

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 741 Liability under the Drycleaning Solvent Cleanup Program
SPONSOR(S): Ross, Kendrick, and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 956

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Natural Resources</u>	<u>16 Y, 2 N</u>	<u>McKinnon</u>	<u>Lotspeich</u>
2) <u>Judiciary</u>	<u></u>	<u>Billmeier</u>	<u>Havlicak</u>
3) <u></u>	<u></u>	<u></u>	<u></u>
4) <u></u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

SUMMARY ANALYSIS

Currently, the Drycleaning Solvent Cleanup Program (DSCP) 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.

HB 741 provides that a real property owner or nearby real property owner is not liable for claims, except for claims asserted by a governmental entity, for property damage of any kind due to drycleaning solvent contamination. This would have the effect of eliminating all causes of action for property damage, including common law causes of action. The immunity provisions of this bill would apply to sites eligible for cleanup under the DSCP and sites covered under a voluntary cleanup program.

This bill has an indeterminate fiscal impact on state and local governments.

This bill will take effect upon becoming law.

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

STORAGE NAME: h0741.ju.doc
DATE: March 28, 2003

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|--|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

HB 741 prohibits parties from pursuing property damage claims for drycleaning contamination that has migrated to their property.

B. EFFECT OF PROPOSED CHANGES:

Drycleaning Solvent Cleanup Program

The Legislature created the Drycleaning Solvent Cleanup Program (“DSCP”) in 1994 to provide a source of funding for rehabilitating sites and drinking water supplies contaminated by drycleaning solvents.¹ 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.²

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, 1998.³

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.

¹ See ss. 376.3078-376.319, F.S.

² See Drycleaning Solvent Cleanup Program, General Program Information, at http://www.dep.state.fl.us/waste/quick_topics/publications/wc/drycleaning/information/general.pdf (last accessed on March 30, 2003).

³ See *Id.*

According to information provided by the DEP, there are 1,364 sites remaining to be cleaned. Annual funding for the DSCP is \$8 million to \$10 million per year and each site costs \$200,000 to \$500,000 to clean. The DEP notes that cleanup of all sites could take “decades”. According to the DEP, some persons have opted for voluntary cleanup of the sites to avoid the delay in the state program.⁴

Immunity Provisions of the DSCP

Section 376.3078(3), F.S., provides an exemption for liability for cleanup for drycleaning facilities eligible under the DSCP. The law provides that the owner, operator or any person who otherwise could be liable as a result of the operation of an eligible drycleaning facility or wholesale supply facility, shall not be subject to administrative or judicial action brought by or on behalf of any state or local government or any person to compel cleanup or pay cleanup costs.⁵

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.

Causes of Action Not Affected by the DSCP

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 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 solvents or similar constituents

⁴ Department of Environmental Protection Bill Analysis, dated March 18, 2003.

⁵ See s. 376.3078(3), F.S.

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:

1. 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;
2. Did not participate in the operation or management of the drycleaning facility at the source location; and
3. Did not cause, contribute to, or exacerbate the release or threat of release of any hazardous substance through any act or omission.

Courtney Enterprises v. Publix Super Markets

In 2001, a court addressed the extent of the immunity provisions under the DSCP. In Courtney Enterprises, Inc. v. Publix Super Markets, Inc.,⁶ the Second District Court of Appeals held that s. 376.3078, F.S., did not abrogate any common law causes of action for damages for diminution of property value. Courtney owned property adjacent to Publix property and learned its property had been contaminated by drycleaning solvents from the Publix property.⁷ Courtney sought damages against Publix based on common law theories of negligence, trespass, nuisance, and strict liability based on “material reduction in the value of its premises.”⁸ Publix argued that it was immune from liability because it was eligible for the DSCP and the DSCP eliminated the ability to recover damages for the cost of rehabilitation of the property. Courtney responded that the DSCP statutes only gave Publix immunity from actions to compel cleanup and did not give immunity for common law causes of actions.⁹

The court held that the DSCP did not eliminate common law causes of action. The court stated that if the legislature had intended to eliminate common law causes of action, it would have expressly stated that intent.¹⁰ Further, the court said “statutes should not be construed to abolish common law rights unless absolutely necessary.”¹¹ Publix argued that the legislature must have intended to abolish the cause of action “since ‘damages’ to real property are held to be the lesser of the repair costs or the diminution in value of the property, to allow an adjoining landowner such as Courtney to recover damages under a common law cause of action would be a back-door way of allowing the landowner to recover rehabilitation costs”.¹² The court disagreed, explaining that damages for rehabilitation of property can be different from damages for diminution of value. The court held:

Section 376.3078 immunizes a real property owner from suit for restoration costs; it should not be read to eliminate common law causes of action altogether but to limit damages in those actions to diminutions in property value.¹³

However, the court expressed concern that its decision might result in a windfall for Courtney:

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

⁶ 788 So. 2d 1045 (Fla. 2d DCA 2001).

