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 Community Affairs Committee

BILL:	SB 1196
INTRODUCER:	Senator Bennett
SUBJECT:	Residential Construction Warranties
DATE:	January 17, 2012 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Anderson	Yeatman	CA	**Pre-meeting**
2.			JU	
3.			BC	
4.				
5.				
6.				

I. Summary:

This bill provides a legislative intent explanation to affirm the limitations of the doctrine of implied warranty of fitness and merchantability or habitability associated with the construction and sale of a new home. This bill provides definitions for "habitability" and "off-site improvement". This bill prohibits a cause of action in law or equity based upon the doctrine of implied warranty of fitness and merchantability or habitability for off-site improvements, except as otherwise provided by law.

This bill creates s. 553.835 and an undesignated section of the Florida Statutes.

II. Present Situation:

The Florida Building Code

The purpose and intent of the Florida Building Codes Act located in part IV, of ch. 553, F.S., is "to provide a mechanism for the uniform adoption, updating, amendment, interpretation, and enforcement of a single unified state building code," known as the Florida Building Code. Section 553.72, F.S., defines the Florida Building Code as a "single set of documents that apply to the design, construction, erection, alteration, modification, repair, or demolition of public or private buildings, structures, or facilities in this state" which establish minimum standards that shall be enforced by authorized state and local government enforcement agencies. The Florida Building Code must be applied, administered, and enforced uniformly and consistently from jurisdiction to jurisdiction. It is the intent of the Legislature that local governments have the power to inspect all buildings, structures, and facilities within their jurisdictions in protection of the public's health, safety, and welfare.

Statute of Repose for Construction Defects
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 imposing time limits within which legal proceedings on a cause of action must be commenced, 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.[1] 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 limitation period specified in the statute of repose.[2]

Limitations Other Than for the Recovery of Real Property
Section 95.11(3)(c), F.S., provides that an action, other than for the recovery of real property, shall be commenced within four years when the cause of action is founded on the design, planning, or construction of an improvement to real property. The four years begin running from the latest of the following:

- The date of actual possession of the real property by the owner;
- The date of the issuance of the certificate of occupancy;
- The date of abandonment of the construction if not completed; or
- The date of completion or termination of the contract with an engineer, architect, or contractor and his or her employer.

If the action involves a latent defect, however, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. In any event, an action for a latent defect must be commenced within 10 years after the latest of the following:

- The date of actual possession of the real property by the owner;
- The date of the issuance of the certificate of occupancy;
- The date of abandonment of the construction if not completed; or
- The date of completion or termination of the contract with an engineer, architect, or contractor and his or her employer.

Implied Warranty of Fitness and Merchantability
In 1972 the Florida Supreme Court, in *Gable v. Silver* followed a national trend and abrogated the doctrine of caveat emptor in real estate transactions as applied to initial home sales and instead applied the common law doctrine of implied warranty to such transactions.[3] In this regard, the Court found the sale of a newly constructed home by a home builder-seller to the first purchaser, as a matter of law, carried with it an implied warranty for construction defects affecting the fitness and merchantability (or habitability) of the home or such other improvements that "immediately support" the home. Improvements that immediately support the home have been interpreted by the courts to include a water well or septic tank. These warranties

[1] *Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992).
[2] *Beach v. Great Western Bank*, 692 So. 2d 146 (Fla. 1997).
[3] *Gable v. Silver*, 258 So. 2d 11 (Fla. 4th DCA 1972), *adopted*, 264 So. 2d 418 (Fla. 1972)

are limited in that they extend to original purchasers only.[4] The implied warranties do not arise in the sale of nonresidential property or property intended for residential development.[5]

Warranties of Fitness for Work and Materials Specified in a Condominium Construction Contract

Section 718.203(2), F.S., provides that the contractor, subcontractors, and suppliers, grant to the developer and to the purchaser of each condominium unit implied warranties of fitness as to the work performed or materials supplied by them as follows:

- For three years from the date of completion of construction of a building or improvement, a warranty for the roof and structural components of the building or improvement and mechanical and plumbing elements serving a building or an improvement, except mechanical elements serving only one unit; and
- For one year after completion of all construction, a warranty as to all other improvements and materials.

Section 718.203(6), F.S., provides that nothing in the section affects a condominium as to which rights are established by contracts for sale of 10 percent or more of the units in the condominium by the developer to prospective unit owners prior to July 1, 1974, or as to condominium buildings on which construction has been commenced prior to July 1, 1974.

Maronda v. Lakeview

The Florida Supreme Court recently heard oral arguments on *Maronda Homes, Inc. v. Lakeview Reserve Homeowners Association, Inc.*,[6] an appeal from an October 2010 decision of the Fifth District Court of Appeal. In the decision under appeal the Fifth District determined that Lakeview Reserve could pursue the project developer, Maronda Homes, under an implied warranty theory for defects and deficiencies in the roads, drainage systems, retention ponds, and underground piping of the subdivision. At issue was the interpretation of the Supreme Court's decision in *Conklin v. Hurley*, in which the Supreme Court determined that implied warranties extended only to the construction of a residence and "improvements immediately supporting the residence" such as water wells and septic tanks.[7] The Fourth District Court of Appeal, in 1985, interpreted *Conklin* as precluding recovery by a homeowner's association under an implied warranty theory for defects in subdivision roads and drainage improvements.[8]

The Florida Supreme Court will decide whether the Fourth District (no implied warranties for off-site improvements) or the Fifth District (implied warranties for off-site improvements) is the law in the State of Florida for homeowners. The other issue to be decided by the Supreme Court is whether the Association itself has standing to pursue the claim or whether a class action on behalf of the homeowners is necessary. The Fifth District ruled that the Association had standing to bring the action.

