# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1013 Residential Construction Warranties
**SPONSOR(S):** Civil Justice Subcommittee; Artiles
**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/CS/SB 1196

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---|---|---|---|
| 1) Civil Justice Subcommittee | 9 Y, 2 N, As CS | Cary | Bond |
| 2) Judiciary Committee | 16 Y, 2 N | Cary | Havlicak |

## SUMMARY ANALYSIS

There is a common law implied warranty of fitness and merchantability or habitability related to the purchase of improved real estate purchased from the builder. This common law implied warranty applies to buildings and other improvements which are affixed to the real property, as opposed to fixtures that can be removed from the real property without damage to the premises.

A recent District Court of Appeal (DCA) decision expanded the common law implied warranty of fitness and merchantability or habitability to off-site improvements, such as roads and drainage areas within a subdivision. This opinion is contrary to a previous Florida Supreme Court opinion. This bill provides that the implied warranty of fitness and merchantability or habitability does not include off-site improvements.

This bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2012, and applies to all cases accruing before, pending on, or filed after that date.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

**Present Situation**

In general, in an exchange between a buyer and a seller, the seller conveys to the buyer with either an express or an implied warranty of fitness and merchantability.[1] Florida has adopted the Uniform Commercial Code (UCC), which provides an implied warranty of merchantability for the sale of goods.[2] However, the UCC does not apply to the sale of real property, and furthermore, it does not apply to affixed buildings upon real property.[3]

Florida courts have created a common law implied warranty of fitness and merchantability for the purchase of real estate.[4] For the warranty to apply, there must be privity between the builder and the first purchaser.[5] This common law implied warranty applies to realty which is affixed to the real property, as opposed to fixtures that can be removed from the real property without damage to the premises.[6] For example, a window unit air conditioner is a fixture, while a central air system is realty.[7] In another case, a court decided that a seawall abutting a lot is not covered by the implied warranty.[8]

Florida courts have previously ruled that an implied warranty only applies to first purchasers of real estate in Florida and is extended only to the construction of a home or other improvements immediately supporting the residence.[9] That was understood to be the law until recently, when a conflicting decision in the 5th DCA held that roads and drainage ditches of a subdivision were within the scope of the common law implied warranty of fitness and merchantability.[10] This decision extended the doctrine beyond what the Supreme Court had previously allowed and directly conflicted with a prior DCA decision, which followed the Supreme Court's reasoning. The 5th DCA case noted, "[w]e also reject the Developer's argument that extending the implied warranties is a matter for the legislature. In the absence of a legislative pronouncement, we are free to apply common law, and this is a case of application of common law warranties."[11]

**Effects of Proposed Changes**

This bill creates s. 553.835, F.S., within the Florida Building Codes Act. This bill contains a Legislative finding that courts have reached different conclusions concerning the scope and extent of the common law doctrine of implied warranty of fitness and merchantability or habitability for improvements immediately supporting the structure of a new home. The bill proclaims the Legislature's intent to affirm the limits to the doctrine of implied warranty of fitness and merchantability or habitability associated with the construction of a new home.

The bill defines "off-site improvement" as the street, road, driveway, sidewalk, drainage, utilities, or any other improvement or structure that is not located on or under the lot on which a new home is constructed, except such improvements that are shared by and part of the overall structure of two or more separately owned homes that are attached, if such improvements affect the fitness and

---

[1] *See, e.g.*, s. 672.301, F.S., *et. seq, the Florida Uniform Commercial Code regarding general obligation and construction of contract.*
[2] Section 672.314, F.S.
[3] Section 672.105, F.S., defines "goods" as all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale. . ."
[4] *Gable v. Silver*, 258 So.2d 11 (Fla. 4th DCA 1972).
[5] *Strathmore Riverside Villas Condominium Ass'n, Inc. v. Paver Development Corp.*, 369 So.2d 971 (Fla. 2d DCA 1979).
[6] *Id.* at 14.
[7] *Id.*
[8] *Conklin v. Hurley*, 428 So.2d 654 (Fla. 1983).
[9] *Port Sewall Harbor & Tennis Club Owners Ass'n v. First Fed. S. & L. Ass'n.*, 463 So.2d 530, 531 (Fla. 4th DCA 1985).
[10] *Lakeview Reserve Homeowners et. al. v. Maronda Homes, Inc., et. al.*, 48 So.3d 902, 908 (Fla. 5th DCA 2010).
[11] *Id.* at 909. The Supreme Court has jurisdiction due to a certified conflict and heard oral arguments on December 6, 2011, to resolve the issue, however, a decision has not yet been released.

merchantability or habitability of one or more of the other adjoining structures. "Off-site improvement" also includes the street, road, driveway, sidewalk, drainage, utilities, or any other improvement or structure that is located on or under the lot but that does not immediately and directly support the habitability of the home itself.

