**WHITE PAPER**

**REVISION TO FLORIDA’S STATUTES OF LIMITATION AND REPOSE FOR ACTIONS FOUNDED UPON AN IMPROVEMENT TO REAL PROPERTY**

**Section 95.11(3)(b), Florida Statutes (2023)[[1]](#footnote-1)**

1. **SUMMARY**

The purpose of this proposal is to request that the Real Property, Probate, and Trust Law (“RPPTL”) Section of the Florida Bar advocate for the Florida Legislature to revise Section 95.11(3)(b), Florida Statutes (2023). This law establishes the statute of limitations and statute of repose periods for actions founded upon the design, planning, or construction of an improvement to real property.

Of note, the 2023 revisions to s. 95.11(3)(b), Fla. Stat., eliminated certain “clock starter,” or “trigger” events for these statutes of limitation and repose, in favor of more discrete deadlines. However, these discrete deadlines do not capture the entire universe of types of improvements to real property, as defined by Florida law. In effect, for those types of improvements not captured by the current statute, there is effectively either is no statute of limitations, or potentially deferral to the general four year limitations period, *see* s. 95.11(3)(o), *Fla. Stat.* (2023), but with no clarity on when the statute would begin. Further, the law, as amended, results in the likely unintended premature triggering of the limitations and repose periods, where there has been an abandonment of construction and subsequent completion of the improvement by a completion contractor under the same permit. Finally, Chapter 2023-22, Laws of Florida fail to contain the preambular findings of its predecessors as to the “public necessity” of shortening the statute of limitations and repose periods, which very well may infringe the access to courts clause in Article I, Section 21 of the Constitution of the State of Florida.

As such, this legislation proposes revisions to s. 95.11(3)(b), Fla. Stat. (2023) to eliminate these ambiguities and its potential constitutional infirmity, while at the same time maintaining or harmonizing other prior substantive revisions found in the 2018 and 2023 versions of the statute.[[2]](#footnote-2) This bill does not have a fiscal impact on state funds.

1. **CURRENT SITUATION**
	1. **Statutes of Limitations and Repose, generally**

A statute of limitations bars a lawsuit’s filing after a certain amount of time elapses following an injury.[[3]](#footnote-3) This time period typically begins to run when a cause of action accrues (that is, on the date of the injury), but may also begin to run on the date the injury is discovered or on which it would have been discovered with reasonable efforts.[[4]](#footnote-4) In other words, a statute of limitations bars the available civil remedy if a lawsuit is not timely filed after an injury.

A statute of repose bars the filing of a lawsuit after a fixed period of time passes following a specific act, which act is unrelated to the cause of action’s accrual or the injury’s discovery, even if this period ends before the plaintiff is injured.[[5]](#footnote-5) 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.[[6]](#footnote-6) Courts construe a cause of action extinguished 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.[[7]](#footnote-7)

* 1. **Statute of Limitations and Repose for Construction Defect Actions (Before April 13, 2023)**

Before enactment of Chapter 2023-22, Laws of Florida on April 13, 2023, section 95.11(3)(c), F.S., established the time periods within which a construction defect cause of action was required to be brought. Specifically, for a patent defect,[[8]](#footnote-8) an action was generally required to be filed within four years from the date of the *later* of the:

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

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

* 1. **CLC technical advice on HB 85 and SB 360**

Senate Bill 360, and its companion, House Bill 85, were filed on January 24, 2023 and December 29, 2022, respectively. On January 31, 2023, the Legislative Subcommittee of the Construction Law Committee (CLC) of the RPPTL Section of the Florida Bar convened a subcommittee meeting shortly after receiving notice of the bills to discuss member concerns. Due to the timing and substance of HB 85, the CLC learned that RPPTL would not be able to take a formal position on the proposed legislation. However, the Legislative Subcommittee was able to reach consensus on a technical advice paper regarding HB 85 following its January 31, 2023 meeting, which was approved during the CLC’s monthly meeting on February 13, 2023. A copy of these meeting minutes, and approved technical advice paper are enclosed as **Composite Exhibit “A.”**

As set forth more fully in **Composite Exhibit “A**,**”** the CLC proposed adding a definition to the “triggering” section to capture “approval of the authority having jurisdiction,” to cover scenarios where there would no TCO, CO or final inspection. This was in furtherance of the goal to “make it the most technically correct bill it can be,” since it was reported as likely to pass.

