HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 21 Construction Defects
SPONSOR(S): Regulatory Reform Subcommittee, Andrade and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 270

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Property Rights Subcommittee	10 Y, 8 N	Mawn	Jones
2) Regulatory Reform Subcommittee	9 Y, 8 N, As CS	Brackett	Anstead
3) Judiciary Committee			

SUMMARY ANALYSIS

A "construction defect" is a deficiency in, or arising out of, the design, specifications, surveying, planning, supervision, or observation of construction, or the construction, repair, alteration, or remodeling of real property ("property"), and includes a Florida Building Code violation. A property owner, including a subsequent purchaser or a community association ("claimant"), may bring a civil action alleging a construction defect claim against the person responsible for the construction defect ("respondent") in a court of competent jurisdiction. A claimant must bring such an action within four years after project completion or, in the case of a latent defect, within ten years of certain specified events.

HB 21:

- Limits actionable violations of the Florida Building Code to material violations.
- Changes the statutory standard for a cause of action based on a Florida Building Code violation by removing the provision that allowed causes of action if the contractor or licensee knew or should have known of the violation.
- Requires a claimant to attempt to resolve a construction defect claim or Florida Building Code violation claim under an existing applicable warranty before sending a notice of claim or filing legal action.
- Provides that a person does not have a cause of action if a warranty provider offers to make repairs to an alleged construction defect or violation of the Florida Building Code, and the person is satisfied with the repairs.
- Provides that the construction defect notice and cure process provided in current law, does not apply unless the responding parties agree to opt in to the process.
- Increases the specificity of detail a claimant must provide in the notice of claim and requires the claimant to include photographs of the damage and repair estimates or expert reports.
- Requires a claimant to affirm in the notice of claim that he or she has personal knowledge of the alleged defect and acknowledge that he or she is aware of the penalties for perjury.
- Requires a claimant to personally sign the notice of claim under penalty of perjury.
- Mandates that the respondent serve a copy of the notice of claim on each person the respondent believes is responsible for the defect.
- Provides that a claimant does not have a cause of action for a construction defect, if the contractor offers to fix the repairs at no cost to the claimant, and the claimant is satisfied with the repairs.
- Provides that submitting a claim to an existing applicable warranty tolls the statute of limitations to bring a cause of action for a construction defect
- Requires a claimant to submit a copy of a notice of claim of an alleged construction to any mortgage company with a security interest in the property, and notify such company of the claim's outcome.

The bill may have a positive insignificant fiscal impact on state government. The bill does not have a fiscal impact on local governments.

The bill provides an effective date of July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Florida Building Code

The Florida Building Code is the statewide building code for all construction in the state. The Florida Building Commission (Commission), housed within the DBPR, implements the Florida Building Code. The Commission reviews the International Code Council's I-Codes and the National Electric Code every three years to determine if it needs to update the Florida Building Code.[1]

Part IV of ch. 553, F.S., is known as the "Florida Building Codes Act," which provides a mechanism for the uniform adoption, updating, interpretation, and enforcement of a single, unified state building code that must be applied, administered, and enforced uniformly and consistently from jurisdiction to jurisdiction.[2] The Florida Building Code is adopted, updated, and interpreted by the Commission, and is enforced by local governments.[3]

The main purpose of the Florida Building Code is to regulate new construction or proposed modifications to existing structures in order to give the occupants the highest level of safety and the least amount of defects.[4] The Florida Building Code sets minimum standards for the design, construction, erection, alteration, modification, repair, and demolition of buildings, structures, and facilities in the state.

Construction and Electrical Contractors

The Legislature has determined that it is "necessary in the interest of the public health, safety, and welfare" to regulate the construction, electrical, and alarm system industry.[5]

Construction contractors are either certified by or registered with the Construction Industry Licensing Board (CILB). The CILB is housed in DBPR and consists of 18 members who are appointed by the Governor and confirmed by the Senate. The CILB is responsible for licensing, regulating, and disciplining certified construction contractors. Electrical contractors and alarm system contractors are certified by or registered with the Electrical Contractors' Licensing Board (ECLB). The ECLB is also housed in DBPR consists of 11 members who are appointed by the Governor and confirmed by the Senate. The ECLB is responsible for licensing, regulating, and disciplining certified electrical and alarm system contractors.[6]

The CILB and the ECLB may take action[7] against a certified contractor if they find the contractor is guilty of violating the contractor's practice act. Violations include:[8]

- Abandoning a construction project;
- Committing financial mismanagement that causes financial harm to a customer;

