

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1899 (PCB JU 04-06) Construction Defects
SPONSOR(S): Committee on Judiciary and Rep. Kottkamp
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary	15 Y, 0 N	Havlicak	Havlicak
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

Chapter 558, F.S., contains Florida's construction defect law which requires pre-litigation notice and an opportunity to cure before initiating a lawsuit for construction defects on residential dwellings. This law was passed by the Legislature during the 2003 regular session.

This bill makes several changes to chapter 558 that, while maintaining the integrity of the notice and opportunity to cure requirements, make the procedures more equitable and manageable for the parties involved. Time frames for a claimant to provide notice, a contractor's response to that notice, acceptance or rejection of offers are modified to fix time requirements in current law. A dual-track for time requirements are established—different time frames for: 1) single-family residence, manufactured or modular home, duplex, triplex, or quadruplex; and 2) an association of one or more units in a multifamily residential building.

The bill makes other changes to chapter 558. Those changes include:

- Eliminates the "deemed to accept" provision as applied to the property owner who does not respond to an offer to cure and instead provides for a mandatory procedural acceptance or rejection by a claimant of the contractor's offer;
- Prohibits the admissibility of an offer made by a contractor for use by a claimant to show existence of a defect in litigation;
- Changes definition of construction defect and dwelling to include appurtenances;
- Requires all parties, upon request, to provide all available discoverable evidence of the defect to the other party. This would include photographs, videos or reports;
- Removes the mutual agreement provision of the destructive testing provision; however, the bill provides that contractors must give reasonable notice of the date and time of any destructive testing, and the claimant may be present to observe the testing, and no destructive testing may be conducted if it will render the property uninhabitable. If the contractor does not repair damages caused by constructive testing, it shall be subject to disciplinary proceedings under chapter 489;
- Allows the parties, by mutual agreement, to alter the procedure for the notice of claim process set forth in chapter 558.

It does not appear that this bill has a fiscal impact on state or local governments.

This bill has an effective date of July 1, 2004.

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

STORAGE NAME: h1899.ju
DATE: April 1, 2004

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. EFFECT OF PROPOSED CHANGES:

CHAPTER 558 — PRESENT SITUATION

Chapter 558, F.S., sets forth a procedure parties must follow in an attempt to settle disputes relating to construction defects. Before a lawsuit can be initiated against potential defendants for an alleged construction defect, the claimant must serve written notice of the claim on the contractor, subcontractor, supplier or design professional. The notice of claim must be served no later than 60 days prior to filing the action.

The notice of claim must describe the claim in reasonable detail sufficient to determine the nature of each alleged construction defect and a description of the damage or loss resulting from each defect. The potential defendants must forward the notice to all other potential defendants who they reasonably believe may be responsible for an alleged defect specified in the notice. Contractors may inspect the dwelling within five days after service of the claim and the claimant is required to provide reasonable access during normal business hours for this inspection. As part of the inspection, the parties may agree to destructive testing with the person performing the testing responsible for any damages caused by the testing.

Section 558.001, F.S., contains legislative findings and a declaration that the construction defect provisions of chapter 558 are designed to provide an effective alternative dispute resolution process which provides the parties an opportunity to resolve certain construction claims without resort to further legal processes.

Proposed changes: This bill amends this section to expressly state the policy reason behind chapter 558 by adding to the legislative findings, "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 558.002, F.S., is the definitional section of this chapter.

