IN THE SUPREME COURT OF FLORIDA
CASE NO. 92,536

FILED
SID J. WHITE
JUL 16 1998
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

METROPOLITAN DADE COUNTY,

Petitioner,

vs.

CHASE FEDERAL HOUSING CORP., et al.,

Respondents.

REPLY BRIEF OF PETITIONER METROPOLITAN DADE COUNTY

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I. IN THE ABSENCE OF AN EXPLICIT EXPRESSION OF RETROACTIVE INTENT BY THE LEGISLATURE FLORIDA'S ANTI-RETROACTIVITY RULE REQUIRES SUBSTANTIVE LAWS TO BE APPLIED PROSPECTIVELY

This case should be resolved through a straightforward application of the Court's long-standing rule requiring a clear and explicit expression of retroactive intent by the Legislature before a new substantive law will be applied retroactively. There being no such explicit expression of retroactive intent in any of the provisions of the Florida Drycleaning Contamination Cleanup Act, it must be applied prospectively.

Neither the decision by the Third District Court of Appeals nor the arguments by the Respondents acknowledge, much less adhere to, this controlling rule of law. This is one of the few similarities between the Third District's decision and the Respondents' contentions in this case. Indeed, the most striking feature of the three Answer Briefs is the extent to which each distances itself from the Third District's rationale for holding that the Act and its immunity provisions are to be applied retroactively.

Unlike the Third District, which infers a retroactive legislative intent from the purported "comprehensiveness" of the Act and its immunity provisions, the Respondents present distinct arguments in support of the Third District's retroactivity holding. Respondents' primary contention is premised upon the County's status as a political subdivision of the state and is couched in constitutional terms under

the Home Rule Amendment of the Florida Constitution. This constitutional argument takes two forms.

First, it is argued that political subdivisions possess no constitutional rights that would prevent the retroactive application of the immunity provisions and therefore the anti-retroactivity rule does not apply to counties. Second, Respondents assert that the County's claims under its environmental protection ordinance directly conflict with, and are therefore superseded by, the Act's immunity provisions. In addition to their two constitutional arguments, the Respondents also contend that even if the rule applies, it is overcome by the retroactive intent divined by construing various provisions of the Act.

While taking a different tack than the Third District, the Respondents' arguments ultimately must fail for the same reason: namely, the failure to comport with Florida's strict anti-retroactivity rule. Accordingly, the threshold, and in this case dispositive, issue is simply one of identifying and applying the proper legal standard. Therefore, the County will first thoroughly address the legal standard for determining retroactive intent before addressing the Respondents' specific arguments.

A. The Legal Standard For Determining Retroactivity

1) <u>Florida's Anti-Retroactivity Rule</u>

Florida has long adhered to a strict, bright-line test in applying the anti-retroactivity rule "that in the absence of an <u>explicit</u> legislative expression to the contrary, a

substantive law is to be construed as having prospective effect only." Young v. Altenhaus, 472 So.2d 1152, 1154 (Fla. 1985)(emphasis supplied); accord, Agency For Health Care Admin. v. Assoc. Indus. of Fla. Inc., 678 So.2d 1239, 1256 (Fla. 1996) (requiring "a clear directive from the legislature."); State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So.2d 55, 61 (Fla. 1995) (requiring "clear legislative intent"); Arrow Air, Inc. v. Walsh, 645 So.2d 422, 425 (Fla. 1994) (requiring "an express statement of legislative intent"); Alamo Rent-A-Car, Inc. v. Mancusi, 632 So.2d 1352, 1358 (Fla. 1994) (requiring that "Legislature clearly expresses its intent"); State v. Lavazzoli, 434 So.2d 321, 323 (Fla. 1983) (requiring "a clear legislative expression"); Century Village, Inc., v. Wellington, etc., 361 So.2d 128, 131 (Fla. 1978) (Legislation "to be given retroactive effect only when "clearly and explicitly" expressed by Legislature.); Walker LaBerge, Inc. v. Halligan, 344 So.2d 239, 242 (Fla. 1977) (requiring "a clear legislative mandate ... on the face of the statute"). Fleeman v. Case, 342 So.2d 815, 818 (Fla. 1976) (requiring an "express and unequivocal statement" of retroactive intent); Foley v. Morris, 339 So.2d 215, 216 (Fla. 1976) (retroactive intent must be expressed "in clear and explicit language"); Thayer v. State, 335 So.2d 815, 817 (Fla. 1976); (retroactive intent to be "clearly expressed") Trustees of Tufts College v. Triple R. Ranch, Inc., 275 So.2d 521, 524 (Fla. 1973) (retroactive intent must be expressed "in

language to (sic) clear and explicit to admit of reasonable doubt.").[1]

