



**House
Legislative
Analysis
Section**

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**SANITARY SEWER OVERFLOWS;
MUNICIPAL LIABILITY**

**Senate Bill 109 (Substitute H-4)
First Analysis (12-11-01)**

**Sponsor: Sen. Shirley Johnson
House Committee: Civil Law and the
Judiciary
Senate Committee: Natural Resources
and Environmental Affairs**

THE APPARENT PROBLEM:

Sanitary sewer overflows (SSOs) can pose a severe problem to the environment and public health. These are discharges of raw or inadequately treated sewage from a separate sanitary sewer collection system before the sewage reaches a wastewater treatment plant. The discharges can back up into basements and buildings, flow out of manholes or weak spots in the collection system, and reach ground or surface waters. According to the Department of Environmental Quality (DEQ), SSOs have risen sharply with the aging and inadequate wastewater infrastructure coupled with factors such as groundwater infiltration, heavy rainstorms or snowmelts, equipment or pump failures, blockages, and power failures. The discharges can contain disease-causing bacteria, floating human waste, toxic pollutants, pesticides, and other contaminants that can threaten public health and the environment, contaminate drinking water sources, and damage buildings.

Governmental agencies are required to provide certain necessary services, such as sewer systems, within municipalities, and are responsible for maintaining and upgrading these systems. Some residents blame their municipality for an aging sewer system and its frequent sewer backups. According to an article in the *Detroit Free Press* (1-30-01), at least 110 homes in Birmingham, 91 homes in Beverly Hills, and 20 homes in Farmington Hills experienced sewer overflows in their basements after heavy rain deluged the system in 1998. According to the sanitary sewer overflow county lookup program established by the DEQ, the following counties, among others, have reported cases of SSOs since July 10, 2000: Ingham County, 20 cases; Macomb County, 23 cases; Oakland County, 41 cases; Washtenaw County, 26 cases; and Wayne County, 35 cases.

Under the governmental immunity act, governmental agencies are immune from tort liability in the exercise or discharge of a governmental function. There are several exceptions to governmental immunity, however, that allow recovery by people injured as a result of a municipality's negligence. In 1998, the Court of Appeals held that municipalities could be held liable for sewer backups without a showing of negligence, so as to establish liability under the trespass-nuisance exception to governmental immunity (*CS&P, Inc. v City of Midland*, 229 Mich App141). See *BACKGROUND INFORMATION* below. This decision has resulted in numerous lawsuits against municipalities for sewer overflows.

Legislation has been introduced in order to establish a more limited legal liability standard. The standard would link liability with proof that an actual sewer system defect existed, that a particular local unit of government was responsible for that defect, and that the defect was the substantial proximate cause (that is, that the defect was 50 percent or more of the cause) of the event, property damage, or physical injury.

THE CONTENT OF THE BILL:

Senate Bill 109 (H-4) would amend Public Act 170 of 1964 which concerns the liability of municipal corporations, political subdivisions, and the state, in order to establish a protocol that allows citizens to seek compensation from a municipal government in the event of a sewer overflow, obtaining compensation for economic and non-economic damages either as the result of a negotiated settlement, or a civil suit and court judgement.

The bill specifies that in order to afford property owners, individuals, and governmental agencies

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greater efficiency, certainty, and consistency in the provision of relief from damages or physical injuries caused by a sewage disposal system event, a claimant and a government agency subject to a claim would have to comply with certain procedures. The bill specifies that a governmental agency would not be immune from tort liability for the overflow or backup of a sewage disposal system if the governmental agency is the appropriate governmental agency. ('Appropriate governmental agency' and 11 other terms are defined by the bill, and noted below.) The bill would abrogate common law exceptions to immunity for the overflow or backup of a sewage disposal systems, and provide the sole remedy for obtaining any form of relief for damages or physical injuries, regardless of the legal theory.

Seeking damages. Under the bill, if a claimant, including a claimant seeking non-economic damages, believed that an event caused property damage or physical injury, the claimant could seek compensation for the property damage or physical injury from a government agency if the claimant showed that all of the following existed at the time of the event: (a) the governmental agency was the 'appropriate governmental agency'; (b) the sewage disposal system had a defect; (c) the governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect; (d) the governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect; and, (e) the defect was a substantial proximate cause of the event and the property damage or physical injury.

