The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Regulated Industries

BILL:	SB 286
INTRODUCER:	Senator Negron
SUBJECT:	Design Professionals
DATE:	February 6, 2013
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	**Favorable**
2.			JU	
3.			CA	
4.				
5.				
6.				

I. Summary:

SB 286 would permit business entities, including corporations, partnerships, firms, and self-employed individuals, to limit by contract the liability of individual employees or agents of that business for negligence arising from the performance of professional services under a contract. For the liability limitation to apply, the following conditions must be met:

- The business entity executes the contract with a claimant or with another entity for professional services on behalf of the claimant;
- The contract includes a prominent statement that the individual employee or agent may not be held liable;
- The individual employee or agent is not a party to the contract;
- The business entity maintains professional liability insurance required by the contract;
- The conduct by the design professional giving rise to the damages occurs within the course and scope of the contract; and
- The harm is solely economic and the harm does not extend to persons or property beyond the contract.

The bill amends the current liability provisions for engineers, surveyors and mappers, architects and interior designers, and landscape architects to specifically reference the limitation of liability provision created under the bill.

The bill provides an effective date of July 1, 2013.

This bill amends the following sections of the Florida Statutes: 471.023, 472.021, 481.219, 481.319, 558.002. The bill creates section 558.0035, Florida Statutes.

II. Present Situation:

Personal Liability for Professional Services

Section 621.07, F.S., provides for the personal liability of an officer, agent, member, manager, or employee of a corporation or limited liability company with regard to negligence, wrongful acts, or misconduct committed by that person while rendering professional services. It provides that the limited liability provided to professional service corporations and limited liability companies shall not:

> be interpreted to abolish, repeal, modify, restrict, or limit the law now in effect in this state applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional service and to the standards for professional conduct; provided, however, that any officer, agent, member, manager, or employee of a corporation or limited liability company organized under this act shall be personally liable and accountable only for negligent or wrongful acts or misconduct committed by that person, or by any person under that person's direct supervision and control, while rendering professional service on behalf of the corporation or limited liability company to the person for whom such professional services were being rendered; and provided further that the personal liability of shareholders of a corporation, or members of a limited liability company, organized under this act, in their capacity as shareholders or members of such corporation or limited liability company, shall be no greater in any aspect than that of a shareholder-employee of a corporation organized under chapter 607 or a member-employee of a limited liability company organized under chapter 608. The corporation or limited liability company shall be liable up to the full value of its property for any negligent or wrongful acts or misconduct committed by any of its officers, agents, members, managers, or employees while they are engaged on behalf of the corporation or limited liability company in the rendering of professional services.

Chapter 588, F.S.--Construction Defects

Chapter 558, F.S., is intended to provide an alternative dispute resolution process that would reduce the need for litigation.[1] Chapter 558, F.S., provides procedures that claimants must follow before initiating litigation regarding construction defects. It provides for notice and an opportunity to cure. Before the property owner may sue a contractor, the property owner is required to notify the contractor of the defect and to give the contractor the opportunity to examine the defect. If the contractor agrees that the defect exists, the contractor is given a reasonable opportunity to repair the defect or make some other offer of settlement. If the parties still disagree, the matter may then go to court. "In more practical terms, it is intended to allow

[1] Chapter 2003-49, L.O.F. The legislative finding with regard to this chapter provides that it is beneficial to have an alternative method to resolve construction disputes that would reduce the need for litigation while protecting the rights of homeowners. Section 558.001, F.S.

both claimants and participants to design and construction to resolve alleged defects before both sides run to the courthouse and spend a pile of money on lawyers."[2]

Section 558.002(3), F.S., defines the term "claimant" to mean:

> a property owner, including a subsequent purchaser or association, who asserts a claim for damages against a contractor, subcontractor, supplier, or design professional concerning a construction defect or a subsequent owner who asserts a claim for indemnification for such damages. The term does not include a contractor, subcontractor, supplier, or design professional.