Proposed changes: This bill amends several of the definitions in this section. These changes are designed to address concerns that some of the definitions are vague and overbroad in that they encompass persons not involved with construction defects. Specifically, the bill makes definitional changes to the following terms:

- Claimant in subsection 3 is changed by removing “tenant”. This clarifies that the provisions of chapter 558 apply only to owners of real property. New language is also added to this definition to include one who asserts a claim for indemnification for construction defect damages.
- Construction defect is expanded to include any deficiency in a “repair or alteration” of a dwelling under enumerated situations. The definition also includes deficiencies to any appurtenance to the dwelling,¹ and any deficiency involving the real property to which the dwelling or appurtenance is affixed. A cross reference to s. 553.84, F.S., is also included in this definition.²
- Contractor is changed to ensure consistency with the definition of “person” in Florida law.³ Additionally, the word “selling” is deleted to clarify that chapter 558 does not apply to real estate brokers, individuals selling their homes, or others not involved in the construction of the house.
- Design professional is changed to ensure consistency with the definition of “person” in Florida law.⁴
- Dwelling is clarified to specifically include triplexes, quadruplexes or other multifamily units. Language is also added to clarify that this chapter only applies to property in which title passes to the owner and does not apply to renters. Condominiums and cooperatives are included in this definition. This definition is also amended to include other appurtenances to and located on the real property.
- Subcontractor is amended to include contractors who perform labor and supply materials on behalf of others in the construction or remodeling of a dwelling. For consistency purposes, the definition includes a cross-reference to the definition of “person” in Florida law.⁵
- Service is amended to permit notice of claim service by certified mail, return receipt requested, to the last known address of the addressee. Personal service is removed from the existing law.
- Supplier is amended by adding a cross-reference to the definition of person found in Florida law.⁶

Section 558.003, F.S., requires a court to abate any lawsuit filed if the plaintiff has not first complied with the requirements of chapter 558.

Proposed changes: The amendments to this section clarify that compliance with chapter 558 is a legislatively-imposed condition precedent to filing a lawsuit for a construction defect.⁷

Section 558.004, F.S., establishes the procedures one must follow in resolving a construction defect claim prior to initiating legal action. Specifically, the section requires that, prior to filing suit; the claimant must serve written notice of claim on potential defendants. Within 25 days of receiving the notice, the potential defendants must respond to the claimant with either:

- a written offer to remedy the alleged defect;
- a written offer to compromise or settle the claim; or
- a written statement disputing the claim.

¹ Appurtenance is defined by BLACK’S LAW DICTIONARY (6th Ed.) as: “[a]n article adapted to the use of the property to which it is connected, and which was intended to be a permanent accession to the freehold.” Examples might include a garage, storage shed, barn, garden, orchard, or swimming pool.

² Section 553.84, F.S., provides for a civil cause of action for damages resulting from a violation of the Florida Building Code.

³ See s. 1.01(3), F.S. that defines “person” as: individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.”

⁴ Id.

⁵ Id.

⁶ Id.

⁷ This condition precedent is similar to Florida Medical Malpractice Act in chapter 766, F.S., which requires the claimant to conduct a presuit investigation. Prior to filing suit under chapter 766, the claimant must notify the defendant of the intent to file suit. Upon notification, the defendant must investigate the claim and within 90 days either: reject the claim; make a settlement offer; or admit liability and offer to arbitrate damages. If the presuit process does not dispose of the case, the lawsuit may proceed.

If the potential defendants reject the claim, the claimant can file suit. If the claimant and potential defendants agree that the potential defendants should remedy the defect, the potential defendants must do so within the agreed timetable. If the potential defendants do not meet the established timetable, the claimant may file suit. If the claimant rejects the offer to repair, he or she must provide the offeror written notice of the rejection, and can then file suit. If the claimant does not respond to an offer within 15 days then the claimant is deemed to have accepted the offer. Any offer to settle, compromise, or remedy a construction defect does not constitute an admission of liability.

