

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 Fiscal Policy

BILL: CS/SB 418

INTRODUCER: Regulated Industries Committee and Senator Richter

SUBJECT: Construction Defect Claims

DATE: April 14, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Kraemer</u>	<u>Imhof</u>	<u>RI</u>	<u>Fav/CS</u>
2.	<u>Billmeier</u>	<u>Knudson</u>	<u>BI</u>	<u>Favorable</u>
3.	<u>Jones</u>	<u>Hrdlicka</u>	<u>FP</u>	<u>Pre-meeting</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 418 amends ch. 558, F.S., relating to construction defect claims. The bill contains a legislative finding that the opportunity to resolve claims without legal process should be extended to insurers of a contractor, subcontractor, supplier, or design professional and contains a finding that the settlement negotiations should be confidential. The bill revises the definition of “completion of a building or improvement” to include a temporary certificate of occupancy.

The bill amends requirements for filing a notice of claim. The notice must describe the claim in reasonable detail and must identify the location of the defect sufficiently to enable the responding party to locate the defect without undue burden. It does not require destructive testing.

The bill provides requirements for the exchange of documents by the parties and provides that a party may assert any claim of privilege recognized under Florida law respecting any of the disclosure obligations mandated by ch. 558, F.S.

II. Present Situation:

Legislative Findings

The legislative findings for ch. 558, F.S., provide that it is beneficial to have an effective alternative dispute mechanism for construction defect disputes in which the claimant provides

the contractor, subcontractor, supplier, or designer responsible for the alleged defect sufficient notice and an opportunity to cure the defect without having to resort to litigation.¹

Definitions

A construction defect, is a deficiency in, or arising out of, the design, specifications, surveying, planning, supervision, observation of construction, or construction, repair, alteration, or remodeling of real property² resulting from:

- Defective material, products, or components used in the construction or remodeling;
- A violation of applicable building codes which allows an action under limited conditions;³
- A failure of the design of real property to meet 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.⁴

The term “action” means a lawsuit or arbitration proceeding for damages to or loss of real or personal property caused by an alleged construction defect.⁵

Completion of a building or improvement is the issuance of a certificate of occupancy (or its equivalent) for the entire building or improvement issued by the appropriate governmental body (such as a city or county). In cases where a certificate of occupancy or the equivalent authorization is not issued, completion means the substantial completion of construction, finishing, and equipping of the building or improvement according to the plans and specifications.⁶

A claimant is a property owner, including a subsequent purchaser or association,⁷ 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. Under the construction defect procedure, a contractor, subcontractor, supplier, or design professional is not designated as a claimant.⁸

A contractor is any person⁹ that is legally engaged in the business of designing, developing, constructing, manufacturing, repairing, or remodeling real property.¹⁰ A subcontractor is a person who is a contractor who performs labor and supplies material on behalf of another

¹ Section 558.001, F.S.

² Section 558.002(8), F.S., defines real property as improved land, and improvements on such land, such as fixtures, manufactured housing, or mobile homes; public transportation projects are excluded.

³ See s. 553.84, F.S.

⁴ Section 558.002(5), F.S.

⁵ See s. 558.002(1), F.S.

⁶ Section 558.002(4), F.S.

⁷ An “association” is defined in s. 558.002(2), F.S., as having the same meaning as in s. 718.103(2), F.S., (condominiums), s. 719.103(2), F.S., (cooperatives), s. 720.301(9), F.S., (homeowners) or s. 723.075, F.S., (mobile home subdivisions).

⁸ Section 558.002(3), F.S.

⁹ As defined in s. 1.01, F.S., a “person” includes “individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.”

