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 Judiciary Committee

BILL:	CS/SB 1196
INTRODUCER:	Community Affairs Committee and Senator Bennett
SUBJECT:	Residential Construction Warranties
DATE:	January 30, 2012 REVISED:

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

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill provides that a purchaser of a new home or a homeowners' association does not have a cause of action for damages based on an implied warranty of fitness and merchantability or habitability, relating to an offsite improvement for a new home. Under the bill, an "offsite improvement" includes a street, road, sidewalk, drainage, utilities, or any other improvement or structure that does not immediately and directly support the fitness and merchantability or habitability of the home itself.

This bill creates section 553.835, Florida Statutes, 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,[1] is "to provide a mechanism for the uniform adoption, updating, amendment, interpretation, and enforcement of a single unified state

[1] See ch. 553, part IV, F.S.

building code," known as the Florida Building Code.[2] 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." The Florida Building Code establishes minimum standards that must be enforced by authorized state and local government enforcement agencies. Specified local boards or agencies "inspect all buildings, structures, and facilities within their jurisdictions" for the protection of the public's health, safety, and welfare.[3] The Florida Building Code must be "applied, administered, and enforced uniformly and consistently from jurisdiction to jurisdiction."[4]

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.[5] 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.[6]

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, must be commenced within four years if 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;

[2] Section 553.72(1), F.S.
[3] Sections 553.73(1)(e) and 553.72(2), F.S.
[4] Section 553.72(1), F.S.
[5] *Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992).
[6] *Beach v. Great Western Bank*, 692 So. 2d 146 (Fla. 1997).

- 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.[7] In this regard, the Court found that 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.[8] However, the implied warranties do not arise in the sale of nonresidential property or property intended for residential development.[9] Furthermore, these warranties are limited in that they extend to original purchasers only.[10]

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

Section 718.203(2), F.S., grants condominium developers or purchasers implied warranties of fitness on work performed or materials supplied by contractors, subcontractors, and suppliers, beginning at the completion[11] of construction. A three year warranty exists for a roof and structural components of the building or improvement, and for mechanical and plumbing elements serving the building or improvement, but not mechanical elements serving only one unit.[12] A one year warranty exists as to all other improvements and materials.[13]

Lakeview v. Maronda

On December 6, 2011, The Supreme Court of Florida heard oral arguments on *Lakeview Reserve Homeowners Association, Inc. v. Maronda Homes, Inc.*,[14] an appeal from an October 2010 decision of the Fifth District Court of Appeal. In the decision under appeal, the court 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

[7] *Gable v. Silver*, 258 So. 2d 11 (Fla. 4th DCA 1972), *adopted*, 264 So. 2d 418 (Fla. 1972)
[8] *Conklin v. Hurley*, 428 So. 2d 654 (Fla. 1983).
[9] *Id*. at 659.
[10] *Strathmore Riverside Villas Condominium Ass'n, Inc. v. Paver Development Corp.*, 369 So. 2d 971 (Fla. 2d DCA 1979).
[11] The limitations period may be tolled until control of a condominium association passes from the developer to the unit owners. *Seawatch at Marathon Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 658 So. 2d 922, 925 (Fla.1994).
[12] Section 718.203(2)(a), F.S.
[13] Section 718.203(2)(b), F.S.
[14] *Lakeview Reserve Homeowners Association, Inc v. Maronda Homes, Inc..*, 48 So. 3d 902 (Fla. 5th DCA 2010)

residence" such as water wells and septic tanks.[15] 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.[16]

The Florida Supreme Court will decide whether the Fourth District opinion (no implied warranties for off-site improvements) or the Fifth District opinion (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 homeowners' association itself has standing to pursue the implied warranties claim or whether a class action on behalf of the homeowners is necessary. The Fifth District Court of Appeal ruled that the association had standing to bring the action.

