

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Rules

BILL: CS/CS/SB 536

INTRODUCER: Community Affairs Committee; Judiciary Committee; and Senator Passidomo

SUBJECT: Limitations of Actions Other Than for the Recovery of Real Property

DATE: February 28, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Stallard</u>	<u>Cibula</u>	<u>JU</u>	Fav/CS
2.	<u>Present</u>	<u>Yeatman</u>	<u>CA</u>	Fav/CS
3.	<u>Stallard</u>	<u>Phelps</u>	<u>RC</u>	Favorable

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 536 addresses two issues regarding the timeframes for bringing a lawsuit based on a defect in the design, planning, or construction of a building or other improvement to real property. First, the bill specifies that a person who is served with a pleading may file a related counterclaim, cross-claim, or third-party claim within 1 year, regardless of whether the filing of the claim would otherwise be time barred.

Second, the bill causes the timeframes for filing a construction-defect lawsuit¹ to begin and end sooner, in some circumstances, than under current law. Both under the bill and current law, the timeframes in which a property owner may file a construction-defect lawsuit begin to run at the latest of four events set forth in statute. One of these events is the completion of the construction contract.

Recent case law suggests that such a contract is not complete, and thus the timeframes for bringing a lawsuit cannot begin to run, until all punch-list or other follow-up work is complete. The bill substantially counters this case law by effectively providing that a construction contract performed pursuant to a building permit is complete when a final certificate of occupancy or certificate of completion is issued. After that point, the correction or repair of completed work

¹ The term “construction-defect lawsuit” will often be used in this Analysis in lieu of the very long, if more precise, statutory description of the type of lawsuit at issue: a “lawsuit based on a defect in the design, planning, or construction of an improvement to real property.”

that is within the scope of the building permit and final certificate does not delay the running of the timeframes in which a construction-defect action may be filed.

II. Present Situation:

Overview

A lawsuit based on a defect resulting from the design, planning, or construction of a building or other improvement to real property must be filed within statutory timeframes, which vary depending on whether the defect is a latent defect or a nonlatent defect. If a lawsuit involves a nonlatent defect, the lawsuit must be filed within 4 years after the latest of four events set forth in statute, such as the issuance of a certificate of occupancy or the “completion . . . of the contract” with the builder. If a lawsuit involves a latent defect, the lawsuit must be filed within 4 years after the defect is discovered or should have been discovered through due diligence. Regardless of when a defect was discovered or should have been discovered, a lawsuit based on the defect must be filed within 10 years after the latest of the events listed in statute, including completion of the construction contract. However, current law does not specify what exactly constitutes completion of a construction contract.

Timeframes for Filing a Lawsuit Based on a Defect in an Improvement to Real Property

A construction-defect lawsuit must be filed within the timeframes set forth in s. 95.11(3)(c), F.S. If the suit involves a nonlatent defect, it must be filed within 4 years after the latest of:

- The date of actual possession by the owner;
- The date of the issuance of a certificate of occupancy;
- The date of abandonment of construction if not completed; or
- The date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer.

If a lawsuit instead involves a latent defect, the 4-year timeframe does not begin to run until the date on which the defect is discovered or the date on which the defect should have been discovered by the exercise of due diligence.

However, regardless of when a defect was discovered or should have been discovered, a lawsuit based on the defect must be filed within 10 years after the latest of:

- The date of actual possession by the owner;
- The date of the issuance of a certificate of occupancy;
- The date of abandonment of construction if not completed; or
- The date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer.

What constitutes the completion of a construction contract has been the subject of litigation and legislation in recent years. In 2015, the Fifth District Court of Appeal held that the contract at issue in the case before it was not completed until the final payment was made under the contract. The court explained:

Completion 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.²

Thus, a buyer's delay in making a payment under the contract could prolong a builder's liability for construction defects.