Obtaining damages. In addition to the requirements to seek damages, the bill specifies that to obtain compensation for property damage or physical injury, a claimant would have to show both of the following: (a) if any of the damaged property was personal property, then reasonable proof of ownership and the value of the damaged personal property. Reasonable proof could include testimony or records documenting the ownership, purchase price, or value of the property, or photographic or similar evidence showing the value of the property; and, (b) the claimant followed the proper notification protocol to seek damages from the governmental agency, as it is described in the bill (see below).

Non-economic damages. Generally, the bill specifies that economic damages are the only compensation for a claim, and directs that a court shall not award and a governmental agency shall not pay non-economic damages as compensation for an event. However, the

bill specifies that a governmental agency would remain subject to tort liability for non-economic damages if the claimant, or the individual on whose behalf the claimant was making the claim, had suffered death, serious impairment of body function, or permanent serious disfigurement. Under the bill, these issues would be questions of law for the court, if the court found either of the following: (a) there was no factual dispute concerning the nature and extent of the claimant's injuries; or, (b) there was a factual dispute concerning the nature and extent of the injuries, but the dispute was not material to determining whether the claimant had suffered a serious impairment of body function, or permanent serious disfigurement.

Further, the bill specifies that a party to a civil action would have all applicable common law and statutory defenses ordinarily available in civil actions, and would be entitled to all rights and procedures available under the Michigan Court Rules.

Claim notification protocol to governmental agency. Under the bill, a claimant would not be entitled to compensation unless he or she notified the governmental agency of a claim of damage or physical injury, in writing, within 45 days after the date the damage or injury had been discovered, or in the exercise of reasonable diligence, should have been discovered. The bill specifies the appropriate content of the written notice, and directs that a governmental agency make information about the notice protocol public. Specifically, if a person notified a contacting agency, either orally or in writing, before providing a notice of a claim, then the contacting agency would be required to provide the person with all of the following information in writing: (a) an explanation of the notice requirements, sufficiently detailed to allow a claimant to comply with the requirements; (b) the name and address of the individual within the governmental agency to whom a claimant must send written notice; and, (c) the required content of the written notice, which would be limited to the claimant's name, address, and telephone number, the address of the affected property, the date of the discovery of any property damages or physical injuries, and a brief description of the claim.

The bill specifies that a claimant's failure to comply with the notice requirements would not bar him or her from bringing a civil action, if the claimant could show both of the following: (a) he or she had notified the contacting agency during the period for giving notice; and, (b) his or her failure to comply with the

notice requirements resulted from the contacting agency's failure to comply with the protocol.

Additional governmental agencies responsible; inspection and investigation before litigation. The bill specifies that if a governmental agency notified of a claim believes that a different or additional governmental agency may be responsible, then that agency would be required to notify each additional or different governmental agency of that fact, in writing, within 15 business days after the date the claimant's notice was received.

The bill specifies that this provision is intended to allow a different or additional governmental agency to inspect a claimant's property, or investigate a claimant's physical injury, before litigation. Further, it specifies that failure to provide notice to a different or additional governmental agency would not bar a civil action against the different or additional governmental agency.

Under the bill, if a governmental agency received a notice from a claimant, or a different or additional governmental agency, the appropriate governmental agency receiving notice could inspect the damaged property, or investigate the physical injury. A claimant, or the owner or occupant of affected property, would be prohibited from unreasonably refusing to allow a governmental agency subject to a claim to inspect damaged property or to investigate a physical injury. Further, the bill specifies that this provision would not prohibit a governmental agency from inspecting damaged property or investigating a physical injury during a civil action.

Civil action. The bill specifies that if a governmental agency notified of a claim and a claimant do not reach an agreement on the amount of compensation for the property damage or physical injury within 45 days after receipt of notice, then the claimant could begin civil action. Further, the bill specifies that a civil action could not be instituted until after that 45 days. However, the bill specifies that this would not apply to claims for non-economic damages.