In the absence of a clear and explicit expression of retroactive intent by the Legislature, this Court has rejected attempts to divine such an intent by way of statutory construction. Hassen v. State Farm Mutual Automobile Insurance Co., 674 So.2d 106, 108 (Fla. 1996) ("This court will not divine an intent that a new law be applied to disturb existing contractual rights or duties when there is no express indication that such is the Legislature's intent."). Another case that is particularly instructive of the Court's long-standing practice of rejecting efforts to supply retroactive intent by way of statutory construction is Fleeman v. Case, supra. There the Court, in declining "to divine legislative intent for an issue as important as retroactive operation," stated:

> We can restrict the debate on a legislative 'intent' for retroactivity to the floor of those chambers, as well as avoid judicial intrusions into the domain of the legislative branch, if we insist that a declaration of retroactive application be made expressly in the legislation under review. By this means the forward or backward reach of proposed laws is irrevocably assigned in the forum best suited to determine that issue, and the judiciary is limited only to determining in appropriate cases

[1] Even if a new law contains an explicit statement of retroactive intent, the courts will refuse to apply it retroactively if it impairs vested rights or imposes new obligations or disabilities with respect to existing rights or past transactions. Laforet, 658 So.2d at 61; Alamo Rent-A-Car, 632 So.2d at 1358; Lavazzoli, 434 So.2d at 323; McCord v. Smith, 43 So.2d 704, 708-09 (Fla. 1949).

> whether the expressed retroactive application of the law collides with any overriding constitutional provision.
>
> There being no express and unequivocal statement in this legislation...,we hold this statute inapplicable to the contracts in these consolidated proceedings.

Id., 342 So.2d at 817-818. (emphasis supplied).

As made clear by the Fleeman Court, the long-standing requirement for an explicit statement of retroactive intent by the Legislature is a rule of statutory construction of the highest order, grounded in notions of the separation of powers doctrine. This is likewise evident from the following statement by the Court in Arrow Air, Inc. v. Walsh, 645 So.2d 422, 425 (Fla. 1994):

> We also agree that the mere fact that "retroactive application of a new statute would vindicate its purpose more fully...is not sufficient to rebut the presumption against retroactivity."

(quoting, Landgraf v. U.S.I. Film Products, 511 U.S. 244, 285-286, 114 S.Ct. 1483, 1507-08, 128 L.Ed.2d 229 (1994); accord, Hassan, 674 So.2d at 110. While adherence to the purpose of an act is usually the controlling principle of statutory construction, it is eclipsed in importance by the policy considerations underlying the Court's requirement for an explicit expression of retroactive intent. Those policies will be more fully addressed below in Section 3, at pages 9-11.

a) Exceptions To The Rule

The exceptions to the anti-retroactivity rule are nearly as well established as the rule itself. Relevant here is that the rule only applies to substantive laws, not procedural laws. Walker & LeBerge v. Halligan, 344 So.2d 239, 243 (Fla. 1977). "[S]ubstantive law prescribes duties and rights and procedural law concerns the means and method to apply and enforce those duties and rights." Alamo Rent-A-Car Inc. v. Mancusi, 632 So.2d at 1358.

In addition to procedural laws, statutes relating solely to remedies also do not come within "the legal conception of a retrospective law." City of Lakeland v. Catinella, 129 So.2d 133, 136 (Fla. 1961); accord, City of Orlando v. Desjardins, 493 So.2d 1027 (Fla. 1986). However, the Court has narrowly circumscribed the exception for "remedial" legislation:

> [W]e have never classified a statute that accomplishes a remedial purpose by creating substantive new rights or imposing new legal burdens as the type of "remedial" legislation that should be presumptively applied in pending cases. [citations omitted]

Arrow Air, Inc. v. Walsh, 645 So.2d at 424.

