

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 875 Limitations of Actions Other Than for the Recovery of Real Property

SPONSOR(S): Judiciary Committee; Civil Justice & Claims Subcommittee; Leek

TIED BILLS: None **IDEN./SIM. BILLS:** CS/CS/SB 536

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee	13 Y, 0 N, As CS	Tuszynski	Bond
2) Judiciary Committee	20 Y, 0 N, As CS	Tuszynski	Poche

SUMMARY ANALYSIS

The Rules of Civil Procedure require a party to assert all counterclaims, cross-claims, and third-party claims within 20 days of the filing of the pleading triggering the claim. Should an applicable statute of limitations expire in those 20 days, a compulsory counterclaim, a cross-claim, or third-party claim that arises from the same conduct or occurrence will not be barred, although a permissive counterclaim will be barred.

CS/CS/HB 875 extends the statute of limitations for a construction defect to allow counterclaims, cross-claims, and third-party claims up to one year after the filing of a pleading to which such claims relate in actions based on the design, planning, or construction of an improvement to real property, even if such claim would otherwise be time barred.

The bill provides that once a governmental authority issues a certificate of completion or certificate of occupancy, actions to correct defects or deficiencies or warranty obligations do not extend the time to bring a claim by delaying the start of the running of the statutes of limitations or repose.

The bill does not appear to have any fiscal impact on state or local government.

The bill provides an effective date of July 1, 2018, and applies to causes of action that commence on or after that date. The bill allows any counter, cross, or third-party claim allowed in response to a pleading filed prior to July 1, 2018 to be commenced before July 1, 2019.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

BACKGROUND

Statutes of Limitations and Repose

A statute of limitations is an absolute bar to the filing of a lawsuit after a date set by law. A law creating a statute of limitations specifies when the time period begins, how long the limitations period runs, and circumstances by which the running of the statutes may be tolled. A statute of limitations usually begins to run when a cause of action accrues, which is generally when the harm occurs.

A statute of repose is similar to a statute of limitations. A statute of repose bars a suit after a fixed period of time after the defendant acts in some way, even if this period ends before the plaintiff has suffered any injury. Although phrased in similar language, a statute of repose is not a true statute of limitations because it begins to run from an established or fixed event, such as the delivery of a product or the completion of work, which is unrelated to accrual of the cause of action.¹

Unlike a statute of limitations, a statute of repose eliminates the underlying substantive right of action, not just the remedy available to the plaintiff, upon expiration of the period specified in the statute.² Courts construe a cause of action rescinded by a statute of repose as if the right to sue never existed. Statutes of repose are designed to encourage diligence in the prosecution of claims, eliminate the potential of abuse from a stale claim, and foster certainty and finality in liability.³

Current law provides that actions founded on the design, planning, or construction of an improvement to real property are subject to a four-year statute of limitations. The four-year time period of the statute of limitations begins to run from the latest date of:⁴

- Actual possession by the owner;
- Issuance of a certificate of occupancy;
- Abandonment of construction if not completed; or
- Completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer.

However, in actions involving a latent defect, the four-year statute of limitations does not begin to run until the defect is discovered or should have been discovered with the exercise of due diligence.⁵ Latent defects are generally considered to be hidden or concealed defects which are not discoverable by reasonable and customary inspection, and of which the owner has no knowledge.⁶

In addition to this four-year statute of limitations, there is a 10-year statute of repose for an action founded on the design, planning, or construction of an improvement to real property. Such actions must be commenced, regardless of the time the cause of action accrued, within 10 years after the date of the above listed events, whichever is latest.⁷ Thus, the statute of repose may bar an action even though the injured party is unaware of the existence of the cause of action.

¹ *Kush v. Lloyd*, 616 So.2d 415 (Fla. 1992).

² *Beach v. Great Western Bank*, 692 So.2d 146 (Fla. 1997)

³ *Lamb By and Through Donaldson v. Volkswagenwerk Aktiengesellschaft*, 631 F. Supp. 1144, 1148 (S.D. Fla. 1986), judgment aff'd, 835 F.2d 1369 (11th Cir. 1988).

