

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 1235 Florida Homeowners' Construction Recovery Fund

SPONSOR(S): Regulatory Affairs Committee; Business & Professional Regulation Subcommittee; Dudley

TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 1098

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professional Regulation Subcommittee	11 Y, 0 N, As CS	Whittier	Luczynski
2) Government Operations Appropriations Subcommittee	10 Y, 0 N	Topp	Topp
3) Regulatory Affairs Committee	16 Y, 0 N, As CS	Whittier	Hamon

SUMMARY ANALYSIS

The Florida Homeowners' Construction Recovery Fund (fund) was created in 1993, after Hurricane Andrew, as a fund of last resort to compensate consumers who contracted for construction, repair or improvement of their Florida residence and who suffered monetary damages due to the financial misconduct, abandonment, or fraudulent statement of the licensed contractor, financially responsible officer, or business organization licensed under ch. 489, F.S. A claimant must be a homeowner and, currently, the damage must have been caused by a Division I contractor, which includes general contractors, building contractors, and residential contractors. The fund is not permitted to compensate consumers who contracted with Division II contractors or to compensate consumers who have suffered damages as a result of payments made in violation of the Florida Construction Lien Law.

Each recovery claim is limited to both a per-claim maximum amount and a total lifetime per-contractor maximum. For contracts entered into after July 1, 2004, the per-claim payment limits are \$50,000 with a total lifetime aggregate of \$500,000 per licensee. Claims are paid in the order that they are filed. The fund must be repaid by the contractor in violation or have their license suspended until the repayment is made. The fund is financed by a 1.5 percent surcharge on all building permit fees associated with the enforcement of the Florida Building Code. The proceeds from the surcharge are allocated equally to the fund and to support the operations of the Building Code Administrators and Inspectors Board.

The bill revises the law to include Division II contractors within the parameters of the fund. It revises the statutory limits on recovery payments to include Division II contracts beginning January 1, 2015, for any contract entered into after July 1, 2014. The bill limits Division II claims to \$15,000 per claim with a \$150,000 lifetime maximum per licensee. The bill removes the prohibition against paying consumer claims where the damages resulted from payments made in violation of the Florida Construction Lien Law for contracts entered into after July 1, 2014. The bill revises the notice that contractors must give to homeowners that details their rights under the recovery fund.

The fiscal impact of the bill is indeterminate as the total amount of additional claims to be paid is unknown and the number of eligible claims and the amount of each claim will vary based on the circumstances. The amount of yearly recovery fund payments is limited by the amount of funding received from the 1.5 percent surcharge. Therefore, the total amount of all claims paid each year will not increase as a result of receiving additional claims.

The bill has an effective date of July 1, 2014.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1235e.RAC

DATE: 4/16/2014

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Florida Homeowners' Construction Recovery Fund

The Florida Homeowners' Construction Recovery Fund (fund) is created in s. 489.140, F.S., as a separate account in the Professional Regulation Trust Fund.

According to the Department of Business and Professional Regulation (DBPR), the fund was created in 1993, after Hurricane Andrew, as a fund of last resort to compensate consumers who contracted for construction, repair, or improvement of their Florida residence and who suffered monetary damages due to the financial misconduct, abandonment, or fraudulent statement of the licensed contractor,¹ financially responsible officer, or business organization licensed under ch. 489, F.S.²

The fund is financed by a 1.5 percent surcharge on all building permit fees associated with the enforcement of the Florida Building Code.³ The proceeds from the surcharge are allocated equally to the fund and support the operations of the Building Code Administrators and Inspectors Board.^{4, 5}

A claimant must be a homeowner and the damage must have been caused by a Division I contractor.⁶ The fund is not permitted to compensate consumers who contracted with Division II contractors or to compensate consumers who suffered damages as a result of payments made in violation of the Florida Construction Lien Law under part I of ch. 713, F.S.

Division I contractors are listed in s. 489.105(3)(a)-(c), F.S., as:

- General contractors,
- Building contractors, and
- Residential contractors.

¹ Department of Business and Professional Regulation, Agency Analysis for SB 1098 (March 11, 2014) (on file with the Business & Professional Regulation Subcommittee).

² Section 489.1402(1)(g), F.S.

³ Section 468.631(1), F.S.