2) The Federal Anti-Retroactivity Rule

Because the Florida rule and the Federal rule share common origins it is instructive to consider the parameters of the Federal rule as well. The Federal rule against the retroactive application of new laws is only slightly less demanding than the Florida rule. In its seminal decision on

retroactive legislation the United States Supreme Court set out a three-prong analytical framework for determining whether newly enacted statutory provisions are applicable to pending cases. Landgraf v. U.S.I., 511 U.S. 244, 280, 114 S.Ct. 1483, 1505, 128 L.Ed. 2d 229 (1994). The first prong is the equivalent of the Florida rule in that it requires a court to give effect to any explicit expressions of retroactive intent. Id. In the absence of such an explicit command, the court is to determine if the provisions of the new law would have "retroactive effect," i.e., "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct or impose new duties with respect to transactions completed." Id.; accord, Miller v. Florida, 482 U.S. 423, 430, 107 S.Ct. 2446, 2451, 96 L.Ed.2d 351 (1987) ("A law is retrospective if it 'changes the legal consequences of acts completed before its effective date'")(quoting, Weaver v. Graham, 450 U.S. 24, 31 101 S.Ct. 960, 67 L. Ed. 2d.2d 17 (1981)).

If the new law would have a "retroactive effect," then the court's final task is to adhere to the strong presumption against retroactivity unless the Legislature has "clearly manifested its intent to the contrary." Hughes Aircraft Company v. U.S. ex rel. Schumer, 117 S.Ct. 1871, 1876 (1997) (applying Landgraf test). The showing required to satisfy the clear intent standard under the third prong of the Landgraf analysis is a heavy one. At a minimum, a court must undertake a careful analysis of the language,

structure, purpose and legislative history of the new law. U.S.A. v. Olin Corporation, 107 F.3d 1506, 1513 (11th Cir., 1997).[2] Moreover, a court is required to individually evaluate each of the particular statutory provisions at issue. Landgraf, 511 U.S. at 280, 114 S.Ct. at 1505.

3) The Policy Considerations Underlying The Anti-Retroactivity Rule

Both the United States Supreme Court and the Florida Supreme Court have acknowledged the long history and fundamental policy considerations underlying the anti-retroactivity rule. The Landgraf Court observed that the "considerations of fairness" and "settled expectations" underlying the rule are "deeply rooted in our jurisprudence," 511 U.S. at 265, 114 S.Ct. at 1497. The Court then articulated the separation of power concerns behind the rule:

> Such a requirement allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes, and has the additional virtue of giving legislators

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[2] The only Florida authority that even arguably suggests a "clear intent" inquiry such as that authorized under Landgraf's third prong is contained in the dicta of a few early decisions. These cases make passing reference to retroactive intent that is "unequivocally implied." See, e.g., Avila S. Condo Assn. v. Kappa, 347 So.2d 599, 605 (Fla. 1977) (A statute is "not to be given retroactive application unless it is required by the terms of the statute or it is unequivocally implied") (quoting, Keystone Water Co. v. Bevis, 278 So.2d 606, 608 (Fla. 1973); Larson v. Independent Life & Accident Ins. Co., 29 So.2d 448 (Fla. 1947) ("If the retroactive interpretation has nothing more than implication to support it, it must be unequivocal and leave no room for doubt as to legislative intent."). There is no Florida case, however, where the court has held retroactive intent to have been "unequivocally implied."

> a predictable background rule against which to legislate.

511 U.S. at 272-273, 114 S.Ct. at 1501; accord, Fleeman v. Case, 342 So.2d at 817-18.

The Florida Supreme Court echoed these observations in Trustees of Tufts College v. Triple R. Ranch, Inc., 275 So.2d 521, 524 (Fla. 1973):

> The bias against retroactive legislation is deeply rooted in the Anglo-American law. . . . A statute will be construed as prospective only unless the intention of the Legislature to give it a retroactive effect is expressed in language to (sic) clear and explicit to admit of reasonable doubt. (emphasis supplied)

There being no clear and explicit expression of retroactive intent contained in any of the provisions of the Florida Drycleaning . Contamination Cleanup Act, a straightforward application of Florida's anti-retroactivity rule requires that the immunity provisions of the Act be applied prospectively. The County will now address the Third District's decision and the Respondents' contentions to the contrary.

