Florida Department of Environmental Protection (DEP) a "site screening report" which indicated the presence of contaminants on or below the site. Even trace amounts—as low as one part per billion—of perchloroethylene would make the facility eligible for the program, presuming that certain other statutory criteria were met. These other criteria consist of operational protocols, such as the requirement for secondary containment devices beneath and around drycleaning machines and chemical storage areas, quick reporting of spills, etc.

The registration period for the program extended from October 1, 1994, through December 31, 1998. Of the 1,737 "wet plant" drycleaning facilities (i.e. a facility where actual drycleaning was or is done upon the premises, as opposed to those facilities where clothes are just dropped off and the drycleaning takes place elsewhere) in the state, 1,564 facilities timely applied for eligibility. Of these, 1,416 facilities have been deemed eligible by the DEP. Of the 148 deemed ineligible, 35 facilities have contested the DEP decision and are in litigation with the DEP.[1]

Eligibility for the DSCP is provided to "contaminated sites," which is defined by s. 376.301(10), F.S., as any contiguous land, sediment, surface water, or groundwater areas that contain contaminants that may be harmful to human health or the environment. Accordingly, a "contaminated site" may cover numerous adjacent and contiguous properties. Also, there may be more than one contaminated site (also called a contaminant plume) on any given property. Each site (i.e., plume) is reviewed separately for eligibility. The DEP performs cleanup of eligible facilities and the sites are addressed on a priority basis using risk-based corrective action.

As of the end of March 2001, the DEP had initiated work on 235 (17%) of the 1,416 eligible sites. Of these, 85 sites are undergoing assessment, 38 are undergoing remedial design work, 9 are under construction, 24 are under active cleanup, 30 are in a monitored natural attenuation status, and cleanup has been completed at 30 sites. The remaining 19 sites are in voluntary cleanup or have been rescored.[2]

The average program cost in Florida for *site assessment* is $91,000, which represents a low of approximately $36,000 for sites determined to need no further action or monitoring only and a high of $200,000 for a very complicated and egregiously contaminated site. The *design costs* for

[1] *Florida Drycleaning Solvent Cleanup Program—An Overview*, Florida Drycleaners' Coalition, August 2001, citing *Drycleaning Solvent Cleanup General Statistics—March 2001*, Florida Department of Environmental Protection and Program abstract presented by Douglas Fitton, DSCP Program Manager for the DEP, in June 2001 to the International Containment and Remediation Technology Conference.
[2] *Id*.

engineered remedial systems where active cleanup is required averages $50,000 and the average *cost of construction* for active cleanup sites is $187,000. The average annual *cost of operation and maintenance* for active cleanup sites is $55,000 per year. The average annual cost for *natural attenuation monitoring* is $24,000. The term for active cleanup sites will range from two to nine or ten years, while the average term for monitoring sites is 2.5 years with a maximum of five years. Florida's program is not a reimbursement program as site work is performed by state-approved contractors under strict monitoring and cost control oversight by the DEP.[3]

Immunity provisions under the DSCP

Section 376.3078(11), F.S., provides a voluntary cleanup provision authorizing property owners to conduct site rehabilitation activities at contaminated sites. Regardless of whether the contaminated site is eligible for the DSCP, a real property owner conducting voluntary cleanup of drycleaning solvents is immune from liability to compel or enjoin site rehabilitation, or to pay the costs of site rehabilitation. The real property owner is also not compelled to pay fines or penalties, provided the owner conducts site rehabilitation in a timely manner consistent with state and federal laws and provides the DEP with site access.