⁴ S. 95.11(3)(c), F.S.

⁵ Id.

⁶ *Alexander v. Suncoast Builders, Inc.*, 837 So. 2d 1056, 1058 (Fla. 3d DCA 2003).

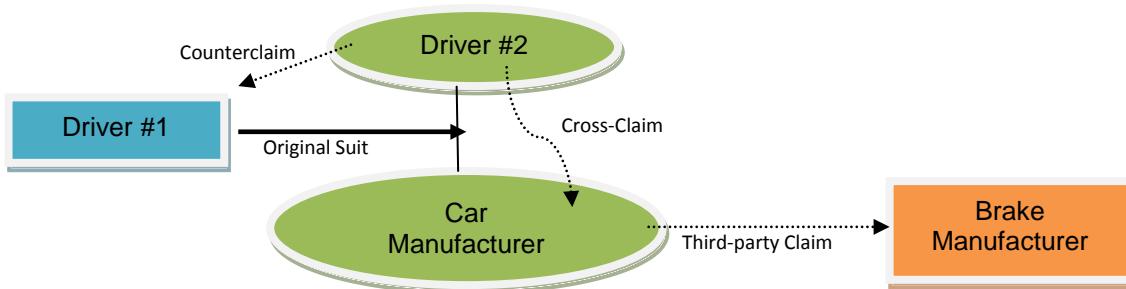
⁷ S. 95.11(3)(c), F.S.

Counterclaims, Cross-claims, and Third-party Claims

A counterclaim is a claim for relief asserted against an opposing party after an original claim has been made.⁸ A counterclaim may be either compulsory or permissive. A compulsory counterclaim is any claim that, at the time of serving the original pleading, the counter-pleader has against any original pleading party. Compulsory counterclaims must arise out of the transaction or occurrence that is the subject matter of the opposing party's claim and do not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.⁹ Generally, failure to assert a compulsory counterclaim in the original action waives the ability to assert it later in a separate action.¹⁰ In contrast, a permissive counterclaim is any claim against an opposing party not arising out of the originally plead transaction or occurrence and is often an entirely different lawsuit between the parties run concurrently for judicial efficiency.¹¹ A permissive counterclaim is not waived if a party fails to assert the claim in the original action.

A cross-claim is a claim for relief asserted against a co-party arising out of the transaction or occurrence that is the subject matter of either the original action or a counterclaim, or relating to any property that is the subject matter of the original action.¹² For example, the plaintiff in a personal injury case involving a car accident files suit against the other driver and the other driver's car manufacturer. The other driver also feels the car manufacturer is at fault for his or her injuries, so he or she file a suit against the car manufacturer as well, which is considered a cross-claim.

A third-party claim is a claim against a person not a party to the original action who may be liable to the defendant for all or part of the plaintiff's claim against the defendant, and may assert any other claim that arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim.¹³ For example, in the above personal injury suit, when the car manufacturer is served with the suit, it believes that the manufacturer of the brakes are at fault for the accident that injured the drivers. The car manufacturer then files a motion for a third-party claim against the brake manufacturer, even though the plaintiff did not include the brake manufacturer as a respondent in the original pleading. A plaintiff may also have a third-party claim based on a counterclaim against them.



Generally, all counterclaims, cross-claims, and third-party claims must be made within 20 days of the pleading triggering the claim.¹⁴ The statute of limitations does not bar the filing of a compulsory counterclaim,¹⁵ but it is well settled that a permissive counterclaim will be barred if it

⁸ Black's Law Dictionary (10th Ed. 2014), counterclaim.

⁹ Fla. R. Civ. Pro. 1.170(a).

¹⁰ Supra, FN 8.

¹¹ Fla. R. Civ. Pro. 1.170(b).

¹² Fla. R. Civ. Pro. 1.170(g).

¹³ Fla. R. Civ. Pro. 1.180(a).

