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	17 Y, 1 N	Arguelles	Havlicak

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. Where it applies, it sets a line between contract law and tort law. Florida courts have inconsistently applied the economic loss rule in the past as it applies to contracts for services. Recently, the Florida Supreme Court ruled that the economic loss rule only applies to products liability cases and not to contracts for services. Therefore, under current case law, the economic loss rule does not bar an action against an individual professional for professional malpractice, including an action for professional malpractice against a design professional, even where the parties have agreed to such limitation by contract.

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 or local government.

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

Negligence law 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 design 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.

Economic Loss Rule

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.

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.

[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] The courts have described the basic economic theory supporting adoption of an economic loss rule:

> In tort, a manufacturer or producer of goods "is liable whether or not it is negligent because 'public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.' " *East River*, 476 U.S. at 866, 106 S.Ct. at 2300 (quoting *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436, 441 (1944) (Traynor, J., concurring). Thus, the "basic function of tort law is to shift the burden of loss from the injured plaintiff to one who is at fault ... or to one who is better able to bear the loss and prevent its occurrence." *Barrett*, supra at 935. The purpose of a duty in tort is to protect society's interest in being free from harm, *Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985), and the cost of protecting society from harm is borne by society in general. Contractual duties, on the other hand, come from society's interest in the performance of promises. *Id*. 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." *Barrett*, supra at 933.[4]

The economic loss rule was developed by courts to more accurately draw the distinction between contract and tort law. This common law rule provides that, where there is a contract between parties and a person harmed by wrongful conduct suffers only economic damages (that is, there is no personal injury involved), the lawsuit must proceed under contract law. Where the economic loss rule applies, the person harmed cannot sue in tort law. The economic loss rule tends to favor defendants because tort law damages are usually greater than contract law damages,[5] and because the parties can agree to limits on damages.

The economic loss rule has long been recognized in Florida law.[6] 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.[7]

The rule's applicability to service contracts has been less clear, as Florida courts have disagreed on its applicability. In 1987, the Florida Supreme Court upheld the economic loss rule in a contract case involving a nonprofessional.[8] In 1992, the Second District ruled that the economic loss rule barred a tort action against an architect who was alleged to have negligently designed a condominium building.[9] In

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[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] *Casa Clara*, 620 So.2d at 1246-47.
[5] *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.").
[6] *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).
[7] *See Monsanto Agricultural Products v. Edenfield*, 426 So.2d 574 (Fla. 1st DCA 1982).
[8] *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*, 744 So.2d 973, and in *Comptech International v. Milam Commerce Park,* 753 So.2d 1219, declined to directly overrule *AFM*.
[9] *Sandarac Association, Inc. v. W.R. Frizzell Architects, Inc.*, 609 So.2d 1349 (Fla. 2d DCA 1992).

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.[10]

On March 7, 2013, the Florida Supreme Court completely abrogated the economic loss rule in contracts for services, limiting its application to product liability cases only.[11] Thus, it appears that the economic loss rule would not protect a design professional from tort damages related to negligent design, even if there is a contract detailing and limiting damages related to the design services.

Effect of Bill

The bill creates s. 558.0035, F.S., to provide that a business entity may limit by contract the liability of individual employees or agents of that business for negligence arising from the performance of professional services under a contract. The bill amends s. 558.002(3), F.S., to define the term "business entity" to mean "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."

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.
- 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 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 persons or property beyond the contract.

The bill provides if a claimant has entered into a contract with a business entity and the contract meets the conditions set forth in the bill, a claimant may be barred from potential tort claims for recovery of economic damages resulting from a construction defect[12] that may be filed by a claimant against a professional employed by the business entity or acting as its agent. The contract would protect the employees and agents of business entities from tort negligence claims for damages resulting from the performance of the professional services that are the subject of the contract.

The effect of the bill's tort liability limitation applies the economic loss rule to bar claims by claimants against the business entity's employees and agents who provided the professional design services under contract. Therefore, a claimant could not bring a negligence claim against a professional who is a business entity's employee or agent for a harm that is based purely on economic loss. The claimant would be limited to a lawsuit based on contract claims against the business entity.

The bill 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 professional geopolgists) to specifically reference the limitation of liability provision created by the bill.

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 ch. 558, F.S.

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[10] *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.

[11] *Tiara Condominium Assn., Inc. v. Marsh & McLennan Companies, Inc.*, Florida Supreme Court slip opinion of March 7, 2013, accessible at: http://www.floridasupremecourt.org/decisions/opinions.shtml

[12] A "construction defect" is defined in s. 558.02(5), F.S.

B. SECTION DIRECTORY:

Section 1 amends s. 558.002, F.S., regarding definitions.

Section 2 creates s. 558.0035, F.S., regarding limitation of liability.

Section 3 amends s. 471.023, F.S., regarding business entities of engineers.

Section 4 amends s.472.021, F.S., regarding business entities of surveyors and mappers.

Section 5 amends s. 481.219, F.S., regarding business entities of architects and interior designers.

Section 6 amends s. 481.319, F.S., regarding business entities of landscape architects.

Section 7 amends s. 492.111, F.S., regarding practice of professional geology by a firm.

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." The application of this constitutional provision to the bill is unclear as the courts have inconsistently applied access to courts and the economic loss rule.

In *Kluger v. White*,[13] the Florida Supreme Court 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*,[14] 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."

Since 1968, the law on the economic loss rule has been in flux. In 1987 in the case of *Florida Power & Light Co.v. Westinghouse Electric Corp.*[15], the Florida Supreme Court found that the "economic loss rule has a long, historic basis," apparently before 1968. In 1999 in the case of *Moransais v. Heathman*[16] the Florida Supreme Court held that Florida's common law and statutory scheme recognizes tort claims against professionals for negligence based on the professional's violation of a duty of care to injured persons. In 2010 in the case of *Witt v. La Gorce Country Club, Inc.*,[17] the Third District Court of Appeal held that a limitation of liability clause in the contract for the benefit of a third party professional geologist was invalid and unenforceable as to a licensed professional. Consequently, the court refused to apply the economic loss rule to bar a negligence claim against the professional under the principle that claims of professional liability operate outside of the contract and cannot be waived. On March 7, 2013, in the case of *Tiara Condominium Assn., Inc. v. Marsh & McLennan Companies, Inc.*,[18] the Supreme Court abrogated the common law economic loss rule in service contract cases.

By allowing the parties to limit such claims against licensed engineers, surveyors and mappers, architects, landscape architects, and professional geologists, it could be argued that the bill implicates 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 that existed in 1968. On other hand, it could be argued that the economic loss rule applied to such claims when the access to courts provision was enacted in 1968, and that this bill does not limit a cause of action but instead restores the law to where it was prior to 1968.

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 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.

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[13] *Kluger v. White*, 281 So.2d 1 (Fla. 1973).
[14] *Johnson v. R. H. Donnelly Company*, 402 So.2d 518 (Fla. 1981).
[15] *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899, 902 (Fla. 1987).
[16] *Moransais v. Heathman*, 744 So.2d 973, 975, 976 (Fla. 1999).
[17] *Witt v. La Gorce Country Club, Inc.*, 35 So.3d 1033 (Fla. 3d DCA 2010).
[18] *Tiara Condominium Assn., Inc. v. Marsh & McLennan Companies, Inc.*, Florida Supreme Court slip opinion of March 7, 2013, at http://www.floridasupremecourt.org/decisions/opinions.shtml.

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.