Under current law, the immunity provisions, for both DSCP-sites and sites at which voluntary cleanup is being conducted, are limited to immunity from being compelled to clean up a site or to pay for the cost of cleanup. There is no immunity from third-party suits for damages, other than those related to the costs of rehabilitation. Section 376.313(3), F.S., provides:

> Notwithstanding any other provision of law, nothing contained in ss. 376.30-376.319 prohibits any person from bringing a cause of action in a court of competent jurisdiction for all damages resulting from a discharge or other condition of pollution covered by ss. 376.30-376.319. Nothing in this chapter shall prohibit or diminish a party's right to contribution from other parties jointly or severally liable for a prohibited discharge of pollutants or hazardous substances or other pollution conditions. Except as otherwise provided in subsection (4) or subsection (5), in any such suit, it is not necessary for such person to plead or prove negligence in any form or manner. Such person need only plead and prove the fact of the prohibited discharge or other pollutive condition and that it has occurred. The only defenses to such cause of action shall be those specified in s. 376.308.

Section 376.313(5), F.S., referenced above, does provide an additional limited defense to such a third-party cause of action if the facility is in compliance; in which case, the plaintiff would be required to prove negligence. However, the defense is only available to drycleaning facilities that are ineligible for the DSCP.

Current law also provides protection for innocent adjacent property owners whose property becomes contaminated by drycleaning solvents that have migrated from a nearby drycleaning facility. Section 376.3078(3)(p), F.S., provides:

> A person whose property becomes contaminated due to geophysical or hydrologic reasons from the operation of a nearby drycleaning or wholesale supply facility and whose property has never been occupied by a business that utilized or stored drycleaning

[3] *Id.*

solvents or similar constituents is not subject to administrative or judicial action brought by or on behalf of another to compel the rehabilitation of or the payment of the costs for the rehabilitation of sites contaminated by drycleaning solvents, provided that the person:

- Does not own and has never held an ownership interest in, or shared in the profits of, the drycleaning facility operated at the source location;
- Did not participate in the operation or management of the drycleaning facility at the source location; and
- Did not cause, contribute to, or exacerbate the release or threat of release of any hazardous substance through any act or omission.

The defense provided by this paragraph does not apply to any liability under a federally delegated program.

Recent legal developments

In *Metropolitan Dade County v. Chase Federal Housing Corp*, 737 So.2d 494 (Fla. 1999), the Florida Supreme Court addressed the issue of whether the immunity provisions of the DSCP could be retroactively applied to bar Dade County from seeking the recovery of money it expended to clean a site contaminated by the defendant's lessees. The court noted that the language in s. 376.3078(3), F.S., clearly and unequivocally provides that, upon being determined eligible to participate in the program, an entity shall not be subject to administrative or judicial action brought by or on behalf of any state or local government or agency thereof, or by or on behalf of any person, to compel rehabilitation or pay for the costs of rehabilitation----regardless of when the drycleaning contamination was discovered. Also, the court noted that the immunity provision pertaining to property owners who voluntarily clean their property (s. 376.3078(9), F.S.) expressly immunizes these property owners from liability for costs incurred to clean the property before the effective date of the DSCP. The court then ruled that the immunity provisions did not violate the due process clause of the constitution and that they could be retroactively applied to bar Dade County's suit for costs incurred prior to the effective date of the act.

In *Courtney Enterprises, Inc. v. Publix Super Markets, Inc.*, 788 So.2d 1045, (Fla. 2d DCA 2001), the owner of a parcel of land adjacent to property owned by Publix brought an action against Publix alleging common law causes of action of negligence, trespass, nuisance, and strict liability for drycleaning solvent contamination of their property. The property owner was seeking damages for the lost value of the property resulting from the contamination. The court in *Courtney* confirmed that the measure of damages in this type of lawsuit under the common law is the lower of the lost value of the property or the cost of cleanup, but not both.

The court in *Courtney* ruled that the plain language of the immunity provisions of the DSCP did not expressly state that the DSCP eliminated liability for common law causes of action for damages. Since the immunity provisions only expressly provide immunity from damages for the costs of cleanup, the court ruled that the property owner could seek damages for the loss in value to the property even though the property would eventually be cleaned up by the state. The court noted that its interpretation of the DSCP rendered the immunity provisions "toothless" and stated the following:

> We find it troublesome that our decision permitting Courtney to present its case to a jury may result in a benefit to Courtney for which Publix may not be able to seek recovery in the event that the state eventually provides the necessary funds to cause Courtney's property to be cleaned up. However, we conclude that this issue can only be addressed by the Legislature.

