HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS

BILL #:	CS/CS/HB 575	**FINAL HOUSE FLOOR ACTION:**	
SPONSOR(S):	Business & Professional Regulation Subcommittee; Civil Justice Subcommittee; Passidomo and others	103 **Y's**	13 **N's**
COMPANION BILLS:	(CS/SB 286)	**GOVERNOR'S ACTION:**	Approved

SUMMARY ANALYSIS

CS/CS/HB 575 passed the House on April 17, 2013 as CS/SB 286. The bill provides liability protection for individuals practicing as a design professional.

Design professionals are engineers, surveyors and mappers, architects, interior designers, and landscape architects. This bill amends laws regarding lawsuits against design professionals.

Current law provides that disputes concerning construction defects arising out of the work of design professionals, other than geologists, are subject to a statutory presuit alternative dispute resolution process. The bill adds geologists to the list of design professionals subject to the statutory presuit alternative dispute resolution process.

Most professionals, including design professionals, are personally subject to claims of professional malpractice. At one time, design professionals were able to use a legal concept known as the economic loss rule to avoid personal liability if the party buying the design services agreed by contract to limit liability; but a recent court ruling provided otherwise. This bill reinstates the economic loss rule for design professionals, providing that a business entity purchasing design services may, by contract, agree that only the design professional company, and not its individual employees, is liable for negligence under the contract. The bill provides requirements for such contracts, and provides that the limitation does not apply to negligence resulting in injury to a person or to property that was not in the contract.

The bill is not anticipated to have a fiscal impact on state or local governments.

The bill was approved by the Governor on April 24, 2013, ch. 2013-28, L.O.F., and will become effective July 1, 2013.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

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.

This statute is applicable to the following design professionals: 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.

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[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. 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.[3]

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,[4] and because the parties to a contract 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, 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.[7] 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.[8] In

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[2] *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc.*, 620 So.2d 1244, 1247 (Fla. 1993).
[3] *Id.* at 1246-47.
[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 Elec. 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, Inc. v. Prevost Car, Inc.,* 660 So.2d 628 (Fla. 1995)(economic loss rule barred negligence claim for defective buses).
[6] *See Monsanto Agr. Products Co. v. Edenfield*, 426 So.2d 574 (Fla. 1st DCA 1982).
[7] See *AFM Corp. v. Southern Bell Tel. & Tel. 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 (Fla. 1999), and in *Comptech Intern., Inc. v. Milam Commerce Park, Ltd.*, 753 So.2d 1219 (Fla. 1999), declined to directly overrule *AFM*.
[8] *Sandarac Ass'n, 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.[9]

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.[10] 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 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.

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 defines 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 must include 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 that 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[11] 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),

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[9] *Moransais*. See also, Lesser, *Chipping Away at the Economic Loss Rule*, The Florida Bar Journal, October 1999, at pages 22-37.
[10] *Tiara Condominium Ass'n., Inc. v. Marsh & McLennan Companies, Inc.*, 2013 WL 828003 (Fla. 2013).
[11] A "construction defect" is defined in s. 558.002(5), F.S.

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.

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. The impact is anticipated to be minimal.

D. FISCAL COMMENTS:

None.