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: SB 260

SPONSOR: Senator Campbell

SUBJECT: Property or Liability Insurance Contracts (Pollution Exclusion)

DATE: January 24, 2002 REVISED: 01/31/02 02/04/02 _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Deffenbaugh	Deffenbaugh	BI	Fav/1 amendment
2.			NR	
3.				
4.				
5.				
6.				

I. Summary:

Commercial general liability policies countrywide typically contain a broad exclusion for pollution liability claims for injuries or damage arising out of the release or discharge of any "pollutant," defined as any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acid, alkalis, chemicals, and waste. However, limited pollution liability coverage may be made available, for an additional premium, as an endorsement to the policy.

The Florida Supreme Court, in *Deni Assoc. of Fla. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135 (Fla. 1998), held that the pollution exclusion provision was clear and unambiguous and rejected application of a legal theory that would interpret the language in light of the parties reasonable expectations. The Court determined that the policy excluded coverage for injuries caused to persons who inhaled fumes from ammonia that spilled from a blueprint machine being moved in a building. In a second case joined for review, the Court determined that coverage was excluded under a policy issued to owners of a citrus grove for injuries caused to two persons standing on adjacent property who were accidentally sprayed with insecticide by a helicopter hired by the owners to spray the grove.

The bill would limit the types of pollution liability claims that may be excluded under a pollution liability exclusion. It provides that "only incidents and hazards that involve long-term environmental degradation or an environment-wide exposure" may be excluded under the pollution liability clause described above. In effect, liability insurers would be required to cover all fume and chemical-related claims that do not fall in this category and would, therefore, significantly expand coverage under commercial general liability policies for such claims.

The Banking and Insurance Committee adopted one amendment which limits the bill to commercial property and commercial liability insurance contracts.

This bill creates an unnumbered section of the Florida Statutes.

II. Present Situation:

Most businesses purchase a commercial general liability insurance policy to protect them from liability due to the negligence of the business or its agents. The scope of the coverage is typically broad, referred to as a comprehensive general liability policy, but is subject to specific exclusions. Until 1970, the policies did not exclude coverage for pollution liability claims.

The late 1960's began a period of increased litigation seeking compensation for injuries caused by pollution and environmental contamination. Federal legislation also imposed liabilities on handlers and disposers of hazardous wastes and on landowners. In response, the insurance industry attempted to limit its coverage of pollution related losses. The pollution exclusion clause became a part of the standard comprehensive liability policy in 1970, and limited coverage to occurrences that were "sudden and accidental." In other words, the policy language was intended to exclude coverage for losses that arose from the gradual discharge of pollutants, or if the policyholder knowingly polluted. The policy language became the subject of much litigation, and courts often found coverage even in cases that arose from the gradual discharge of pollutants.[1] However, in 1994, the Florida Supreme Court in *Dimmitt Chevrolet v. Southeastern Fidelity Ins. Corp*.[2] determined that the term "sudden and accidental" as used in the pollution exclusion clause was not ambiguous. The Court found that pollution damage from oil spills and leaks which took place in the usual course of recycling used oil, and which occurred gradually over many years, was not "sudden and accidental" and was not covered.

With the increase in litigation and exposure and the number of courts finding the policy language ambiguous, the insurance industry changed their policies. In 1985, the Insurance Services Office (ISO) developed what is often referred to as the "absolute pollution exclusion." Most commercial liability insurers in Florida use the standard comprehensive general liability policy form filed by ISO and approved for use in Florida, which includes the so-called absolute pollution exclusion, which states:

> **B. EXCLUSIONS**
> This insurance does not apply to:
> . . . . .
> **f. Pollution**
> (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":
> (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insurer;
> . . . . . .

[1] Rosenkranz, Joshua; "The Pollution Exclusion Clause Through the Looking Glass," 74 Geo. L.J. 1237 (April, 1986)
[2] 636 So.2d 700 (Fla. 1994)

> "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed."

However, limited coverage for pollution liability may be offered by an insurer. The limited pollution liability endorsement filed by ISO and approved in Florida continues to exclude coverage for injuries or damage caused by the handling or storage of waste, pollutants which are transported, the clean up or removal of pollutants, or pollutants from a storage tank or other container below ground or water exposed by erosion or excavation. Staff is not aware of how readily available this endorsement is to commercial policyholders.

In 1998, the Florida Supreme Court in *Deni Assoc. of Fla. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135 (Fla. 1998), held that the absolute pollution exclusion provision was clear and unambiguous, and excluded coverage in both cases joined for review. The pollution exclusion clauses were substantially the same as the ISO clause quoted above. In the first case, an architectural engineering firm was moving equipment into a building where it leased space, and ammonia was accidentally spilled from a blueprint machine. The fire department evacuated the building and broke windows for ventilation. Claims were made against the firm by for injuries sustained by persons inhaling the ammonia fumes. Claims were also made by other commercial tenants for loss of income due to evacuation of the building. In the second case, the owners of a citrus grove contracted with a company to aerially spray chemical insecticide on its citrus groves. The helicopter overshot its mark and splashed insecticide on two men who were standing on adjacent property, who sued both companies for injuries. In both cases, the pollution exclusion was determined by the Court to clearly exclude coverage.

