

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Environment and Natural Resources

BILL: SB 32

INTRODUCER: Senator Gibson

SUBJECT: Relief of former employees of Fairfax Street Wood Treaters by the State of Florida

DATE: January 31, 2020

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Anderson	Rogers	EN	Favorable
2.			HP	
3.			JU	
4.			AP	

I. Summary:

SB 32 is a claim bill requesting relief for former employees of Wood Treaters, Inc./Wood Treaters, LLC (Wood Treaters), who worked at the Fairfax Street Wood Treaters (FSWT) site and who allege injury from excessive, persistent, and prolonged exposure to toxic levels of arsenic used to treat wood during the company's operation from 1980 to 2010. The bill alleges that the Department of Environmental Protection, the Department of Financial Services, and the Department of Health failed to enforce measures to protect employees from toxic substances in the workplace and ignored the hazardous conditions in which employees at FSWT were working. The bill alleges that the State of Florida has an equitable obligation to redress the injuries and damages sustained by employees.

The bill directs the Department of Health to collaborate with the National Institute for Occupational Safety and Health to develop accurate and reliable data on the exposure levels and the duration and frequency of exposure to arsenic for all former employees of Wood Treaters who worked at FSWT, so as to ascertain the risks to their health posed by such exposure.

The bill makes an appropriation of \$10 million from the General Revenue Fund to the Office of the Attorney General for the relief of former employees of Wood Treaters who demonstrate personal injuries and damages. The bill directs the Attorney General to compensate each eligible former employee in the amount of \$100,000. The bill limits attorney fees to 25 percent of the amount awarded.

II. Present Situation:

Fairfax Street Wood Treaters, Inc.

From 1980 to 2010, the Fairfax Street Wood Treaters (FSWT) facility produced pressure treated wood for wholesale and commercial use.¹ The facility was owned and operated by Wood Treaters, Inc.² The operations at the FSWT site used a hazardous wood treating preservative called chromated copper arsenate (CCA), which is a concentrated form of the chemical arsenic, to pressure treat various types of wood.³

In 2003, Wood Treaters, LLC was formed and the operations of Wood Treaters, Inc. were transferred to the LLC.⁴ Wood Treaters, LLC (“Wood Treaters”) operated until 2010, when it filed for bankruptcy. By July 2010, it had ceased operations and abandoned the facility. The company was declared bankrupt in 2012.⁵ Wood treated with CCA drip-dried on the property, resulting in soil, water, and sediment contamination with arsenic, chromium, and copper.⁶

The United States Environmental Protection Agency (EPA) leads site investigation and cleanup activities in cooperation with the Florida Department of Environmental Protection (DEP), and the Florida Department of Health (DOH). In August 2010, DEP requested EPA's assistance in mitigating the release of hazardous substances at the FSWT site to the environment. EPA conducted removal actions, or short-term cleanups, of the site in 2010 and 2011.⁷ In 2012, EPA added FSWT to its National Priorities List, or Superfund Program, for cleanup of the contamination.⁸ From March to October 2019, EPA completed cleanup activities to address the soil and sediment contamination at the FSWT site.⁹

Former employees of Wood Treaters allege that state agencies have failed to administer their respective legal duties requiring that the agencies protect the health and safety of employees in their workplace where they were exposed to toxic substances and waste.¹⁰ The former employees allege that Wood Treaters violated occupational safety laws and required employees to handle

¹ United States Environmental Protection Agency (EPA), *Fairfax St. Wood Treaters, Jacksonville, FL, Cleanup Activities*, <https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.Cleanup&id=0410582> (last visited Jan. 24, 2020).

² Law Office of Ennis Leon Jacobs, Jr., *Claimant's Statement and Legal Memorandum*, 7 (April 11, 2019)(on file with the Senate Committee on Environment and Natural Resources).

³ EPA, *Fairfax St. Wood Treaters, Jacksonville, FL, Cleanup Activities*, <https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.Cleanup&id=0410582> (last visited Jan. 24, 2020).

⁴ Law Office of Ennis Leon Jacobs, Jr., *Claimant's Statement and Legal Memorandum*, 7 (April 11, 2019)(on file with the Senate Committee on Environment and Natural Resources).

⁵ EPA, *Fairfax St. Wood Treaters, Jacksonville, FL, Cleanup Activities*, <https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.Cleanup&id=0410582> (last visited Jan. 24, 2020).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ EPA, *Fairfax St. Wood Treaters, Jacksonville, FL, Stay Updated, Get Involved*, <https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.Stayup&id=0410582#Stayup> (last visited Jan. 24, 2020).