II. THE THIRD DISTRICT'S DECISION AND THE RESPONDENTS' CONTENTIONS ARE CONTRARY TO THE WELL-ESTABLISHED ANTI-RETROACTIVITY RULE

A. The Third District's Inference of Retroactive Intent From The Purported "Comprehensive" Nature of the Act Violates The Rule's Requirement That a Legislative Expression of Retroactive Intent Be Clear and Explicit.

Based solely upon its general characterization of the Act as "comprehensive," the Third District inferred "that the legislature has clearly expressed its intention that the

Act is to be retroactively applied." Metropolitan Dade County v. Chase Federal Housing Corp., 705 So.2d 674, 676 (Fla. 3d DCA 1998).

As previously discussed at pages 14-16 of the County's Amended Initial Brief, the Third District provides no rationale nor legal precedent for what amounts to a new legal doctrine of implied retroactivity. Nor did the Third District otherwise provide an explanation for its break with this Court's long-standing rule requiring that a legislative expression of retroactive intent be explicitly stated. This is a rule to which the Third District itself had strictly adhered, until now. Anderson v. Anderson, 468 So.2d 528, 530 (Fla. 3d DCA 1985); Seaboard System R.R., Inc. v. Clemente, 467 So.2d 348, 357 (Fla. 3d DCA 1985); Senfield v. Bank of Nova Scotia Trust Co., 450 So.2d 1157, 1164 (Fla. 3d DCA 1984). There being no explicit commands by the Legislature that the Act or any of its provisions are to be applied retroactively, the Third District's ruling must be reversed and the immunity provisions of the Act held to apply prospectively.

The same result would obtain under the federal version of the rule. This is because the Third District's inference of retroactive intent from its general characterization of the Act as "comprehensive" falls far short of the clear intent standard required under the third prong of the Landgraf analysis. The Third District did not reach its conclusion of a "clearly expressed" retroactive intent by

way of the required careful analysis of the language, structure, purpose and legislative history of the Act. See, U.S.A. v. Olin Corporation, 107 F.3d 1506, 1512-13 (11th Cir. 1997). Nor did the Third District undertake an individualized assessment of each of the Act's immunity provisions. see, Landgraf, 511 U.S. at 280, 114 S.Ct. at 1505.

Nor can it otherwise reasonably be argued that a legislative intent to apply the Act retroactively can be "unequivocally implied" from the Third District's general characterization of the Act as "comprehensive".[3]

B. Respondents' Contention That The Home Rule Amendment To The Florida Constitution Renders The Anti-Retroactivity Rule Inapplicable To The County Is Without Merit

While distancing themselves from the rationale employed by the Third District, Respondents attempt to defend the Court's holding by elevating their supporting arguments to a constitutional level. In this regard, Respondent Chase Federal declares "The Miami-Dade County Home Rule Amendment to the Florida Constitution controls this action." (Chase Federal Answer Brief, pg. 13). Respondent Sunniland likewise states the "threshold issue" in constitutional terms: "Is the state's constitutional authority over its subdivision subject to judicially created presumption on retroactive legislation?" (Sunniland Answer Brief, pp. 19-20).

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[3] see, footnote 2, supra.

From this constitutional perch, Respondents advance two arguments in support of their contention that the anti-retroactivity rule is inapplicable to the County. First, that the County, as a political subdivision of the State, is not possessed of any constitutional rights that would prevent the retroactive application of the Act's immunity provisions. Second, Respondents argue that the County's action under its local ordinance directly conflicts with the Respondents' rights under the Act and is therefore barred by virtue of the constitutional supremacy of general laws over local ordinances.

