

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/CS/HB 583 Construction Defect Claims

SPONSOR(S): Judiciary Committee, Regulatory Reform Subcommittee and Civil Justice & Property Rights Subcommittee, Yarborough

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Property Rights Subcommittee	16 Y, 0 N, As CS	Mawn	Jones
2) Regulatory Reform Subcommittee	11 Y, 5 N, As CS	Brackett	Anstead
3) Judiciary Committee	17 Y, 2 N, As CS	Mawn	Kramer

SUMMARY ANALYSIS

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 violation. Chapter 558, F.S., creates an alternative dispute resolution mechanism for construction defect claims to reduce the need for litigation and protect property owner rights. Ch. 558 also limits the liability of an architect, landscape architect, engineer, surveyor, geologist, or interior designer (“design professional”) employed by a business entity for damages resulting from negligence occurring with the course and scope of a professional services contract in certain circumstances.

Section 95.11(3)(c), F.S., establishes time periods within which construction defect claims must be filed. Specifically, a construction defect claim generally must be filed within four years from the date of the later of:

- 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 engineer, architect, or contractor and his or her employer.

However, if the defect is latent (that is, not easily discoverable), 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, and in no case may a construction defect claim be filed later than ten years after the later of any of the above events.

CS/CS/CS/HB 583:

- Repeals ch. 558, F.S.
- Preserves the ch. 558 design professional liability limitation by moving it to s. 768.401, F.S.
- Modifies the time periods within which a construction defect claim may be filed by:
 - Making the four-year statute of limitations for a:
 - Patent (that is, obvious or known) defect run from the later of the date of the owner’s actual possession or the completion or termination of the contract between the engineer, architect, or contractor and his or her employer.
 - Latent defect run from the time the defect is discovered or should have been discovered.
 - Decreasing the statute of repose for a latent defect from ten years to seven years.
 - Creating exceptions for latent defects: shown to have been fraudulently concealed; found in a condominium or homeowners’ association’s common areas; or arising from a material Florida Building Code 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 provides an effective date of July 1, 2022.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED 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 from jurisdiction to jurisdiction.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 or proposed modifications to existing structures to achieve the highest level of safety and the fewest number of defects.³ To accomplish this purpose, 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 that requires a building permit, the building official must inspect the work to ensure that it complies with the Building Code.⁷ 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 material violation.⁸ A “material violation” is a violation that exists 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.⁹

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 Feb. 23, 2022).

⁴ A building permit is an official document or certificate issued by the local building official that authorizes performance of a specific 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 by a government entity who supervises building code activities. *Id.*

⁸ S. 553.781, F.S.

⁹ *Id.*

Certificates of Completion or Occupancy

Where construction work for which a permit has been issued passes the required inspections and satisfies all permit requirements, the building official will either issue a certificate of completion or the permit will be considered closed where no certificate of completion is required.¹⁰ Further, where a new structure to be occupied¹¹ passes the required inspections and satisfies all permit requirements, the building official will issue a certificate of occupancy.¹² A building or structure requiring a certificate of occupancy may not be used or occupied until the certificate of occupancy is issued for the structure.¹³ A building official may also suspend or revoke a certificate of occupancy or completion if the certificate was issued in error or on the basis of incorrect information supplied or where it is determined that the building or structure is in violation of any ordinance, regulation, or Building Code provision.¹⁴

Statutes of Limitations and Repose

A statute of limitations bars the filing of a lawsuit after a certain period of time passes following an injury.¹⁵ A statute of limitations 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.¹⁶ 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 discovery of the injury, even if this period ends before the plaintiff is injured.¹⁷ 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.¹⁸ 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.¹⁹

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 property²⁰ resulting from:

- Defective material, products, or components used in the 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 at the time of construction.²¹

Chapter 558, Florida Statutes, creates an alternative dispute resolution mechanism for construction defect claims to reduce the need for litigation and protect property owner rights.²² Under this chapter, a

¹⁰ A certificate of completion is issued for remodels, renovations, shell buildings, and structures that will not be occupied (e.g., for pools). S. 553.79(17)(a), F.S.; S. 110, Fla. Bldg. Code, 7th Ed.

¹¹ This includes an existing building or structure that is changing its occupancy classification.

¹² S. 110, Fla. Bldg. Code, 7th Ed.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Legal Information Institute, *Statute of Limitations*, https://www.law.cornell.edu/wex/statute_of_limitations (last visited Feb. 23, 2022).