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[1] S. 553.73(7), F.S.
[2] *See* s. 553.72(1), F.S.
[3] Ss. 553.72, & 553.73, F.S.
[4] Florida Building Commission, *Advanced Florida Building Code Principals*, http://www.floridabuilding.org/Upload/Courses_trp/421-2-MATERIAL-Adv%20FL%20Bldg%20Code%20-%20Course%20PDF%20version%207.0.pdf (last visited Feb. 9, 2021).
[5] s. 489.101, F.S.
[6] *See generally* Ch. 489, F.S.
[7] The CILB and the ECLB may place a contractor on probation, reprimand him or her, revoke or suspend the contractor's certificate or registration, or deny the issuance of a renewal certificate or registration. The CILB and the ECLB may also require financial restitution to a consumer for financial harm directly related to a violation, require continuing education, or assess costs associated with investigation and prosecution. Ss. 489.129(1), 489.533(1), F.S.
[8] Ss. 455.227(1)(k), 489.129(1)(o), and 489.533(1), F.S.

- Failing to perform any statutory or legal obligation placed upon a licensee;
- 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;
- Being convicted or found guilty of, or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the practice of contracting or the ability to practice contracting; or
- Proceeding on a job without obtaining applicable local building department permits and inspections.

In addition to the CILB or ECLB disciplining a contractor, any licensee responsible for a material Florida Building Code violation who failed to correct the violation within a reasonable time may be fined by a local jurisdiction at least $500 but no more than $5,000. A failure to pay the fine will result in a suspension of the licensee's ability to pull building permits.[9]

A "material violation" is a violation existing within a completed building, structure, or facility which may reasonably result, or has resulted, in physical harm to a person or significant damage to the performance of a building or its systems.[10]

New Home Warranties

New home warranties guarantee the repair or replacement of certain elements of a newly-constructed home, if necessary, within a specified time. Builders often back new home warranties; however, builders sometimes purchase warranties from independent companies that assume responsibility for the claims, and homeowners may purchase additional coverage from third-party warranty companies.[11]

The duration of coverage offered under a new home warranty varies based on the type of element at issue. Most new home warranties cover workmanship and materials, such as drywall and paint, for one year after construction.[12] Coverage for elements such as air conditioning, plumbing, and electricity typically lasts for two years, and some new home warranties cover major structural defects making a home unsafe for up to ten years.[13] However, new home warranties typically do not cover expenses a homeowner incurs due to a construction defect or repair, such as temporary relocation costs, or superficial defects, such as small cracks in tile or cement.[14]

Generally, a new home warranty contract specifies how a claim must be made under the warranty. Many new home warranties require mediation[15] of disputed warranty claims, followed by mandatory binding arbitration[16] if mediation is unsuccessful.[17]

Statutory Civil Actions – Current Situation

Any person damaged by a Florida Building Code violation has a civil cause of action against the culpable party.[18]

There is no cause of action against a party who did not know and had no reason to know of the violation if:

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[9] S. 553.781, F.S.
[10] *Id.*
[11] Federal Trade Commission ("FTC"), *Warranties for Newly Built Homes*, https://www.consumer.ftc.gov/articles/0186-warranties-newly-built-homes (last visited Feb. 9, 2021).
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] Mediation is a process whereby a neutral third person helps the parties discuss and try to voluntarily resolve their dispute.
[16] Mandatory binding arbitration is a process whereby parties to a contract agree to submit their disputes to a third party instead of to the courts, and there are no appellate rights.
[17] FTC, *supra* note 11.
[18] S. 553.84, F.S.

- The party obtained the required building permit;
- The party receive government approval of the plans;
- The construction project passed all required inspections; and
- There was no personal injury or damage to other property.[19]

However, this does not apply if the culpable party **knew or should have known** that the violation existed.[20]

Statutory Civil Actions – Effect of the Bill

The bill limits a statutory civil action, pursuant to s. 553.84, F.S., based on a violation of ch. 553, F.S., or the Florida Building Code to only allow suits based on "material" violations. The bill defines "material violation" means a violation that exists within a completed building, structure, or facility which may reasonably result, or has resulted, in physical harm to a person or significant damage to the performance of a building or a system.

The bill changes the statutory standard for a cause of action based on a violation of ch. 553, F.S., or a the Florida Building Code violation by removing the provision that allowed causes of action if the contractor or licensee knew or should have known of the violation.

