HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 575 Design Professionals
SPONSOR(S): Business & Professional Regulation Subcommittee; Civil Justice Subcommittee; Passidomo and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 286

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N, As CS	Arguelles	Bond
2) Business & Professional Regulation Subcommittee	11 Y, 2 N, As CS	Morton	Luczynski
3) Judiciary Committee			

SUMMARY ANALYSIS

Design professionals are engineers, surveyors and mappers, architects, interior designers, and landscape architects. Professionals, including design professionals, are personally subject to claims of professional malpractice.

Disputes concerning construction defects arising out of the work of a design professional are subject to a statutory presuit alternative dispute resolution process. The bill adds geologists to the class of design professionals, subjecting disputes concerning construction defects with a geologist to the alternative dispute resolution requirements.

The economic loss rule is a court-created legal concept that provides that contract law, not tort law, applies where one party to a contract suffers a purely economic loss occasioned by another party to the contract. While courts had previously applied the rule to limit liability for negligence claims arising from contracts for design professional services, the Florida Supreme Court ruled this month that the economic loss rule applies only to products liability cases.

The bill allows a business entity employing a design professional to enter into a contract limiting the liability of individual employees or agents of that business entity for negligence occurring under the contract.

The bill is not anticipated to have a fiscal impact on state funds.

The bill provides an effective date of July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Construction Defects Alternative Dispute Resolution

In 2003, the Legislature adopted chapter 558, F.S., to provide an alternative dispute resolution process for construction defects in real property. Before a lawsuit may be initiated against a contractor, subcontractor, supplier or design professional for an alleged construction defect, the claimant must serve written notice of the claim to the defendant and provide an opportunity to resolve that claim, including repair of the defect. The chapter applies to both commercial and residential properties.

Design professionals include licensed architects, interior designers, landscape architects, engineers, and surveyors.

Geologists

Section 492.102, F.S., defines the practice of professional geology as "geological services, including, but not limited to, consultation, investigation, evaluation, planning, and geologic mapping, but not including mapping as prescribed in chapter 472 [relating to land surveying and mapping], relating to geological work, except as specifically exempted. …"

Professional geologists are licensed and regulated by the Board of Professional Geologists within the Department of Business and Professional Regulation.

Negligence Law and Malpractice

A tort is a common law civil wrong where a person's behavior unfairly causes harm to another. Negligence law, a type of tort, provides that a person injured by the wrongful conduct of another is entitled to a judgment against the wrongdoer for the damages caused.

A professional is personally liable for his or her negligent acts. This personal liability, known as malpractice, is set forth generally in the law on professional associations,[1] and is specifically created by statute as to the following professionals:

- Engineers, at s. 471.023(3), F.S.
- Surveyors and mappers, at s. 472.021(3), F.S.
- Architects and interior designers, at s. 481.219(11), F.S.
- Landscape architects, at s. 481.319(6), F.S.
- Geologists, at s. 492.111(4), F.S.

Each of these provisions provides that the fact that the design professional practices through a business organization does not relieve him or her from personal liability for negligence misconduct or wrongful acts.

Contract law versus tort law

Traditionally, contract law and tort law (including negligence and malpractice) are separate in their application: contract law enforces expectancy interests created by an agreement between parties; tort law compensates people for personal injury or property damage caused by tortious conduct, without regard to contract.

[1] Section 621.07, F.S.

Tort law protects the interests of society as a whole by imposing a duty of reasonable care to prevent property damage or physical injury, while contract law protects the economic expectations of the contracting parties.[2] Parties entering a contract allocate their risk in the contract, keeping the risk contained to the contracting parties. This can be contrasted with tort law, under which risk is borne by the party in the best position to prevent injury, and the costs are borne by the public through increased costs for services and insurance.[3]

Practically, the division between the two areas of law matters in the results attainable. Contract law limits recovery to expectation damages – damages reasonably expected to flow from the contractual breach. On the other hand, tort law allows all damages proximately resulting from tortious conduct.

Economic Loss Rule

To more definitively draw the distinction in cases where both contract and tort claims could arguably exist, courts have developed the economic loss rule. When the rule applies, if the dispute arises from a contract between the parties and the only damages suffered are economic losses, lawsuits based on tort law are prohibited.

The economic loss rule tends to favor defendants because tort law damages are usually greater than contract law damages,[4] and because the parties can agree to limits on damages.