Proposed changes: This bill changes some of the requirements of s. 558.004, F.S., and is designed to establish workable and fair time frames. One way this is accomplished is through establishing a dual-track process; one set of time frames for actions involving single-family residence, manufactured or modular home, duplex, triplex or quadruplex; and a longer time frame for actions involving an association of one or more units in a multifamily residential building. The bill makes time changes to the following events:

- Written notice of claim: Current law requires all claimants to serve written notice of claim on the contractor 60 days before filing an action. This bill establishes a dual-track for notice and other time frames. Single-family residence owners must still serve written notice of claim upon contractors 60 days before filing an action for a construction defect; however, residents of a multifamily residential building have 120 days to serve written notice.
- Reasonable inspection of dwelling: Time frame in which a contractor is able to perform a reasonable inspection of the dwelling is changed from “5 business days” to “30 days” after receipt of the notice of claim (50 days in a multifamily residential building).
- Notice of claim forwarded to lower-tier subcontractors: Current law requires the contractor to forward the notice of claim to each subcontractor who may be responsible for the defect within 10 days of service of the notice of claim. This bill amends s. 558.004(3), F.S., to require this notice to be given within 10 days after “receipt” of notice of claim (30 days after receipt of notice of claim for multifamily residential building);
- Lower-tier subcontractors’ response to the contractor: This reply is changed from 5 business days to 15 days (30 days for multifamily residential building); and
- Written response to claimant: Time frame for contractors to respond in writing to the claimant’s notice of claim is changed from 25 days to 45 days (75 days for multifamily residential dwellings).

This bill requires the notice of claim to include a reference to chapter 558 and, if the defect arises from work performed under a contract, the notice must be served on the person with whom the claimant contracted with.

The inspection under current law permits destructive testing if mutually agreed to by the parties. This bill removes the mutual agreement provision; however, the bill provides that contractors must give reasonable notice of the date and time of any destructive testing. Additionally, the bill provides that the claimant may be present to observe the testing, and no destructive testing may be conducted if it will render the property uninhabitable. If the contractor does not repair damages caused by constructive testing, it shall be subject to disciplinary proceedings under chapter 489.

Contractors under current law may respond to a claimant’s notice of claim in three ways: 1) a written offer to remedy the defect; 2) a written offer to compromise and settle the claim by monetary payment; and 3) a written statement that disputes the claim. This provision is amended to add a fourth option, i.e., a written offer to compromise and settle the claim by a combination of repairs and monetary payment.

This bill deletes subsection (6) of s. 558.004, F.S., whereby a claimant, who fails to respond to a contractor’s offer to remedy or settle a claim of notice, is deemed to have accepted the contractor’s

offer. This language imposing an automatic acceptance of an offer of compromise on somebody who fails to reject the offer is contrary to general principles of contract law which require an offer to be affirmatively accepted. The bill also requires the claimant, upon receiving a timely settlement offer, to reject or accept the offer within 15 days (or 45 days for multifamily residential buildings) after receiving the offer. The claimant cannot proceed with an action without timely and properly serving a notice of rejection of the settlement offer. Should a claimant initiate a lawsuit before accepting or rejecting the offer, the court must abate the action until the claimant complies with this requirement.

The bill requires a claimant, if he or she accepts the offer from the contractor, to provide the contractor and its agent's access to the dwelling during normal working hours to repair the defect. At this point, the contractor is excused from making the agreed upon repairs only for reasonable delays beyond its control, such as weather conditions, delivery of materials, claimant's actions, or issuance of any required permits.

The bill specifically provides that chapter 558 does not preclude the parties from agreeing on a partial settlement or compromise of the claim. In such case, the claimant may, without further notice, proceed with an action on the unresolved portions of the claim.

The bill deletes language providing that the failure of a claimant or contractor to follow the procedures of chapter 558 is admissible in an action for a constructive defect. Additionally, language is added that specifies that offers exchanged as part of the mandated statutory procedure shall not be admissible against any party in subsequent litigation to show the existence of a defect.

Language is added that specifies the tolling of the statute of limitations period applies to claims against bond sureties who are not otherwise mentioned in this statutory scheme. This change would prevent a claimant whose statute of limitations is about to expire from filing suit against a surety without joining the contractor in an effort to escape the pre-litigation requirements of chapter 558.

The bill also provides for a claimant to amend his or her initial list of construction defect described in the notice of claim as these additional or new defects become known. However, a court shall allow an action to proceed to trial only as to the alleged defects in the notice or amended notice of defects.