III. Effect of Proposed Changes:

Application of an Implied Warranty of Fitness and Merchantability or Habitability (Section 1)

The bill creates s. 553.835, F.S., denying a cause of action in law or equity based upon the doctrine of implied warranty of fitness and merchantability or habitability for offsite improvements, except as otherwise provided by law.

The bill defines an "offsite improvement" in relation to the "lot on which a new home is constructed." The definition of an off-site improvement encompasses any "street, road, sidewalk, drainage, utilit[y], or any other improvement or structure" that is not located on or under the lot. Regardless of its location, any improvement or structure will be deemed an "offsite improvement" if it does not immediately and directly support the fitness and merchantability or habitability of the home itself.

Existing rights of purchasers of homes or homeowners' associations to pursue causes of action based upon contract, tort, or statute are not altered or limited by the bill.

Legislative Intent and Purpose (Preamble and Section 1)

The bill affirms limitations on the doctrine of implied warranty of fitness and merchantability or habitability associated with the construction and sale of a new home, and provides an explanation of the legislative intent for affirming these limitations.

Severability (Section 2)

The bill creates an undesignated section of the Florida Statutes, providing a severability clause. The severability clause directs a court to sever provisions of the bill which the court finds to be invalid and to give effect to the provisions that are valid.[17]

---

[15] *Conklin v. Hurley*, 428 So. 2d 654 (Fla. 1983).

[16] *Port Seawall Harbor and Tennis Club Owners Ass'n., Inc. v. First Federal Savings and Loan Ass'n of Martin County*, 463 So. 2d 530 (Fla. 4th DCA 1985).

[17] "Courts are under a duty to sever unconstitutional provisions from a law and allow the remainder of the law to stand if that is possible, regardless of the lack of a severability clause in the law." The Florida Senate, *Manual for Drafting Legislation*, 126 (6th ed. 2009) (citing *State ex rel. Boyd v. Green*, 355 So. 2d 789 (Fla. 1978)).

Effective Date (Section 3)

The bill provides an effective date of July 1, 2012. The limitations on the doctrine of implied warranty of fitness and merchantability or habitability, established by the bill, would apply 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.

D. Other Constitutional Issues

The bill applies retroactively to cases accruing before and pending on the effective date of the bill, which is July 1, 2012. If the decision of the Fifth District Court of Appeal in *Lakeview Reserve Homeowners Association, Inc. v. Maronda Homes, Inc.*, created a vested right to a cause of action, the retroactive application of the bill to cases accruing before the effective date and to pending cases may be unconstitutional. "'[O]nce a cause of action has accrued, the right to pursue that cause of action is generally considered a vested right.'"[18] Accordingly, legislation that abolishes an accrued cause of action may violate the due process clause of the Florida Constitution.[19] On the other hand, a statute that relates only to a procedure or remedy generally may apply to all pending cases.[20]

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

[18] *American Optical Corporation v. Spiewak*, 73 So. 3d 120, 126 (Fla. 2011) (quoting *R.A.M. of South Fla., Inc., v. WCI Communities, Inc.*, 869 So. 2d 1210, 1220 (Fla. 2d DCA 2004)).
[19] *Id.* at 133.
[20] *Morris v. Swanson*, 940 So. 2d 1256, 1257 (Fla. 1st DCA 2006) (quoting *Young v. Altenhaus*, 472 So. 2d 1152, 1154 (Fla.1985)).

equity based upon the doctrine of implied warranty of fitness and merchantability or habitability for off-site improvements.

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.[21]

VIII. Additional Information:

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

CS by Community Affairs on January 23, 2012
The CS strikes the definition of habitability. The CS inserts the phrase 'fitness and merchantability' as interchangeable with habitability to line up with case law. The CS replaces a provision regarding the applicability of s. 553.835, F.S. The CS provides that the existing rights of purchasers of homes or homeowners' associations to pursue certain causes of action are not altered or limited.

B. Amendments:

None.

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