¹⁰ Law Office of Ennis Leon Jacobs, Jr., *Claimant's Statement and Legal Memorandum*, 4 (April 11, 2019)(on file with the Senate Committee on Environment and Natural Resources).

CCA in an unsafe manner that was not in line with best practices in the wood treating industry. The former employees have described their injuries as generally a “lengthy decline in health,” with specific reports of irritated skin, severe respiratory conditions, severe sinus conditions, and cardiovascular conditions.¹¹ Several of the employees of Wood Treaters are now deceased, but their families assert that their exposure to CCA was a substantial factor in their demise.¹²

Sovereign Immunity

Sovereign immunity is defined as: “A government’s immunity from being sued in its own courts without its consent.”¹³ Article X, section 13 of the Florida Constitution, authorizes the Legislature to enact laws that permit suits against the state. The Legislature has, to some extent, permitted tort suits against the state, but has limited the collectability of judgments against the state to \$200,000 per person and \$300,000 per incident.¹⁴ These limits do not preclude plaintiffs from obtaining judgments in excess of the statutory cap; however, plaintiffs cannot force the government to pay damages that exceed the recovery cap.¹⁵ Damaged persons seeking to recover amounts in excess of the limits may request that the Legislature authorize a claim bill (see discussion of Claim Bills below).

Public Duty Doctrine

A key issue for tort liability is that of duty.¹⁶ All plaintiffs in tort actions must first establish that the defendant owed the plaintiff a duty of care, that is, a duty to act reasonably regarding the injured party's interests. When bringing tort claims against private individuals, duty is often a simple issue to decide. Individuals almost always have a duty to act with reasonable care regarding those they come into contact with. However, when government actions are in question, finding duty requires a more thorough analysis. This duty analysis is prior to any analysis of sovereign immunity.¹⁷

An exception to the waiver of sovereign immunity is referred to as the “public duty doctrine,” which provides that the government may not be liable unless there is a statutory or common law duty of care in existence that would have been applicable to an individual under similar circumstances.¹⁸ In *Trianon Park Condo. Ass'n, Inc. vs. City of Hialeah*, the Florida Supreme Court identified the following four categories of governmental functions to be considered when determining the application of sovereign immunity: (1) legislative, permitting, licensing, and executive officer functions; (2) enforcement of laws and the protection of public safety; (3) capital improvements and property control operations; and (4) providing professional educational

¹¹ *Id.* at 6, 12.

¹² *Id.* at 6.

¹³ BLACK’S LAW DICTIONARY, 621 (8th ed. 2005).

¹⁴ Section 768.28(5), F.S.

¹⁵ *Berek v. Metropolitan Dade Cnty.*, 422 So.2d 838 (Fla. 1982).

¹⁶ Duty, in torts, is a legal relationship arising from a standard of care, the violation of which subjects the actor to liability. BLACK’S LAW DICTIONARY, 428 (8th ed. 2005).

¹⁷ For “there to be a governmental tort liability, there must be either an underlying common law or statutory duty of care with respect to the alleged negligent conduct.” *Trianon Park Condo. Ass'n, Inc. vs. City of Hialeah*, 468 So. 2d 912, 917 (Fla. 1985).

¹⁸ *Id.*

and general services for the health and welfare of the citizens.¹⁹ The court has stated that there is no common law duty of care for the functions in the first and second categories; however, regarding the third and fourth, there are common law duties of care for how property is maintained and operated and how professional and general services are performed.²⁰ Thus, these latter functions are to be analyzed to determine if they are discretionary or operational.²¹

The court found that the government, in enacting laws or regulations, or issuing or not issuing licenses, permits, variances, or directives, is acting pursuant to basic governmental functions performed by the legislative or executive branches of government.²² There has never been a common law duty establishing a duty of care with regard to how these various governmental bodies or officials should carry out these functions.²³ For other actions, such as law enforcement,²⁴ a government entity owes a duty to the general public, but not to specific individuals,²⁵ unless the government has established a special relationship with the individual harmed or the action created a foreseeable zone of risk.²⁶

Discretionary Functions

Where the state is involved in a discretionary or policy-making function, courts have refused to find liability.²⁷ Discretionary functions include areas such as licensing, legislating, judicial decision-making, permitting, inspecting, designing public improvements, and other types of high-level planning. For example, the state cannot be sued for failing to pass or enforce a law which would have prevented a particular harm.