¹⁰ Section 558.002(6), F.S.

contractor for construction or remodeling of real property,¹¹ and a supplier is a person who does not perform labor, but does provide materials, equipment, or other supplies for the construction or remodeling of real property.¹²

Notice of Claim Requirements

Before an action may be brought by a claimant alleging a construction defect, the claimant must serve¹³ a written notice of claim on the contractor, subcontractor, supplier, or design professional. The written notice must be provided at least 60 days before filing the action, or in the case of an association representing more than 20 parcels (association claimant), at least 120 days before the filing.¹⁴

A construction defect claim arising from work performed under a contract requires the written notice of claim to be served on the person with whom the claimant contracted, and must describe the claim in detail sufficient to determine the nature of the construction defect and a description of the damage or loss resulting from it, if known.¹⁵

The person who receives the claim (claim recipient) within 10 days after service of the notice of claim (within 30 days for an association claimant) can serve a copy of the notice of claim to each contractor, subcontractor, supplier, or design professional whom the claim recipient reasonably believes is responsible for each defect specified in the notice of claim (the subsequent claim recipient). The claim recipient must identify the specific defect for which it believes the particular subsequent claim recipient is responsible.¹⁶

Within 15 days after service of a copy of the notice of claim to a subsequent claim recipient (within 30 days for an association claimant), the subsequent claim recipient must serve a written response to the claim recipient, including:

- A report, if any, of the scope of any inspection of the property;
- The findings and results of the inspection;
- A statement of whether the subsequent claim recipient is willing to make repairs to the property or whether such claim is disputed;
- A description of any repairs the subsequent claim recipient is willing to make to remedy the alleged construction defect; and
- A timetable for the completion of such repairs.¹⁷

¹¹ Section 558.002(10), F.S.

¹² Section 558.002(11), F.S.

¹³ Service of a notice of a construction defect means delivery by certified mail with a United States Postal Service record of evidence of delivery or attempted delivery to the last known address of the addressee, by hand delivery, or by delivery by any courier with written evidence of delivery. *See* s. 558.002(9), F.S.

¹⁴ Section 558.004(1), F.S.

¹⁵ *See* s. 558.004(6), (7), and (8), F.S.

¹⁶ Section 558.004(3), F.S.

¹⁷ Section 558.004(4), F.S.

Within 45 days after service of the notice of claim (within 75 days for an association claimant), the claim recipient must serve a written response to the claimant providing:

- A written offer to remedy the alleged construction defect at no cost to the claimant, a detailed description of the proposed repairs necessary to remedy the defect, and a timetable for the completion of such repairs;
- A written offer to compromise and settle the claim by monetary payment, that will not obligate the claim recipient's insurer, and a timetable for making payment;
- A written offer to compromise and settle the claim by a combination of repairs and monetary payment, that will not obligate the claim recipient's insurer, that includes a detailed description of the proposed repairs and a timetable for the completion of such repairs and making payment (the (5)(c) option);
- A written statement that the claim recipient disputes the claim and will not remedy the defect or compromise and settle the claim; or
- A written statement that a monetary payment, including insurance proceeds, if any, will be determined by the claim recipient's insurer within 30 days after notification to the insurer by means of serving the claim, which service occurs at the same time the claimant is notified of this settlement option. A written statement under this option may also include an offer under the (5)(c) option above, but such offer must be contingent upon the claimant also accepting the determination of the insurer whether to make any monetary payment in addition to the offer. If the insurer for the claim recipient makes no response within the 30 days following service, then the claimant is deemed to have met all conditions necessary to filing an action on the noticed claim.¹⁸

Insurance Claims

Section 558.004(13), F.S., provides that the construction defect procedure does not relieve the claim recipient from complying with the terms of any liability insurance policy. Further, the providing of a copy of a notice of claim to an insurer does not constitute a claim for insurance purposes.

Exchange of Documents and Other Information

Upon request, the claimant or the claim recipient must exchange:¹⁹

- Any design plans, specifications, and as-built plans;
- Any documents detailing the design drawings or specifications;
- Photographs, videos, and expert reports that describe any defect upon which the claim is made;
- Subcontracts; and
- Purchase orders for the work that is claimed defective or any part of such materials.²⁰

¹⁸ Section 558.004(5)(a)-(e), F.S.

¹⁹ The exchange must occur within 30 days after service of a written request. The written request must contain an offer to pay the reasonable costs of reproduction.

²⁰ Section 558.004(15), F.S.