Definitions. Under the bill, 12 definitions are included to establish the conceptual elements of the compensation recovery protocol. There are definitions for the following terms, some of which are included here: "*affected property*," "*appropriate governmental agency*," (which would mean a governmental agency that, at the time of a sewage disposal system event, owned or operated, or directly or indirectly discharged into, the portion of the sewage disposal system that a claimant alleges

caused damage or physical injury), "*claimant*," (which would be defined to mean a property owner who believes that a sewage disposal system event caused damage to the owner's property or a physically injured individual or person making a claim on behalf of a physically injured individual who believes that a sewage disposal system event caused the physical injury. Claimant includes a person who is subrogated to a claim of a property owner or physically injured individual), "*contacting agency*," (which would be defined to mean any of the following within a governmental agency: (i) the clerk of the governmental agency; (ii) if there were no clerk, an individual who may lawfully be served with civil process directed against the governmental agency; and (iii) any other individual, agency, authority, department, district, or office authorized by the governmental agency to receive notice, including but not limited to an agency, authority, department, district, or office responsible for the operation of the sewage disposal system, such as a sewer department, water department, or department of public works), "*defect*" (which would be defined to mean a construction, design, maintenance, operation, or repair defect), "*non-economic damages*" (which would be defined to include, but not be limited to, pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, humiliation, and other non-pecuniary damages), "*person*," "*serious impairment of body function*" (which would mean that term as defined in the Insurance Code), "*service lead*" (which would mean an instrumentality that connects an affected property, including a structure, fixture, or improvement on the property, to the sewage disposal system and that is neither owned nor maintained by a governmental agency), "*sewage disposal system*" (which would mean all interceptor sewers, storm sewers, sanitary sewers, combined sanitary and storm sewers, sewage treatment plants, and all other plants, works, instrumentalities, and properties used or useful in connection with the collection, treatment, and disposal of sewage and industrial wastes, and includes a storm water drain system under the jurisdiction and control of a governmental agency), "*sewage disposal system event*" or "*event*" (which would mean the overflow or backup of a sewage disposal system onto an affected property. An overflow or backup would not be a sewage disposal system event if any of the following were 'a substantial proximate cause' of the overflow or backup: (i) an obstruction in a service lead that was not caused by a governmental agency; (ii) a connection to the sewage disposal system on the affected property, including, but not limited to a

sewer system, building drain, surface drain, gutter, or downspout; and, (iii) an act of war, whether the war is declared or undeclared, or an act of terrorism), and "substantial proximate cause" (which would mean a proximate cause that was 50 percent or more of the cause of the event and the property damage or physical injury).

MCL 691.1416 et al.

HOUSE COMMITTEE ACTION:

The members of the House Committee on Civil Law and the Judiciary substituted the Senate-passed version of Senate Bill 109 with a modified version of House Bill 4960 (in particular, Substitute H-2, Draft 3, with amendments), a bill that had served as a working document for a study group convened to advise the standing committee. The bill is substantially different from the Senate-passed version.

The Senate-passed version of Senate Bill 109 would have made political subdivisions immune from civil liability for non-economic damages caused as the result of the back-up of a sewer system, built, operated, maintained, or repaired, or otherwise under its jurisdiction, under either of the following circumstances: (a) the political subdivision was in full compliance with an order, permit, or other document with an enforceable schedule for addressing its sewage-related water pollution problems that was issued by the Department of Environmental Quality, or entered into as part of an action brought by the state against the political subdivision; or, (b) the political subdivision was not subject to an order, permit, or other document with an enforceable schedule, but met all of the following: (i) it was properly operating and maintaining the sewer system at the time of the back-up; (ii) the back-up was the first experienced by the sewer system; and, (iii) following the back-up, the political subdivision entered into an order, permit, or other document with an enforceable schedule for addressing the political subdivision's sewage-related water pollution problems.

Unlike the Senate-passed version of the bill, Senate Bill 109 (H-4) would make political subdivisions liable for non-economic damages under some circumstances, as well as establish a protocol that would allow citizens to seek and obtain damages for sewer back-ups if they could prove that a defect existed in the system, that a particular unit of government was responsible for that defect, and if the defect was the "substantial proximate cause" (that is,

was 50 percent or more) of the cause of the event and the property damage or physical injury.

BACKGROUND INFORMATION:

CS&P, Inc. v City of Midland involved a case in which water and sewage emanating from toilets and floor drains invaded the premises of a commercial building located in Midland, and caused extensive damage to the building and its contents. Evidently, broken risers in the sewer on a street adjacent to the building caused a blockage, and diverted the water and sewage into the building. The city admitted that it owned the sewer system, and that it was responsible for maintaining, installing, and repairing sanitary sewers. Although the section of the sewer that failed had been cleaned and inspected, no problems had been found.

