

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 297 Limitations on Actions Other than for the Recovery of Real Property

**SPONSOR(S):** Civil Justice Subcommittee; Perry and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 316

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	8 Y, 4 N, As CS	King	Bond
2) Government Operations Appropriations Subcommittee	11 Y, 0 N	White	Topp
3) Regulatory Affairs Committee			

### SUMMARY ANALYSIS

Both a statute of limitations and a statute of repose limit the time period with which a person may file a lawsuit. A statute of limitations usually begins when the cause of action accrues and bars the lawsuit after a set period of time. A statute of repose extinguishes the right of action altogether and begins at the occurrence of a specified event.

Under current law, a cause of action founded on the design or construction of a building is subject to a four-year statute of limitations and a 10-year statute of repose. The statute of limitations and the statute of repose start at the latest date of the following: the date of actual possession; the date a certificate of occupancy is issued; the date construction, if not completed, is abandoned; or the date the contract is completed or terminated. The difference between the two is in treatment of a latent defect. The statute of limitations for a latent defect begins when the defect was or should have been discovered, but the statute of limitations may not extend beyond the statute of repose. The statute of repose thus limits the cause of action even if the injured party has no knowledge of the latent defect.

A recent court decision found that a construction contract is complete upon final payment. For the purposes of both the statute of limitations and the statute of repose, this bill provides that a construction contract is considered complete on the last day that the contractor, architect, or engineer performs services related to the contract.

This bill also provides that any action that would otherwise be barred by this change in the definition of the completion of the contract may be commenced within one year after the effective date of the bill.

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

This bill has an effective date of July 1, 2016.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Current Situation

A statute of limitations is an absolute bar to the filing of a lawsuit after a date set by law. Laws creating statutes of limitation specify when the time period begins, how long the limitations period runs, and circumstances by which the running of the statutes may be tolled (suspended). A statute of limitations usually begins to run when a cause of action accrues (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 not from accrual of the cause of action, but 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.<sup>1</sup> Moreover, unlike a statute of limitations, a statute of repose abolishes or completely eliminates the underlying substantive right of action, not just the remedy available to the plaintiff, upon expiration of the period specified in the statute of repose.<sup>2</sup> 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.<sup>3</sup>

Section 95.11(3)(c), F.S., currently 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 the following events:

- 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, when an action involves a latent defect,<sup>4</sup> 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.

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. Thus, the statute of repose may bar an action even though the injured party is unaware of the existence of the cause of action.

#### Recent Case Law

In 2013, the Fifth District Court of Appeal was presented with the issue of what constituted "the date of 'completion . . . of the contract' "<sup>5</sup> for the purpose of determining the beginning of the statute of repose

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

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

<sup>3</sup> *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)

<sup>4</sup> 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. *Alexander v. Suncoast Builders, Inc.*, 837 So. 2d 1056, 1058 (Fla. 3d DCA 2003).

<sup>5</sup> *Cypress Fairway Condominium v. Bergeron Const. Co. Inc.*, 164 So. 3d 706, 707 (Fla. 5th DCA 2015).

pursuant to s. 95.11(3)(c), F.S. The court held that the contract is complete for purposes of s. 95.11(3)(c), F.S., on the date final payment is made.<sup>6</sup> It reasoned that

[c]ompletion of the contract means completion of performance by both sides of the contract, not merely performance by the contractor. Had the legislature intended the statute to run from the time the contractor completed performance, it could have simply so stated. It is not our function to alter plain and unambiguous language under the guise of interpreting a statute.<sup>7</sup>

The court's definition of completion of the contract subjects the triggering of the statute of limitations period to particular actions of the injured party. This differs from the normal operation of a statute of repose which is usually based on the actions of the injuring party.

### **Effect of Proposed Changes**

This bill amends s. 95.11(3)(c), F.S., to define the date of the completion of the contract. It provides that the completion of the contract for purposes of the statute of repose and statute of limitations for design, planning, or construction defects is the last day during which the professional engineer, registered architect, or licensed contractor furnishes labor, services, or materials, excluding those furnished to correct a deficiency in previously performed work or materials supplied.

The amendment to s. 95.11(3)(c), F.S., applies to any action commenced on or after July 1, 2016, regardless of when the cause of action accrued. Therefore, a party whose cause of action accrued prior to the changes in this bill, but who commences the action after July 1, 2016, could be barred from bringing the action by the shortening of the statute of repose resulting from the change in the definition in the completion of the contract. The bill provides that in such circumstances, if the action would not have been barred under the court's definition of the completion of the contract, the action may be commenced before July 1, 2017. If the action is not commenced by July 1, 2017 and is barred by the new definition of the completion of the contract, then the action will be forever barred.

#### **B. SECTION DIRECTORY:**

Section 1 amends s. 95.11, F.S., relating to limitations on actions other than for the recovery of real property.

Section 2 provides for applicability.

Section 3 reenacts 327.441(2), F.S., relating to commercial general liability policies; coverage to contractors for completed operations.

Section 4 provides an effective date of July 1, 2016.

## **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:**

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<sup>6</sup> *Id.* at 708.

<sup>7</sup> *Id.*

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:

This 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, not reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Although the right to commence an action is a valid and protected property interest,<sup>8</sup> a plaintiff has no vested right in a statute of repose in effect when his or her cause of action accrues.<sup>9</sup> Thus, the time allowed for a suit may be either initially imposed or reduced by legislation enacted after the cause of action arose, provided the litigant still has a reasonable time left in which to enforce his or her right.<sup>10</sup> The amendment to s. 95.11(3)(c), F.S., made in this bill may reduce the time allowed for a suit after the cause of action arose, but the bill appears to give a litigant reasonable time to enforce his or her right before being completely barred.

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 December 2, 2015, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment provided that any action that would otherwise be barred by changing the definition of the completion of the contract may be commenced within one year after the effective date of the act. This analysis is drafted to the committee substitute as reported favorably by the Civil Justice Subcommittee.

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<sup>8</sup> See *Polk Cty. BOCC v. Special Disability Trust Fund*, 791 So. 2d 581, 583 (Fla. 1st DCA 2001).

<sup>9</sup> *Lamb By and Through Donaldson v. Volkswagenwerk Aktiengesellschaft*, 631 F. Supp. 1144 (S.D. Fla. 1986), judgment aff'd, 835 F.2d 1369 (11th Cir. 1988).

<sup>10</sup> *Bauld v. J.A. Jones Const. Co.*, 357 So. 2d 401, 403 (Fla. 1978), quoting *Hart v. Bostick*, 14 Fla. 162, 181 (1872); *Walter Denson & Son v. Nelson*, 88 So. 2d 120 (Fla. 1956).