Courtney, at 1050.

III. Effect of Proposed Changes:

Section 1. Amends s. 376.301, F.S., by creating a new definition of "nearby real property owner." The term "nearby real property owner" is defined to mean the individual or entity that is vested with ownership, dominion, or legal or rightful title to real property, or that has a ground lease in real property, onto which drycleaning solvent has migrated through soil or groundwater from a drycleaning or wholesale-supply facility eligible for site rehabilitation under s. 376.3078(3), F.S., or from a drycleaning or wholesale-supply facility that is approved by the department for voluntary cleanup under s. 376.3078(11), F.S. This arguably precludes a business tenant from bringing a damage suit for actual impaired use of the improvements on the contaminated real property or for damages such as lost profits associated with stigma to the real property or improvements caused by the drycleaning contamination. This definition also only refers to drycleaning solvent migrating through soil or groundwater from a facility eligible for the DSCP, or at which voluntary cleanup is being conducted, and does not indicate that the contamination has migrated across a property boundary onto a nearby real property. Accordingly, a "nearby real property owner" may actually be co-located with the individual or entity receiving the immunity.

Section 2. Amends s. 376.3078, F.S., to broaden the civil liability immunity provisions in subsections (3) and (11) of s. 376.3078, F.S., to eliminate property damage claims of any kind brought by any person against the real property owner, the nearby property owner or the owner or operator of a drycleaning facility or a wholesale supply facility. Property damages claims include, but are not limited to, diminished value of real property or improvements, lost or delayed rent, sale or use of real property or improvements, or stigma to real property or improvements caused by drycleaning-solvent contamination. This committee substitute further expands this immunity to provide that any real property owner or nearby real property owner who voluntarily conducts site rehabilitation will also be immune from suit.

This committee substitute provides in subsection (3) of s. 376.3078, F.S., that the real property owner must provide, upon request from any nearby real property owner, a certified copy of the department's Order of Eligibility for the drycleaning solvent contamination and a statement that the real property owner's property contains a drycleaning facility or wholesale supply facility eligible for site rehabilitation and that any contamination that has migrated onto the nearby real property owner's property will be cleaned up under the provisions of the DSCP. The department must prepare such statements when requested by the real property owner. If the real property owner fails to provide such documentation within 60 days of a request from the nearby real property owner, then the real property owner will not be immune from any claims for property damage by the nearby real property owner.

This committee substitute also provides in subsection (11) of s. 376.3078, F.S., that upon request from the nearby real property owner, any real property owner who voluntarily conducts site rehabilitation will provide the nearby real property owner with all reasonably available public records documentation referencing the approved voluntary cleanup agreement. However, it does not contain any requirement that the real property owner provide the nearby real property owner with an affidavit.

Section 3. Amends subsection (6) of s. 376.308, F.S., to provide that the immunity of any real property owner or nearby real property owner is not affected by anything in ch. 376, F.S., unless expressly provided in the chapter.

Section 4. Amends subsections (3) and (5) of s. 376.313, F.S., which pertains to the nonexclusiveness of remedies and individual causes of action for damages in pollution cases. Currently, s. 376.313(3), F.S., provides that nothing contained in ss. 376.30-376.319, F.S., prohibits any person from bringing a cause of action for all damages resulting from a discharge or other condition of pollution covered by ss. 376.30-376.319, F.S. This subsection is amended to conform it with the immunity provisions in subsections (3) and (11) of s. 376.3078, F.S., to expressly provide that subsection (3) of s. 376.313, F.S., does not permit causes of action for property damage against the owner or operator of a drycleaning facility or a wholesale supply facility, or the owner of the real property on which such facility is located, if such entity is eligible under subsections (3) or (11) of s. 376.3078, F.S.

