

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/CS/CS/HB 85 Causes of Action Based on Improvements to Real Property
SPONSOR(S): Judiciary Committee and Regulatory Reform & Economic Development Subcommittee and Civil Justice Subcommittee, Snyder and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 360

FINAL HOUSE FLOOR ACTION: 89 Y's 8 N's **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/CS/CS HB 85 passed the House on March 24, 2023, as CS/SB 360 as amended. The Senate concurred in the House amendment to the Senate bill and subsequently passed the bill as amended on March 29, 2023.

A "construction defect" is a deficiency in, or arising out of, the design, specifications, surveying, planning, supervision, or observation of construction, or the construction, repair, alteration, or remodeling of real property, and includes a Florida Building Code ("Building Code") violation. Causes of action which may be available for a construction defect claim include breach of contract or warranty, fraud, negligence, and a statutory cause of action under s. 553.84, F.S., for Building Code violations.

Section 95.11(3)(c), F.S., establishes the time periods within which a construction defect cause of action must be brought. Specifically, for a patent (that is, obvious or known) defect, an action must generally be filed within four years from the date of the latest of the:

- Owner's actual possession;
- Issuance of a certificate of occupancy;
- Construction's abandonment, if not completed; or
- Completion or termination of the engineer's, architect's, or contractor's contract with his or her employer.

However, for a latent (that is, not easily discoverable) defect, the four-year statute of limitations begins to run on the date the defect was discovered or should have reasonably been discovered with due diligence. In any event, the applicable statute of repose provides that in no case may a construction defect claim be filed more than ten years after the later of any event triggering the statute of limitations for patent defects.

The bill:

- Modifies the time periods within which a construction defect cause of action must be brought by:
 - Changing the point from which the four-year statute of limitations begins to run for patent defects to the date of the earliest of the following events:
 - Issuance of a temporary certificate of occupancy;
 - Issuance of a certificate of occupancy;
 - Issuance of a certificate of completion; or
 - Construction's abandonment, if not completed.
 - Decreasing the statute of repose from ten years to seven years, generally running from the earliest of the listed triggering events for the statute of limitations.
 - Specifying how to determine the limitations period for each building in a multi-building improvement and for a single-dwelling residential building used as a model home.
 - Giving plaintiffs a set period of time to sue if these changes would otherwise cut off their rights.
- Limits the statutory Building Code violation cause of action to a "material" violation.

The bill may have an indeterminate fiscal impact on state government, but does not appear to have a fiscal impact on local government. The bill was approved by the Governor on April 13, 2023, ch. 2023-22, L.O.F., and became effective on that date.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Florida Building Code

The Florida Building Codes Act (“Building Code”), set out in part IV of ch. 553, F.S., provides a mechanism for the uniform adoption, updating, interpretation, and enforcement of a single state building code that must be applied, administered, and enforced uniformly and consistently across the state.¹ The Building Code is adopted and interpreted by the Florida Building Commission, housed within the Department of Business and Professional Regulation (“DBPR”), and enforced by local governments.²

The Building Code’s primary purpose is the regulation of new construction and existing structure modifications to achieve the highest safety level and the fewest construction defects.³ To accomplish this, the Building Code sets minimum standards for the design, construction, erection, alteration, modification, repair, and demolition of structures in the state.

Plan Review and Building Permits

Each local government must issue building permits for construction projects within its jurisdiction.⁴ However, the building official may not issue a building permit before first reviewing the plans and specifications and finding that such plans and specifications comply with the Building Code.⁵ No person, firm, or corporation may construct, erect, alter, repair, secure, or demolish any structure without first obtaining a building permit, if required, from the building official.⁶

Inspections and Violations

For any construction requiring a building permit, the building official⁷ must inspect the work to ensure that it complies with the Building Code.⁸ Where a local government determines that an engineer, architect, or contractor has committed a “material violation” of the Building Code and failed to correct the violation within a reasonable time, the local government must impose a fine on such licensee of no less than \$500 and no more than \$5,000 per violation.⁹ A “material violation,” as the term is used here, is a violation existing within a completed building, structure, or facility which may result, or has resulted, in physical harm to a person or significant damage to the performance of a building or its systems.¹⁰

¹ S. 553.72(1), F.S.

² Ss. 125.56, 553.72, 553.73, and 553.74, F.S.

³ Fla. Bldg. Comm., *Advanced Florida Building Code Principals*, http://www.floridabuilding.org/Upload/Courses_trp/421-2-MATERIAL-Adv%20FL%20Bldg%20Code%20-%20Course%20PDF%20version%207.0.pdf (last visited April 26, 2023).