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[4] *Strathmore Riverside Villas Condominium Association, Inc. v. Pacer Development Corp.*, 369 So. 2d 971 (Fla. 2d DCA 1979).
[5] *Conklin v. Hurley*, 428 So. 2d 654 (Fla. 1983).
[6] *Maronda Homes, Inc. v. Lakeview Reserve Homeowners Association, Inc.,* 48 So. 3d 902 (Fla. 5th DCA 2010)
[7] *Conklin v. Hurley*, 428 So. 2d 654 (Fla. 1983)
[8] *Port Seawall Harbor and Tennis Club Owners Ass'n., Inc. v. First Federal Savings and Loan Association of Martin County*, 463 So..2d 530 (Fla. 4th DCA 1985).

Summary of Other States
According to the National Association of Home Builders, there are twelve states that have, or have had, statutory warranties.

The statutory new home warranty acts for Indiana, Louisiana, Maryland, Minnesota, Mississippi, and New Jersey all specifically exclude, "off-site improvements" from warranty coverage. Mississippi is the most specific in its exclusion language, listing the non-covered off-site improvements as follows: "off-site improvements including streets, roads, drainage and utilities or any other improvements not a part of the home itself."[9]

The statutory new home warranty provision for Connecticut, Maine, New York, and Virginia do not indicate whether off-site improvements would be included or excluded from warranty coverage.

III. Effect of Proposed Changes:

Section 1 creates s. 553.835, F.S., which provides a legislative intent explanation to affirm the limitations of the doctrine of implied warranty of fitness and merchantability or habitability associated with the construction and sale of a new home. This section defines "habitability" and "off-site improvement". Prohibits a cause of action in law or equity based upon the doctrine of implied warranty of fitness and merchantability or habitability for off-site improvements, except as otherwise provided by law.

Section 2 provides that if any provision in the act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Section 3 provides an effective date of July 1, 2012, and applies to all cases accruing before, pending on, or filed after that date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

[9] Section 83-58-5, Miss. Code Ann.

D. Other Constitutional Issues

Section 3 of the bill may raise an impairment of contract constitutional issue. Both the Federal and Florida State Constitutions contain limitations on the State's right to alter or impair existing contracts.[10] Article I, Section 10 of the State Constitution and the Contract Clause of the United States Constitution prohibit laws impairing contractual obligations. Retrospective operation is not favored by courts, and a law is not construed as retroactive unless the act clearly, by express language or necessary implication, indicates that the Legislature intended a retroactive application.[11] These provisions allow courts to strike laws which retroactively burden or alter contractual obligations.[12]

The framework courts use to determine whether a law has impaired a contract is similar to a rational basis review. The United States Supreme Court set forth a three part test for whether a law violates a private contract under the Contract Clause in Energy Reserves Group v. Kansas Power & Light.[13] First, the state regulation must substantially impair a contractual relationship. If it doesn't substantially impair a contractual obligation then the inquiry ends, as the Contract Clause applies only to laws which *substantially* impair contract rights. Second, the State "must have a significant and legitimate purpose behind the regulation, such as the remedying of a broad and general social or economic problem."[14] Third, the law must be reasonable and appropriate for its intended purpose.

Florida's Contract Clause interpretations have generally mirrored the United States Supreme Court's interpretation of the Contract Clause of the Constitution of the United States.[15]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill might have an economic impact on the real estate development community. This legislation would limit the ability of new homeowners to bring a cause of action in law or equity based upon the doctrine of implied warranty of fitness and merchantability or habitability for off-site improvements.

[10] *See* U.S. Const., Art. I, Sec. 10, clause 1; Fla. Const., Art. I, Sec. 10.
[11] See *Heberle v. P.R.O. Liquidating Co.,* 186 So. 2d 280, 282 (1st DCA 1966) ("A strict rule of statutory construction indulged in by the courts is the presumption that the legislature, in the absence of a positive expression, intended statutes or amendments enacted by it to operate prospectively only, not retroactively.").
[12] *See In re Advisory Opinion to the Governor*, 509 So. 2d 292 (Fla. 1987); *Daytona Beach Racing & Recreational Facilities District v. Volusia County*, 372 So. 2d 419 (Fla. 1979).
[13] 459 U.S. 400 (1983).
[14] *Id.* at 411-13.
[15] *See generally Pomponio v. Cladridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1980); *Brevard County v. Florida Power and Light*, 693 So. 2d 77 (Fla. 5th DCA 1997).

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Florida Supreme Court heard oral arguments on December 6, 2011, regarding the *Maronda v. Lakeview* case and has yet to release an opinion.[16]

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[16] SC10-2292 & SC10-2336, Fla. Sup. Ct.