Courts use a four-part test to determine whether an activity should be classified as discretionary.²⁸ The court asks four questions, all of which must be answered in the affirmative, before making a finding that a function is discretionary:

- Does the challenged government activity involve a basic governmental policy, program, or objective?
- Is the challenged activity central to the accomplishment of the policy, program, or objective?
- Does the challenged activity require the government to make policy evaluations, exercise judgment, or use expertise?
- Does the government agency possess proper legal authority to engage in the challenged activity?²⁹

¹⁹ *Id.* at 919

²⁰ *Id.* at 919-920.

²¹ *Id.* at 921.

²² *Id.* at 919.

²³ *Id.*

²⁴ *Id.* at 919.

²⁵ *Id.* at 915.

²⁶ *See, e.g., Sams v. Oelrich*, 717 So. 2d 1044, 1047 (Fla. 1st DCA 1998).

²⁷ *Department of Transp. v. Konney*, 587 So.2d 1292 (Fla. 1991); *City of Daytona Beach v. Palmer*, 469 So.2d 121 (Fla. 1985); *Carter v. City of Stuart*, 468 So.2d 955 (Fla. 1985); *Reddish v. Smith*, 468 So.2d 929 (Fla. 1985); *Harrison v. Escambia Cnty. Sch. Bd.*, 434 So.2d 316 (Fla. 1983); *Department of Transp. v. Neilson*, 419 So.2d 1071 (Fla. 1982).

²⁸ *Department of Health and Rehab. Servs. v. Yamuni*, 529 So.2d 258 (Fla. 1988).

²⁹ *Id.* at 259.

Claim Bills

Generally, a claim bill, sometimes called a relief act, is a bill that compensates a particular individual or entity for injuries or losses occasioned by the negligence or error of a public officer or agency.³⁰ It is a means by which an injured party may recover damages even though the public officer or agency involved may be immune from suit. For a claim bill to pass, there must be majority approval in both chambers of the Legislature.³¹

A claim against the state may not be presented to the Legislature more than 4 years after the cause for relief accrued.³² Further, all relief acts of the Legislature must be for payment in full. No further claims for relief may be submitted to the Legislature for a previously compensated claim.³³ A claimant must petition the Legislature, in accordance with its rules, to seek an appropriation to pay a judgment against the state or state agency.³⁴ For recovery of an excess judgment or equitable claim against a subdivision of the state, the Legislature may direct such payment through passage of a claim bill.³⁵

Senate Rule 4.81(6) and House Rule 5.6(c) provide that the Legislature will not process a contested claim bill until the claimant has exhausted all available administrative and judicial remedies. However, both chambers may consider a bill in which the parties have executed a written settlement agreement.³⁶

Once a claim bill is filed, the presiding officer of each chamber may refer the bill to a special master of that chamber, as well as to one or more committees.³⁷ If the President of the Senate determines that a hearing is necessary to determine liability, proximate cause, and damages, a special master shall conduct a de novo hearing pursuant to reasonable notice. If the special master conducts a hearing, he or she must prepare a final report containing findings of fact, conclusions of law, and recommendations.³⁸ The Senate and House special masters usually conduct a joint hearing.³⁹

The National Institute for Occupational Safety and Health (NIOSH)

The Occupational Safety and Health Act of 1970⁴⁰ established NIOSH as a research agency that would focus on the study of worker safety and health, and empowering employers and workers to create safe and healthy workplaces. NIOSH is part of the United States Centers for Disease

³⁰ Office of the Senate President, The Florida Senate, and Civil Justice Subcommittee, The Florida House of Representatives, *Legislative Claim Bill Manual*, 2 (Aug. 2019)[hereinafter *Legislative Claim Bill Manual*], available at <https://www.flsenate.gov/PublishedContent/ADMINISTRATIVEPUBLICATIONS/leg-claim-manual.pdf>.

³¹*Id.*

³² Section 11.065, F.S.

³³ *Legislative Claim Bill Manual*, 2, available at

<https://www.flsenate.gov/PublishedContent/ADMINISTRATIVEPUBLICATIONS/leg-claim-manual.pdf>.

³⁴ Sections 11.066 and 768.28(5), Florida Statutes; see also *Legislative Claim Bill Manual*, 2.

³⁵ Section 768.28(5), F.S., see also *Legislative Claim Bill Manual*, 2-3.

³⁶ Senate Rule 4.81(6).

³⁷ Senate Rule 4.81(3)-(4).