¹⁶ *Id.*

¹⁷ Legal Information Institute, *Statute of Repose*, https://www.law.cornell.edu/wex/statute_of_repose (last visited Feb. 23, 2022); *Kush v. Lloyd*, 616 So.2d 415 (Fla. 1992).

¹⁸ *Beach v. Great Western Bank*, 692 So.2d 146 (Fla. 1997).

¹⁹ *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).

²⁰ "Real property" means land that is improved and the improvements thereon, including fixtures, manufactured housing, or mobile homes. S. 558.002(8), F.S.

²¹ S. 558.002(5), F.S.

²² S. 558.001, F.S.

property owner, including a subsequent purchaser or a community association²³ (“claimant”), may only bring a civil action alleging a construction defect claim against the contractor, subcontractor, supplier, or design professional²⁴ responsible for the defect (“respondent”) after satisfying the statutory pre-suit requirements, unless the claimant and the respondent have opted out of ch. 558 in writing.²⁵ However, ch. 558 does not create any new rights, causes of action, or theories on which liability may be based.²⁶

Notice of Claim

Chapter 558 requires a claimant to serve a written notice of claim on the respondent at least 60 days before bringing a construction defect claim in court, or at least 120 days before doing so if the claim involves an association representing more than 20 parcels.²⁷ The notice of claim must describe in reasonable detail the alleged defect’s nature and, if known, the damage or loss caused by the defect.²⁸ The notice of claim must also identify the alleged defect’s location with enough detail to allow the respondent to easily locate the defect.²⁹

Within 10 days after service of the notice of claim, or within 30 days after service if the claim involves an association representing more than 20 parcels, the respondent may serve a copy of the notice of claim (“notice copy”) to each contractor, subcontractor, supplier, or design professional the respondent reasonably believes is responsible for each defect specified in the notice (“secondary respondent”) and must note therein the specific defect for which he or she believes each secondary respondent is responsible.³⁰

Inspection and Testing

Within 30 days after service of the notice of claim, or within 50 days after service if the claim involves an association representing more than 20 parcels, the respondent has a right to perform a reasonable inspection of the property to assess each alleged defect and the extent of any necessary repairs.³¹ The claimant must give the respondent reasonable access to the property during normal working hours, and the respondent must reasonably coordinate the timing and manner of the inspections to minimize the number of inspections.³² Each secondary respondent is also entitled to inspect the property.³³

If the respondent determines that destructive testing is necessary to reveal the alleged defect’s nature and cause, the respondent must give the claimant written notice describing the destructive testing to be performed, the person chosen to do the testing, the estimated amount of time needed for testing and repairs, and the money offered for repair costs.³⁴ If the claimant objects to the person chosen to perform the testing, the respondent must provide the claimant with a list of three qualified persons from which the claimant may choose one person to perform the testing.³⁵ Any destructive testing must be done at a mutually agreeable time, must not make the property uninhabitable, and does not give the party performing the destructive testing or associated repairs construction lien³⁶ rights unless the

²³ “Community associations” are condominium, cooperative, homeowners’, and mobile home park homeowners’ associations. S. 558.002(2), F.S.

²⁴ A design professional, such as an architect, landscape architect, engineer, surveyor, or geologist, employed by a business entity or an agent thereof is not individually liable for damages resulting from negligence occurring within the course and scope of a professional services contract under certain conditions. Ss. 558.002(7) and 558.0035, F.S.

²⁵ Parties who opt out of chapter 558 may negotiate as part of any construction contract a mandatory alternative dispute resolution process. Ss. 558.003, 558.004, and 558.005(1), F.S.

²⁶ S. 558.004(12)(c), F.S.

²⁷ Service of the notice of claim tolls the applicable statute of limitations relating to any person covered under chapter 558 and any bond surety for a specified time period. Ss. 558.004(1)(a) and (10), F.S.

²⁸ S. 558.004(1)(b), F.S.

²⁹ *Id.*

³⁰ S. 558.004(3), F.S.

³¹ S. 558.004(2), F.S.

³² *Id.*

³³ S. 558.004(3), F.S.

³⁴ S. 558.004(2)(a) and (b), F.S.

