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The Florida Handbook of Solid and Hazardous Waste Regulation: Private Regulation[1]

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Legal overview

This section discusses how private regulation impacts solid and hazardous waste management in the state of Florida. This type of regulation occurs through private lawsuits. These lawsuits may be based on the legal principles of:

- nuisance
- trespass (both intentional and unintentional)
- negligence
- strict liability

In addition, and perhaps even more importantly, federal solid and hazardous waste laws have sections known as citizen lawsuit provisions. These sections allow citizens to enforce those particular laws through private lawsuits. It is important for you to understand how you may be held liable for your actions by other members of the public.

How does private regulation work?

Consider the following. If you were to dispose of a hazardous waste improperly, a representative or agent of the government could require you to clean it up. Your neighbor could also file a lawsuit against you to require you to clean up the waste. In addition, environmental groups, developers, banks, or any other person interested in the land or the waste and its potential hazards could sue you for violating the statute or the regulations.

What is nuisance?

Under the theory of nuisance, a common basis for filing pollution lawsuits, you may not use your property in a way that causes harm to others. Nuisances may be:

- public, if they affect the rights of the general public
- private, if they affect the rights of a particular individual

Public nuisance lawsuits may be brought against you by a public official on behalf of the public at large and certain

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types of public nuisances may be criminal acts. Private nuisance lawsuits may only be brought by the person or persons directly affected by the nuisance.

How are nuisance cases decided?

In nuisance lawsuits, the court will often balance the social value of the nuisance against the harm it causes. If the harm is slight and the social value is great, the lawsuit will fail. But if the social value is small and the harm is great, the plaintiff (the person suing) may recover monetary damages and prohibit the defendant (the person being sued) from continuing the activity.

For example, consider the case where neighbors or local officials sue a dairy farmer, claiming that the farm is a nuisance (private) and a health hazard (public). The social value is fresh milk products. The harm may range from bad smells on occasional windy days to disease-carrying insects and rodents. The judge will try to compare these two factors as part of the final decision on whether the farm is, in fact, a nuisance, and what, if anything, should be done about it.

What is injunctive relief and how is it used?

Injunctive relief is a form of request made to the court to cause a certain activity to cease. Many times, plaintiffs of a nuisance lawsuit may ask for temporary, preliminary, or permanent injunctive relief. Injunctive relief, if granted, may force you to cease certain operations, most likely the operations complained about by the plaintiff. Generally, courts will not grant injunctive relief when it may cause irreversible harm to the operation, but may do so when the activity can easily be restarted and when the plaintiff may suffer from extreme physical harm.

What is the Florida Right-to-Farm Act?

The Florida Right-to-Farm Act restricts nuisance lawsuits against farmers. The statute explicitly states that if a farm was not a nuisance when it was established, it will not be considered a public or private nuisance after it has been in operation for one year. This rule applies even if the farm changes ownership, and is the backbone of farmer protection in the state of Florida. Without the Right-to-Farm Act, nuisance lawsuits could be used to move farmers out of areas with burgeoning developments, thereby destroying the character of the affected communities and limiting the potential for agriculture within the state of Florida.

What farming activities are protected under this statute?

The statute protects:

- you if you change the type of use on your farm
- you if you change the intensity of use
- you if the use of the surrounding land changes
- the new owner if you sell your farm

The statute does *not* protect you for both of the following:

- if your farm was located next to an established homestead or business on March 15, 1982
- if you increase the noise, odor, dust, or fumes by expanding your farm operation

What farming activities are not protected under this statute?

This statute does not allow you to violate the general principles of negligence or nuisance. Contaminating water wells or misapplying pesticides will still leave you open to a potential lawsuit. The statute specifically mentions conditions that will be evidence of a nuisance. These conditions include:

- the presence of untreated or improperly treated waste, including human waste, garbage, offal, dead animals, dangerous waste materials, or gases harmful to human life
- the presence of improperly built or maintained septic tanks, water closets, or privies
- the keeping of diseased animals, which are dangerous to human health, unless you are following a current state or federal disease control program
- the presence of unsanitary places where animals are slaughtered, and unsanitary conditions or health hazards

What is negligence?

Negligence simply means causing harm to someone else by failing to do what a reasonable person would have done under the same circumstances. The harm may be economic, physical, or emotional. Anyone seeking to recover damages for someone else's negligence must prove four legal ingredients:

1. *Duty:* Your responsibility to govern your own conduct so that others are not harmed. Any responsibility you owe to protect another person on your property.

2. *Breach of duty:* Occurs if you do not fulfill your duty of care. That is, you do not act with the degree of caution or foresight that a reasonably prudent person would have used in the same situation. For example, after inviting someone with whom you are doing business onto your property, you fail to warn them of a known danger on your property and that person is harmed as a result. You breached your duty of care by not telling that person of that danger.