⁴ A building permit is an official document or certificate issued by the local building official that authorizes performance of a specific construction activity. Ss. 125.01(1)(bb), 125.56(1), 468.603(2), and 553.80(1), F.S.

⁵ Ss. 125.56 and 553.79, F.S.

⁶ Building permits are generally not required for cosmetic improvements, such as painting or flooring replacement. S. 553.79, F.S.

⁷ A building official is a local government employee or a person contracted with a government entity who supervises building code activities. *Id.*

⁸ *Id.*

⁹ S. 553.781, F.S.

¹⁰ *Id.*

Certificates of Completion or Occupancy

The building official issues a certificate of completion where an existing building or structure is renovated or remodeled without a change in its occupancy or use, or when a shell building¹¹ is newly constructed, and such work passes its final building inspection.¹² Where a new structure to be occupied¹³ passes its final building inspection, the building official issues a certificate of occupancy.¹⁴ A building or structure requiring a certificate of completion or occupancy generally may not be used or occupied until the appropriate certificate is issued; however, the building official may issue a temporary certificate of completion or occupancy before the project's close if a portion of the building or structure may be safely used or occupied.¹⁵ The temporary certificate grants the applicant the same rights as a certificate of completion or occupancy but expires after a set time period unless the building official grants an extension.¹⁶ A building official may also suspend or revoke a temporary or final certificate of occupancy or completion if the certificate was issued in error or on the basis of incorrect information or where it is determined that the building or structure is in violation of any ordinance, regulation, or Building Code provision.¹⁷

Statutes of Limitations and Repose

A statute of limitations bars a lawsuit's filing after a certain amount of time elapses following an injury.¹⁸ This time period typically begins to run when a cause of action accrues (that is, on the date of the injury), but may also begin to run on the date the injury is discovered or on which it would have been discovered with reasonable efforts.¹⁹ In other words, a statute of limitations bars the available civil remedy if a lawsuit is not timely filed after an injury.

A statute of repose bars the filing of a lawsuit after a fixed period of time passes following a specific act, which act is unrelated to the cause of action's accrual or the injury's discovery, even if this period ends before the plaintiff is injured.²⁰ Further, a statute of repose eliminates the underlying substantive right of action, not just the available civil remedy, upon expiration of the statutorily-specified filing period.²¹ Courts construe a cause of action rescinded by a statute of repose as if the right to sue never existed, which encourages diligence in the prosecution of claims, eliminates the potential for abuse resulting from a stale claim, and fosters finality in liability.²²

¹¹ A shell building separates a structure's interior space from its exterior and generally consists of the foundation, outer walls, roofing, windows, and exterior doors. When a shell building is constructed, the developer leaves the structure's interior unfinished so that the purchaser or tenant may contract with other construction professionals to customize its elements (including flooring, ceilings, interior walls, interior doors, and electrical fittings). Nassau County Building/Code Enforcement Department, *Guidelines for Shell Building and Tenant Build-Out Permits*, <https://www.nassaucountyfl.com/DocumentCenter/View/13984/Guidelines-for-Shell-Building-and-Tenant-Build-Out-Permits?bidId> (last visited April 26, 2023).

¹² Passage of a final building inspection would include obtaining approvals for all permits issued for the project (such as building and fire permits and sub-permits such as electrical, mechanical, elevator, plumbing, and roof permits). S. 553.79(17)(a), F.S.; S. 110, Fla. Bldg. Code, 7th Ed. (2020).

¹³ This includes an existing building or structure for which the occupancy classification is changing.

¹⁴ S. 111, Fla. Bldg. Code, 7th Ed. (2020).

¹⁵ Typically, the building official also requires that any outstanding work be nearing completion before issuing a temporary certificate. See City of Tampa, *Apply for a Temporary Certificate of Occupancy*, <https://www.tampa.gov/document/apply-temporary-certificate-occupancy-tco-35571> (last visited April 26, 2023) (requiring an applicant for a temporary certificate of occupancy to affirm that construction will be complete within 90 days); *id.*

¹⁶ S. 111, Fla. Bldg. Code, 7th Ed. (2020).

¹⁷ *Id.*

¹⁸ Legal Information Institute, *Statute of Limitations*, https://www.law.cornell.edu/wex/statute_of_limitations (last visited April 26, 2023).

¹⁹ *Id.*

²⁰ Legal Information Institute, *Statute of Repose*, https://www.law.cornell.edu/wex/statute_of_repose (last visited April 26, 2023); *Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992).

²¹ *Beach v. Great Western Bank*, 692 So. 2d 146 (Fla. 1997).