³⁵ S. 558.004(2)

³⁶ Under Part I of chapter 713, F.S., a contractor, subcontractor, material supplier, laborer, or professional (such as an architect or landscape artist) may claim a lien on a property on or for which such person performed work or provided materials but was not paid, even where such person does not have a direct contract with the property owner.

claimant personally contracts with such party.³⁷ Additionally, the claimant has a right to observe the destructive testing.³⁸ However, if the claimant refuses to allow reasonable destructive testing, the claimant loses the right to claim damages which could have been avoided or mitigated by the destructive testing.³⁹

Disclosures

A claimant and a respondent must exchange, within 30 days after service of a written request, any design plans; specifications; photographs and videos of the alleged defect; expert reports describing the alleged defect; subcontracts; purchase orders for the allegedly-defective work or materials; and maintenance records and other documents related to the alleged defect's discovery, investigation, causation, and extent.⁴⁰ A party may assert any claim of privilege⁴¹ recognized in state law with respect to a requested disclosure.⁴²

Settlement Offers

Within 15 days after service of a notice copy, or within 30 days of service if the claim involves an association with more than 20 parcels, the secondary respondent must give the respondent a written reply.⁴³ Such reply must include a report, if any, of the scope of any property inspections conducted by the secondary respondent and the findings and results of such inspections.⁴⁴

Additionally, within 45 days of service of the notice of claim, or within 75 days of service if the claim involves an association representing more than 20 parcels, the respondent must give the claimant a written reply.⁴⁵ Such reply must include a written:

- Offer to remedy the alleged defect at no cost to the claimant, a detailed description of proposed repairs, and a timetable for repair completion;
- Offer to compromise and settle the claim by monetary payment;
- Offer to compromise and settle the claim by a combination of repairs and monetary payment that includes a detailed description of proposed repairs and a timetable;
- Statement that the respondent disputes the claim and will not remedy the alleged defect or settle the claim; or
- Statement that a monetary payment will be determined by the respondent's insurer within 30 days after insurer notification.⁴⁶

A claimant who receives a timely settlement offer must accept or reject the offer by serving written notice on the respondent within 45 days after receiving the offer; if a claimant brings a construction defect claim without first doing so, the court must stay the action upon timely motion until the claimant complies.⁴⁷ However, a claimant may, without further notice, bring an action against the respondent if the respondent disputes the claim and will not remedy the alleged defect or settle the claim, or does not timely respond to the notice of claim.⁴⁸

Statute of Limitations and Repose

Florida law provides that a construction defect claim generally has a four-year statute of limitations, running from the later of the date of:

³⁷ S. 558.004(2)(d), (f), and (g), F.S.

³⁸ S. 558.004(2)(e), F.S.

³⁹ S. 558.004(2)(g), F.S.

⁴⁰ S. 558.004(15), F.S.

⁴¹ A claim of privilege protects certain information from disclosure or discovery. The Florida Evidence Code recognizes certain privileges, including the lawyer-client privilege, the husband-wife privilege, and the psychotherapist-patient privilege. See ch. 90, F.S.

⁴² *Id.*

⁴³ S. 558.004(4), F.S.

⁴⁴ *Id.*

⁴⁵ S. 558.004(5), F.S.

⁴⁶ S. 558.004(4) and (5), F.S.

⁴⁷ S. 558.004(7), F.S.

⁴⁸ S. 558.004(6), F.S.

- 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 engineer,⁴⁹ architect,⁵⁰ or contractor⁵¹ and his or her employer.⁵²

However, if the defect is latent,⁵³ the four-year statute of limitations begins to run from the time the defect is discovered or should have been discovered with the exercise of due diligence.⁵⁴

Florida law also provides a ten-year statute of repose for a construction defect claim, running from the later of the date of:

- 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 engineer, architect, or contractor and his or her employer.⁵⁵

In other words, a construction defect claim is time-barred after ten years from the later 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.

Design Professional Liability Limitation

An architect, landscape architect,⁵⁶ engineer, surveyor,⁵⁷ geologist,⁵⁸ or interior designer⁵⁹ (“design professional”) employed by a business entity⁶⁰ or an agent thereof is not individually liable for damages resulting from negligence occurring within the course and scope of a professional services contract if:

- The contract is made between the business entity and a claimant or with another entity for the provision of professional services to the claimant;
- The contract does not name as a party to the contract the individual employee or agent who will perform the professional services;
- The contract includes a prominent statement, in uppercase font that is at least five point sizes larger than the rest of the text, that, pursuant to statute, an individual employee or agent may not be held individually liable for negligence;
- The business entity maintains any professional liability insurance required under the contract; and
- Any damages are solely economic in nature and do not extend to personal injuries or property not subject to the contract.⁶¹

⁴⁹ Chapter 471, F.S., governs the practice of engineering.

⁵⁰ Part I of ch. 481, F.S., governs the practice of architecture.