Section 558.002(7), F.S., defines the term "design professional" to mean "a person, as defined in s. 1.01, licensed in this state as an architect, interior designer, landscape architect, engineer, or surveyor."[3]

Economic Loss Rule

The economic loss rule is "a judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses."[4] Under the economic loss rule, economic damages may not be recovered in a negligence action if the damages are not accompanied by physical property damage or bodily injury.[5] This rule "bars a plaintiff from bringing tort claims to recover pure economic damages arising from a breach of contract cause of action absent personal injury or property damages."[6] As a result, where the relationship between the plaintiff and the defendant is derived in contract, and the plaintiff cannot prove a tort independent of some contractual breach, the economic loss rule bars recovery on any noncontract claims.[7]

The Florida Supreme Court defined economic losses as "damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits, without any claim of personal injury or damage to other property."[8] An economic loss includes "disappointed economic expectations," i.e., the loss of the benefit of the bargain. Courts have found that such losses are more appropriately protected by contract law, rather than by tort law.[9] To recover damages under tort law, "there must be a showing of harm above and beyond disappointed expectations. A buyer's desire to enjoy the benefit of his bargain is not an interest that tort law traditionally protects."[10]

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[2] Leiby and Lesser, *How to Comply with Chapter 558 Florida Statutes: Current Challenges and Future Changes*, The Florida Bar Journal (Feb. 2009).
[3] Section 725.08(4), F.S., also defines the term "design professional" to mean "an individual or entity licensed by the state who holds a current certificate of registration under chapter 481 to practice architecture or landscape architecture, under chapter 472 to practice land surveying and mapping, or under chapter 471 to practice engineering, and who enters into a professional services contract."
[4] *Indemnity Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532, 536 (Fla. 2004).
[5] 17 FLA. JUR. 2D *Damages* s. 36 (2010).
[6] *Id*.
[7] *Id.*
[8] *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc.*, 620 So. 2d 1244, 1246 (Fla. 1993) (quoting *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 918 (1966)).
[9] *Id.*
[10] *Id.* (quoting *Redarowicz v. Ohlendorf*, 441 N.E.2d 324, 327 (Ill. 1982)).

In *Casa Clara*, the Florida Supreme Court applied the economic loss rule to bar a negligence claim[11] by homeowners against a concrete supplier with whom the homeowners were not in privity. The court held that "[i]f a house causes economic disappointment by not meeting a purchaser's expectations, the resulting failure to receive the benefit of the bargain is a core concern of contract, not tort, law."[12] The court noted that there were other protections for homeowners, such as statutory warranties, the general warranty of habitability, the duty of sellers to disclose defects, the ability of purchasers to inspect houses for defects, and the homebuyers' power to bargain over price.[13]

The distinction between contract law and tort law is relevant to the remedies that can be attained. Tort law compensates people for personal injury or property damage caused by tortuous conduct, without regard to a contract. Contract law enforces expectancy interests created by an agreement between parties. Tort remedies may award plaintiffs greater damages and tort plaintiffs may be able to avoid the conditions of the contract,[14] while "contract principles [are] more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage."[15]

Recognizing the different interests that tort and contract law are intended to protect, the Florida Supreme Court also stated that:

> [t]his is the basic difference between contract law, which protects expectations, and tort law, which is determined by the duty owed to an injured party. For recovery in tort "there must be a showing of harm above and beyond disappointed expectations. A buyer's desire to enjoy the benefit of his bargain is not an interest that tort law traditionally protects."[16]

Economic Loss Rule and Design Professionals

In *Moransais v. Heathman*,[17] the Florida Supreme Court considered the application of the economic loss rule to a professional malpractice claim brought by a homeowner (plaintiff) against licensed engineers (defendants) who made a pre-purchase inspection and allegedly failed to detect and disclose defects in the condition of the house. The plaintiff had contracted with a professional engineering corporation to perform the home inspection services, and the contract did not name the defendants who actually conducted the inspection as parties to the contract.

The court considered the following two questions:

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[11] *Casa Clara* at 1246. In this case, the condominium association's claims against the defendant included breach of common law implied warranty, products liability, negligence, and violation of the building code.
[12] *Id.* at 1247 (citing *East River Steamship Corp. v. Transamerica Delaval, Inc.* 476 U.S. 858, 870 (1986)).
[13] *Id.* at 1247.
[14] *Id.* at 1245 (citing William L. Prosser, *The Borderland of Tort and Contract in Selected Topics on the Law of Torts*, 380, 425 (1953)).
[15] *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899, 902 (Fla. 1987).
[16] *Casa Clara*, 620 So. 2d at 1246.
[17] *Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999).