Each of these arguments is easily refuted. Respondents' first argument is based upon the false premise that the anti-retroactivity rule is of constitutional origins. Although the rule finds expression in several provisions of the federal and state constitution, it "embodies a legal doctrine centuries older than our Republic." Landgraf, 511 U.S. at 266, 114 S.Ct. at 1497. As previously discussed, the underlying basis of the rule includes fundamental notions of "fairness," "settled expectations," the separation of powers doctrine and providing "legislators a predictable background against which to legislate."[4] The reach of the rule is equally broad and cannot be narrowly confined to the various constitutional expressions of the rule. As emphasized by the Landgraf Court, "[w]hile the constitutional impediments

to retroactive civil legislation are now modest, prospectivity remains the appropriate default rule." 511 U.S. at 272, 114 S.Ct. at 1501. Accordingly, the County's failure to possess a particular constitutional right giving expression to the rule is not a bar to the rule's application.

An additional flaw in Respondents' argument is its erroneous view of the rule's object. The rule is directed at laws, not persons or entities. Yet, by urging the Court to carve out an exception to the rule by exempting counties, Respondents would skew the rule's proper focus upon the substantive nature of the law. Contrary to Respondents' argument, the United States Supreme Court has applied the rule in cases where the obligations of a new law "fell only on the government." Landgraf, 511 U.S. at 271, n. 25, 114 S.Ct. at 1500, n.25.

Moreover, the creation of a new exception excluding political subdivisions would result in a confusing, disjointed application of the rule. The immunity provision contained in subsection (3) of the Act presents a prime example of this. Subsection (3), in pertinent part, provides eligible persons with immunity from any "action brought by or on behalf of any state or local government or agency thereof or by or on behalf of any person . . .". (emphasis supplied). Since the immunity afforded includes protection from actions brought by private parties, as well

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[4] see, pp. 9-10, infra.

as state and local government agencies, then under the Respondents' formulation of the rule the provisions would apply prospectively to private actions and retroactively to government actions. Such an approach can hardly be said to be in accord with "settled expectations" or giving legislators a "predictable background rule against which to legislate."[5]

The Legislature presently has a clear understanding of the rule's straightforward requirement that retroactive intent be expressed clearly and explicitly. For evidence of this the Court need look no further than §376.308(5) (1997) ("Effective July 1, 1996, and operating retroactively to March 29, 1995,..."), a provision contained within the same statutory scheme as the Drycleaning Act.

The Respondents' second constitutional argument asserts that the County's claims under its local ordinance directly conflicts with the Act's immunity provisions and are therefore barred by the constitutional supremacy of general laws over local ordinances. The most obvious defect in this argument is that it assumes the existence of the very matter at issue; namely, the retroactive application of the Act's grant of immunity.

In Food Spot Corp. v. Renfrow, 668 So.2d 1053 (Fla. 3d DCA 1996) (per curiam affirmance, citing Jordan Chapel Freewill Baptist Church v. Dade County, 334 So.2d 661 (Fla. 3d DCA 1986) cert. denied, 348 So.2d 949 (Fla. 1987)), the

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[5] Id.

Third District affirmed the lower court's determination that "Under the 'impossibility of co-existence' test for conflict, it is readily apparent that the County and State programs can co-exist within their own respective sphere of operations." (Appendix to Initial Brief, at page 55). The task here is simply to further define those "respective sphere[s] of operation." Respondents' assertion of the constitutional supremacy of the Act's immunity provisions, in the event they are determined to apply retroactively, adds nothing to this inquiry. Simply because the State is possessed of superior governmental powers is no reason to presume that those powers have been exercised to their fullest extent. To the contrary, the Landgraf Court noted that the anti-retroactivity rule has been applied even with respect to immigration laws, an area in which Congress has plenary and exclusive authority. 511 U.S. at 271-72, 114 S.Ct. at 1500 (citing, Chew Heong v. United States, 112 U.S. 536, 5 S.Ct. 255, 28 L.Ed. 770 (1884)).

