HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 87 Construction Defect Claims
SPONSOR(S): Business & Professions Subcommittee; Civil Justice Subcommittee; Passidomo and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 418

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N, As CS	Malcolm	Bond
2) Business & Professions Subcommittee	12 Y, 1 N, As CS	Anstead	Luczynski
3) Judiciary Committee			

SUMMARY ANALYSIS

The bill updates the current procedure for filing a notice of construction defect claim.

The bill includes a “temporary” certificate of occupancy in the definition of “completion of a building or improvement” in ch. 558, F.S., relating to construction defects, in ch.718, F.S., relating to warranties for condominiums, and in ch. 719, F.S., relating to warranties for cooperatives.

The bill requires that the notice of claim identify the location of each construction defect, based upon at least a visual inspection, sufficiently to enable the responding party to locate the alleged defect without undue burden.

The bill requires that the contractor's response to a notice of claim indicate whether he or she is willing to make repairs, settle the claim with a monetary offer, or both, whether the contractor disputes the claim and whether the contractor’s insurer will cover the claim.

The bill clarifies that providing a copy of the notice of claim to an insurance company does not constitute a claim for insurance purposes unless provided for under the terms of the contractor's insurance policy.

The bill adds “maintenance records” and other documents to those records to be exchanged by the claimant with the contractor related to the defect claim.

The bill requires the court to award monetary sanctions against the claimant for pre-suit costs, including costs of inspection, investigation, testing, attorney’s fees, and prejudgment interest, if the court grants a motion for sanctions pursuant to s. 57.105(1), F.S., and if the court finds that the notice of claim included an alleged construction defect that the claimant knew or should have known was unsupported pursuant to s. 57.105(1)(a) or (b), F.S.

The bill does not have a fiscal impact on state or local governments.

The bill has an effective date of October 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Chapter 558, F.S., provides a method for resolving construction defect disputes before filing a lawsuit. In short, it provides for notice and an opportunity to cure. Before the property owner may file a complaint against a contractor, the property owner is required to serve the contractor with a notice of claim that provides the contractor with information about the alleged defect, gives the contractor the opportunity to examine the defect, and, if the contractor agrees that the defect exists, gives the contractor a reasonable opportunity to repair the defect or make some other offer of settlement. If the parties do not resolve the dispute through this process, the claimant may still bring an action against the contractor in court. Similar methods for presuit notice and resolution are required in other areas, including medical negligence, claims against nursing homes, and eminent domain.[1]

Legislative Findings and Declaration

Section 558.001, F.S., provides legislative findings 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.

The bill amends s. 558.001, F.S., to include a finding that the insurer of the contractor, subcontractor, supplier, or designer responsible for the alleged defect should also be provided an opportunity to resolve a claim "through confidential settlement negotiations."

Applicability; Temporary Certificate of Occupancy

Current law only requires a notice of claim to be filed after a project has reached completion. "Completion of a building or improvement" is currently defined in s. 558.002(4), F.S., as the

> issuance of a certificate of occupancy for the entire building or improvement, or the equivalent authorization to occupy or use the improvement, issued by the governmental body having jurisdiction and, in jurisdictions where no certificate of occupancy or the equivalent authorization is issued, means substantial completion of construction, finishing, and equipping of the building or improvement according to the plans and specifications.

The bill amends the definition of "completion of a building or improvement" in s. 558.002(4), F.S., to provide that the issuance of a temporary certificate of occupancy qualifies as "completion of a building or improvement." The bill also amends the definition of "completion of a building or improvement" in ss. 718.203(3) and 719.203(3), F.S., related to warranties for condominiums and cooperatives, to make those definitions consistent with the amended definition in s. 558.002(4), F.S.

Notice

Section 558.004(1), F.S., requires a claimant to provide a notice of claim of an alleged construction defect to the contractor, subcontractor, supplier, or designer, at least 60 days before filing any action, or at least 120 days before filing an action involving an association representing more than 20 parcels. "The notice of claim must describe the claim in reasonable

[1] *See* s. 720.311, F.S., related to homeowners association disputes; ch. 766., F.S., related to medical negligence claims; s. 429.293(3), F.S., related to assisted care communities; s. 400.0233(3), F.S., related to nursing homes; and, s. 73.015, F.S., related to eminent domain.

detail sufficient to determine the general nature of each alleged construction defect and a description of the damage or loss resulting from the defect, if known."

The bill amends s. 558.004(1), F.S., to require that the notice of claim also identify the location of each construction defect, based upon at least a visual inspection, sufficiently to enable the responding party to locate the alleged defect without undue burden.