- Where a purchaser of a home contracts with an engineering corporation, does the purchaser have a cause of action for professional malpractice against an employee of the engineering corporation who performed the engineering services?
- Does the economic loss rule bar a claim for professional malpractice against the individual engineer who performed the inspection of the residence where no personal injury or property damage resulted?

The court held that home purchasers have a cause of action for professional malpractice against an employee of the engineering corporation who conducts a home inspection but with whom the home purchaser is not in privity of contract.[18] The court concluded that professional malpractice and negligence claims are not barred by the economic loss rule. The court's holding was based on two principal reasons:

- Florida's common law and statutory scheme recognizes tort claims against professionals for negligence based on the professional's violation of a duty of care to the injured person.
- The economic loss rule is not intended to apply to professionals who negligently perform their duties.

The court stated that Florida's common law provides that persons who are:

> injured by another's negligence may maintain an action against the other person based on that other person's violation of a duty of due care to the injured person. Further, where the negligent party is a professional, the law imposes a duty to perform the requested services in accordance with the standard of care used by similar professionals in the community under similar circumstances.[19]

In addition to Florida's common law, the court relied on the two-year statute of limitations for professional malpractice in s. 95.11(4)(a), F.S. It also relied on s. 621.07, F.S., which provides that professional employees of a corporation may be held individually liable for any negligence committed while rendering professional services, to support its conclusion that the fact that both of the engineer defendants were employees of a corporation did not shield them from liability.

The court found that engineers were professionals within the meaning of s. 95.11, F.S., noting that a profession is "any vocation requiring at a minimum a four-year college degree before licensing is possible in Florida."[20] The court also noted that ss. 471.023 and 621.07, F.S., indicate an intent to hold licensed engineers as professionals in a corporation or partnership personally liable for their negligent acts.

[18] Privity of contract is defined as: the relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so. The requirement of privity has been relaxed under modern laws and doctrines of implied warranty and strict liability, which allow a third-party beneficiary or other foreseeable user to sue the seller of a defective product. *Blacks Law Dictionary* (9th Edition).
[19] *Moransais* at 975-76.
[20] *Id.* at 976 (citing *Garden v. Frier*, 602 So. 2d 1273, 1275 (Fla. 1992)).

Regarding the economic loss rule, the court noted that the rule has not eliminated causes of action premised upon torts that are independent of the contract.[21] It also held that the rule was not intended to bar well-established common law causes of action, such as those for neglect in providing professional services.[22] The court stated that the economic loss rule was primarily intended to limit product liability claims, and that it should generally be limited to that context "or situations where the policy considerations are substantially identical to those underlying the product liability-type analysis."[23] Noting that actions against professionals often involve only economic loss without any personal or property damage, the court stated that extending the economic loss rule to tort cases against professionals "would effectively extinguish such causes of action."[24]

Third Party Liability Limitations in Contracts

Generally, Florida law recognizes limitation of liability clauses in contracts and permits third party beneficiaries to enforce a limitation of liability clause. For example, in *Florida Power and Light Company v. Mid-Valley*,[25] Florida Power and Light Company (FPL) sued Brown & Root, Inc. (Brown & Root), an engineering firm, and one of its engineers for negligence in the design, engineering, surveying, and construction of an embankment associated with a cooling water reservoir. Brown & Root and its employee engineer were not a party to the contract. The parties to the contract were FPL and "Mid-Valley, Inc. (Mid-Valley), which was a wholly-owned subsidiary of Brown & Root. The case was brought in Federal court.

The contract included a limitation of liability clause to the effect that the engineer would not be held "liable for any indirect, special or consequential loss or *damage* arising out of the performance of services" under the contract, including damages caused by the engineer's negligence.[26] The contract also provided that Mid-Valley would indemnify the engineer and hold the engineer harmless from any damages or liability.

In *Florida Power and Light Company v. Mid-Valley*, the Federal Court of Appeals for the Eleventh Circuit found that Brown & Root and the engineer were intended third party beneficiaries of the contract and, as such, were entitled to the protection of the limitation of liability clause and the indemnity provision in the contract.

However, in *Witt v. La Gorce Country Club, Inc.*,[27] the Florida Third District Court of Appeal held that the limitation of liability clause in the contract was invalid and unenforceable as to a geologist in his capacity as a licensed professional. Consequently, the court refused to apply the economic loss rule to bar the claim. The court relied on the holding in *Moransais*, and also noted that, as a professional geologist, Witt was specifically subject to personal liability for negligence, misconduct, or wrongful acts under s. 492.111, F.S. Consequently, the court rejected the application of the economic loss rule to a professional malpractice claim against a licensed professional geologist.