3. *Causation:* Your failure to use due care was the cause of the plaintiff's harm. Proving this step may be difficult if the damage is only indirectly related to your act or if there are other possible causes for the harm. This is specifically important when dealing with environmental issues such as pollution, where it is difficult and sometimes impossible to determine who, if anyone, caused the plaintiff's harm.

4. *Damage:* The plaintiff must prove that he suffered actual damage from your act. If no damage resulted, even if you admit your conduct was negligent, the plaintiff has no claim for negligence.

What is negligence per se?

If you are named as a defendant in a private lawsuit because of your actions, and those actions violated a statute, the court will usually find the violation of the statute is evidence of negligence. This evidence is usually enough to find the defendant guilty of statutory negligence, or negligence per se, in the private lawsuit as well. Negligence per se can be defeated, but it is extremely difficult to prove that you were not negligent when you violate a statute. This rule only applies if:

- the statute was intended to prevent the type of damage that actually occurred and started the lawsuit
- the statute was intended to protect people like the plaintiff

Even complying with all statutes does not guarantee immunity from negligence actions; just from the legal attack of negligence per se.

What is strict liability?

Strict liability means liability imposed without any evidence of negligence. It will not make any difference whether or not you acted reasonably, or how careful you may have been, so long as the damaging event occurs.

When is strict liability used?

Strict liability is usually imposed on those who engage in abnormally dangerous or "ultrahazardous" activities, like handling explosives, or other activities defined by statute, including generating, transporting, storing, or disposing of hazardous wastes under CERCLA (the Comprehensive Environmental Response, Compensation, and Liability Act). Abnormally dangerous activities are judged on certain factors. Those factors include:

- the existence of a high degree of risk of some kind of harm to the person, land, or property of others
- the likelihood that the harm will be great
- the inability to eliminate the risk by exercising reasonable care
- the extent to which the activity is not a matter of common usage
- the inappropriateness of the activity to its location
- the extent to which the activity's value to the community is outweighed by its dangerous characteristics

What is joint and several liability?

When two or more parties, acting independently, cause harm, the law (or the courts) may impose the principle of joint and several liability. This principle allows the plaintiff to recover the full amount of damage from any single defendant, regardless of how much or how little that defendant was actually responsible for the injury. This is sometimes seen as extreme and unfair, as you may see from the example below; however, it is considered necessary to ensure that the plaintiff "becomes whole" again.

For example, when defendants lose and become jointly and severally liable, they are left to spread the loss among themselves. Many times, some or most of the defendants are insolvent or do not have enough money to cover the full judgment. If a defendant is insolvent, then the court will look to those defendants who are solvent (i.e., those defendants who do have enough money to satisfy the judgment) to pay the plaintiff. That is how a defendant at fault for only 10 percent of the damages may be required to pay the plaintiff the full amount awarded. The defendant who paid the plaintiff's award can go back to court and sue the other defendants for reimbursement, a process known as "contribution."

A specific example of joint and several liability might be a situation in which an abandoned hazardous waste site is discovered with 50 drums of chemicals. All 50 drums have

the name of the companies from which they originated painted on them. One of the drums may be from ABC Company and the rest are from XYZ Company. Under CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act), which specifically authorizes joint and several liability, the Environmental Protection Agency (EPA) can force ABC Company to pay for the entire cleanup, even though only one drum out of the fifty came from ABC Company. ABC Company can then try to force (by suing) XYZ Company to pay back ABC for XYZ's share (49/50, or 98%) of the cleanup costs in a lawsuit for contribution.

In some cases, only one drum out of the fifty may have any name on it. EPA may still force ABC Company to pay the entire cost of cleanup because it is the only identifiable contributor. In this case, since ABC Company does not know who the other contributors were, it has no way to recover the costs of cleaning up the unknown companies' drums.

In 2006, Florida changed its approach to assessing liability between multiple defendants. Florida has now eliminated joint and several liability and instead imposes "proportionate liability." Of course, this change only affected Florida law; federal law still applies joint and several liability in assessing CERCLA claims.

What is proportionate liability?

In a proportionate liability system, each defendant is only liable for his specific proportion of harm to the plaintiff, and no more. Normally, this will be fixed by percentages. For example, a co-defendant who is found by a jury to be 40 percent responsible for a plaintiff's injury would not be required to pay more than 40 percent of the entire settlement. This is the system in Florida. However, Florida is in the minority on this position; most states follow joint and several liability.

What is a citizen lawsuit?

A citizen lawsuit is a private lawsuit that is explicitly authorized by a statute. Such an authorizing provision is present in most major federal environmental statutes, including RCRA (Resource Conservation and Recovery Act) and CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act). The citizen lawsuit provision allows people to bring an action against anyone who violated the statute, and in some cases, even against the government for failing to enforce a statute or rule. While an environmental statute, FIFRA does not contain a citizen suit provision.

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