²² *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).

Construction Defect Claims

A “construction defect” is a deficiency in, or arising out of, the design, specifications, surveying, planning, supervision, or observation of construction, or the construction, repair, alteration, or remodeling of real property²³ resulting from:

- Defective material, products, or components used in construction or remodeling;
- A Florida Building Code violation;
- A failure of real property’s design to meet the applicable professional standards of care at the time of governmental approval; or
- A failure to construct or remodel real property in accordance with accepted trade standards for good and workmanlike construction in place at the time of construction.²⁴

Available Causes of Action

Causes of action which may be available for a construction defect claim include breach of warranty,²⁵ breach of contract²⁶ (if the parties are in privity²⁷), fraud, and negligence.²⁸ Florida law also provides a statutory cause of action in s. 553.84, F.S., for Building Code violations. Specifically, this section provides that any person damaged as a result of a Building Code violation has a cause of action against the person responsible. However, unless the person responsible knew or should have known of the violation, there is no cause of action if:

- The person responsible obtains the required building permits and any local government or public agency with Building Code enforcement authority approves the plans;
- The construction project passes all required inspections; and
- There is no personal injury or damage to property other than the property that is the subject of the permits, plans, and inspections.

In order to bring a cause of action based on a construction defect claim, a property owner must first satisfy pre-suit requirements set out in ch. 558, F.S., unless the property owner and the person to be sued have opted out of ch. 558 in writing.²⁹ These statutory pre-suit requirements include providing the person to be sued with notice of the claim and opportunities to inspect the alleged defect and make a settlement offer, which may include monetary payments or an offer to repair the defect.³⁰

²³ “Real property” means land that is improved and the improvements thereon, including fixtures, manufactured housing, or mobile homes. S. 558.002(8), F.S.

²⁴ S. 558.002(5), F.S.

²⁵ Warranties may be expressly provided by the developer or contractor or implied in common law or statute.

²⁶ A contract forms when an offer is made and the offered terms are accepted. Where one party to a contract fails to perform his or her duties under the contract, a breach of contract claim arises. Awardable damages are generally limited to those damages specified in the contract; in other words, punitive damages (that is, damages awarded above the actual damages to punish the person responsible) are generally unavailable. *Suarez Trucking FL Corp. v. Souders*, 350 So. 3d 38 (Fla. 2022); *Lewis v. Guthartz*, 428 So. 2d 222 (Fla. 1982).

²⁷ Parties are in privity when they are in direct contract with one another. Legal Information Institute, *Privity*, <https://www.law.cornell.edu/wex/privity> (last visited April 26, 2023).

²⁸ Negligence is a tort. To prevail in a negligence action, the plaintiff must prove that the defendant owed him or her a duty, the defendant breached the duty, and the plaintiff suffered damages proximately caused by the breach. However, a negligence claim does not exist where the defendant only breached a duty owed under a contract; in such case, the plaintiff would have to prove that the defendant breached a non-contractual duty owed to the plaintiff, such as a statutory or common law duty. *U.S. v. Stephens*, 994 So. 2d 1062 (Fla. 2008); *Monroe v. Sarasota County Sch. Bd.*, 746 So. 2d 530 (Fla. 2d DCA 1999); *Goldberg v. Fla. Power & Light Co.*, 899 So. 2d 1105 (Fla. 2005).

²⁹ Parties who opt out of chapter 558 may contractually negotiate a mandatory alternative dispute resolution process or other pre-suit requirements. S. 558.005(1), F.S.

³⁰ Ss. 558.003 and 558.004, F.S.

Applicable Statutes of Limitations and Repose

Section 95.11(3)(c), F.S., establishes the time periods within which a construction defect cause of action must be brought. Specifically, for a patent defect,³¹ an action must generally be filed within four years from the date of the later of the:

- Owner's actual possession;
- Issuance of a certificate of occupancy;
- Construction's abandonment, if not completed; or
- Completion or termination of the engineer's, architect's, or contractor's contract with his or her employer.³²

However, for a latent defect,³³ the four-year statute of limitations begins to run on the date the defect was discovered or should have reasonably been discovered with due diligence. In any event, the statute of repose in this section provides that in no case may a construction defect claim be filed more than ten years after the latest of any event triggering the statute of limitations for patent defects. In other words, a construction defect claim is time-barred after ten years from the latest of any of the events listed above even where the defect is not yet discovered or could not reasonably have been discovered with the exercise of due diligence.