⁵¹ Chapter 489, F.S., governs the practice of contracting.

⁵² “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. 95.011(3)(C), F.S.

⁵³ A “latent defect” is a defect is a hidden defect that cannot be discovered by reasonable and customary observation or inspection, and of which the owner has no knowledge. Contrast this with a “patent defect,” meaning 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, *Latent Defect*, https://www.law.cornell.edu/wex/latent_defect#:~:text=A%20hidden%20or%20concealed%20defect,and%20customary%20observation%20or%20inspection (last visited Feb. 23, 2022); Legal Information Institute, *Patent Defect*, https://www.law.cornell.edu/wex/patent_defect (last visited Feb. 23, 2022).

⁵⁴ S. 95.11(3)(c), F.S.

⁵⁵ *Id.*

⁵⁶ Part II of ch. 481, F.S., governs the practice of landscape architecture.

⁵⁷ Chapter 472, F.S., governs the practice of surveying and mapping.

⁵⁸ Chapter 492, F.S., governs the practice of geology.

⁵⁹ Part I of ch. 481 F.S., governs the practice of interior design.

⁶⁰ “Business entity” means any corporation, limited liability company, partnership, limited partnership, proprietorship, firm, enterprise, franchise, association, self-employed individual, or trust doing business in Florida. S. 558.0035(2), F.S.

⁶¹ S. 558.0035(1), F.S.

Community Associations

Condominiums

A condominium (“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.⁶² All unit owners are members of the condo association, and the association is responsible for common elements operation and maintenance.⁶³

A condo is created by recording a declaration of condominium in the public records of the county where the condo is located.⁶⁴ 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.⁶⁵ However, unit owners other than the developer may elect a majority of the condo association’s board members after the earlier of the following events:

- Three years after 50 percent of the units that will be operated ultimately by the association have been conveyed to purchasers;
- Three months after 90 percent of the units that will be operated ultimately by the association have been conveyed to purchasers;
- When all the units that will be operated ultimately by the association have been completed, some of them have been conveyed to purchasers, and none of the others are being offered for sale by the developer in the ordinary course of business;
- When some of the units have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business;
- When the developer files a petition seeking protection in bankruptcy;
- When a receiver for the developer is appointed by a circuit court and is not discharged within 30 days after such appointment, unless the court determines within 30 days after appointment of the receiver that transfer of control would be detrimental to the association or its members; or
- Seven years after the date of the recording of the certificate of a surveyor and mapper⁶⁶ or an instrument that transfers title to a unit in the condo which is not accompanied by a recorded assignment of developer rights in favor of the grantee of such unit, whichever occurs first; or in the case of an association:
 - That may ultimately operate more than one condo, seven years after the date of the recording of the certificate of a surveyor and mapper or an instrument that transfers title to a unit which is not accompanied by a recorded assignment of developer rights in favor of the grantee of such unit, whichever occurs first, for the first condo it operates; or
 - Operating a phase condo,⁶⁷ seven years after the date of the recording of the certificate of a surveyor and mapper or an instrument that transfers title to a unit which is not accompanied by a recorded assignment of developer rights in favor of the grantee of such unit, whichever occurs first.⁶⁸

Homeowners’ Associations

A homeowner’s association (“HOA”) is an association of residential property owners in which voting membership is made up of parcel owners, in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel.⁶⁹ The HOA may also own or maintain common areas which members may be entitled to use.⁷⁰

⁶² “Common elements” means the portions of condo property not included in the units. S. 718.103(8) and (11), F.S.

⁶³ Ss. 718.103(2) and 718.113(1), F.S.

⁶⁴ S. 718.104(2), F.S.

⁶⁵ S. 718.103(16), F.S.

⁶⁶ See s. 718.104(4)(e), F.S.

⁶⁷ Phase condominiums are created pursuant to s. 718.403, F.S.

⁶⁸ S. 718.301(1), F.S.

⁶⁹ S. 720.301(9), F.S.

⁷⁰ “Common area” means all real property within a community which is owned or leased by an association or dedicated for use or maintenance by the association or its members. S. 720.301(2), F.S.