⁴ *Id.*

⁵ In 2013, the Legislature gave DBPR the authority to transfer excess cash to the fund if it determines it is not needed to support the operation of the Building Code Administrators and Inspectors Board; however, DBPR may not transfer excess cash that would exceed the amount appropriated in the General Appropriations Act and any amount approved by the Legislative Budget Commission pursuant to s. 216.181, F.S. See sect. 2, ch. 2013-187, Laws of Fla.

⁶ Section 489.1402(1)(c), (f), and (d), F.S.

Division II contractors are listed in s. 489.105(3)(d)-(q), F.S., as:

- Sheet metal contractors,
- Roofing contractors,
- Class A air-conditioning contractors,
- Class B air-conditioning contractors,
- Class C air-conditioning contractors,
- Mechanical contractors,
- Commercial pool/spa contractors,
- Residential pool/spa contractors,
- Swimming pool/spa servicing contractors,
- Plumbing contractors,
- Underground utility and excavation contractors,
- Solar contractors,
- Pollutant storage systems contractors, and
- Specialty contractors.

Decisions regarding the fund are made by the Construction Industry Licensing Board which is housed within DBPR.

Construction Industry Licensing Board

The Construction Industry Licensing Board (board) consists of 18 members who are responsible for licensing and regulating the construction industry in this state.⁷ The board is divided into Division I and Division II members following the definitions of Division I and Division II contractors respectively, jurisdiction falling to each division relative to their scope.⁸ Five members constitute a quorum for each division.

The board meets regularly to consider applications for licensure, to review disciplinary cases, and to conduct informal hearings related to licensure and discipline.⁹ It engages in rulemaking to implement the provisions set forth in its statutes and conducts other general business, as necessary.¹⁰

The board, with respect to actions for recovery from the fund, may “intervene, enter an appearance, file an answer, defend the action, or take any action it deems appropriate and may take recourse through any appropriate method of review” on behalf of the state.¹¹ In accordance with DBPR rules, “The Board shall either authorize payment of the claim in full or in part, or deny the claim in full, by entry of a Final Order in accordance with Section 489.143, F.S. Action by the Board shall be considered final agency action.”¹²

Section 489.129, F.S., grants the board the authority to take actions against any certificate holder or registrant if the contractor, financially responsible officer, or business organization for which the contractor is a primary qualifying agent, a financially responsible officer, or a secondary qualifying agent responsible under s. 489.1195, F.S., is found guilty of certain acts, including the acts that may qualify a claim to the fund. Specifically, the acts that may qualify a claim to the fund are financial misconduct, abandonment, or fraudulent statement of the contractor¹³ and are described in s. 489.129(1)(g), (j), or (k), F.S. If the violation is not expressly based on s. 489.129(1)(g), (j), or (k), F.S., the claimant must demonstrate that the contractor engaged in activity that is described in those subsections.¹⁴

⁷ Section 489.107, F.S.

⁸ Section 489.107(4)(c), F.S.

⁹ Florida Department of Business and Professional Regulation, Construction Industry Licensing Board, *available at* <http://www.myfloridalicense.com/DBPR/pro/cilb/index.html> (Last visited March 18, 2014).

¹⁰ Section 489.108, F.S.

¹¹ Section 489.142(1), F.S.

¹² Rule 61G4-21.004(7), F.A.C.

¹³ Department of Business and Professional Regulation, Agency Analysis for SB 1098 (March 11, 2014) (on file with the Business & Professional Regulation Subcommittee).

¹⁴ Rule 61G4-21.003(3), F.A.C.

Financial Misconduct

Section 489.129(1)(g), F.S., allows disciplinary proceedings for committing mismanagement or misconduct in the practice of contracting that causes financial harm to a customer. Financial mismanagement or misconduct occurs when:

- Valid liens have been recorded against the customer's property by the contractor for supplies or services ordered by the contractor for which the customer has paid the contractor, but the contractor has not removed the liens within 75 days of such liens;
- The contractor has abandoned a job and the percentage of completion is less than the percentage of the contract price received by the contractor, unless the contractor is entitled to retain such funds under the terms of the contract or refunds the excess funds within 30 days after abandonment; or
- The contractor's job has been completed, and the customer has been made to pay more than the original contract price, as adjusted for subsequent change orders, unless such increase in cost was the result of circumstances beyond the contractor's control, was caused by the customer, or was otherwise permitted by the terms of the contract between the contractor and the customer.