Although the CLC’s technical advice paper was presented to other RPPTL committees and industry trade groups, including a homebuilder’s trade association and Associated General Contractors, this technical advice was not incorporated into the final version of the law. These issues were presented to the CLC membership again at the RPPTL’s 2023 Construction Law Institute on March 17, 2023, a little over 2 weeks before the Senate voted to approve Committee Substitute for SB 360, as amended.[[9]](#footnote-9)

* 1. **S. 95.11(3)(b), F.S., as amended by Chapter 2023-22, Laws of Florida (April 13, 2023)**

On April 13, 2023, Gov. Ron DeSantis signed into law [Committee Substitute for Senate Bill No. 360](https://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=77143&SessionId=99). *See* [Chapter 2023-22, Laws of Florida](https://laws.flrules.org/2023/22) (Apr. 13, 2023). Under this law, the first principal revision to Section 95.11(3)(b) was to revise and simplify the date when the “clock” starts in two significant ways. Before the amendment, the statute provided four categorical options with the clock starting upon the latest of those events. The new law eliminated to of these options from the list: the date of “actual possession by the owner,” and the date of “completion of the contract or termination of the contract.” Historically, those two options prompted a host of disputes (and inconsistent results at the trial level) because of their inherent imprecision.[[10]](#footnote-10)

The law, as amended, created two basic categories of “clock-starter” events. The first was the issuance of a certificate from the authority having jurisdiction (either a temporary certificate of occupancy, a certificate of occupancy, or a certificate of completion); the second was abandonment of construction. The second “clock-starter” revision category at issue in this White Paper was to change from the clock starting upon the *latest* of the listed events to, now, starting at the *earliest* of the events listed.

In summary, the law, as amended, modified the periods within which a construction defect cause of action must be brought. Specifically, the bill:

* Changed the point from which the four-year statute of limitations begins to run for patent defects to the date of the *earliest* of the:
	+ Issuance of a temporary certificate of occupancy;
	+ Issuance of a certificate of occupancy;
	+ Issuance of a certificate of completion; or
	+ Construction’s abandonment, if not completed.
* Decreased the statute of repose from ten years to seven years, running from the date of the *earliest* of the:
	+ Issuance of a temporary certificate of occupancy;
	+ Issuance of a certificate of occupancy;
	+ Issuance of a certificate of completion; or
	+ Construction’s abandonment, if not completed.
	1. **Ambiguity regarding the “clock starter” events in s. 95.11(3)(b), F.S. (2023)**

Following amendment of s. 95.11(3)(b), representatives of the CLC presented on the bill changes and potential shortcomings, first at the RPPTL’s 2023 Legislative Update Meeting, and again at the CLC’s August 2023 monthly meeting and CLE presentation.[[11]](#footnote-11) Both presentations focused on ambiguities surrounding projects that were not covered by the statutorily enumerated “clock starter” events (also referred to as “trigger gaps”). However, as discussed more fully in §VI(c), *infra*, the Legislative Update presentation also identified constitutional problems with the bill. Specifically, the bill failed to include preambular findings of “public necessity,” as required for laws that infringe the right of access to courts. *See* Article 1, Section 21, *Florida Constitution* (2023).

Turning to the “clock starter” event issue, s. 95.11(3)(b), Fla. Stat. (2023) is ambiguous because the events which are specified to trigger either the statute of limitations or statute of repose do not cover all of the scenarios in which the design, planning, or construction of an improvement to real property occurs.

S. 95.11(3)(b) applies to any action “founded on the design, planning, or construction of an *improvement to real property*.”[[12]](#footnote-12) (*emphasis added*). Because this emphasized phrase is undefined in the statute, Florida courts have assigned to it a plain, ordinary meaning.[[13]](#footnote-13) Indeed, Florida courts have drawn a line in choosing *not* to apply the construction defect statute of limitation and repose to disputes founded on “repairs,” as contrasted with “improvements” to real property.[[14]](#footnote-14)

It does not appear that Florida courts have considered the plain, ordinary meaning of the phrase “real property,” standing alone, in defining the phrase “improvement to real property.” However, “[u]nder the common law, and except as modified by statute, real property consists of those things that are permanent, fixed, and immovable, such as lands, tenements, and hereditaments of all kinds that are not annexed to the person or cannot be moved from the place in which they exist.”[[15]](#footnote-15) Section 95.11(3)(b) arguably does modify the statutory definition of “improvement to real property,” insofar as that statute, now provides: “Notwithstanding any provision of this section to the contrary, if the *improvement to real property* consists of the design, planning, or construction of multiple buildings, *each building must be considered its own improvement* for purposes of determining the limitations period set forth in this paragraph.” (*emphasis added*). This white paper and accompanying proposed legislation do not seek to alter this definition, and the revisions to s. 95.11(3)(b) proposed in § III, *supra*, are harmonious with this modified definition.