The plaintiffs alleged that Midland was liable for damages to the building and its contents under a trespass-nuisance theory. The city moved for summary disposition, arguing that because maintenance of a sewer system is a governmental function, the plaintiffs' claims were barred by governmental immunity. The trial court held that the plaintiffs had pleaded causes of action under the trespass-nuisance exception to governmental immunity, and denied the city's motions. The trial court also ruled that negligence was not an element the plaintiffs would have to prove at trial in order to establish Midland's liability under a trespass-nuisance theory. After a jury trial, the plaintiffs were awarded damages.

The sole issue on appeal was whether the trial court had erred by ruling that the plaintiffs did not have to prove negligence in order to establish liability under the trespass-nuisance exception to governmental immunity. The Court of Appeals affirmed the decision of the trial court. As described by the Court of Appeals, trespass-nuisance is a "trespass or interference with the use or enjoyment of land caused by a physical intrusion that is set in motion by the government or its agents and resulting in personal or property damage". The court followed a 1994 ruling of the Michigan Supreme Court, which held that negligence is not a necessary element of the cause of action, even if the instrumentality causing the trespass-nuisance was built with all due care and in strict conformity to the plan adopted by a governmental agency or department (*Peterman v Department of Natural Resources*, 446 Mich 177).

Although the Michigan Supreme Court in October 1999 granted leave to appeal the Court of Appeals

decision in *CS&P*, the Supreme Court reversed its order in January 2000. Therefore, the Court of Appeals decision is final.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill would have an indeterminate fiscal impact on local units of government. The fiscal impact would depend both on the extent to which the bill would increase or decrease the number of lawsuits; and, in any determinations of liability, the degree to which it would enable recovery for non-economic damages. (12-10-01)

ARGUMENTS:

For:

This legislation affords property owners, individuals, and governmental agencies greater efficiency, certainty, and consistency in the provision of relief for damages or physical injuries caused by what the bills calls "a sewage disposal system event." The bill puts in place a protocol under which citizens can file claims against, and recover damages from, a local government that operates a sewage or waste management system. The new protocol would allow citizens to seek and obtain damages for sewer back-ups if they could prove that a defect existed in the system, that a particular unit of government was responsible for that defect, and if the defect was the "substantial proximate cause" (that is, it was 50 percent or more) of the cause of the event and the property damage or physical injury.

For:

This bill would impose a more reasonable standard for liability in sewer overflow events. Currently, governmental units are being held liable for events beyond their control. They need the protection this legislation provides, not the virtually unlimited exposure which has been the result of recent court decisions. For example, an electric utility is generally not liable for damage caused by a power outage resulting from lightning. Yet municipalities can be held liable for damages caused by a sewer backup resulting from an unusually large rainstorm.

According to *CS&P, Inc. v City of Midland* (1998), local units are subject to a strict liability standard. Plaintiffs need not prove that a local unit was negligent in order to hold it liable under the trespass- nuisance doctrine (which applies only to governmental agencies). In contrast, to prove the liability of a private company, the complainant must prove that the private entity intends to intrude on the

property of another. Then, and only then, will the private entity be held liable for trespass. Municipalities, liable under the trespass-nuisance doctrine, need not be found negligent, but merely present. Under this doctrine, the complainant does not need to prove that a local unit was negligent in order to recover damages, but merely that there was trespass. This is a 'higher' standard of liability--one that is easier to prove--than the standard that applies to private entities. It provides for nearly limitless exposure, and as a matter of public policy it is both unwise and unfair.

For:

This bill protects homeowners' rights and yet holds local units of government responsible for defects in their sewage systems. When raw sewage overflows into a home's basement and fills it with stench and slime, full restitution of damages, including in certain instances non-economic damages, should be allowed. If, for example, an incident causes death, serious injury, or disfigurement, citizens should be able to collect non-economic compensation.

Response:

Citizens already can collect economic damages for sewer back-ups. Indeed, according to an article that appeared in the *Detroit Free Press* entitled "Sewage suit settled before liability bill passes" (7-18-01), one law firm in the state has represented almost 5,000 home owners in mostly class-action back-up and flooding cases throughout the state since 1996, and has been able to obtain judgments or settlements from cities of almost \$16 million. As to the provision that would allow for non-economic damages for sewer back-ups, these would rarely be awarded in basement flooding cases. Overall, the bill would have little effect.

For:

According to the Southeast Michigan Council of Governments, this legislation provides accountability, certainty, recognition, and protection-policy principles that are in the best interest of the broad spectrum of property owners. With regard to *accountability*, the bill asserts that liability for damages should be linked to responsibility for causing flooding. With regard to *certainty*, the bill allows sewer system owners and operators to know when they are meeting their responsibilities. As to *recognition*, the bill recognizes that all basement flooding is not preventable. Finally, the bill offers *protection* for homeowners and their local governments that increases the likelihood that insurance coverage will be available to cover the risk of sewer back-ups and basement flooding.