[21] *Id.* at 981 (citing *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So. 2d 1238 (Fla. 1996)).
[22] *Id.* at 983.
[23] *Id.*
[24] *Id.*
[25] *Florida Power and Light Company v. Mid-Valley, Inc.*, 763 F.2d 1316 (11th Cir. 1985).
[26] *Id.* at 1318.
[27] *Witt v. La Gorce Country Club, Inc.*, 2009 WL 1606437 (Fla. 3d DCA 2009).

In *Witt*, the plaintiff, La Gorce Country Club, Inc., entered into a design-build contract for a reverse osmosis system with ITT Industries, Inc. (ITT), and Gerald M. Witt and Associates, Inc. (GMWA), which was the company of the defendant professional geologist Gerald M. Witt (Witt). The contract provided a limitation of liability to the benefit of Witt, who in his individual capacity, was not a party to the contract. The reverse osmosis system ultimately failed after numerous technical problems during the design and building of the system, and the plaintiff filed suit.[28]

In effect, the *Witt* decision is an exception to the rule, as expressed in *Florida Power and Light Company v. Mid-Valley*, that third party beneficiaries of a contract are entitled protection of a liability limitation clause in a contract. Under *Witt*, professionals are exempt from that protection. In refusing to recognize the contract's liability limitation and to apply the economic loss rule to limit Witt's liability, the court noted that:

> claims of professional negligence operate outside of the contract. Because a professional negligence claim exists and operates outside of a professional services contract, it would be inapposite to limit such a remedy to the confines of the very document outside of which it was intended to operate.[29]

Engineers

Professional engineers are regulated by the Board of Professional Engineers within the Department of Business and Professional Regulation (department), which enforces and administers the provisions of ch. 471, F.S. Existing law provides the following education and experience requirements for a person to qualify to take the examination for licensure as an engineer:

- Graduating from an approved engineering curriculum of four years or more in a school, college, or university which has been approved by the board and has a record of four years of active engineering experience of a character indicating the competence to be in responsible charge of engineering;
- Graduating from an approved engineering technology curriculum of four years or more in a school, college, or university within the State University System, having been enrolled or having graduated prior to July 1, 1979, and having had a record of four years of active engineering experience of a character indicating competence to be in responsible charge of engineering; or
- Having, in lieu of the education and experience requirements, 10 years or more of active engineering work of a character indicating that the applicant is competent to be placed in responsible charge of engineering. This provision does not apply unless the person

[28] The claims against Gerald M. Witt, the defendant professional geologist, and his codefendant corporations included: (1) fraud in the inducement against codefendant ITT Industries, Inc. (ITT); (2) aiding and abetting fraud in the inducement by Witt and his company Gerald M. Witt and Associates, Inc. (GMWA); (3) violation of the Florida Deceptive and Unfair Trade Practices Act in ss. 501.201-501.213, F.S., by ITT and GMWA; (4) professional malpractice by Witt and GMWA; and (5) breach of the contract by GMWA. *Witt* 2009 WL at 2.

[29] *Witt* at 4.

> notifies the department before July 1, 1984, that she or he was engaged in such work on July 1, 1981.[30]

Engineer Liability

Licensed engineers may practice through a business organization, including a partnership, corporation, or other legal entity offering professional services.[31] Current law establishes the liability of engineers when practicing through a business organization, including the liability of partners in a partnership and of the business organization's officers, agents, or employees for negligence, misconduct, or wrongful acts.[32] Section 471.023(3), F.S., provides that the "fact that a licensed engineer practices through a business organization does not relieve the licensee from personal liability for negligence, misconduct, or wrongful acts committed by him or her." With regard to the extent of a licensed engineer's liability for his or her own negligence, misconduct, or wrongful acts while employed by a business organization, s. 471.023(3), F.S., also provides that:

> any officer, agent, or employee of a business organization other than a partnership shall be personally liable and accountable only for negligent acts, wrongful acts, or misconduct committed by him or her or committed by any person under his or her direct supervision and control, while rendering professional services on behalf of the business organization.