The foregoing common law context is important because the amendments to s. 95.11(3)(b) attempt to establish discrete events which would trigger the running of the statute of limitations and statute of repose based almost entirely on statutory definitions. As set forth in the chart below, the phrases “temporary certificate of occupancy, certificate of occupancy, and certificate of completion” are defined by the Florida Building Code.[[16]](#footnote-16)



Use of these events as “triggers” for the statute of limitation and repose periods provides the benefit of certainty and precision (i.e., there are no factual disputes over when an owner took possession of the property, or when the contract was “completed,” as was previously the case). However, exclusive use of these “triggers” is problematic for at least five reasons.

First, these “triggers” do not include the entire universe of types of “improvement to real property,” as defined by Florida law. For instance, Title XXVI, Florida Statutes, governs horizontal improvements (e.g., roads, bridges, non-vertical infrastructure). Such improvements use a different but substantially equivalent phrase of “final acceptance,” when the governmental entity (i.e., Florida Department of Transportation or other political subdivisions of the state) approves the improvement to real property. *See* Section 337.85(1)(c), Florida Statutes (2023) (“‘Final acceptance’ means that the contractor has completely performed the work provided for under the contract, the department or its agent has determined that the contractor has satisfactorily completed the work provided for under the contract, and the department or its agent has submitted written notice of final acceptance to the contractor.”).

Second, the issuance of a Temporary Certificate of Occupancy (“TCO”) and Certificate of Occupancy (“CO”), as compared to the issuance of a Certificate of Completion (“CC”), are mutually exclusive, in that TCOs and COs are only issued (and required to be issued) for improvements where there is a change in use or occupancy (e.g., new home, condominium building, or commercial building), whereas a CC may (but is not required to be) issued for “systems” (e.g., roof systems, HVAC systems, electrical systems). Stated another way, a CC would cover those types of improvements where the owner continues to occupy the premises while the improvement is being made, whereas the TCO or CO would cover improvements for which an owner cannot take occupancy until issuance. Further, unlike a TCO or CO, the building official is not required to issue a CC upon final approval of all required inspections.[[17]](#footnote-17)

Third, while s. 95.11(3)(b) still allows for the statute of limitations or repose period to be triggered if the improvement is abandoned by the designer, planner, or contractor, it has eliminated “Completion or termination of the engineer’s, architect’s, or contractor’s contract with his or her employer” as a triggering event. Deletion of the phrase “[…] termination of the […] contract” is problematic, because “abandonment of construction” and “termination of the contract” are not necessarily mutually inclusive, analogous, or equivalent. “Abandonment” focuses on whether a construction party has executed the work with reasonable promptness, whereas “termination” focuses on whether the non-breaching party has satisfied conditions precedent to termination, if any, before declaring the contract unenforceable because of a material breach by the counter-party.[[18]](#footnote-18) As such, s. 95.11(3)(b) (2023) is ambiguous, insofar as it does not address when the limitations and repose period would run where a contract is terminated, as opposed to abandoned.

Fourth, and somewhat relatedly, s. 95.11(3)(b) is ambiguous and potentially inequitable where there is an “abandonment of construction,” but the owner of the real property to be improved hires a subsequent designer, planner, or contractor to complete the existing permitted improvements. Under s. 95.11(3)(b) the limitations periods would begin to run from the *earlier* of abandonment, TCO, CO, or CC. As an example, assume that a condominium developer begins construction and its contractor becomes insolvent and abandons the project before completion. The developer then transfers the existing building permit from the first contractor to the replacement contractor. The replacement contractor obtains a CO for the project under the initial building permit. In a subsequent suit for construction defects by either the developer or condominium association, the replacement contractor would argue that the limitations and repose periods began to run on the *earliest* of the specified events under s. 95.11(3)(b), *i.e.*, abandonment of construction by the first contractor. The developer or association may argue that this result is inequitable, because the delays occasioned by having to replace the abandoned contractor led to a belated discovery of defects at or after TCO or CO. However, the replacement contractor would likely argue that s. 95.11(3)(b), by its plain terms, allows for no such equitable consideration, and the limitations or repose periods should be applied from the earliest date(the first contractor’s abandonment of the project). This scenario is not considered or addressed in the staff analysis for HB 85 or SB 360, and would appear to be an unintended consequence of s. 95.11(3)(b).