Multi-Dwelling Buildings

The Building Code defines "dwelling" as any building containing one or two dwelling units used, intended, or designed to be built, used, rented, leased, let, or hired out to be occupied, or that are occupied for living purposes.³⁴ In turn, the Building Code defines "dwelling unit" as a single unit providing complete independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking, and sanitation.³⁵ Multi-dwelling buildings may include unit-style condominium ("condo") or cooperative ("co-op") buildings, multi-family homes (such as a duplex or triplex), and townhouses; whether or not a multi-dwelling building is a part of a condo or co-op depends not on its appearance but rather on whether it has been organized as such under Florida law. Special considerations apply to construction defect claims involving condos and co-ops.

Condominiums

A condominium, or "condo," is a form of real property ownership created under ch. 718, F.S., and generally regulated by DBPR. Persons own condo units along with an undivided right of access to the condo's common elements.³⁶ All unit owners are members of the condo association, and the association is responsible for common elements operation and maintenance.³⁷

A condo is created by recording a declaration of condominium in the public records of the county where the condo is located.³⁸ A developer initially creates the condo and offers condo units for sale, and while the condo is developer-controlled, the developer may elect all or a majority of the members of the condo association's board of administration.³⁹ However, unit owners other than the developer may elect

³¹ A "patent defect" is a defect that is reasonably apparent or known to the owner. *Alexander v. Suncoast Builders, Inc.*, 837 So. 2d 1056, 1058 (Fla. 3d DCA 2003); Legal Information Institute, *Patent Defect*, https://www.law.cornell.edu/wex/patent_defect (last visited April 26, 2023).

³² "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 is made. S. 95.11(3)(C), F.S.

³³ A "latent defect" is a hidden defect that cannot be discovered by reasonable and customary observation or inspection, and of which the owner has no knowledge. *Alexander*, 837 So. 2d at 1058; Legal Information Institute, *Latent Defect*, https://www.law.cornell.edu/wex/latent_defect#:~:text=A%20hidden%20or%20concealed%20defect,and%20customary%20observation%20or%20inspection (last visited April 26, 2023).

³⁴ S. R202, Fla. Bldg. Code, 7th ed. (2020).

³⁵ *Id.*

³⁶ "Common elements" means the portions of condo property not included in the units. S. 718.103(8) and (11), F.S.

³⁷ Ss. 718.103(2) and 718.113(1), F.S.

³⁸ S. 718.104(2), F.S.

³⁹ S. 718.103(16), F.S.

a majority of the condo association's board members after "turnover," which occurs at the earlier of statutorily-specified events.⁴⁰

Cooperatives

A cooperative, or "co-op," is a form of property ownership created under ch. 719, F.S., in which the real property is owned by the co-op association and individual units are leased to the residents, who own shares in the association.⁴¹ The lease payment amount is the pro-rata share of the co-op's operational expenses. Co-ops operate similarly to condos, and the laws regulating co-ops are largely identical to those regulating condos.

Construction Defect Claims

At the point of turnover in a condo or co-op, Florida law requires the developer to provide the association with a written inspection report; however, this report is limited in scope to the maintenance, condition, replacement costs, and useful life of specified components and thus may not provide the association with any insight into the existence of a construction defect.⁴² It is the responsibility of the association to conduct an exhaustive property evaluation and determine whether to bring a cause of action based on any discovered construction defects.⁴³

If a construction defect is found in the condo's common elements or is found in individual units but is prevalent throughout the building, the association may bring a cause of action in its own name or on behalf of all unit owners.⁴⁴ However, a condo association does not have exclusive authority to sue over construction defects; the Florida Supreme Court has held that a unit owner may also bring such a claim, even where the defect is found in the common elements, if the interests of other unit owners are represented in the action or if the duty breached was owed only to a particular unit owner.⁴⁵

Relevant to the consideration of whether to bring such an action is s. 718.124, F.S., which tolls the applicable four-year statute of limitations until turnover occurs; however, this section does not toll the ten-year statute of repose.⁴⁶ Practically speaking, this means that if a defect occurs during construction of a condo or co-op but turnover does not happen for eleven years after an event triggering the statute of repose, the association is time-barred from filing suit on the defect claim even if the statute of limitations had only just begun to run.

Further, in *Sabal Chase Homeowners' Association, Inc., v. Walt Disney World Co.*, the Fifth District Court of Appeal ("DCA") held that, where a project is multi-unit in nature and each unit is issued its own certificate of occupancy before the contract's completion, so that it can be occupied while other units are still under construction, the statute of repose does not begin to run from the date of contract completion.⁴⁷ Rather, the statute of repose runs for each unit individually from the date its certificate of occupancy is issued. The court found that to rule otherwise would unfairly subject earlier-constructed units to a longer repose period than later-constructed units.