III. Effect of Proposed Changes:

Legislative Findings

The bill amends the legislative findings to add the insurer of the contractor, subcontractor, supplier, or design professional as a party that should be provided the opportunity to resolve a construction defect claim through the construction defect procedure. The bill also contains a finding that the procedure is a confidential settlement negotiation.

Definitions

The bill amends the definition of “completion of a building or improvement,” to mean the issuance of a certificate of occupancy whether temporary or otherwise. Currently, the completion of a building or improvement is only when the certificate of occupancy (or its equivalent) for the entire building or improvement is issued by the appropriate governmental body (such as a city or county).²¹

Warranties commence with the completion of a building or improvement. Express warranties are granted to purchasers by developers, and other warranties are granted by contractors, subcontractors, and suppliers to both developers and purchasers. The bill amends the definition of “completion of a building or improvement” in s. 718.203(3), F.S., of the Condominium Act and s. 719.203(3), F.S., of the Cooperative Act to make those definitions consistent with the amended definition in s. 558.002(4), F.S. The warranties would begin once a temporary certificate of occupancy is issued.

Notice of Claim Requirements

The bill clarifies the requirement that the notice of claim describe in reasonable detail the nature of each alleged construction defect and the damage or loss resulting from the defect, if known. The claimant or its agents must identify the location of the alleged defect based upon at least visual inspection. The information in the notice of claim must allow the claim recipient to locate the alleged defect without “undue burden.” The claimant has no obligation to perform destructive or other testing to identify the location of the alleged defect.

The bill repeals the statement of repair requirements a subsequent claim recipient had to include in its response to a claim recipient. Currently claim recipients are required to include offers or statements in the response to the claimant. The bill requires the subsequent claim recipient’s written response to include one of these offers or statements in its response to the claim recipient. The response is no longer required to include a statement of repairs the subsequent claim recipient is willing to make and the timetable for completion.

²¹ See s. 558.002(4), F.S. In cases where a certificate of occupancy or the equivalent authorization is not issued, completion means the substantial completion of construction, finishing, and equipping of the building or improvement according to the plans and specifications.

Insurance Claims

Current law provides that sending a copy of a claim to an insurer does not constitute the making of a claim for insurance purposes. The bill provides that an insurance policy may allow for such action to constitute a valid claim for coverage under the policy.

Exchange of Documents and Other Information

The bill eliminates the requirement for a claimant or any claim recipient (or any subsequent claim recipient) to exchange documents detailing the design drawings or specifications upon request. The bill requires those parties provide, upon request, maintenance records and other documents related to the discovery, investigation, causation, and extent of alleged construction defects identified in a notice of claim, as well as any resulting damages. A party may assert any claim of privilege recognized under Florida law respecting any of the disclosure obligations mandated by ch. 558, F.S.

The bill is effective October 1, 2015.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

Revision to the term “completion of a building or improvement” may affect persons and associations eligible to file or receive notices of claim (and insurers of those persons) by changing the calculation of the time period for which warranties under s. 718.203, F.S., and s. 719.203, F.S., are effective.

C. Government Sector Impact:

According to the Department of Business and Professional Regulation, the bill will not impact to department. According to Office of the State Courts Administrator, there is an

indeterminate minimal fiscal impact to the courts that can be absorbed with existing resources.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 558.001, 558.002, 558.004, 718.203, and 719.203.

IX. Additional Information:

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

CS by Regulated Industries on March 31, 2015:

The committee substitute provides that a claim for an alleged construction defect must be based, at a minimum, upon a visual inspection by the claimant or its agents, and must identify the location of the defect. There is no duty to conduct destructive or other testing. The committee substitute removes the requirement that the notice must identify the specific location of the defect and identify the specific provisions of the building code, project plans, project drawings, specifications or other information that serve as the basis of the claim. It also removes the provision that failure to include this information in the notice is prima facie evidence of a defective notice of claim. It also removes the provisions concerning frivolous claims, monetary sanctions, and attorney fees.

- B. **Amendments:**

None.