The economic loss rule has long been recognized in Florida law.[5] It is firmly established in products liability cases, where it is based on the notion that tort law imposes a duty on manufacturers to take reasonable care so that their products will not harm persons or property, but imposes no duty for manufacturers to ensure their products will meet the economic expectations of purchasers.[6]

The rule's applicability to service contracts has been less clear. Florida courts have applied it in cases of contractual privity, determining that "when the parties are in privity, contract principles are generally more appropriate for determining remedies for consequential damages that the parties have, or could have, addressed through their contractual agreement."[7]

The courts have reasoned that "no cause of action in tort can arise from a breach of a duty existing by virtue of contract,"[8] and explained, "The prohibition against tort actions to recover solely economic damages for those in contractual privity is designed to prevent parties to a contract from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort."[9]

Specifically, as to service contracts, courts have been inconsistent in applying the economic loss rule:

- In 1987, the Florida Supreme Court applied the economic loss rule to bar a tort action against a telephone company who printed an incorrect phone number in a directory advertisement.[10]

---

[2] *Casa Clara Condominium Assoc. v. Charley Toppino and Sons*, 620 So.2d 1244, 1247 (Fla. 1993).
[3] See *Id.* at 1247 ("When only economic harm is involved, the question becomes whether the consuming public as a whole should bear the cost of economic losses sustained by those who failed to bargain for adequate contract remedies").
[4] *Id.* at 1244 ("Plaintiffs find a tort remedy attractive because it often permits the recovery of greater damages than an action on a contract and may avoid the conditions of a contract.").
[5] *See, e.g., Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899, 902 (Fla. 1987)(economic loss rule barred negligence claim for defective nuclear steam generators); *Casa Clara, 620* So.2d 1244 (economic loss rule barred negligence claim for defective concrete); *Airport Rent-A-Car. v. Prevost Car,* 660 So.2d 628 (Fla. 1995)(economic loss rule barred negligence claim for defective buses).
[6] *See Monsanto Agricultural Products v. Edenfield*, 426 So.2d 574 (Fla. 1st DCA 1982).
[7] *Tiara Condominium Assoc., Inc. v. Marsh & McLennan Co., Inc.,* 2013 WL 828003, No. SC10-1022 (Fla. 2013), *available at* http://www.floridasupremecourt.org/decisions/opinions.shtml.
[8] *Weimar v. Yacht Club Point Estates, Inc.,* 223 So. 2d 100, 103 (Fla. 4th DCA 1969).
[9] *Indemnity Insurance Co. of North America v. American Aviation Inc.,* 891 So. 2d 532, 536 (Fla. 2004).
[10] *See AFM Corp. v. Southern Bell Telephone & Telegraph Co.,* 515 So.2d 180 (Fla. 1987). In *AFM*, the Supreme Court extended the economic loss rule to preclude a negligence claim arising from breach of a service contract in a nonprofessional services context. The Supreme Court in *Moransais v. Heathman*, 744 So.2d 973, and in *Comptech International v. Milam Commerce Park,* 753 So.2d 1219, declined to directly overrule *AFM*.

- In 1992, the Second District applied the economic loss rule to bar a tort action against an architect who was alleged to have negligently designed a condominium building.[11]
- In 1999, however, the Florida Supreme Court expressly provided that the economic loss rule would not bar a negligence action against an engineer who was alleged to have negligently inspected a home.[12]

On March 7, 2013, the Florida Supreme Court receded from the previous cases applying the economic loss rule to service contracts and held: "the economic loss rule applies only in the products liability context."[13] In a concurring opinion, Justice Pariente explained that limiting the economic loss rule to products liability cases does not provide an expansion for viable tort claims. "Basic common law principles already restrict the remedies available to parties who have specifically negotiated for those remedies, and … our clarification of the economic loss rule's applicability does nothing to alter these common law concepts." She went on to explain:

> While the contractual privity form of the economic loss rule has provided a simple way to dismiss tort claims interconnected with breach of contract claims, it is neither a necessary nor a principled mechanism for doing so. Rather, these claims should be considered and dismissed as appropriate based on basic contractual principles—a proposition we reaffirmed in *American Aviation*, where we stated that "when the parties have negotiated remedies for nonperformance pursuant to a contract, one party may not seek to obtain a better bargain than it made by turning a breach of contract into a tort for economic loss." *Am. Aviation*, 891 So. 2d at 542. The majority's decision does not change this statement of law, but merely explains that it is common law principles of contract, rather than the economic loss rule, that produce this result.[14]

Contractual waivers of liability

"Although viewed with disfavor under Florida law, exculpatory clauses limiting liability for negligence are valid and enforceable when clear and unequivocal. 'For such a clause to be effective, ... it must clearly state that it releases the party from liability for his own negligence.'"[15] However, if such clauses contravene public policy, they may be unenforceable.[16]

Proposed Changes

The bill adds licensed geologists to the definition of design professionals, subjecting disputes concerning construction defects with a geologist to the alternative dispute resolution requirements of chapter 558.

The bill provides an avenue for design professionals, including licensed architects, interior designers, landscape architects, engineers, surveyors and geologists, to limit their personal liability for negligence. Specifically, the bill provides that design professionals employed by a business entity, which is defined to include a self-employed professional, are not individually liable for damages resulting from negligence within the course and scope of the contract if certain contractual and disclosure requirements are met.