⁷ See Courtney, 788 So. 2d at 1047.

⁸ Courtney, 788 So. 2d at 1047.

⁹ See Courtney, 788 So. 2d at 1047.

¹⁰ See Courtney, 788 So. 2d at 1049.

¹¹ Courtney, 788 So. 2d at 1049.

¹² Courtney, 788 So. 2d at 1049.

¹³ Courtney, 788 So. 2d at 1050.

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.¹⁴

The Immunity Provisions of HB 741

HB 741 provides that a real property owner or nearby real property owner¹⁵ is not liable for claims, except for claims asserted by a governmental entity, for property damage of any kind, including "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 would have the effect of eliminating all causes of action for property damage, including the common law cause of action of diminution of property value discussed in Courtney. The constitutional issues raised by this provision are discussed in the "Constitutional Issues" section of this analysis.

In addition, this bill makes "nearby real property owners" not subject to administrative or judicial action to compel rehabilitation or pay for the costs of rehabilitation for contamination resulting from the discharge of drycleaning solvents. This changes current law because, under current law, immunity from actions to compel rehabilitation against persons whose property was contaminated is provided for under s. 376.3078(3)(p), F.S. This bill may expand the class of property owners that will be immune from such actions because while s. 376.3078(3)(p), F.S., limits immunity to certain classes of property owners, such as owners who have had no business interest in the drycleaning facility that caused the contamination, the bill's definition of "nearby property owner" provides that immunity to all nearby real property owners even if they once had a business interest in the facility that caused the contamination.

These immunity provisions would apply to sites eligible for cleanup under the DSCP and sites covered under a voluntary cleanup program. In addition, "nearby real property owners" contaminated by sites covered under a voluntary cleanup program would have similar immunity.

Retroactive Application of HB 741

This bill provides that its immunity provisions are effective for all causes of action arising after the effective date of the bill and retroactively for all causes of action arising before the effective date of the bill for which a lawsuit has not been filed before the effective date of the bill. The bill takes effect upon becoming a law. The constitutional issues raised by this provision are discussed in the "Constitutional Issues" section of this analysis.

Insurance

Current law requires third party liability insurance for property damage caused by drycleaning solvents. This bill eliminates that requirement and limits the insurance requirement to bodily injury insurance.

Legislative Findings

This bill contains language that could be considered legislative findings. The bill states:

Strong public interests are served by subsections (3) and (11). These include improving the marketability and use of, and the ability to borrow funds as to, property contaminated by

¹⁴ Courtney, 788 So. 2d at 1050.

¹⁵ The bill defines "nearby real property owner" as "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 facility or wholesale supply facility eligible for site rehabilitation under s. 376.3078(3) or from a drycleaning facility or wholesale supply facility that is approved by the department for voluntary cleanup under s. 376.3078(11)."

drycleaning solvents and encouraging the voluntary remediation of contaminated sites. The extent to which claims or rights are affected by subsections (3) and (11) is offset by the remedies created in this section. The limitations imposed by these subsections on such claims or rights are reasonable when balanced against the public interests served. The claims or rights affected by subsections (3) and (11) are speculative, and these subsections are intended to prevent judicial interpretations allowing windfall awards that thwart the public-interest provisions of this section.

As discussed in the Constitutional Issues section of this analysis, the courts may uphold the abrogation of rights if the legislature provides an alternative remedy or finds an overwhelming public necessity for the abrogation of the rights. This language could be used by a court to understand the public necessity behind this bill and the alternative remedy provided.

C. SECTION DIRECTORY:

Section 1. Amends s. 376.301, F.S., to create a new definition of “Nearby real property owner.”

Section 2. Amends subsections 376.3078(1), (3) and (11), F.S., to expand immunity provisions of DSCP to include immunity from claims of any person, except for any governmental entity, for property damages of any kind caused by drycleaning solvent contamination.

Section 3. Amends subsection 376.30781, F.S., to correct cross-reference.

Section 4. Amends subsection 376.3079, F.S., to limit insurance requirements for third party liability insurance to bodily injury.

Section 5. Amends subsection 376.308(6), F.S., to establish that immunity of real property owner and nearby real property owner shall not be affected by anything in chapter 376, F.S., unless expressly provided in the chapter.

Section 6. Amends subsection 376.313, F.S., to eliminate individual cause of action for property damages resulting from drycleaning solvent contamination from drycleaning facilities or wholesale supply facilities.