Partnerships and all partners are also jointly and severally liable for the negligence, misconduct, or wrongful acts committed by their agents, employees, or partners while acting in a professional capacity.[33] A business organization is liable up to the full value of its property for any negligent acts, wrongful acts, or misconduct committed by any of its officers, agents, or employees while they are engaged on its behalf in the rendering of professional services.[34]

Surveyors and Mappers

Surveyors and mappers are regulated by the Board of Professional Surveyors and Mappers within the Department of Agriculture and Consumer Services, which enforces and administers the provisions of ch. 472, F.S.[35] Existing law provides the following education and experience requirements for a person to qualify to take the examination for licensure as a surveyor and mapper:

- Receiving a degree in surveying and mapping of four years or more in a surveying and mapping degree program from a college or university recognized by the board and having a specific experience record of four or more years as a subordinate to a professional surveyor and mapper in the active practice of surveying and mapping, which experience is of a nature indicating that the applicant was in responsible charge of the accuracy and correctness of the surveying and mapping work performed.

[30] Section 471.013(1), F.S.
[31] Section 471.023, F.S
[32] *Id.*
[33] Section 471.023(3), F.S.
[34] *Id.*
[35] The regulation of surveyors and mappers was transferred from the Department of Business and Professional Regulation to the Department of Agriculture and Consumer Services by ch. 2009-66, L.O.F.

- Being a graduate of a four-year course of study, other than in surveying and mapping, at an accredited college or university and having a specific experience record of six or more years as a subordinate to a registered surveyor and mapper in the active practice of surveying and mapping, five years of which are of a nature indicating that the applicant was in responsible charge of the accuracy and correctness of the surveying and mapping work performed.[36]

Surveyors and Mappers Liability

Licensed surveyors and mappers may practice through a corporation or partnership. Current law establishes the liability of surveyors and mappers when practicing through a corporation or partnership.[37] "The fact that any registered surveyor and mapper practices through a corporation or partnership shall not relieve the registrant from personal liability for negligence, misconduct, or wrongful acts committed by him or her."[38]

In regard to the extent of a licensed mapper and surveyor's liability for his or her own negligence, misconduct, or wrongful acts while employed by a business organization, s. 472.021(3), F.S., also provides that:

> any officer, agent, or employee of a business organization other than a partnership shall be personally liable and accountable only for negligent acts, wrongful acts, or misconduct committed by him or her or committed by any person under his or her direct supervision and control while rendering professional services on behalf of the business organization.

Partnerships and all partners are also jointly and severally liable for the negligence, misconduct, or wrongful acts committed by their agents, employees, or partners while acting in a professional capacity.[39] A business organization is liable up to the full value of its property for any negligent acts, wrongful acts, or misconduct committed by any of its officers, agents, or employees while they are engaged on its behalf in the rendering of professional services.[40]

Architects and Interior Designers

Architects and interior designers are regulated by the Board of Architecture and Interior Design within the Department of Business and Professional Regulation, which enforces and administers the provisions of part I of ch. 481, F.S. Existing law provides the following education and experience requirements for a person to qualify to take the examination for licensure as an architect:

- Graduating from a school or college of architecture accredited by the National Architectural Accreditation Board, or from an approved architectural curriculum at an unaccredited school or college of architecture approved by the board; and
- Completing one year of the internship experience required by s. 481.211(1), F.S.[41]

[36] Section 472.013(2), F.S.
[37] Section 472.021(3), F.S.
[38] *Id*.
[39] *Id.*
[40] *Id*.
[41] Section 481.209(1), F.S.

Current law provides the following education and experience requirements for a person to qualify to take the examination for licensure as an interior designer:

- Graduating from a board-approved interior design program of five years or more and completing one year of diversified interior design experience;
- Graduating from a board-approved interior design program of four years or more and completing two years of diversified interior design experience;
- Completing at least three years of a board-approved interior design curriculum and completing three years of diversified interior design experience; or
- Graduating from an interior design program of at least two years and completing four years of diversified interior design experience.[42]

Architects and Interior Designers Liability

Licensees may offer architecture and interior design services through a corporation, limited liability company, or partnership.[43] The corporation, limited liability company, or partnership shall not be relieved of responsibility for the conduct or acts of its agents, employees, or officers.[44]

With regard to the extent of a licensed architect's or interior designer's personal liability, s. 481.219(11), F.S., also provides that:

> the architect who signs and seals the construction documents and instruments of service shall be liable for the professional services performed, and the interior designer who signs and seals the interior design drawings, plans, or specifications shall be liable for the professional services performed.