Fifth, and finally, s. 95.11(3)(b) does not contain a “catch-all” provision for improvements to real property in which the statutorily enumerated “clock starter” events or “triggers” do not apply. Improvements in response to a natural disaster, such emergency water extraction and remediation, or for waterproofing, painting, and flooring installation, may not be subject to issuance of a CO, TCO, CC, or inspection by the building official. There is ambiguity as to which section of s. 95.11 would apply in this scenario, since the more specific statute, i.e., s. 95.11(3)(b) would appear to apply, but its statutory triggers would not be met. *See supra*, §I; n. 12. Such an ambiguity would not be present if the legislature had retained “completion of the contract” as a triggering event in Chapter 2023-22, Laws of Florida.[[19]](#footnote-19) In 2017, “completion of the contract” was defined as “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.”[[20]](#footnote-20) In 2018, the legislature further modified this definition to exclude repair or correction of completed work, to include warranty and other related (i.e., “punch list”) work, performed after issuance of a CO or CC, from extending the limitation and repose periods.[[21]](#footnote-21)

* 1. **Potential conflict between s. 95.11(3)(b) and s. 718.124, Fla. Stats. (2023)**

Condominium law practitioners have pointed to potential conflicts and inequities in s. 95.11(3)(b), Fla. Stat., where a developer retains control of a condominium association until such time as the statute of repose expires.[[22]](#footnote-22) Fla. Stat. § 718.301(1)(g) (2023) permits a developer to retain control of Association for up to 7 years following recordation of the certificate of surveyor or mapper accompanying declaration of condominium. While a unit-owner controlled association controlled has the right to sue for matters of common interest at turnover, e.g., defective construction of the common elements, Chapter 718, Florida Statutes tolls only the statute of limitations, but not the statute of repose, until developer turnover.[[23]](#footnote-23) This scenario is depicted below.[[24]](#footnote-24)



Any revision to Fla. Stat. § 718.124 (2023) which would allow for statutory tolling of the repose period would have the practical impact of lengthening the statute of repose period, which was shortened from 10 to 7 years in 2023. Because this shortening was the product of lobbying by the commercial construction industry, and was met with opposition by the community association and Plaintiff’s bar, it is unlikely that the CLC would be able to take a position on any such revision.[[25]](#footnote-25)

* 1. **Comment, review and approval by the Construction Law Committee**

As noted above, the CLC has presented on the shortcomings of s. 95.11(3)(b), Fla. Stat. in a variety of forums, to both CLC and RPPTL membership. *See infra*, §II(c)-(d). In response, the CLC has received member concerns regarding the ambiguities referenced above. Beginning in March 2024, the CLC Legislative Subcommittee studied, met and conferred regarding this white paper and proposed bill, and ultimately approved both at its May 9, 2024 subcommittee meeting. This white paper and proposed bill received full approval at the Construction Law Committee meeting held on May 13, 2024.

1. **EFFECT OF PROPOSED CHANGES**

The proposed bill aims to capture the entire universe of actions that are founded on the design, planning, or construction of an improvement to real property, by including a comprehensive definition of “completion of the improvement.”[[26]](#footnote-26) It does so by distinguishing between those improvements that are subject to a TCO or CO, as opposed to a CC or building inspection approval only. It adds an additional category of “final acceptance” intended to cover horizontal improvements. Also, it seeks to limit the statutory triggers of “abandonment” or “termination,” as applying only to the construction party who abandons the project or is terminated, to avoid the apparent unintended consequence of premature statutory triggering. Finally, it reintegrates the statutory definition of “contract completion,” using the Florida legislature’s 2017 and 2018 definitions and accompanying case law, to serve as a “catch-all” category for such actions that meet the definition of an improvement to real property, but are not covered by the more discrete statutory triggers. The revised statutory triggers set forth below.

1. Foremost, based upon “completion of the improvement,” which is defined as:
	1. the date in which the authority having jurisdiction issues a temporary certificate of occupancy or certificate of occupancy, whichever date is earliest;
	2. for an improvement in which the improvement is required to comply with the Florida Building Code, but the authority having jurisdiction is not required to issue a certificate of occupancy, completion of all required inspections under the Florida Building Code, or issuance of a Certificate of Completion, whichever date is earliest;
	3. for an improvement made pursuant to Title XXVI, Florida Statutes, final acceptance, as defined by Section 337.185(c), Florida Statutes;
2. If these do not apply, then the date of abandonment of construction if not completed, or the date of termination of the contract between the architect, landscape architect, interior designer, engineer, surveyor and mapper, or licensed contractor and his or her employer, whichever date is earliest, but only as to the licensed contractor who has abandoned construction or the professional engineer, registered architect, or licensed contractor of whose contract is terminated; or
3. Finally, as a “catch-all,” the completion of the contract between the architect, landscape architect, interior designer, engineer, surveyor and mapper, or licensed contractor and his or her employer. “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.
4. The proposed bill includes modifications which make clear that for improvements under (i), (ii), (iii), or (v) of this section, that correction of defects to completed work or repair of completed work, whether performed under warranty or otherwise, does not extend the period of time within which an action must be commenced.