The bill provides that a person has a statutory cause of action based on a violation of ch. 553, F.S., or the Florida Building Code, **if the violation resulted in significant damage to the permitted property or may reasonably result in personal injury or significant damage to the performance of a building or its system,** regardless if the culpable party obtained the required building permit, received government approval of the plans, construction project passed all required inspections, and there was no personal injury or damage to other property.

The bill requires that before filing a cause of action based on a material violation of ch. 553, F.S., or the Florida Building Code, a person must submit a written claim for the alleged material violation under any existing applicable warranty. A person must provide access to the property for an inspection within 30 days of serving a claim. If the warranty provider offers to repair the alleged material violation, the person has 30 days to provide written authorization approving the repairs. A warranty provider has 120 days from the inspection to complete the repairs or offer a remedy.

The bill provides that a person may bring a cause of action if the warranty provider denies the claim, does not complete the repair, or offers a remedy that is unsatisfactory to the person who submitted the claim. However, a person is barred from bringing a cause of action, if the warranty provider offers to repair the alleged violation and the person fails to provide written authorization approving repairs.

The bill also provides that any offer or failure to offer a repair of an alleged material violation or to compromise and settle a claim by monetary payment or other remedy does not constitute an admission of liability and is not admissible in an action based on a material violation of ch. 553, F.S., or the Florida Building Code.

Construction Defect Claims

A "construction defect" is a deficiency in, or arising out of, the design, specifications, surveying, planning, supervision, or observation of construction, or the construction, repair, alteration, or remodeling of real property[21] ("property") resulting from:

- Defective material, products, or components used in the construction or remodeling;
- A Florida Building Code violation;
- A failure of real property's design to meet the applicable professional standards of care at the time of governmental approval; or

[19] *Id.*
[20] *Id.*
[21] "Real property" means land that is improved and the improvements thereon, including fixtures, manufactured housing, or mobile homes. S. 558.002(8), F.S.

- A failure to construct or remodel real property in accordance with accepted trade standards for good and workmanlike construction at the time of construction.[22]

A property owner, including a subsequent purchaser or a community association[23] ("claimant"), may bring a civil action alleging a construction defect claim against the contractor, subcontractor, supplier, or design professional[24] responsible for the construction defect ("respondent") in a court of competent jurisdiction.[25]

A claimant must bring an action alleging a construction defect within four years of the later of:
- Actual possession by the owner;
- The issuance of a certificate of occupancy;
- Abandonment of construction if not completed; or
- Completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer.[26]

In the case of a latent defect,[27] a claimant must bring such action within four years of the defect being discovered or should have been discovered with the exercise of due diligence.[28] In no circumstances may an action be brought 10 years after the later of:
- Actual possession by the owner;
- The issuance of a certificate of occupancy;
- Abandonment of construction if not completed; or
- Completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer.[29]

Notice of Claim – Current Situation

Chapter 558, F.S., requires a claimant to serve a written notice of claim on the respondent at least 60 days before bringing a construction defect claim in court, or at least 120 days before bringing such claim if it involves an association representing more than 20 parcels. The notice of claim must describe in reasonable detail the alleged defect's nature and, if known, the damage or loss caused by the defect.[30] The notice of claim must also identify the alleged defect's location with enough detail to allow the respondent to easily locate the defect.[31]

If a claimant serves a written notice of claim, it tolls the four-year statute of limitations to bring an action for a construction defect, the later of:[32]
- 90 days, or 120 days if the claimant is an association representing more than 20 parcels, after service of the notice of claim; or
- 30 days after the end of the repair period or payment period stated in the offer, if the claimant accepted the offer.

The parties may agree to extend the tolling period.

[22] S. 558.002(5), F.S.
[23] "Community associations" are condominium, cooperative, homeowners', and mobile home park homeowners' associations. S. 558.002(2), F.S.
[24] A design professional employed by a business entity or an agent thereof is not individually liable for damages resulting from negligence occurring within the course and scope of a professional services contract under certain conditions. S. 558.0035, F.S.
[25] S. 558.004, F.S.
[26] S. 95.11(3)(c), F.S.
[27] A "latent defect" is a hidden or concealed defect that could not be discovered by reasonable and customary observation or inspection made with ordinary care. Blacks Law Dictionary 611 (6th ed. 1996).
[28] S. 95.11(3)(c), F.S.
[29] *Id.*
[30] S. 558.004(1), F.S.
[31] *Id.*
[32] S. 558.004(10), F.S.