Currently, subsection (5) of s. 376.313, F.S., provides that civil actions against owners or operators of drycleaning facilities or wholesale supply facilities, or the owner of the real properties on which such facilities are located, that are not eligible for the DSCP, must prove such entities acted negligently if, at the time of discharge, the damages resulted solely from a discharge from a drycleaning facility or wholesale supply facility that was in compliance with department rules regulating drycleaning facilities or wholesale supply facilities. The committee substitute adds facilities involved in voluntary cleanups under s. 376.3078(11), F.S., to this list of entities.

Section 5. Amends s. 376.3079, F.S., which pertains to third-party liability insurance. Currently, the DSCP, in s. 376.3078(10), F.S., requires owners or operators of drycleaning facilities or wholesale supply facilities to purchase third-party liability insurance in the amount of $1 million of coverage. Section 376.3079, F.S., provides for a program for the department to assist these facilities in obtaining such third-party liability insurance. Subsection (3)(a) of s. 376.3079, F.S., defines the term "third-party liability", for purposes of ss. 376.3078 and 376.3079, F.S., as the insured's liability, other than for site rehabilitation costs, for bodily injury or property damage caused by an incident of contamination related to the operation of a drycleaning facility or wholesale supply facility.

The committee substitute amends the definition of the term "third-party liability" in subsection (3)(a) of s. 376.3079, F.S., to provide that it means the insured's liability only for bodily injury caused by an incident of contamination. It expressly provides that the term does not mean liability for property damage. This change is in conformance with the committee substitute's provisions providing immunity from claims for property damage in subsections (3) and (11) of s. 376.3078, F.S.

Section 6. Provides that the act shall take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Access to Courts---Article I, Section 21, Fla. Constitution

The committee substitute's immunity provisions, without expressly declaring, effectively abrogate the nearby real property owner's common law causes of action for the recovery of any type of property damages arising from the contamination. In that regard, the committee substitute appears to address the court's concern in *Courtney* that the immunity provisions in the DSCP were toothless as they still allowed a contaminated property owner to recover damages for lost property value under a common law cause of action, even when the contaminated property would eventually be cleaned pursuant to the DSCP.

Since the committee substitute arguably eliminates a person's common law cause of action, the constitutional right of access to courts under Article I, s. 21 of the Florida Constitution is implicated. Although courts generally oppose any burden placed on the right of a person to seek redress of injuries from the courts, the legislature may abrogate or restrict a person's access to the courts if the legislature provides: (1) a reasonable alternative remedy or commensurate benefit; or (2) a showing of an overpowering public necessity for the abolishment of the right *and* a showing that there is no alternative method of meeting such public necessity. *See Kluger v. White,* 281 So.2d 1 (Fla. 1973); *Lasky v. State Farm Insurance Co.,* 296 So.2d 9 (Fla. 1974).

The committee substitute's provisions arguably satisfy the first prong of the access to courts test set forth in *Kluger*. The DSCP provides, at no cost to the owner of the contaminated property, complete cleanup of the property so that it is restored to its pre-contamination status. This remedy may place the owner in an equal, if not better, position than the owner would occupy under a common law remedy as the costs of the cleanup may exceed the lost value of the property. Arguably, this satisfies the first prong of the *Kluger* test because a "reasonable alternative remedy or commensurate benefit" has been provided.

However, it could be argued that the rehabilitation remedy does not provide a reasonable alternative in some situations. For example, the owner of contaminated property who desired to sell the property but could not do so due to the contamination would potentially have to wait to sell the property until it is rehabilitated. If the property was ranked low on the priority cleanup list, then the owner potentially could wait years before the property could be sold. A court could consider this to be an unreasonable remedy, thereby not satisfying the first prong of the *Kluger* test.