In providing the new triggers under (ii) and (iii) above, the proposed bill has substituted the phrases “licensed engineer” and “registered architect,” with a broader definition, to include architects, landscape architects, interior designers, engineers, surveyors, and mappers.[[27]](#footnote-27) These revisions have been made in an effort to capture all designers or planners who might participate in an improvement to real property.

The proposed bill seeks to provide greater precision as to the triggering of the limitations and repose periods for actions founded on the design, planning, or construction of an improvement to real property. Importantly, the proposed bill accomplishes the 2023 Florida Legislature’s intent of having these periods run from the earlier of TCO, CO, or CC issuance, while at the same time clarifying the distinction between projects subject to a TCO or CO, as opposed to a CC or inspections only. Further the proposed bill does so by broadening the category of discrete trigger events, to include horizontal improvements. The additional categories or “termination” and “completion of the contract” are necessary to avoid the statutory ambiguity created by the 2023 amendment. Reincorporating the phrase “completion of the contract,” would have no impact on projects that receive a CO, TCO, CC, or final inspection (where CO or TCO are not required).

Finally, as noted in § VI, *supra*, this white paper further proposes that the Florida Legislature establish facts necessary to support the preambular findings necessary to establish that any potential limitation on “access to courts” imposed by this law is supported by an “overpowering public necessity.”

1. **FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS**

None.

1. **DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR**

The direct economic impact on the private sector is unknown. However, the Final House Bill Staff Analysis for s. 95.11(3)(b), Fla. Stat., provided that the amendments would have the following impacts:

* may potentially leave consumers bearing the costs associated with latent construction defects that are not discovered within the shortened statute of repose;
* may reduce construction costs for consumers as savings realized by the construction industry due to lowered insurance premiums and litigation costs may be passed on to consumers;
* may reduce financial liability for the construction industry due to lowered insurance premiums and litigation costs.

The direct economic impact of the proposed revisions to s. s. 95.11(3)(b), Fla. Stat. should be no more than under the current law.

1. **CONSTITUTIONAL ISSUES**

There is a substantial question about the constitutionality of the 2023 statute of repose change. In 1979, the Florida Supreme Court held that the creation of the statute of repose was unconstitutional in *Overland Const. Co., Inc. v. Sirmons*, 369 So. 2d 572 (Fla. 1979), for violating the “access to courts” clause in the Florida Constitution at Article 1, Section 21, as the legislature had not expressed an “overpowering public necessity” for the statute. In 1980, the legislature re-enacted the statute of repose with express findings in the preamble expressing that public necessity. *See* Ch. 80-322, Laws of Florida. In 2006, when the legislature shortened the repose period to 10 years, it included effectively the same findings of public necessity in the preamble. Chapter 2006-145, Laws of Florida. The inclusion of the preamble in 2006 certainly implies the legislature’s logical recognition that if the imposition of a statute of repose in the first instance violates the access to courts right of the Florida Constitution, then shortening it would also violate it unless there are similar findings of public necessity as expressed by the legislature in Ch. 80-322. However, the 2023 legislation included no such findings, and the difference between a five-year shortening in 2006 and a further three-year shortening in 2023 would seem an immaterial distinction. The legislative history of the 2023 law suggests no consideration of this issue at all. In sum, it appears that the shortening of the statute of repose as expressed in Chapter 2023-22 may very well violate the Florida Constitution’s access to courts clause under existing precedent. If s. 95.11(3)(b), Fla. Stat. is found unconstitutional, Florida courts would likely revert back to the pre-April 13, 2023 version of the statute. *See* *State ex rel. Boyd v. Green*, 355 So. 2d 789, 795 (Fla. 1978) (“Where a repealing act is adjudged unconstitutional, the statute (or in this case the rule) it attempts to repeal remains in force.”).

[Chapter 2006-145, Laws of Florida](https://laws.flrules.org/files/Ch_2006-145.pdf) and [Chapter 80-322, Laws of Florida](http://edocs.dlis.state.fl.us/fldocs/leg/actsflorida/1980/1980V1Pt2.pdf) are included with this white paper as **Composite Exhibit “B**,**”** which include the preambular findings of these laws in their entirety. However, the CLC has declined to draft any such findings, as the making of such findings is the prerogative of the legislature. *See* *Est. of McCall v. United States*, 134 So. 3d 894, 906 (Fla. 2014) (“While courts may defer to legislative statements of policy and fact, courts may do so only when those statements are based on actual findings of fact”).