Corporations, limited liability companies, and partnerships are not relieved of responsibility for the conduct or acts of their agents, employees, or officers.[45]

Landscape Architects

Landscape architects are regulated by the Board of Landscape Architecture within the Department of Business and Professional Regulation, which enforces and administers the provisions of part II of ch. 481, F.S. Existing law provides the following education and experience requirements for a person to qualify to take the examination for licensure as a landscape architect:

- Completing a board-approved professional degree program in landscape architecture; or
- Having six years of actual practical experience in landscape architectural work of a grade and character satisfactory to the board.[46]

[42] Section 481.209(2), F.S.
[43] Section 481.219, F.S.
[44] Section 481.219(11), F.S.
[45] *Id.*
[46] Section 481.309(1), F.S.

Practicing landscape architecture through a corporation or partnership does not relieve any landscape architect from personal liability for his or her professional acts.[47]

Landscape Architects Liability
Licensees may offer landscape architect services through a corporation or partnership.[48] Section 481.319(6), F.S., provides that:

> the fact that registered landscape architects practice landscape architecture through a corporation or partnership as provided in this section shall not relieve any landscape architect from personal liability for his or her professional acts.

III. Effect of Proposed Changes:

The bill creates s. 558.0035, F.S., to permit business entities to limit by contract the liability of individual employees or agents of that business for negligence arising from the performance of professional services under a contract.

The bill amends s. 558.002(3), F.S., to define the term "business entity" to mean "any corporation, limited liability company, partnership, limited partnership, proprietorship, firm, enterprise, franchise, association, self-employed individual, or trust, whether fictitiously named or not, doing business in this state." It does not appear that this definition is limited to the design professionals referenced in the bill, i.e., the engineers, surveyors and mappers, architects, interior designers, and landscape architects.

For the liability limitation to apply, the following conditions must be met:

- The business entity executes the contract with a claimant or with another entity for professional services on behalf of the claimant;
- The contract includes a prominent statement that the individual employee or agent may not be held liable;
- The individual employee or agent is not a party to the contract;
- The business entity maintains professional liability insurance required by the contract;
- The conduct by the design professional giving rise to the damages occurs within the course and scope of the contract; and
- The harm is solely economic and the harm does not extend to persons or property beyond the contract.

In regards to the condition in s. 558.0035(1), F.S., that the business entity must have executed the contract with another entity for professional services on behalf of the claimant,[49] this condition would apply to contracts between the business entity and a person other than the property owner. For example, a contract for services between an architectural firm (the business entity) and an

[47] Section 481.319(6), F.S.
[48] Section 481.319, F.S.
[49] A "claimant" is defined as "a property owner, including a subsequent purchaser or association, who asserts a claim for damages against a contractor, subcontractor, supplier, or design professional concerning a construction defect or a subsequent owner who asserts a claim for indemnification for such damages. The term does not include a contractor, subcontractor, supplier, or design professional."

engineering firm or subcontractors for services needed to satisfy the business entities contract with the claimant.

Regarding the condition in s. 558.0035(4), F.S., that the business entity must maintain professional liability required under the contract, the bill does not require that the contract must require that the business entity maintain professional liability insurance. The extent to which the contract requires the maintenance of professional liability insurance coverage would be limited to the contract as negotiated by the parties. It appears that, if the contract is silent on the issue of liability insurance, then the business would not be required to maintain such insurance in order for the liability limitation to apply.

Regarding the condition in s. 558.0035(5), F.S., that the conduct by the design professional giving rise to the damages must have occurred within the course and scope of the contract, it is not clear if this condition applies when the conduct giving rise to the damages was performed by a person who was not a design professional. Although s. 558.035, F.S., refers to the "performance of professional services," subsection (5) is the only provision in this section that refers to the design professional.

Regarding the condition in s. 558.0035(6), F.S., that the harm is solely economic and does not extend to persons or property not subject to the contract, it is not clear whether the term "not subject to the contract" is limited to the person or persons who are a party to the contract. To the extent that other persons may have an interest, including an economic interest, in the benefits of the contract without being a party to the contract, those persons appear not to be barred from suing the business entity's employees and agents for negligence. For example, a condominium association which was not a party to the contract between the business entity and the condominium developer would not be subject to the limitation.