Florida law sets procedures and minimum requirements for HOA operation and provides for the arbitration of certain disputes, administered by DBPR, but no state agency directly regulates HOAs.⁷¹

An HOA is created by recording a declaration of covenants in the public records and incorporating the declaration in the deed of each parcel in the community; the declaration runs with the land and subjects it to the HOA's jurisdiction and control.⁷² A developer initially creates the community served by the HOA, and while the HOA is developer-controlled, the developer may elect all or a majority of the members of the HOA's board of directors.⁷³ However, members other than the developer may elect at least a majority of the HOA's board members after the earlier of the following events:

- Three months after 90 percent of the parcels in all phases of the community that will ultimately be operated by the HOA have been conveyed to members other than the developer;
- Such other percentage of the parcels has been conveyed to members, or such other date or event has occurred, as is set forth in the governing documents in order to comply with the requirements of any governmentally chartered entity with regard to mortgage financing;
- Upon the developer abandoning or deserting its responsibility to maintain and complete the amenities or infrastructure as disclosed in the governing documents;
- Upon the developer filing a petition under chapter 7 of the federal Bankruptcy Code;
- Upon the developer losing title to the property through a foreclosure action or the transfer of a deed in lieu of foreclosure, unless the successor owner has accepted an assignment of developer rights and responsibilities first arising after the date of such assignment; or
- Upon a receiver for the developer being appointed by a circuit court and not being discharged within 30 days after such appointment, unless the court determines within 30 days after such appointment that transfer of control would be detrimental to the association or its members.⁷⁴

Effect of Proposed Changes

CS/CS/CS/HB 583 repeals ch. 558, F.S., so that a property owner with a construction defect claim may sue on the claim without the need to first comply with the currently-existing chapter's alternative dispute resolution process. However, parties to a construction contract retain the ability to negotiate a mandatory alternative dispute resolution process as part of the contract's terms, and the bill saves from repeal ch. 558's design professional liability limitation by moving it to s. 768.401, F.S.

Further, the bill amends s. 95.11(3)(c), F.S. to create bright-line rules for the time periods in which a construction defect claim may be filed by:

- Making the four-year statute of limitations for a:
 - Patent defect claim run from the later of the date of the:
 - Owner's actual possession; or
 - Completion or termination of the contract between the engineer, architect, or contractor and his or her employer.
 - Latent defect claim run from the date the defect is discovered or should reasonably have been discovered with the exercise of due diligence.
- Providing for a seven-year statute of repose for a latent defect claim running from the later of the date of the:
 - Owner's actual possession; or
 - Completion or termination of the contract between the engineer, architect, or contractor and his or her employer.

Under the bill, "actual possession" means the date possession of the property where the subject improvements are constructed is delivered to a party other than the contractor or the contractor's affiliate. However, with respect to improvements in a community association subject to an HOA or condo association, "actual possession" means the date that association members other than the developer or its successor may elect a majority of the board of directors or board of administration.

⁷¹ Arbitrable HOA disputes are limited to election and recall disputes. See generally, ch. 720, F.S.

⁷² S. 720.301(4), F.S.

⁷³ S. 720.301(6), F.S.

⁷⁴ S. 720.307(1), F.S.

The bill also creates exceptions where a person has a longer time to bring a claim for certain latent defects. Specifically, if an action alleges a latent defect of a common area that is subject to an HOA or condo association, the action must be filed within:

- Seven years from the date of the:
 - Owner's actual possession; or
 - Completion or termination of the contract between the engineer, architect, or contractor and his or her employer; or
- Four years from the date the association was turned over to the unit owners, whichever is latest.⁷⁵

Further, if an action alleges a latent defect and the claimant can show:

- By clear and convincing evidence⁷⁶ that the engineer, architect, or contractor, or such person's employer, fraudulently concealed the defect, the action may be filed within 15 years after the time for filing an action begins to run.
- That the defect arises from a material Building Code violation, the action may be filed within ten years after the time for filing an action begins to run.

The amendments to s. 95.11(3)(c), F.S., apply to any action commenced on or after July 1, 2022, regardless of when the cause of action accrued, but any action that would not have been barred by that section before the bill's effective date must be commenced before July 1, 2023. If such an action is not commenced before July 1, 2023, and is barred by the amendments to s. 95.11(3)(c), F.S., made by the bill, then the action is barred.

The bill provides an effective date of July 1, 2022.

⁷⁵ Turnover occurs when the members other than the developer are entitled to elect a majority of the board of directors or board of administration. At turnover, the developer must turn over to the owner-controlled board specified documents and records. Ss. 718.301 and 720.307, F.S.

⁷⁶ "Clear and convincing evidence" is an intermediate standard of proof between the "preponderance of the evidence" standard used in most civil cases and the "beyond a reasonable doubt standard" used in criminal cases. Clear and convincing evidence means that the evidence is highly and substantially more likely to be true than untrue. *Reid v. Estate of Sonder*, 63 So.3d 7, 10 (Fla. 3rd DCA 2011).