As additional authority in support of their conflict argument, Respondents cite to the decision in Sun Harbor Homeowners Assn., Inc. v. Broward Co. Dept. of Nat. Res. Prot., 700 So.2d 178 (Fla. 4th DCA, 1997). In Sun Harbor the Fourth District held that a statute which abolished local regulation of mangroves barred the continuation of a local enforcement action for civil penalties after the statutory 180-day "window" period had elapsed, notwithstanding that the local action had been commenced

prior to the enactment of the statute. Respondents' reliance on Sun Harbor is misplaced. First, unlike the Drycleaning Act the statute there explicitly abolished "all local government regulation" as of a date certain. §403.9324(3), Fla. Stat. (1995). More importantly, the Sun Harbor Court carefully distinguished between the exercise of a local government's regulatory powers and the pursuit of substantive rights. Pursuant to settled case law, the Fourth District found Broward County's administrative enforcement action for civil penalties to be a clear exercise of regulatory power. Id., at 180. (citing, Pensacola & A.R. Co. v. State, 45 Fla. 86, 33 So.985 (Fla. 1903) and Fogg v. Southeast Bank N.A., 473 So.2d 1352 (Fla. 4th DCA 1985)).

In contrast, Miami-Dade County's cost recovery action seeks to recover large sums it expended to address off-site contamination from the Respondents' properties. The Third District, which cited to Sun Harbor in footnote 4 of its opinion, understood this distinction and accepted "that the Act affects substantial rights." Chase Federal Housing, 705 So.2d at 675. This distinction, however, is lost on the Respondents. Under their expansive reading of Sun Harbor all actions by counties would be viewed as an exercise of regulatory powers. It suffices to say that Respondents have

failed to cite a single case to support such a proposition.[6]

As previously noted, Respondents attempt to frame the issue in terms of an unwarranted judicial interference with the constitutional powers of the State over its political subdivisions. Yet, the rule of anti-retroactivity is a rule of judicial deference intended to ensure that it is the Legislature, and not the judiciary, that performs the important task of deciding in the first instance if a law is to be applied retroactively. Here it is clear from the Legislature's failure to include an explicit expression of retroactive intent, in accordance with Florida's long-held anti-retroactivity rule, that it did not intend for the Act's grant of immunity to apply retroactively. That the Legislature did not include such a command in any of the subsequent amendments to the Act only serves to underscore this conclusion.

C. Respondents' Contention That A Clear Expression of Retroactive Intent Can Be Implied From Various Provisions Of The Act Is Contrary to Florida's Anti-Retroactivity Rule And Otherwise Erroneous

In contrast to the Third District's inference of a retroactive intent from the general characterization of the Act as comprehensive, Respondents' argue that such an intent can be implied from various specific provisions of the Act.

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[6] Respondents' related contention that State statutes can effect takings upon counties with impunity because counties are without due process rights ignores the Florida Constitution's prohibition against unfunded mandates by the Legislature. Article III, §18, Fla. Const.

As earlier discussed, such attempts to supply retroactive intent by implication have been specifically rejected by this Court. Hassan, 674 So.2d at 108; Fleeman, 342 So.2d at 817-18. Accordingly, the Court would be ill-advised to accept Respondents' invitation to derive, by implication, a retroactive intent through the construction of various provisions of the Act.

However, even if the Court agrees to engage in such an exercise of statutory construction, it will become readily apparent that there is no such retroactive intent by the Legislature, much less one that is "unequivocally implied."[7] To the contrary, the language of the Act clearly indicates that the Act and its immunity provisions are to be applied prospectively.

Not only was the original enactment of the Act devoid of any explicit command of retroactivity, but none of the subsequent amendments to the Act supplied such a command. This silence by the Legislature occurred notwithstanding the drycleaning industry's and the Legislature's full awareness of the pending litigation on the issue of retroactivity. Instead, the Act and subsequent amendments thereto simply provide: "This act shall take effect [prospective date]." Chapter 94-355, §15, Chapter 95-238, §10, Chapter 98-189, §18, Laws of Fla. In this regard, the Court has stated that the "Legislature's inclusion of an effective date. . . . effectively rebuts any argument that retroactive application

of the law was intended." State Dept. of Rev. v. Zuckerman-Vernon Corp., 354 So.2d 353, 358 (Fla. 1977); accord, Landgraf, 511 U.S. at 257, 114 S.Ct. at 1493. ("A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.")