In response to the DCA opinion, the Legislature amended s. 95.11(3)(c), F.S., to state:

Completion of the contract means the later of the date of final performance of all the contracted services or the date that final payment for such services becomes due without regard to the date final payment was made.³

But in 2017, the Fifth DCA decided another case involving the issue of what "completion . . . of the contract" means in s. 95.11(3)(c), F.S.⁴ In that case, the builder argued that the homeowner's complaint was filed more than 10 years after closing on the construction contract at issue, and thus was time-barred. However, the DCA noted that the contract expressly contemplated that work under the contract could occur after closing. The court essentially held that the closing on a contract is not equivalent to contract completion. As such, under this case, a builder's liability for construction defects may be prolonged by at least some construction activities after the closing on a contract.⁵

Though this case was decided before the effective date of the 2017 amendment to s. 95.11(3)(c), F.S., it does not appear that the court would have decided the case differently under the new language.

III. Effect of Proposed Changes:

The bill addresses two issues regarding the timeframes for bringing a lawsuit based on a defect in the design, planning, or construction of a building or other improvement to real property. First, the bill specifies that a person who is served with a pleading may file a related counterclaim, cross-claim, or third-party claim within 1 year, regardless of whether the filing of the claim would otherwise be time barred.

Second, the bill causes the timeframes for filing a construction-defect lawsuit to begin and end sooner, in some circumstances, than under current law. Both under the bill and current law, the timeframes in which a property owner may file a construction-defect lawsuit begin to run at the latest of four events set forth in statute. One of these events is the completion of the construction contract. Recent case law suggests that such a contract is not complete, and thus the timeframes for bringing a lawsuit cannot begin to run, until all punch-list or other follow-up work is

² *Cypress Fairway Condo. v. Bergeron Constr. Co.*, 164 So. 3d 706, 707 (Fla. 5th DCA 2015).

³ See Ch. 2017-101, s. 1, Laws of Fla.

⁴ *Busch v. Lennar Homes, LLC*, 219 So. 3d 93 (Fla. 5th DCA 2017).

⁵ See *id.* at 95.

complete. The bill substantially counters this case law by effectively providing that a construction contract performed pursuant to a building permit is complete when a final certificate of occupancy or certificate of completion is issued. After that point, the correction or repair of completed work that is within the scope of the building permit and final certificate does not delay the running of the timeframes in which a construction-defect action may be filed.

The bill provides that amendments to s. 95.11(3)(c), F.S., made by this act apply to any action commenced on or after July 1, 2018, regardless of when the cause of action accrued.

Additionally, any action that would have been permissible under s. 95.11(3)(c), F.S., prior to the amendments made by this act may be commenced before July 1, 2019. However, if such action is not commenced by July 1, 2019, and is barred by the amendments to s. 95.11(3)(c), F.S., made by this act, it shall be barred.

The bill takes effect July 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

As the bill further specifies the timeframes in which a construction lawsuit may be filed, it may eliminate the need to litigate the issue in certain cases, thus reducing the cost of litigating these cases. On the other hand, the bill will reduce timeframes for some property owners to seek redress in court for construction defects.

C. Government Sector Impact:

As the bill specifies what constitutes completion of a contract, it may reduce the amount of the courts' resources that must be spent adjudicating whether given cases are time-barred.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 95.11 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Community Affairs on February 6, 2018:

- Provides that amendments to s. 95.11(3)(c), F.S., made by this act apply to any action commenced on or after July 1, 2018, regardless of when the cause of action accrued; and
- Provides that any action that would have been permissible under s. 95.11(3)(c), F.S., prior to the amendments made by this act may be commenced before July 1, 2019. However, if such action is not commenced by July 1, 2019, and is barred by the amendments to s. 95.11(3)(c), F.S., made by this act, it shall be barred.

CS by Judiciary on January 25, 2018:

The committee substitute allows a person 1 year from the date the person is served with a pleading in a construction-defect lawsuit to file a related counterclaim, cross-claim, or third-party claim, regardless of whether the claim would otherwise be time-barred. The underlying bill allowed 45 days to file the related claims. Also, the committee substitute further delineates what constitutes work that is necessary for the completion of a construction contract, which is an event that can commence the timeframe for filing a lawsuit.

B. Amendments:

None.