¹⁴ Fla. R. Civ. Pro. 1.140 (a)(1); Fla. R. Civ. Pro. 1.180(a);

¹⁵ *Allie v. Ionata*, 503 So.2d 1237 (Fla.1987)

is filed beyond the statute of limitations.¹⁶ Cross-claims and third-party claims (in certain circumstances), are also not barred by the statute of limitations as they are said to 'relate back' to the original complaint due to the fact that they all arise from the same conduct, transaction or occurrence.¹⁷

Definition of "Completion of the Contract"

As noted above, one trigger for the start of the statute of limitations and statute of repose pursuant to current law is the completion of the contract. Current law defines "completion of the contract" as the later of the date of final performance of all the contracted services or the date that final payment for such services becomes due without regard to the date final payment is made.¹⁸ Current law may be unclear regarding what day is considered the final day of performance under the contract.

An issue arises regarding the definition of final performance, namely whether warranty work performed by the contractor has the effect of extending the time of final performance to the date that the warranty work is completed. The term warranty work refers to the common term in a construction contract that requires the contractor to warrant, or assure, that all work performed will be free from defects in materials or workmanship for some fixed period of time.

The Florida Building Commission requires that no building or structure be released for use or connected to a utility system until a certificate of completion has been issued and that no building can be occupied until a building official has issued a certificate of occupancy.¹⁹

Effect of Proposed Changes

CS/CS/HB 875 amends s. 95.11(3)(c), F.S., to extend the time to file counterclaims, cross-claims, or third-party claims up to one year beyond the current statutes of limitations or repose in an action based on the design, planning, or construction of an improvement to real property. The bill allows such claims to be filed up to one year after the filing of the triggering pleading in actions based on the design, planning, or construction of an improvement to real property, even if those claims would otherwise be time bared. These claims must arise out of the same conduct, transaction, or occurrence set out in the triggering pleading.

The bill provides that, once a governmental authority issues a certificate of completion or certificate of occupancy, any action by the contractor to correct defects or deficiencies or warranty obligations, does not extend the time for beginning the running of the statute of limitations or statute of repose.

The bill provides an effective date of July 1, 2018, and applies to causes of action that commence on or after that date. The bill allows any counter, cross, or third-party claim allowed in response to a pleading filed prior July 1, 2018 to be commenced before July 1, 2019.

¹⁶ *DuBreuil v. James*, 365 So.2d 184 (Fla. 3d DCA 1978)

¹⁷ Fla. R. Civ. Pro 1.190(c); See *Caduceus Properties, LLC v. Graney*, 137 So.3d 987, 992-93 (Fla. 2014).

¹⁸ Supra, FN 7.

¹⁹ S. 111, 2017 Fl. Building Code, 6th Edition, available at: <https://codes.iccsafe.org/public/document/FBC2017/chapter-1-scope-and-administration> (last accessed January 7, 2018).

B. SECTION DIRECTORY:

- Section 1:** Amends s. 95.11, F.S., relating to limitations other than for the recovery of real property.
- Section 2:** Makes provisions of the bill applicable to causes of action commenced on or after July 1, 2018, and allows any counter, cross, or third-party claim allowed in response to a pleading filed prior to that date until July 1, 2019.
- Section 3:** Provides an effective date of July 1, 2018.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 17, 2018, the Civil Justice & Claims Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Extended the time a counterclaim, cross-claim, or third-party claim may be commenced by one year.
- Required notice, in a particular form, be given to the owner informing him or her that the performance of warranty or corrective work does not extend the time to bring a claim founded on the design, planning, or construction of an improvement to real property.
- Changed the effective date and makes the bill apply to causes of action that accrue on or after July 1, 2019.

On February 7, 2018, the Judiciary Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Removed from the bill a notice requirement, in a specific form, notifying a property owner that warranty or corrective work does not extend the time to bring a claim.
- Removed reference to a punch list.
- Applied the bill to all cases commenced on or after July 1, 2018, and allows any counter, cross, or third-party claim allowed in response to a triggering pleading filed prior to that date to be commenced before July 1, 2019, or otherwise be barred.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.