Against:

The Michigan Supreme Court is considering a case involving sewer backups in two municipalities that will substantially clarify current Michigan law regarding liability for sewer backups that result in basement flooding. Legislative action on Senate Bill 109 should await clarification from the Michigan Supreme Court on two cases: *Jones v Farmington Hills*, and *Pohutski v Allen Park*. Both cases have been consolidated by the Michigan Supreme Court, which heard oral arguments this fall and will render a decision in early 2002.

Against:

This bill will not restore insurer comfort with municipal risk. According to committee testimony, insurance will not be available to local units of government for these flooding and sewer overflow events, unless the legislation includes a provision that the defect in the sewer system was "the proximate cause" of the sewer over-flow (that is, the one most direct cause). As it is drafted, the phrase "the proximate cause" has been jettisoned in favor of "substantial proximate cause," which means a "proximate cause that is 50 percent or more of the cause" of the sewer overflow event, the property damage, or physical injury. As a result, a spokesman for the Michigan Municipal Risk Management Authority notes that governmental entities should be prepared to go without insurance coverage, or very limited coverage for the foreseeable future. This means the new standard of liability defined in the bill will be financed, for the most part, with municipal tax dollars.

Generally, those who insure against risks in local government observe that the insurance marketplace has entered a hard market cycle. Re-insurers are now allocating their capacity more selectively to achieve profitability. This means that reinsurance will be harder to find for certain higher risk areas, like sewer backups. The September 11 attacks on the World Trade Center and the Pentagon further exacerbated this market trend. The insurance industry has been particularly hard hit, and the estimates of insured losses continue to mount. Initial estimates of \$40 billion have grown to more than \$70 billion, as the September 11 attacks have proved to be the largest single-event loss in history.

Against:

Unlike the Senate-passed version of Senate Bill 109, this substitute bill would not protect municipalities from liability for non-economic damages caused by sewer backups, even if local elected officials were

complying with a state-ordered and DEQ-approved plan to correct and eliminate a sewage system violation. For example, a city could be required to pay a homeowner for repairing a flooded basement and replacing its contents, and the city also could have to pay additional damages to compensate the homeowner if a claimant experienced death, disfigurement, or impairment of body function. The intent of the Senate-passed version of this bill was to provide local governments immunity from citizens' claims for non-economic damages--protecting city budgets from the imposition of unexpected legal and financial burdens that come of large non-economic damage awards-- if the local governments could not reasonably be considered to have been liable, given state mandates. This bill fails to protect local governments in that manner. Further, by creating an entirely new category of liability and requiring that citizens be given notice, the bill could well increase local governments' exposure to citizens' suits for damages.

Against:

This legislation further erodes the concept of governmental immunity, a set of principles first put in place to prevent citizens from what is, in effect, bringing suit against themselves as taxpayers. It should be noted that the need for governmental immunity is greatest with regard to the provision of those services whose effects are most uncertain--that is to say, when the provision of the service entails unpredictable results and even likely mishaps, or 'acts of God'. Generally it is these kinds of service delivery systems that are relegated only to governments, precisely because the private sector assesses their profitability to be too low, and their risk too high. Indeed, governmental agencies are mandated by law to provide an efficient and systematic drainage system to safeguard the public health and welfare, regardless of profitability. Further, often improvements to these kinds of service delivery systems are extraordinarily expensive for taxpayers, and it is for that reason that the expense of their improvement is undertaken collectively. It makes little sense to spend already limited tax dollars on court judgments or out-of-court settlements when the tax dollars would be better used to improve the infrastructure of the system.

POSITIONS:

The Michigan Environmental Council supports the bill. (12-6-01)

The Michigan Townships Association supports the bill with amendments. (12-10-01)

The Michigan Municipal League supports the bill with amendments. (12-10-01)

SEMCOG is not opposed to the bill. (12-6-01)

The Department of Environmental Quality is neutral on the bill. (12-6-01)

The Michigan Association of Counties has the current substitute under review to determine how it affects counties' ability to insure their operations. (12-6-01)

The Michigan Municipal Risk Management Association does not support the bill. (12-10-01)

Analyst: J. Hunault

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.