Abandonment of the Project

Section 489.129(1)(j), F.S., allows disciplinary proceedings for abandoning a construction project, which is presumed after 90 days if the contractor terminates the project without just cause or without proper notification to the owner, including the reason for termination, or fails to perform work without just cause for 90 consecutive days.

Fraudulent Statement by the Contractor

Section 489.129(1)(k), F.S., allows disciplinary proceedings for signing a statement with respect to a project or contract:

- Falsely indicating that the work is bonded;
- Falsely indicating that payment has been made for all subcontracted work, labor, and materials which results in a financial loss to the owner, purchaser, or contractor; or
- Falsely indicating that workers' compensation and public liability insurance are provided.

Discipline

Section 489.129, F.S., allows the board to take the following actions given the circumstances above:

- Place on probation or reprimand the licensee;
- Revoke, suspend, or deny the issuance or renewal of the certificate or registration;
- Require financial restitution to a consumer for financial harm directly related to a violation of a provision of part 1 of ch. 489, F.S.;
- Impose an administrative fine not to exceed \$10,000 per violation;
- Require continuing education; or
- Assess costs associated with investigation and prosecution.

Claims Process

The claimant must have obtained a final judgment, arbitration award, or board issued restitution order against the contractor for damages that are a direct result of a compensable violation. A claim for

recovery must be made within one year after the conclusion of any civil, criminal, administrative action, or award in arbitration based on the act.¹⁵

Completed claim forms must be submitted with:

- A copy of the complaint that initiated action against the contractor, a certified copy of the underlying judgment, order of restitution, or award in arbitration, together with the judgment;
- A copy of any contract between the claimant and the contractor, including change orders;
- Proof of payment to the contractor and/or subcontractors;
- Copies of any liens and releases filed against the property, together with the Notice of Claim and Notice to Owner; copies of applicable bonds, sureties, guarantees, warranties, letters of credit and/or policies of insurance; and
- Certified copies of levy and execution documents, and proof of all efforts and inability to collect the judgment or restitution order, and other documentation as may be required by the board to determine causation of injury or specific actual damages.¹⁶

Pursuant to s. 489.143, F.S., each recovery claim is limited to both a per-claim maximum amount and a total life time per-contractor maximum. For contracts entered prior to July 1, 2004, the fund claims are limited to \$25,000 per claim with a total life time aggregate limit of \$250,000 per licensee.¹⁷ For contracts entered after July 1, 2004, the per-claim payment limits are increased to \$50,000 with a total life time aggregate of \$500,000 per licensee.¹⁸ Claims are paid in the order that they are filed.¹⁹

The board will not compensate claimants from the recovery fund for any of the following reasons.

- The claimant is a licensee who acted as the contractor;
- The claimant is the spouse of the judgment debtor or licensee or a personal representative of such spouse;
- The claim is based upon a construction contract in which the licensee was acting with respect to the property owned or controlled by the licensee;
- The claim is based upon a construction contract in which the contractor did not hold a valid and current license at the time of the construction contract;
- The claimant was associated in a business relationship with the licensee other than the contract at issue;
- When, after notice, the claimant has failed to provide documentation in support of the claims required by rule;
- Where the licensee has reached the aggregate limit; or
- The claimant has contracted for scope of work described in s. 489.105(3)(d)-(q), F.S. [Division II contractors].²⁰

The fund is also not permitted to compensate consumers who suffered damages as a result of payments made in violation of Florida Construction Lien Law under part I of ch. 713, F.S.

Duty of Contractor to give Notice of Fund

Any agreement or contract for the repair, restoration, improvement, or construction to residential real property must contain a statutorily mandated notification statement informing the consumer of their rights under the recovery fund, unless the total contract price is less than \$2,500.²¹

¹⁵ Rule 61G4-21.003(5), F.A.C.

¹⁶ Rule 61G4-21.003(2), F.A.C.

¹⁷ Section 489.143(2) and (5), F.S.

¹⁸ *Id.*

¹⁹ Section 489.143(6), F.S.

²⁰ Rule 61G4-21.004(3), F.A.C.

²¹ Section 489.1425, F.S.