If a claimant has entered into a contract with a business entity and the contract meets the conditions set forth in the bill, a claimant may be barred from potential tort claims for recovery of economic damages resulting from a construction defect[50] that may be filed by a claimant against a professional employed by the business entity or acting as its agent.. The contract would protect the employees and agents of business entities from tort negligence claims for damages resulting from the performance of the professional services that are the subject of the contract. In effect, the economic loss rule could be applied to such persons, whether professionals or not. But in regards to professionals, the bill may extend the application of the rule to them as was rejected in the *Witt* case.

[50] A "construction defect" is defined in s. 558.02(5), F.S., as a deficiency in, or a deficiency arising out of, the design, specifications, surveying, planning, supervision, observation of construction, or construction, repair, alteration, or remodeling of real property resulting from:

- Defective material, products, or components used in the construction or remodeling;
- A violation of the applicable codes in effect at the time of construction or remodeling which gives rise to the cause of action;
- A failure of the design of real property 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.

The effect of the bill's tort liability limitation is also to apply the economic loss rule to bar claims by claimants against the business entity's employees and agents who provided the professional design services under contract. Therefore, a claimant could not bring a negligence claim against a professional who is a business entity's employee or agent for a harm that is based purely on economic loss. The claimant would be limited to a lawsuit based on contract claims against the business entity.

The bill amends the current liability provisions in ss. 471.023(3), F.S. (engineers), 472.021(3), F.S. (surveyors and mappers), 481.219(11), F.S. (architects and interior designers), and 481.319(6), F.S. (landscape architects) to specifically reference the limitation of liability provision created in ch. 558, F.S., under the bill.

The bill provides an effective date of July 1, 2013.

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:

Section 21, Art. I, of the Florida Constitution provides the constitutional right of access to court. It provides:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

In *Johnson v. R. H. Donnelly Company*, the Florida Supreme Court held that the constitutional right of "access to courts guarantees the continuation of common law causes of action and those causes of action may be altered only if there is a reasonable substitution which protects the persons protected by the common law remedy."[51] In *Kluger v. White*, the Florida Supreme Court also held that the Legislature cannot abolish a common law cause of action "unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown."[52]

[51] *Johnson v. R. H. Donnelly Co.*, 402 So. 2d 518, 520 (Fla. 1981).
[52] *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973).

As noted earlier, in *Moransais v. Heathman*,[53] the Florida Supreme Court stated that Florida's common law and statutory scheme recognizes tort claims against professionals for negligence based on the professional's violation of a duty of care to injured persons.

As noted earlier, in *Witt v. La Gorce Country Club, Inc.*,[54] the Third District Court of Appeal held that a limitation of liability clause in the contract for the benefit of a third part professional geologist was invalid and unenforceable as to a licensed professional. Consequently, the court refused to apply the economic loss rule to bar a negligence claim against the professional under the principle that claims of professional liability operate outside of the contract and cannot be waived.

By limiting negligence claims against licensed engineers, surveyors and mappers, architects, and landscape architects, the bill may implicate concerns relating to the constitutional right of access to courts to the extent that the bill limits causes of actions for professional negligence and professional malpractice. However, the effect of the bill is to not bar such claims in all instances. It would permit a claimant, as defined in s. 558.02(3), F.S., and a business entity, as defined in the bill, to waive by contract professional liability of the business entity's employees and agents. In effect, the bill would reject the holding in *Witt*.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill limits the tort claims against a business entity's, as defined in the bill, employees and agents, including licensed engineers, surveyors and mappers, architects, and landscape architects (design professionals). The design professionals affected by the bill may experience lower costs for professional liability insurance and may charge lower prices to their customers for their professional services as a consequence of the liability limitations that may be provided in a contract.

Parties to a contract who experience an economic loss that may be attributable to the professional negligence or professional malpractice of a design professional or by an employee or agent of a business entity may be limited to the remedies available under contract law, e.g., they may be barred from claims for negligence that resulted solely in economic harm to the extent that the contract does not authorize such claims.

C. Government Sector Impact:

None.

[53] *Moransais v. Heathman*, 744 So. 2d 973, 975, 976 (Fla. 1999).
[54] *Witt v. La Gorce Country Club, Inc.*, 2009 WL 1606437 (Fla. 3d DCA 2009).

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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.