1. **OTHER INTERESTED PARTIES**

Commercial Real Estate Committee, RPPTL Section of the Florida Bar

Condominium & Planned Unit Development Committee, RPPTL Section of the Florida Bar

Development and Land Use Committee, RPPTL Section of the Florida Bar

Insurance and Surety Committee, RPPTL Section of the Florida Bar

Real Property Litigation Committee, RPPTL Section of the Florida Bar

Real Property Problems Study Committee, RPPTL Section of the Florida Bar

Legislative Committee, RPPTL Section of the Florida Bar

Business Litigation Committee, Business Law Section of the Florida Bar

Trial Lawyers Section of the Florida Bar

Ball Janik LLP\*

Becker & Poliakoff P.A.\*

Florida Justice Association\*

Florida Justice Reform Institute\*

Florida Defense Lawyers Association

AIA Florida

American Planning Association, Florida Chapter

American Fire Sprinkler Association, Florida Chapter\*

ASCE Florida Section

Associated Builders & Contractors of Florida\*

Associated Industries of Florida\*

Florida Associated General Contractor’s Council\*

Florida Engineering Association

Florida Home Builders Association

Florida League of Cities

Florida Refrigeration and Air Conditioning Contractor’s Association\*

Florida Surety Association\*

Florida Transportation Builders Association

Highland Homes\*

Miami-Dade County\*

*\*Denotes lobbyists disclosed for HB 85 or SB 360 (2023)*

**COMPOSITE EXHIBIT “A”**

**COMPOSITE EXHIBIT “B”**

1. Paragraph (3)(c) of s. 95.11, Florida Statutes (2022) was redesignated as paragraph (3)(b) by s. 3, ch. 2023-15, Laws of Florida. [↑](#footnote-ref-1)
2. This white paper *does not* propose revisions to any of the following portions of s. 95.11(3)(b), Fla. Stat. (2023): (i) the shortening of the repose period from 10 to 7 years, s*ee* *CS for SB 360*, pg. 2, l. 6 (Enrolled Mar. 29, 2023); (ii) the “clock starter” revisions associated with newly constructed single-dwelling residential buildings, or the modified definition of “improvements to real property” for multi-building developments, s*ee* *CS for SB 360*, pg. 3, l. 61-63 and 65-69; (iii) the definition of “material violation” of Florida’s Building Code, *see CS for SB 360*, pg. 3, l. 79 and 82; pg. 4, l. 90-95); (iv) or its “savings clause” (pg. 4, l. 96-104). *See* *also* [House of Representatives Staff Final Bill Analysis, CS/CS/CS/HB 85](https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0085z.CJS.DOCX&DocumentType=Analysis&BillNumber=0085&Session=2023), pg. 7 (May 18, 2023) (providing summary of these changes). Further, this white paper *does not* propose modifying the 2018 amendments to former s. 95. 11(3)(c), Fla. Stat. (2022), which added a limited extension of the statute of repose for counterclaims, cross-claims, and third-party claims added in 2018. *See* Wright, W.C, Fuente, J., Heckert, K., Strady, M., *Take-Two: Legislature Amends Florida’s Construction Statute of Limitations and Repose Again in 2018*, ActionLine, Vol. XXXIX, No. 4, p. 8 (Summer 2018). This white paper *does* proposed reincorporating “completion of the contract” as a “catch-all” trigger to cure the ambiguities in the current law, which was deleted from the 2023 version of the statute. *See* *infra*, §§ II(e); III. [↑](#footnote-ref-2)
3. Legal Information Institute, Statute of Limitations, <https://www.law.cornell.edu/wex/statute_of_limitations> (last accessed: April 1, 2024). [↑](#footnote-ref-3)
4. *Id.* [↑](#footnote-ref-4)
5. Legal Information Institute, Statute of Repose, <https://www.law.cornell.edu/wex/statute_of_repose> (last visited April 1, 2024); *Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992). [↑](#footnote-ref-5)
6. *Beach v. Great Western Bank*, 692 So. 2d 146 (Fla. 1997). [↑](#footnote-ref-6)
7. *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). [↑](#footnote-ref-7)
8. A “patent defect” is a defect that is reasonably apparent or known to the owner. *Alexander v. Suncoast Builders, Inc.*, 837 So. 2d 1056, 1058 (Fla. 3d DCA 2003); Legal Information Institute, Patent Defect, <https://www.law.cornell.edu/wex/patent_defect> (last visited April 1, 2024). [↑](#footnote-ref-8)
9. *See* Dannecker, J. and Buffinton, A., PLENARY II – THE LIMITATIONS ON THE LIMITATIONS: A REVIEW OF FLORIDA’S STATUTE OF LIMITATIONS AND STATUTE OF REPOSE IN 95.11(3)(c), 2023 Construction Law Institute (Mar. 17, 2023). The PowerPoint presentation slides for this plenary session incorporate the technical issues raised in the CLC Legislative Subcommittee’s technical advice paper approved at the February 13, 2023 CLC meeting. The slides, along with the conference paper, are available upon request. [↑](#footnote-ref-9)
10. *See* *e.g.* *Westpark Pres. Homeowners Ass'n, Inc. v. Pulte Home Corp.*, 365 So.3d 391, 395-396 (Fla. 2d DCA 2023) (holding that “owner” in the context of a townhome development means the developer who owned the property when construction was complete, rather than purchasers from the developer, as some circuit courts had ruled). [↑](#footnote-ref-10)
11. *See* McCall, A., Weintraub, L., and Partington, B., *THE BEST LAID PLANS OF MICE AND MEN …*

