

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 741 Liability under the Drycleaning Solvent Cleanup Program
SPONSOR(S): Ross
TIED BILLS: **IDEN./SIM. BILLS:** SB 956

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Natural Resources</u>	<u> </u>	<u>McKinnon</u>	<u>Lotspeich</u>
2) <u>Judiciary</u>	<u> </u>	<u> </u>	<u> </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

The bill eliminates by statute a common law cause of action for a property owner to sue a responsible party for causing pollution by the release of dry-cleaning solvents that has migrated beneath the property, and thereby diminished the value of his property.

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:

Present Situation

The 1994 Legislature created the Drycleaning Solvent Cleanup Program (DSCP), which is administered by the Department of Environmental Protection (DEP), to provide a source of funding for rehabilitating sites and drinking water supplies contaminated by drycleaning solvents. The legislation created section 376.3078, F.S., to provide eligible drycleaning facilities and wholesale supply facilities an exemption from liability for cleanup, provided that the facilities meet the requirements of the law and regulation. 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.

The DEP performs cleanup of eligible facilities, and sites are addressed on a priority basis using risk-based corrective action.

Under current law, the immunity provisions 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. (Section 376.313(3), F.S.)

Current law also provides protection against any action to compel site clean-up for innocent property owners whose property becomes contaminated by drycleaning solvents that have migrated from a nearby drycleaning facility. (Paragraph 376.3078(3)(p), F.S.)

In May 2001, the Second District Court of Appeal overturned a trial court ruling and confirmed the common law remedy that a property owner has the right to sue for property damages caused by pollution migrating to his property. (Courtney Enterprises, Inc. v. Publix Super Markets, Inc., 788 So. 2d 1045 (2nd DCA, 2001))

The case involved contamination by the dry-cleaning solvent perchloroethylene (“perc”) emanating from a dry-cleaning facility on property leased from Publix. A property owner down-gradient discovered perc in the groundwater beneath his property while already engaged in cleaning up petroleum contamination at the site for which he was responsible. The presence of the perc in the groundwater greatly complicated the petroleum clean-up that was already underway and eventually caused the cessation of the petroleum clean-up because of the fear of drawing the perc contamination further onto the property. The property owner sued Publix for a material reduction in the value of his property as a result of the perc contamination.

The Court held that the Water Quality Assurance Act (Chapter 376, F.S.) does not prohibit an adjoining landowner from pursuing a common law cause of action for diminution in the value of his land. The Court observed that Florida has long recognized common law causes of action for a landowner whose land was damaged by pollution from an adjoining landowner. The Court found that the language in Subsections 376.3078(3) and (11), F.S., granting limited immunity to those who own or operate dry-cleaning facilities against actions to compel clean-up, does not alter that common law cause of action. The Court expressly held that abrogating this common law cause of action is an issue that “can only be addressed by the legislature.”

Effect of Proposed Changes

The bill eliminates by statute a common law cause of action for a property owner to sue a responsible party for causing pollution from dry-cleaning solvents that have migrated beneath his property, and thereby diminished the value of the property.

HB 741 adds a new definition of “nearby real property owner,” which is a property owner onto whose property dry-cleaning solvent has migrated. Such a property owner, as well as any other property owner, would not be liable for property damages caused to another property by the migration of dry-cleaning solvents.

Accordingly, the bill expands the 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. The result of this change is that adjacent real property owners and other affected parties will not be able to pursue such property damage claims. The bill also has the effect of applying the broadened immunity retroactively to causes of action accruing prior to the effective date of the act for which a lawsuit has not been filed.

In light of the existing statutory provision creating an individual cause of action for damages caused by drycleaning solvent contamination (see s. 376.313, F.S.), the effect of the proposed legislation is a significant change to Florida’s current environmental laws.

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: None
2. Expenditures: None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: None
2. Expenditures: None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs: 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.

2. Direct Private Sector Benefits: 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: None

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:
None.
2. Other:
None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill's changes to third party liability immunity could have an indirect environmental and fiscal impact in that it reduces 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