The Court in *Deni* cited its prior holding[3] that insurance policy exclusions which are ambiguous or susceptible to more than one meaning must be construed in favor of the insured, but held that the pollution exclusion provision in this case was clear and unambiguous. The court rejected application of the "doctrine of reasonable expectations," a legal theory that upholds the insured's expectations as to the scope of coverage if such expectations are objectively reasonable. The Court stated that there is no need for this doctrine if the policy provisions are ambiguous because in Florida ambiguities are construed against the insurer. To apply the doctrine to unambiguous provisions would be to rewrite the contract and the basis upon which the premiums were charged.[4]

Subsequent federal court cases, decided according to Florida law, have followed the holding in *Deni*. The U.S. Court of Appeals for the Eleventh Circuit found that the pollution exclusion clause was not ambiguous, citing *Deni*, resulting in no coverage for employee claims that the air conditioning system transported contaminants from the attic into the offices.[5] The same Court similarly concluded that under Florida law, the absolute pollution exclusion excluded coverage for injuries sustained by breathing vapors emitted from roofing products, regardless of whether the products were used properly or negligently.[6] In a third case, this Eleventh Circuit again found

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[3] *Excelsior Insurance Co. v. Pomona Park Bar & Package Store*, 369 So.2d 938 (Fla. 1979).

[4] *Deni*, at 1140. For a criticism of *Deni*, see, Stempel, Jeffrey; "Unreason in Action: A Case Study of the Wrong Approach to Construing the Liability Insurance Pollution Exclusion," 50 Fla. L. Rev. 463 (July 1998).

[5] *West American Insurance Co. v. Band & Desenberg*, 138 F. 3d. 1428 (11th Cir. 1998).

[6] *Technical Coating Applicators v. U.S. Fidelity and Guaranty*, 157 F.3d 843 (11th Cir. 1998)

an exclusion of coverage for injuries resulting from ingesting and inhaling of lead from the old and crumbling paint in a Tampa Housing Authority dwelling.[7]

Other states have rulings similar to Florida, but a number of jurisdictions have found the absolute pollution exclusion to be ambiguous, or subject to interpretation in light of the reasonable expectations of the insured, resulting in coverage for certain events. For example, a federal appellate court, applying Michigan law, found that the pollution exclusion did not bar coverage for injuries from chemical fumes used to seal a floor in the room above a school classroom.[8] According to this decision, state and federal courts are split on the issue of whether the total pollution exclusion bars coverage for all injuries caused by contaminants, or whether the exclusion applies only to injuries caused by traditional environmental pollution, citing numerous cases for each side of this issue. In another case, the Seventh Circuit explained that without some limiting principle, the pollution exclusion would extend far beyond its intended scope and lead to absurd results, such as barring coverage for someone who slips and falls on a spilled bottle of Drano, which is not ordinarily characterized as pollution.[9] But, in *Deni*, the Florida Supreme Court said that it saw no reason to address hypothetical situations based on facts not before the court and simply concluded, "Suffice it to say that insurance policies will not be construed to reach an absurd result."[10]

III. Effect of Proposed Changes:

The bill would limit the types of pollution liability claims that may be excluded under a pollution liability exclusion in a property or liability insurance contract. It provides that "only incidents and hazards that involve long-term environmental degradation or an environment-wide exposure" may be excluded under a clause that excludes coverage for damage caused by the actual or threatened discharge or release of pollutants, including smoke, vapor, soot, fumes, acid, alkalis, chemicals, waste, or any other solid, liquid, gaseous, or thermal irritant or contaminant. In effect, liability insurers would be required to cover all fume, contaminant, and chemical-related claims that do not fall in the category of involving long-term environmental degradation or exposure. Any additional limitation on the coverage would appear to be prohibited.

This bill would significantly expand coverage under commercial general liability policies for fume, contaminant, and chemical-related claims which are excluded under the total pollution exclusion in current policies. The bill would nullify the effect of the Florida Supreme Court decision in *Deni* and subsequent Florida law cases, which have interpreted the current exclusion as clear and unambiguous, resulting in exclusion of coverage for all, or the vast majority, of injuries caused by chemicals and contaminants.

For example, the Florida cases cited above which were based on the current exclusion, would all appear to be decided differently and could result in coverage under the facts of those cases: persons injured by inhaling ammonia spilled out of a blueprint machine inside a building; persons accidentally sprayed with insecticide by a helicopter; persons breathing vapors from roofing products; and persons ingesting or inhaling lead from old and crumbling paint. An

[7] *Auto Owners Insur. Co. v. City of Tampa Housing Authority*, 231 F.3d 1298 (11th Cir. 2000)
[8] *Meridian Mut. Ins. Co. v. Kellman*, 197 F.3d 1178 (6th Cir. 1999).
[9] *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.* , 976 F.2d 1037 (7th Cir. 1992).
[10] *Deni*, at 1140.

example of what would appear to continue to be excluded, would be leakage from underground tanks that cause long-term damage to the environment.

The bill would apply to policies issued or renewed on or after August 1, 2002. The bill is not limited to commercial policies and would apply to any property or liability policy, whether commercial or personal lines. However, its practical impact appears to be limited to commercial policies since personal lines policies (e.g., homeowner's) do not typically include a pollution exclusion.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Insurers writing commercial liability insurance will be subject to increased claims costs for injuries due to fumes, chemicals, and contaminants, resulting in higher premiums for businesses purchasing such policies. The amount of such increase is unknown. Commercial policyholders will be afforded the additional protection from personal liability for lawsuits for such injuries, and victims of such injuries may be more likely to obtain compensation. The bill may also reduce the availability of commercial liability coverage, particularly for businesses that pose a greater risk for pollution or chemical-related claims.

C. Government Sector Impact:

Governmental entities may experience an increase in premiums for commercial liability coverage.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Banking and Insurance:
Limits the application of the bill to commercial property and commercial liability insurance contracts. (WITH TITLE AMENDMENT)