*actually turned out mostly OK this time*, 43rd Annual RPPTL Legislative & Case Law Update Seminar (Jul. 21, 2023); *See* Mickley, S. and Henson, B., 2023 Construction Law Legislative Update, CLC Monthly Meeting (Aug. 14, 2023) (paper and presentation materials available upon request). [↑](#footnote-ref-11)
12. Florida courts have held that the more “specific” s. 95.11(3)(c), Fla. Stat., controls over more “general” statutes of limitation or repose, such as the 5-year statute of limitations for breach of contract actions, *Dubin v. Dow Corning Corp.*, 478 So. 2d 71, 73 (Fla. 2d DCA 1985) or the 2-year statute of limitations for professional negligence actions, *Am. Auto. Ins. Co. v. FDH Infrastructure Servs., LLC*, 364 So. 3d 1082, 1084-1085 (Fla. 4th DCA 2023). *State, Dep’t of Transp. v. Echeverri*, 736 So.2d 791, 792 (Fla. 3d DCA 1999) (holding that s. 95.11(3)(c) “clearly applies to all actions ‘founded on the design, planning, or construction of an improvement to real property”). [↑](#footnote-ref-12)
13. *See Hillsboro Island House Condominium Apartments, Inc. v. Town of Hillsboro Beach*, 263 So.2d 209, 213 (Fla.1972) (quoting Black's Law Dictionary 890 (4th ed. 1969)) (defining as “‘[a] valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than merely repairs or replacement of waste, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes.’”): *Companion Prop. & Cas. Grp. v. Built Tops Bldg. Servs., Inc.*, 218 So. 3d 989, 991–92 (Fla. 3d DCA 2017) (citing *Hillsboro Island* with approval); *Dominguez v. Hayward Indus., Inc.*, 201 So. 3d 100, 102 (Fla. 3d DCA 2015) (same); *Pinnacle Port Cmty. Ass'n, Inc. v. Orenstein*, 952 F.2d 375, 377–78 (11th Cir. 1992) (same). [↑](#footnote-ref-13)
14. *Compare Pinnacle Port Cmty. Ass'n, Inc.*, 952 F.2d at 377–78 (“The stipulated repairs were intended not to enhance the assumed value of the property but to restore the walls to their original watertight state. The contracted work, then, was in the nature of repairs.”) *and* *Dominguez*, 201 So. 3d at 102 (collecting cases, and finding that, pool filter, as component part of swimming pool, did not constitute an “improvement to real property”) *with Harrell v. Ryland Grp.*, 277 So. 3d 292, 298 (Fla. 1st DCA 2019) (finding that act of “combining” a ladder to attic with hardware attachments met the plain, ordinary meaning of “constructed,” and therefore constituted an “improvement to real property”). [↑](#footnote-ref-14)
15. 42 *Fla. Jur 2d Property* § 7 (Mar. 2024). [↑](#footnote-ref-15)
16. Section 553.473(1)(a), Florida Statutes (2023) authorizes the Florida Building Commission to adopt the Florida Building Code, which courts recognize as being statutory in nature. *Edward J. Seibert, A.I.A. Architect & Planner, P.A. v. Bayport Beach & Tennis Club Ass'n, Inc.*, 573 So. 2d 889, 892 (Fla. Dist. Ct. App. 1990) (finding that only court, and not experts, are permitted interpret the meaning of the code, and instruct the jury on the code). The above-quoted definitions are taken from the Florida Building Code, 8th Edition (2023). Current and prior versions of the Florida Building Code can be accessed at: <https://codes.iccsafe.org/codes/florida> (last accessed: May 4, 2024). [↑](#footnote-ref-16)
17. *See* Section 111, Certificate of Occupancy, *Florida Building Code, Building, 8th Ed..* Anecdotally, the CLC membership has reported that CCs are not required to be issued by the building official, and often times, are either not issued, or issued only upon request of the owner or contractor (and, in some cases, months or years after the system has passed final inspection). [↑](#footnote-ref-17)