⁴⁰ Ss. 718.124 and 718.301(1), F.S.

⁴¹ S. 719.103(2) and (26), F.S.

⁴² Ss. 718.301(4)(p) and 719.301(4)(p), F.S.

⁴³ In any claim against a developer, if a defect is found in a condo's design, construction, or structural elements, or in any mechanical, plumbing, electrical, fire protection, or other element that requires a licensed professional for design or installation under chapters 455, 471, 481, 489, or 633, F.S., the defect must be examined and certified by an appropriately-licensed Florida engineer, design professional, contractor, or other individual or entity. A condo or co-op association should also reference its governing documents to determine whether any restrictions exist that would impair its right to initiate litigation. S. 718.301(7), F.S.

⁴⁴ The exact percentage of affected units necessary to count as "prevalent" is unclear, but courts have found a defect impacting 90-100 percent of unit owners sufficient. Fla. R. Civ. P. 1.221; *Avila S. Condo. Ass'n, Inc. v. Kappa Corp.*, 346 So. 2d 599 (Fla. 1997); *Seawatch at Marathon Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 610 So. 2d 470 (Fla. 3d DCA 1992); *Brazilian Court Hotel Condo. Owner's Ass'n, Inc. v. Walker*, 584 So. 2d 609 (Fla. 4th DCA 1991); *El Conquistador Condo., Inc. v. Day*, 338 So. 2d 237 (Fla. 3d DCA 1976).

⁴⁵ *Rogers & Ford Constr. Corp. v. Carlandia Corp.*, 626 So. 2d 1350 (Fla. 1993).

⁴⁶ *Spring Isle Comm. Ass'n, Inc. v. Herme Enter. Inc.*, 328 So. 3d 1120 (Fla. 5th DCA 2021).

⁴⁷ 726 So. 2d 796 (Fla. 3d DCA 1999).

Effect of the Bill

The bill amends s. 95.11, F.S., to modify the time periods within which a construction defect cause of action must be brought. Specifically, the bill:

- Changes the point from which the four-year statute of limitations begins to run for patent defects to the date of the earliest of the:
 - Issuance of a temporary certificate of occupancy;
 - Issuance of a certificate of occupancy;
 - Issuance of a certificate of completion; or
 - Construction's abandonment, if not completed.
- Decreases the statute of repose from ten years to seven years, running from the date of the earliest of the:
 - Issuance of a temporary certificate of occupancy;
 - Issuance of a certificate of occupancy;
 - Issuance of a certificate of completion; or
 - Construction's abandonment, if not completed.

The bill also:

- Provides that, if a newly constructed single-dwelling residential building is used as a model home, the time begins to run from the date that a deed is recorded first transferring title to another party.
- Specifies that, if a real property improvement consists of the design, planning, or construction of multiple buildings, each building must be considered its own improvement for purposes of determining the limitations period set forth in the bill, consistent with the reasoning of the Fifth DCA in the *Sabal Chase* case, described above.
- Provides that these amendments apply to any construction defect cause of action commenced on or after the bill's effective date, regardless of when the cause of action accrued, except that any such action that would not have been time-barred before these amendments must be commenced on or before July 1, 2024.

Finally, the bill amends s. 553.84, F.S., to limit the cause of action for a Building Code violation to a cause of action for a "material" Building Code violation, defined by the bill as a Building Code violation "that exists within a completed building, structure, or facility which may reasonably result, or has resulted, in physical harm to a person or significant damage to the performance of a building or its systems."⁴⁸ This limitation would apply even where the person responsible for a "non-material" Building Code violation knew or should have known that the violation existed and failed to repair it.

The bill was approved by the Governor on April 13, 2023, ch. 2023-22, L.O.F., and became effective on that date.

⁴⁸ The bill does not specify what amounts to "significant damage," as the term is used in this section, or the degree of physical harm necessary for the violation to rise to the level of "material." Cf. s. 553.781, F.S. (using the same definition of "material violation" but for regulatory purposes).

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have an indeterminate impact on state government to the extent that it reduces construction defect claim litigation in the state court system.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The direct economic impact on the private sector is unknown. However, the bill:

- May leave consumers bearing the costs associated with:
 - Latent construction defects that are not discovered within the shortened statute of repose.
 - Building Code violations not amounting to “material” violations where there is no other available cause of action.
- May reduce construction costs for consumers as savings realized by the construction industry due to lowered insurance premiums and litigation costs may be passed on to consumers.
- May reduce financial liability for the construction industry due to lowered insurance premiums and litigation costs.

D. FISCAL COMMENTS:

None.