³⁸ Senate Rule 4.81(3).

³⁹ *Legislative Claim Bill Manual*, 7.

⁴⁰ Pub. L. No. 91-596, 84 Stat. 1590 (1971).

Control and Prevention within the United States Department of Health and Human Services. NIOSH conducts research to reduce worker illness and injury, advance worker well-being, and enhance worker safety.⁴¹

NIOSH conducts health hazard evaluations upon requests from employers, employees, or union officials. If a field investigation is needed, NIOSH will evaluate the current workplace conditions and employee health concerns and make recommendations on how to reduce or eliminate any identified hazards.⁴² The Occupational Safety and Health Administration (OSHA) is the regulatory agency that sets and enforces standards to ensure safe and healthful working conditions and provides training, outreach, education, and assistance.⁴³ NIOSH has previously conducted a number of health hazard evaluations involving CCA.⁴⁴

III. Effect of Proposed Changes:

The bill includes a series of whereas clauses that establish the circumstances giving rise to the claim. The bill requests relief of former employees of Wood Treaters, Inc./Wood Treaters, LLC (Wood Treaters) who allege injury from excessive, persistent, and prolonged exposure to toxic levels of arsenic used to treat wood during the company's operation from 1980 to 2010. The preamble describes the use by Fairfax Street Wood Treaters (FSWT) of chromated copper arsenate, which includes a concentrated inorganic form of arsenic, to pressure treat utility poles, pilings, heavy timber items, and plywood lumber products.

The bill alleges that the Department of Environmental Protection (DEP), the Department of Financial Services (DFS), and the Department of Health (DOH) failed to enforce measures to protect employees from toxic substances in the workplace and ignored the hazardous conditions that employees at the FSWT site were working in. The bill alleges that the State of Florida has an equitable obligation to redress the injuries and damages employees sustained. The bill includes a statement that the facts stated in the preamble are found and declared to be true.

The bill directs DOH to collaborate with the National Institute for Occupational Safety and Health to develop accurate and reliable data on the exposure levels and the duration and frequency of exposure to arsenic for all former employees of Wood Treaters who worked at the FSWT site, so as to ascertain the risks to their health posed by such exposure.

The bill makes an appropriation of \$10 million from the General Revenue Fund to the Office of the Attorney General for the relief of former employees of Wood Treaters who demonstrate personal injuries and damages resulting from exposure to arsenic as a result of working at the FSWT site, and who demonstrate that such injuries and damages were sustained as a result of the failure of DEP, DFS, and DOH to exercise their statutory duties to control the unlawful release

⁴¹ United States Centers for Disease Control and Prevention (CDC), *About NIOSH*, <https://www.cdc.gov/niosh/about/default.html> (last visited Jan. 30, 2020).

⁴² CDC, *Health Hazard Evaluations (HHEs)*, <https://www.cdc.gov/niosh/hhe/faq.html> (last visited Jan. 30, 2020).

⁴³ United States Department of Labor, *About OSHA*, <https://www.osha.gov/aboutosha> (last visited Jan. 30, 2020).

⁴⁴ See e.g. NIOSH Health Hazard Evaluation Report #2005-0153-2997, Broward County Parks and Recreation Division, Markham Park (Apr. 2006), available at <https://www.cdc.gov/niosh/hhe/reports/pdfs/2005-0153-2997.pdf>; NIOSH Health Hazard Evaluation Report # 91-314-2179, Memphis Wood Preserving Company, Horn Lake, Mississippi (Feb. 1992), available at <https://www.cdc.gov/niosh/hhe/reports/pdfs/1991-0314-2179.pdf>.

of arsenic. The bill directs the Attorney General to compensate each eligible former employee in the amount of \$100,000.

The bill provides that an amount awarded under the act is intended to provide the sole compensation for all present and future claims arising out of the factual situation described in the bill which resulted in injuries and damages to former employees of Wood Treaters. The bill limits the total amount paid for attorney fees relating to this claim to 25 percent of the amount awarded.

The bill takes 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. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill would have a positive fiscal impact to any former employees that are eligible to receive compensation under the bill.

C. Government Sector Impact:

The bill would have a negative fiscal impact to the state due to the appropriation from the General Revenue Fund to the Office of the Attorney General.

VI. Technical Deficiencies:

None.

VII. Related Issues:

It is unknown whether the claimant has exhausted all available administrative and judicial remedies.

The Special Master has not conducted a hearing or completed a report on the claim.

VIII. Statutes Affected:

None.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.