Even if the first prong of the *Kluger* test was not satisfied, the second prong is likely satisfied. The overpowering public necessity can be found in the legislative intent section of the DSCP, currently found in s. 376.3078(1), F.S., which is to create a comprehensive scheme to eliminate the ongoing threat to Florida's groundwater caused by past and presently occurring dry cleaning contamination. Additionally, it can be argued that the immunity from lawsuits is the only alternative means of meeting the goal of rehabilitating contaminated sites as continuing to allow common law lawsuits for recovery of damages for lost property value thwarts the act's intent to rehabilitate contaminated properties.

Due Process---Article I, Section 9, Fla. Constitution

The committee substitute's immunity provisions contain effective date clauses that make the immunity provisions applicable to "causes of action accruing on or after the effective date of this act and applies retroactively to causes of action accruing before the effective date of this act, for which a lawsuit has not been filed." Conceivably, this means that nearby real property owners who have accrued causes of action, but have not filed a lawsuit as of the effective date of the bill, will not be able to proceed with a lawsuit similar to the one addressed in the *Courtney* decision. Arguably, abolition of an accrued cause of action is the abolition of a vested right. *See Rupp v. Bryant*, 417 So.2d 658 (Fla. 1982).

Generally, due process considerations prevent the state form retroactively abolishing vested rights. *See State Dept. of Transportation v. Knowles*, 402 So.2d 1155 (Fla. 1981). The rule is not absolute, however, and courts have used a weighing process to balance the considerations permitting or prohibiting an abrogation of value. Specifically, the test enunciated in *Knowles* requires the consideration of three factors: (1) the strength of the public interest served by the statute; (2) the extent to which the right affected is abrogated; and (3) the nature of the right affected.

It is unknown how a court would construe a retroactive application of the committee substitute's immunity provisions. The Florida Supreme Court expressly indicated in the *Chase Federal* decision that its decision to uphold the retroactive application of the immunity provision as it applied to governmental entities was predicated *solely* on the fact that the governmental entity's powers were subject to the supremacy of state law. The court, citing *Rupp*, emphasized that "…a different result might well be reached if these immunity provisions were applied to abrogate the cause of action of a private plaintiff…"

Nevertheless, it could be argued that the *Knowles* test is satisfied as the public interest being served---the rehabilitation of contaminated soil and water---is an overwhelming

public interest of paramount concern. Additionally, eliminating common law causes of action effectuates rehabilitation as remedial measures are often delayed for long periods while determinations as to liability, and the extent of liability, are made. Such delays result in: the continuation and intensification of the threat to public health, safety, and welfare; greater damage to the environment; and significantly higher costs to contain and remove the contamination.

These policies are already contained in s. 376.3078, F.S., and they will be weighed against the extent to which the common law remedy has been abrogated. In this instance, the only remedy that has been taken away is the lost value of the property, which is not available in all common law cases as it is only available when the cost to rehabilitate the property is greater than the lost value. Accordingly, the policies will have to be judged in comparison to those cases where the owner desires to sell the property but cannot do so because it is contaminated and the property will not be rehabilitated until some future date

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The impact to the private sector, although indeterminate, is four-fold:

- First, the bill's provisions requiring real property owners to provide nearby real property owners with documentation of DSCP eligibility for the nearby real property should facilitate the selling and financing of the nearby real property as potential buyers and lenders can be assured that the property will be rehabilitated to its pre-contamination status.
- Second, the bill's provisions pertaining to immunity from all types of property damage could encourage real property owners to voluntarily rehabilitate the nearby real property, thereby furthering the goal of the DSCP to eliminate contamination as quickly as possible.
- Third, the immunity provisions will prevent nearby real property owners from receiving a double recovery---damages for the lost value of the contaminated property and rehabilitation of the property to its pre-contamination status.
- Fourth, the retroactive application of the immunity provisions will prevent certain nearby real property owners from recovering damages for the lost value of their contaminated properties. Nevertheless, their properties will be rehabilitated at no cost to them.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.