Effect of Proposed Changes

The bill revises the law to include Division II contractors within the parameters of the fund. Specifically, it revises the statutory limits on recovery payments to include Division II contracts beginning January 1, 2015, for any contract entered into after July 1, 2014. The bill limits Division II claims to \$15,000 per claim with a \$150,000 lifetime maximum per licensee.

The bill removes the prohibition against paying consumer claims where the damages resulted from payments made in violation of the Florida Construction Lien Law for contracts entered into after July 1, 2014.

The bill revises language for the notice that contractors must give to homeowners informing them of their rights under the recovery fund, to advise that payments from the fund are up to a limited amount.

B. SECTION DIRECTORY:

Section 1. Amends s. 489.1401, F.S., revising legislative intent.

Section 2. Amends s. 489.1402, F.S., revising definitions.

Section 3. Amends s. 489.141, F.S., revising conditions under which a claimant is eligible to seek recovery from the recovery fund.

Section 4. Amends s. 489.1425, F.S., revising a form required to be provided by a contractor.

Section 5. Amends s. 489.143, F.S., prohibiting fund disbursements from exceeding a specified amount for each Division I claim and each Division II claim and revising requirements providing caps on payment for certain claims against a licensee.

Section 6. Provides an effective date of July 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Indeterminate. See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may increase restitution payments required of licensed Division II contractors against whom a recovery claim is paid. Licensees must repay the fund for any amount of recovery paid to a consumer from the fund or have their license suspended until the repayment is made.

D. FISCAL COMMENTS:

This bill will likely result in additional claims being paid from the fund. However, the fiscal impact of the bill is indeterminate as the total amount of additional claims to be paid is unknown and the number of eligible claims and the amount of each claim will vary based on the circumstances. During the five fiscal years prior to removal of Division II licensees from fund eligibility (FY 2002 through 2006), Division II contractor claims constituted approximately 23.3 percent of all claims paid by the fund. The average payment amount for each Division II claim was approximately \$8,200. Applying the percentage of Division II contractor claims paid during FY 2002 to 2006 and the average payment per claim, provides a reasonable estimate of additional claims of \$852,800 per year. The total amount of each claim can vary widely based on the circumstances of the contract. In addition, the number of claims received per year can vary widely from year to year.²²

According to DBPR, as of March 27, 2014, the fund currently has a backlog of 142 completed claims representing \$4,345,735²³ in anticipated payments, which are awaiting approval by the board. The amount of yearly recovery fund payments is limited by the amount of funding received from the 1.5 percent surcharge. Therefore, the total amount of all claims paid each year will not increase as a result of receiving additional claims. However, the inclusion of additional claims will likely extend the amount of time it takes to pay each individual claim.²⁴

DBPR indicates the bill will increase the workload of staff in the Office of General Counsel to prosecute cases against Division II contractors with revoked licenses. The bill expands the definition of “contractor” for recovery fund purposes to include Division II contractors; therefore, DBPR would continue to prosecute cases against revoked licensees solely for recovery fund purposes. However, DBPR states that the additional workload can be accomplished with current DBPR staffing and resources.²⁵

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

²² Department of Business and Professional Regulation, Agency Bill Analysis for HB 1235 (March 20, 2014) (on file with the Business & Professional Regulation Subcommittee).

²³ Updated outstanding claims information, email from Department of Business and Professional Regulation to House Government Operation Subcommittee staff (March 27, 2014) (on file with the Government Operations Appropriations Subcommittee).

²⁴ Department of Business and Professional Regulation, Agency Analysis for SB 1098 (March 11, 2014) (on file with the Business & Professional Regulation Subcommittee).

²⁵ Department of Business and Professional Regulation, Agency Bill Analysis for HB 1235 (March 20, 2014) (on file with the Business & Professional Regulation Subcommittee).

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 24, 2014, the Business & Professional Regulation Subcommittee adopted an amendment that did the following and reported the bill favorably with committee substitute:

- Reinserts language that was stricken in the bill that limits claims to a \$250,000 lifetime cap per licensee and clarifies that this limitation is for contracts entered into prior to July 1, 2004.

On April 10, 2014, the Regulatory Affairs Committee adopted a technical amendment changing the word “claimant” to “claim” and reported the bill favorably with committee substitute.

This analysis is drafted to the committee substitute.