The bill provides that there is no cause of action in law or equity for the purchaser of a home or to a homeowners' association based upon the doctrine of implied warranty of fitness and merchantability or habitability for off-site improvements, except as otherwise provided by statute, with specific reference to ss. 718.203 and 719.203, F.S., relating to condominiums and cooperatives.

The bill contains a severability clause.

The bill provides an effective date of July 1, 2012, and applies retroactively to all cases accruing before, pending on, or filed after the effective date.

B. SECTION DIRECTORY:

Section 1 creates s. 553.835, F.S., relating to implied warranties.

Section 2 provides a severability clause.

Section 3 provides an effective date of July 1, 2012.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The bill takes effect on July 1, 2012, and contains a provision applying the bill to all cases accruing before, pending on, or filed after that date. This provision gives the bill retroactive application.

To determine whether a statute should be retroactively applied, courts apply two interrelated inquiries. First, courts determine whether there is clear evidence of legislative intent to apply the statute retrospectively. If so, then courts determine whether retroactive application is constitutionally permissible.[12]

The bill clearly intends to apply retroactively, so only the second inquiry need be considered. A retrospective provision is not necessarily invalid. It is only invalid in those cases wherein vested rights are adversely affected or destroyed. Generally, due process considerations prevent the state from retroactively abolishing vested rights.[13] To be vested, a right must be more than a mere expectation based on an anticipation of the continuance of an existing law.[14] It must be an immediate, fixed right of present or future enjoyment.[15]

A statute does not operate retrospectively merely because it is applied in a case arising from conduct prior to the statute's enactment. Rather, the court looks to whether the new provision attaches new legal consequences to events completed before its enactment. Retroactive application of a civil statute is generally unconstitutional if the statute impairs vested rights, creates new obligations, or imposes new penalties.[16]

In one case, the Florida Supreme Court struck down a law that applied bad faith penalties against insurers retroactively because the penalty would have been over $200,000 higher if they had applied the statute retroactively.[17] In another case, the Supreme Court upheld a statute enacted soon after a controversy as to the interpretation of the original law, reasoning that the Legislature was not making a substantive change, but rather clarifying the original intent of the law.[18] A statute barring a suit against a governmental employee, intended to apply retroactively, was struck down under the due process clause in art. I, s. 9 of the Florida Constitution because the plaintiff's right to sue had become vested "since the suit was filed long before the statute was amended."[19] However, a retroactive statute was upheld because the class subject to the statute was on fair notice that a statutory provision for curing a violation was not a vested right, but rather a matter of legislative grace that could be withdrawn by subsequent legislative action.[20]

Once a cause of action has accrued, the right to pursue that cause of action is generally considered a vested right and a statute that becomes effective subsequently may not be applied to eliminate or

[12] *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So.2d 494, 499 (Fla. 1999).
[13] *Id.* at 503.
[14] *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So.2d 1210, 1218 (Fla. 2nd DCA 2004).
[15] *Florida Hosp. Waterman, Inc. v. Buster*, 948 So.2d 478, 490 (Fla. 2008).
[16] *R.A.M.* at 1216.
[17] *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55 (Fla. 1995).
[18] *Lowry v. Parole and Probation Com'n*, 473 So.2d 1248 (Fla. 1985).
[19] *Bryant v. School Bd. of Duval County, Fla.*, 399 So.2d 417 (Fla. 1st DCA 1981).
[20] *R.A.M.* at 1217.

curtail the cause of action. Likewise, it is impermissible for a statute to be applied to prevent the enforcement of a judgment obtained before the effective date of the statute.[21]

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 31, 2012, the Civil Justice Subcommittee adopted two amendments and reported the bill favorably as a committee substitute. The amendments remove a definition; provide that there is no cause of action available to a homeowners' association under the doctrine of implied warranty of fitness and merchantability or habitability; and provide that this bill does not alter statutory warranties applicable to condominium or cooperative associations.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

[21] *American Optical Corp. v. Spiewak*, 73 So.3d 120, 126 (Fla. 2011).