The primary reasons offered by the Respondents in support of their retroactive reading is the Act's undisputed purpose to remedy problems created by past dry cleaning solvent contamination and that abandoned sites can be eligible for the state cleanup program "regardless of when the contamination was discovered." §376.3078(1) and (3)(b), Fla. Stat. (1997) (quoted repeatedly throughout each of the Answer Briefs) Yet, these phrases merely reflect that the subject of the legislation concerns past contamination. As aptly stated by the Landgraf Court, a statute "is not made retroactive merely because it draws upon antecedent facts for its operation." Landgraf at 1499, n.24 (quoting, Cox v. Hart, 260 U.S. 427, 435, 43 S.Ct. 154, 157, 67 L.Ed. 332 (1922).

The County's Amended Initial Brief, at pages 17-26, provides a straightforward interpretation of the Act's immunity provisions which is consonant with both the Act's purpose of expediting cleanups and Florida' anti-retroactivity rule. While that interpretation will not be repeated here, it is important to note that the County's

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[7] footnote 2, supra.

construction is in accord with the continuing nature of solvent contamination, both in fact and in law. Factually, the spread of contamination is ongoing and groundwater cleanups often span several years. Legally, the ongoing spread of contamination constitutes a "continuing invasion of rights," giving rise to a new cause of action each day until the nuisance conditions are abated. State D.E.P. v. Fleet Credit Corporation, 691 So.2d 512, 514 (Fla. 4th DCA, 1997); accord, State D.E.P. v. CTL Distribution, Inc., etc., 23 Fla.L.Weekly D576, D577 (Fla. 3d DCA 1998).

The County's prospective reading of the Act's grant of immunity is consistent with this factual and legal reality. (See, Amended Initial Brief, pp. 21 and 22). A person is granted immunity under subsection (3) of the Act for those actions related to site rehabilitation which accrue after a site has been determined eligible for the state operated program, but not for such actions that accrued prior to the eligibility determination. Likewise, a cleanup is not "voluntary" for purposes of subsection (9)'s grant of immunity until the site is determined eligible and thus no longer under a legal duty to perform cleanup work. This interpretation is also in harmony with the continuing statutory duty to cleanup such contamination, which exists under local and state law prior to an eligibility determination. See, §376.305(1), Fla. Stat. (1997).

There is simply no basis in reason or fact to support the Respondents' bald assertion that the County's

interpretation would eliminate all sites with existing contamination from the state operated cleanup program. (Chase Federal Answer Brief, p.35) This is nonsense belied by the hundreds of contaminated sites that have already applied and been determined eligible for the program without objection by Miami-Dade County. This is because most facilities perform their legal duty to continue with remedial work until determined eligible for the program.

On the other hand, if the Act's grant of immunity is applied retroactively then there will be no reason for a facility to undertake to perform its legal duty to continue with cleanup work during the pre-eligibility period. Accordingly, cleanups will be delayed and the already underfunded state cleanup program will be overwhelmed by more extensively contaminated sites. Moreover, the taxpayers of local governments, such as Miami-Dade County in this case, will be required to shoulder substantial cleanup costs that were incurred long before the effective date of the Act in response to contamination caused by the drycleaning industry.

In sum, the County's interpretation of the Act is the only reading that both complies with the anti-retroactivity rule and furthers the Act's purpose of expediting the cleanup of contaminated drycleaning sites.

CONCLUSION

The decision of the Third District Court of Appeal should be reversed and the action remanded for a trial on the claims contained in the County's Complaint.

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon David Ashton, Esq. and Robert M. Brochin, Esq., Morgan, Lewis & Bockius, LLP, 5300 First Union Financial Center, 200 S. Biscayne Blvd., Miami, FL 33131-2330; Harris C. Siskind, Esq., Coll, Davidson, etc., P. A., 3200 Miami Center, 201 Biscayne Blvd., Miami, FL 33131-2312 and Halsey & Burns, P.A., 4980 First Union Financial Center, 200 S. Biscayne Blvd., Miami, FL 33131, on this 15th day of July, 1998.

Respectfully submitted,

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