B. SECTION DIRECTORY:

- Section 1:** Amends s. 95.11, F.S., relating to limitations other than for the recovery of real property.
Section 2: Amends s. 471.023, F.S., relating to qualification of business organizations.
Section 3: Amends s. 472.021, F.S., relating to certification of partnerships and corporations.
Section 4: Amends s. 481.219, F.S., relating to qualification of business organizations.
Section 5: Amends s. 481.319, F.S., relating to corporate and partnership practice of landscape architecture.
Section 6: Amends s. 492.111, F.S., relating to practice of professional geology by a firm, corporation, or partnership.
Section 7: Repeals ch. 558, F.S., consisting of ss. 558.001, 558.002, 558.003, 558.0035, 558.004, and 558.005, F.S., relating to construction defects.
Section 8: Creates s. 768.401, F.S., relating to design professionals; contractual limitation on liability.
Section 9: Creates an unnumbered section providing for applicability.
Section 10: Provides an effective date of July 1, 2022.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have an indeterminate negative impact on state government to the extent that it increases construction defect 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 increase costs associated with a construction defect claim by removing the pre-suit requirements that a complainant must satisfy, which may lead to increased litigation. However, the parties to a construction contract would retain the option to negotiate a mandatory alternative dispute resolution process or other pre-suit requirements under the contract's terms.
- May leave consumers bearing the costs related to latent construction defects where a claim is not filed within the seven-year statute of repose created by the bill and no exception applies.
- Preserves a liability limitation for design professionals.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Although the right to file a lawsuit is a valid and protected property interest,⁷⁷ a plaintiff has no vested right in a statute of limitations or repose in effect when his or her cause of action accrues.⁷⁸ Thus, a statute of limitations or repose may be either initially imposed or reduced by legislation and applied to an existing cause of action, if the litigant still has a reasonable amount of time left in which to enforce his or her right to file a lawsuit.⁷⁹ The bill may reduce the statute of limitations or repose for filing a construction defect claim in certain instances, but the bill also gives a claimant one year following the bill's adoption to file any claims that may be cut off by the changes made in the bill.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On January 19, 2022, the Civil Justice and Property Rights Subcommittee adopted a proposed committee substitute ("PCS") and reported the bill favorably as a committee substitute. The PCS differed from the original bill as it repealed chapter 558, Florida Statutes, consisting of ss. 558.001, 558.002, 558.003, 558.0035, 558.004, and 558.005, F.S.

On February 8, 2022, the Regulatory Reform Subcommittee adopted a PCS and reported the bill favorably as a committee substitute. The PCS differed from the underlying bill as it:

- Revised the four-year time period for the statute of limitations for claims based on construction defects by providing that the time-period begins to run 45 days after the date of:
 - Completion of the project, which means the date of issuance of the certificate of occupancy or the completion of the building permit for the project; or
 - Abandonment of the project if the project is not completed.
- Required a latent defect claim to be commenced within seven years.
- Required a material Building Code violation claim, where the claimant can show by clear and convincing evidence that the responsible party had actual knowledge of the defect at the time it occurred, to be commenced within 15 years.
- Repealed the 10-year statute of repose for claims based on construction defects.
- Removed a provision repealing ch. 558, F.S., restoring that chapter to current law.

On February 23, 2022, the Judiciary Committee adopted a PCS and reported the bill favorably as a committee substitute. The PCS differed from the underlying bill as it:

- Repealed ch. 558, F.S., but preserved ch. 558's design professional liability limitation from repeal by moving it to another chapter.

⁷⁷ See *Polk Cnty. BOCC v. Special Disability Trust Fund*, 791 So. 2d 581, 583 (Fla. 1st DCA 2001).

⁷⁸ *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).

⁷⁹ *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).

- Modified the time periods within which a construction defect claim may be filed by:
 - Making the four-year statute of limitations for a:
 - Patent defect run from the later of the date of the owner's actual possession or the completion or termination of the contract between the engineer, architect, or contractor and his or her employer.
 - Latent defect run from the time the defect is discovered or should have been discovered.
 - Decreasing the statute of repose for a latent defect from ten years to seven years.
 - Creating exceptions for latent defects shown to have been fraudulently concealed; found in a condominium or homeowners' association's common areas; or arising from a material Florida Building Code violation.

The analysis is drafted to the committee substitute as passed by the Judiciary Committee.