Finally, the bill adds a new subsection (15) imposing a duty on all parties to exchange evidence of the construction defects, e.g., expert reports, photographs, and videos. Expert reports exchanged pursuant to this subsection may not be used in any subsequent litigation unless the expert testifies as a witness or the report is relied upon by a different expert who testifies on behalf of the party who prepared the report.

Section 558.005, F.S., addresses notice requirements in a contract for sale, design, construction, or remodeling of a dwelling under chapter 558. This section requires contractors in a sales contract to provide notice to the owner of the dwelling of the contractor's right to cure construction defects before the owner can commence litigation. Current law provides disclosure language that meets the requirements of this section.

Proposed changes: The title of this subsection is changed from "contract of sale" to "contract provisions" because the bill omits from the definition of "contractor" persons involved in the sale of dwellings. This bill also provides the parties with an opportunity to agree to any alternative dispute resolution mechanism they wish at the time of contracting and provides the flexibility to expressly override the provisions of chapter 558 by written mutual agreement.

This section also contains clarifying language on the applicability of chapter 558. Specifically, it amends s. 558.005, F.S., to apply chapter 558 requirements to all actions accruing before July 1, 2004, but not yet commenced as of July 1, 2004.

Severability Clause

Section 6 of this bill specifically states that if any provision of this act or the application of this act to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provisions or application. Therefore, the provisions in this act are declared severable.

C. SECTION DIRECTORY:

Section 1: Amends s. 558.001, F.S., relating to legislative findings and declaration.

Section 2: Amends s. 558.002, F.S., relating to definitions.

Section 3: Amends s. 558.003, F.S., relating to action; abatement.

Section 4: Amends s. 558.004, F.S., relating to notice and opportunity to repair.

Section 5: Amends s. 558.005, F.S., relating to contract provisions and applications.

Section 6: Provides a severability clause.

Section 7: Provides an effective date of July 1, 2004.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill does not appear to impact state revenues.

2. Expenditures:

This bill does not appear to impact state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not appear to impact local government revenues.

2. Expenditures:

This bill does not appear to impact local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill does not appear to have a direct fiscal impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with the counties or cities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 17, 2004, the Judiciary Committee adopted three amendments to the bill:

Amendment 1 was a technical amendment to s. 558.003, F.S.

Amendment 2 clarifies the chapter 558 notice that contractors must give in a contract for design, construction or remodeling of a dwelling, and clarifies the applicability of chapter 558, i.e., amends s. 558.005, F.S., to apply chapter 558 requirements to all actions accruing before July 1, 2004, but not yet commenced as of July 1, 2004.

Amendment 3 amends s. 558.004, F.S., to:

- Provide that contractor must reasonably coordinate with claimant on the timing and manner of inspecting property.
- Provide that no destructive testing may be conducted if it will render the property uninhabitable. Contractors must give reasonable notice of the date and time of any destructive testing, and the claimant may be present to observe the testing. If the contractor does not repair damages caused by constructive testing, it shall be subject to disciplinary proceedings under chapter 489.
- Clarify that if a claimant who has not accepted or rejected a settlement offer from a contractor files a lawsuit, the court will abate such proceeding until the claimant has either accepted or rejected the offer.
- Excuse contractors from timely repairs for reasonable delays beyond its control, e.g., weather conditions, late delivery of materials, and issuance of required permits.
- Clarify that a claimant can amend their construction defects notice to the contractor to include newly discovered defects, but a claimant cannot go to trial on any defect which has not been properly noticed and processed as required by chapter 558.
- Specifically state that nothing in s. 558.004, F.S., shall preclude other legal actions.
- Add a new subsection (15) imposing a duty on all parties to exchange evidence of the construction defects, e.g., expert reports, photographs, and videos. Expert reports exchanged pursuant to this subsection may not be used in any subsequent litigation unless the expert testifies as a witness or the report is relied upon by a different expert who testifies on behalf of the party who prepared the report.

This analysis is drafted to the bill as amended.