18. *Compare* *Mack Indus., Inc. v. Donald W. Nelson, Inc.*, 134 So. 2d 821 (Fla. 2d DCA 1961) (finding abandonment where excavation and fill had been performed on property at least four months prior to recording of mortgage and on date mortgage was recorded the filled excavation had weeds and grass growing upon it, the construction was not prosecuted with reasonable promptness so as to render operations sufficiently manifest and substantial to notify interested persons that work was progressing or that there had been no material abandonment) *with* *Fla. Recycling Servs., Inc. v. Greater Orlando Auto Auction, Inc.*, 898 So. 2d 129, 131 (Fla. 5th DCA 2005) (recognizing that, in circumstances where there is a written construction contract, court must examine whether terminating party followed notice and opportunity to cure provisions in agreement to determine whether termination rights properly exercised) [↑](#footnote-ref-18)
19. In 2017, the Florida Legislature defined “completion of the contract” as “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,” in response to the Fifth District Court of Appeal’s decision in *Cypress Fairway Condo. v. Bergeron Const. Co. Inc*.. 164 So. 3d 706, 708 (Fla. 5th DCA 2015) (holding that “completion of the contract means completion of performance by both sides of the contract, not merely performance by the contractor”); Feldman, B., *A Practical Guide to Florida’s Construction Statute of Repose After 2017 Legislative Changes*, Vol. XXXIX, No. 1 (Winter 2017-2018); [↑](#footnote-ref-19)
20. *Id.*; *Chapter 2017-37*, Laws of Florida (amending *Fla. Stat.* §95(11)(3)(c), effective July 1, 2017). [↑](#footnote-ref-20)
21. Chapter 2018-97, Laws of Florida (amending *Fla. Stat.* §95. 11(3)(c), effective July 1, 2018); *See* Wright, W.C, Fuente, J., Heckert, K., Strady, M., *Take-Two: Legislature Amends Florida’s Construction Statute of Limitations and Repose Again in 2018*, p. 8 (discussing changes). [↑](#footnote-ref-21)
22. Berger, D., *Veto SB 360, Gov. DeSantis. It Makes Residents in Older Condo Buildings Less Safe*, Miami-Herald (Apr. 11, 2023) (<https://beckerlawyers.com/wp-content/uploads/2023/04/Legislation-would-give-high-rise-residents-less-power-_-Miami-Herald.pdf>) (last accessed: April 1, 2024). [↑](#footnote-ref-22)
23. *Fla. Stat.* § 718.111(3) (2023); *Fla. Stat.* § 718.124 (2023); *Sabal Chase Homeowners Ass'n, Inc. v. Walt Disney World Co.*, 726 So. 2d 796, 799 (Fla. 3d DCA 1999). [↑](#footnote-ref-23)
24. The abbreviation “SOR” in the graphic stands for “Statute of Repose.” In the scenario above, the developer has discovered the latent defect well prior to turnover. While this might expose the developer to claims of fraud or breach of contract, it would likely exonerate members of the construction team from liability on a construction defect theory. Further, if the Association were to discover defects shortly after turnover, as is often the case upon receipt of the statutorily mandated turnover report pursuant to Fla. Stat. § 718.301(4)(p) (2023), their claims would be eliminated pursuant to Fla. Stat. § 95.11(3)(b). [↑](#footnote-ref-24)
25. *See Lobbyist Disclosure & Information* for [HB 85](https://www.myfloridahouse.gov/LD/default.aspx?bn=0085&lyi=10&search=1#search) and [SB 360](https://www.myfloridahouse.gov/LD/default.aspx?bn=0360&lyi=10&search=1#search) (2023). [↑](#footnote-ref-25)
26. Outside of Florida “[a] common trigger is the date of *substantial completion*. Some statutory schemes eliminate the adjective *substantial*.” *See* Bruner & O’Connor on Construction Law, *§ 7.29, When do builder statutes of repose begin to run?*, FN 7-8 (2023) (*emphasis added*). The CLC recommends against using the adjective “substantial,” because of the industry-recognized meaning of this phrase is less precise than the triggers proposed in the bill revision. *See AIA-2017 A201 General Conditions of the Contractor for Construction*, § 9.8.1 (defining substantial completion as “the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.”) [↑](#footnote-ref-26)
27. *See* *generally*, Ch. 471, Fla. Stat. (2023); Ch. 472, Fla. Stat. (2023); Ch. 481, Fla. Stat. (2023); *Fla. Stat.* §713.03(2023) (identifying an “architect, landscape architect, interior designer, engineer, or surveyor and mapper” as persons entitled to lien for professional services). [↑](#footnote-ref-27)