For the liability limitation to apply, the following conditions must be met:

- The business entity must execute a contract with a claimant or with another entity for professional services on behalf of the claimant.[17]

[11] *Sandarac Association, Inc. v. W.R. Frizzell Architects, Inc.*, 609 So.2d 1349 (Fla. 2d DCA 1992).
[12] *Moransais v. Heathman*, 744 So.2d 973 (Fla. 1999). *See also*, Lesser, *Chipping Away at the Economic Loss Rule*, The Florida Bar Journal, October 1999, at pages 22-37.
[13] *Tiara Condominium,* 2013 WL 828003.
[14] *Id.*
[15] *Rosenberg v. Cape Coral Plumbing, Inc.,* 920 So. 2d 61 (Fla. 2nd DCA, 2005)(citing *Borden v. Philips,* 752 So. 2d 69, 73 (Fla. 1st DCA 2000) and quoting *Goyings v. Jack & Ruth Eckerd Found*., 403 So.2d 1144, 1146 (Fla. 2d DCA 1981).
[16] *Applegate v. Cable Water Ski, L.C.*, 974 So.2d 1112, 1114 (Fla. 5th DCA 2008).
[17] This condition would apply to contracts between the business entity and a person other than the property owner.

- The contract includes a prominent statement that the individual employee or agent may not be held liable.
- The individual employee or agent is not a party to the contract.
- The business entity maintains any professional liability insurance required by the contract.
- The conduct by the design professional giving rise to the damages occurs within the course and scope of the contract.
- The harm is solely economic and the harm does not extend to personal injuries or property beyond the contract.

If the liability limitation applied, the claimant would be limited to a lawsuit based on contract claims.

The bill defines 'business entity' as "any corporation, limited liability company, partnership, limited partnership, proprietorship, firm, enterprise, franchise, association, self-employed individual, or trust, whether fictitiously named or not, doing business in this state."

The bill also amends the current liability provisions in ss. 471.023(3) (applicable to engineers), 472.021(3) (applicable to surveyors and mappers), 481.219(11) (applicable to architects and interior designers), 481.319(6) (applicable to landscape architects), and 492.111(4) (applicable to geologists) to specifically reference the limitation of liability provision created by the bill.

The bill provides an effective date of July 1, 2013.

B. SECTION DIRECTORY:

Section 1 amends s. 558.002, F.S., to add geologists to the definition of design professionals.

Section 2 creates s. 558.0035, F.S., providing for the contractual limitation of liability of individual design professionals.

Section 3 amends s. 471.023, F.S., incorporating the contractual limitation into a malpractice provision for engineers.

Section 4 amends s. 472.021, F.S., incorporating the contractual limitation into a malpractice provision for surveyors and mappers.

Section 5 amends s. 481.219, F.S., incorporating the contractual limitation into a malpractice provision for architects and interior designers.

Section 6 amends s. 481.319, F.S., incorporating the contractual limitation into a malpractice provision for landscape architects.

Section 7 amends s. 492.111, F.S., incorporating the contractual limitation into a malpractice provision for geologists.

Section 8 provides an effective date of July 1, 2013.

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:

Property owners will have to comply with the notice provisions of chapter 558, F.S., before bringing a legal action for construction defects arising out of the work of a geologist.

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:

Article I, s. 21 of the Florida Constitution provides the constitutional right of access to courts. It reads: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

In *Kluger v. White*,[18] the Florida Supreme Court also held that the Legislature cannot abolish a common law cause of action "unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown." In *Johnson v. R. H. Donnelly Company*,[19] the Florida Supreme Court held that the constitutional right of "access to courts guarantees the continuation of common law causes of action [in effect in 1968] and those causes of action may be altered only if there is a reasonable substitution which protects the persons protected by the common law remedy."

While the Florida Supreme Court has ruled that the economic loss rule only applies to products liability cases, negligence claims arising from contracts may be barred by common law principles of contract law.[20]

By limiting negligence claims against licensed engineers, surveyors and mappers, architects, geologists and landscape architects, the bill may implicate concerns relating to the constitutional right of access to courts to the extent that the bill limits causes of actions for professional negligence and professional malpractice. However, the bill does not bar such claims in all instances. It permits the parties to waive, by contract, professional liability of the business entity's employees and agents. While such exculpatory clauses are disfavored, they are enforceable when they are clearly disclosed and they do not contravene public policy.

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.

[18] *Kluger v. White*, 281 So.2d 1 (Fla. 1973).
[19] *Johnson v. R. H. Donnelly Company*, 402 So.2d 518 (Fla. 1981).
[20] *Tiara Condominium Assn.,* 2013 WL 828003 (Pariente, concurring).

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 6, 2013, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment moves the definition of “business entity” from s. 558.002, F.S. to s. 558.035, F.S., to make the definition specific to the section. This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

On March 27, 2013, the Business & Professional Regulation Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment added geologists to the definition of ‘design professional,’ subjecting geologists to both the provisions of the bill and to chapter 558, relating to construction defects, and made other technical and conforming changes. This analysis is drafted to the committee substitute as passed by the Business & Professional Regulation Subcommittee.