Section 7. Provides that the act shall take effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See “Fiscal Comments”

2. Expenditures:

See “Fiscal Comments”

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See “Fiscal Comments”

2. Expenditures:

See "Fiscal Comments"

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

According to the Department of Environment Protection, adjacent and nearby real property owners and other parties may suffer property damage related losses such as diminution in value of 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 contamination, and they will be unable to pursue a common law cause of action for such damages if this bill becomes law. Because their right to be "made whole" under traditional tort law is being abrogated, they may suffer economic loss as a result. However, real property owners with contaminated property who gain the additional immunity provided by this bill will benefit from the avoidance of litigation and damage judgments.

D. FISCAL COMMENTS:

It is not clear what effect, if any, this bill will have on state and local government revenues and expenditures.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

Access to Courts

This bill abrogates a common law cause of action. When the legislature abrogates a cause of action, such action may be challenged under Florida's access to courts provision of the state constitution. In Kluger v. White,¹⁶ the Florida Supreme Court considered the Legislature's power to abolish causes of action. At issue in Kluger was a statute which abolished causes of action to recover for property damage caused by an automobile accident unless the damage exceeded \$550.¹⁷ The court held that the statute violated the access to courts provision of the state constitution.

The "access to courts provision" (article 1, section 21) of the Declaration of Rights in the Florida Constitution requires that the courts "be open to every person for redress of any injury". In Kluger, the court held that where a right to access to the courts for redress for a particular injury predates the adoption of the declaration of rights in the 1968 state constitution, the legislature cannot abolish the right without providing a reasonable alternative unless the legislature can show (1) an overpowering public necessity to abolish the right and (2) no alternative method of meeting such public necessity.¹⁸

It is unclear whether the alternative remedy provided by this bill, participation in the DSCP cleanup program, is a reasonable alternative to the right to sue for common law damages. The bill states:

¹⁶ 281 So. 2d 1 (Fla. 1973).

¹⁷ Kluger, 281 So. 2d at 2-3.

¹⁸ Kluger, 281 So. 2d at 4.

The extent to which claims or rights are affected by subsections (3) and (11) is offset by the remedies created in this section.

It can be argued that this language is a legislative finding that the DSCP is a reasonable alternative to the right to sue for common law property damage.

Similarly, it is not clear whether a court would find that there is an overpowering public necessity for this abrogation. However, the bill provides language that "strong public interests" are served by this bill.

Due Process

This bill appears to be applying current legislation retroactively to past events. In Metropolitan Dade County v. Chase Federal Housing Corp.,¹⁹ the Florida Supreme Court addressed whether Dade County could recover for cleanup costs already expended and noted:

Two interrelated inquiries arise when determining whether statutes should be retroactively applied. The first inquiry is one of statutory construction: whether there is clear evidence of legislative intent to apply the statute retrospectively. If the legislation clearly expresses an intent that it apply retroactively, then the second inquiry is whether retroactive application is constitutionally permissible.²⁰

The Court held that based upon the express terms of the DSCP as well as the structure and purpose of the DSCP, the immunity provision contained in the DSCP could be applied retroactively. However, the court noted:

[W]e emphasize that a different result might well be reached if these immunity provisions were applied to abrogate a cause of action of a private plaintiff rather than a government entity's cause of action.²¹

In Department of Transportation v. Knowles,²² the court discussed some of the issues raised by the abrogation of the right to recover damages:

Under due process considerations, a retroactive abrogation of value has generally been deemed impermissible. The rule is not absolute, however, and courts have used a weighing process to balance the considerations permitting or prohibiting an abrogation of value. Despite formulations hinging on categories such as "vested rights" or "remedies," it has been suggested that the weighing process by which courts in fact decide whether to sustain the retroactive application of a statute involves three considerations: the strength of the public interest served by the statute, the extent to which the right affected is abrogated, and the nature of the right affected.²³

It is unclear whether the retroactive effects of this bill would survive this scrutiny.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

¹⁹ 737 So. 2d 494 (Fla. 1999).

²⁰ Metropolitan Dade County, 737 So. 2d at 499 (citations omitted).

²¹ Metropolitan Dade County, 737 So. 2d at 505.

²² 402 So. 2d 1155 (Fla. 1981).

²³ Knowles, 402 So. 2d at 1158 (citations and footnotes omitted).

Comment by the staff of the Committee on Natural Resources:

The bill's changes to third party liability immunity could have an indirect environmental and fiscal impact by reducing the incentive to conduct a voluntary cleanup in order to avoid potential third-party liability. Under current law, the real property owner of a site contaminated with drycleaning solvents, whether eligible for the DSCP or not, is vulnerable to third party damage claims. Consequently, some owners proceed with timely, voluntary cleanup at their expense. For DSCP-eligible sites, this saves state funds since the owner pays for the cleanup rather than waiting for the DSCP to do so. For non-DSCP-eligible sites, this saves state staff resources since the DEP is then working cooperatively with a motivated party rather than working to persuade or coerce an unmotivated party to act. In either eligibility context, the voluntary cleanup results in a cleanup sooner rather than later.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

None.