Response to Notice

Section 558.004(4), F.S., requires a contractor, subcontractor, supplier, or designer who has received a notice of claim to respond to the notice within 15 days, or within 30 days for an action involving an association representing more than 20 parcels. The response must include reports and inspections, a statement of whether the contractor is willing to make repairs to the property, whether the claim is disputed, a description of any repairs they are willing to make, and a timetable for the completion of such repairs.

The bill amends s. 558.004(4), F.S., to provide that the contractor's response must be in writing and must include at least one of the responses already provided for in s. 558.004(5)(a)-(e), F.S., whether he or she is willing to make repairs, settle the claim with a monetary offer, or both, whether the contractor disputes the claim, or whether the contractor's insurer will cover the claim.

Insurance Claims

Section 558.004(13), F.S., provides that nothing in s. 558.004, F.S., relieves a contractor, subcontractor, supplier, or designer's from complying with all the provisions of a liability insurance policy with regard to coverage of a construction defect claim and provides that providing a copy of the presuit notice to the contractor's insurer does not constitute a claim for insurance purposes.

The bill clarifies s. 558.004(13), F.S., to provide that if the terms of the contractor's insurance policy permit a claim to be made by providing a copy of the presuit notice to the insurer, the notice may constitute a claim under the policy.

Information Exchange

Section 558.004(15), F.S., provides that any party may, during the ch. 558, F.S., presuit process, request an exchange of the following information relating to the claimed construction defects:

- 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.

The requesting party must offer to pay the reasonable costs of reproduction.

The bill amends s. 558.004(15), F.S., to require a party to also exchange "the claimant's maintenance records and other documents related to the discovery, investigation, causation, and extent of the alleged defect identified in the notice of claim and any damages resulting" from the defect. The bill also provides that photographs and videos provided pursuant to a request must be "of the alleged construction defect identified in the notice of claim."

Previously Resolved Claims and Sanctions for Unsupported Claims

Section 558.004(8), F.S., provides that if a contractor, subcontractor, supplier, or designer pays or repairs a defect in accordance with a settlement with a claimant, the claimant is barred from proceeding with an action for that defect.

Section 57.105, F.S., generally provides for court-imposed sanctions, including monetary sanctions, against parties and counsel who raise claims or defenses that are not supported by the material facts or would not be supported by current law.[2]

The bill creates a specific provision within the construction defect claim law that requires the court to award monetary sanctions against the claimant for pre-suit costs, including costs of inspection, investigation, testing, attorney's fees, and prejudgment interest, if after the claimant files a complaint, the court grants a motion for sanctions pursuant to s. 57.105(1), F.S., and if the court finds that the pre-suit notice of claim included an alleged construction defect that the claimant knew or should have known was unsupported pursuant to s. 57.105(1)(a) or (b), F.S.

B. 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. 558.004, F.S., relating to notice and opportunity to repair a construction defect.

Section 4 amends s. 718.203, F.S., relating to warranties by condominium developers.

Section 5 amends s. 719.203, F.S., relating to warranties by cooperative developers.

Section 6 provides an effective date of October 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

[2] s. 57.105(1), F.S.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 4, 2015, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment provided that any claim previously resolved in the time and manner agreed to by the parties but later included in a complaint would be deemed frivolous.

On March 10, 2015, the Business & Professions Subcommittee adopted one amendment. The amendment:

- Removes the requirement that the claimant cite to specific provisions of the building code, provide project plans, project drawings, and project specifications.
- Removes language rendering a notice of claim defective if it fails to include required information.
- Clarifies that that the notice of claim must identify the location of each construction defect, based upon at least a visual inspection, sufficiently to enable the responding party to locate the alleged defect without undue burden.
- Modifies the response required of subcontractors, suppliers, and design professionals, to be in line with current law.
- Removes the requirement to pay "related fees" in addition to the current requirement to pay the reasonable costs of reproduction for the exchange of documents related to the claim.
- Removes a repetitive provision on sanctions against the claimant for including settled matters in a lawsuit against the contractor.
- Revises the bill's subsection (16), which created a claim for attorney's fees and costs for the contractor based on the pre-suit notice of claim. The new language requires the court to award monetary sanctions against the claimant for pre-suit costs, including costs of inspection, investigation, testing, attorney's fees, and prejudgment interest, if the court grants a motion for sanctions pursuant to s. 57.105(1), F.S., and if the court finds that the notice of claim included an alleged construction defect that the claimant knew or should have known was unsupported pursuant to s. 57.105(1)(a) or (b), F.S.

The bill was reported favorably as a committee substitute.

The staff analysis is drafted to reflect the committee substitute.