However, serving a written notice of claim does not toll the 10-year statute of repose to bring an action for a construction defect.[33]

Within 10 days after service of the notice of claim, or within 30 days after service if the claim involves an association representing more than 20 parcels, the respondent may serve a copy of the notice of claim ("notice copy") to each contractor, subcontractor, supplier, or design professional the respondent reasonably believes is responsible for each defect specified in the notice ("secondary respondent") and must note therein the specific defect for which he or she believes each secondary respondent is responsible.[34]

Notice of Claim – Effect of the Bill

The bill prohibits a claimant whose contract is subject to ch. 558, F.S., from filing a notice of claim and commencing litigation on a construction defect claim before first submitting a written claim for the alleged defect under any existing applicable warranty.

The bill requires a claimant to provide access for an inspection within 30 days after serving the warranty claim. If the warranty provider offers to repair the alleged defect, the claimant has 30 days to provide written authorization approving the repairs. A warranty provider has 120 days from the inspection to complete the repairs or offer a remedy.

The bill allows a claimant to serve a notice of claim if the warranty provider denies the warranty claim, does not complete the repair, or offers a remedy that is unsatisfactory to the claimant. However, a claimant is barred from bringing a cause of action, if the warranty provider offers to repair the alleged defect and the claimant fails to provide written authorization approving the repairs.

The bill provides that, in addition to serving a notice of claim, submitting a written warranty claim for an alleged construction defect tolls the four-year statute of limitations to bring an action to the later of:

- 90 days, or 120 days if the claimant is an association representing more than 20 parcels, after submitting the written warranty claim; or
- 30 days after the end of the repair period or payment period stated in the offer, if the claimant accepted the warranty provider's offer.

The bill also provides that any offer or failure to offer a repair of the alleged defect or to compromise and settle the claim by monetary payment or other remedy does not constitute an admission of liability and is not admissible in an action based on an alleged construction defect.

The bill provides that a notice of claim must:

- Describe the alleged defect and its location in specific (instead of "reasonable") detail.
- Include any repair estimates or expert reports the claimant obtained relating to the alleged defect and, if the alleged defect is visible, at least one photograph of such defect.
- Affirm the claimant has personal knowledge of the alleged defect.
- Acknowledge the claimant is aware of the penalties for perjury.[35]
- Be signed by the claimant directly below a statement declaring that, under penalty of perjury, the claimant has read the notice of claim and the facts alleged are true to the best of his or her knowledge or belief.

Further, the bill requires a respondent to serve a notice copy on any secondary respondent and provides that a person who willfully includes a false statement in the notice of claim commits perjury and is subject to punishment as provided by law.

Inspection and Testing – Current Situation

[33] Ss. 95.11(3)(c), and 558.004(1)(d), F.S.; *Gindel, et al. v. Centex Homes*, 267 So. 3d 403, 404 (Fla. 4th DCA Sept. 12, 2018) (determining that the 10 year period to bring a construction defect cause of action is a statute of repose)
[34] S. 558.004(3), F.S.
[35] Perjury is a false statement made under oath. Perjury not in an official proceeding is a first degree misdemeanor punishable by up to one year in the county jail and a $1,000 fine. Ss. 775.082, 775.083, and 837.012, F.S.

Within 30 days after service of the notice of claim, or within 50 days after service if the claim involves an association representing more than 20 parcels, the respondent has a right to perform a reasonable inspection of the property to assess each alleged defect and the extent of any necessary repairs or replacements.[36] The claimant must give the respondent reasonable access to the property during normal working hours, and the respondent must reasonably coordinate the timing and manner of the inspections to minimize the number of inspections.[37] Each secondary respondent is also entitled to inspect the property.[38]

If the respondent determines that destructive testing is necessary to reveal the alleged defect's nature and cause, the respondent must give the claimant written notice describing the destructive testing to be performed, the person chosen to do the testing, the estimated amount of time needed for testing and repairs, and the money offered for repair costs.[39]

If the claimant objects to the person chosen to perform the testing, the respondent must provide the claimant with a list of three qualified persons from which the claimant may choose one person to perform the testing.[40] Any destructive testing must be done at a mutually agreeable time, must not make the property uninhabitable, and does not give the party performing the destructive testing or associated repairs construction lien[41] rights unless the claimant personally contracts with such party.[42] Additionally, the claimant has a right to observe the destructive testing.[43] However, if the claimant refuses to allow reasonable destructive testing, the claimant loses the right to claim damages which could have been avoided or mitigated by the destructive testing.[44]

Inspection and Testing – Effect of the Bill

The bill expressly provides that a secondary respondent may perform a reasonable inspection of the property and that a respondent must reasonably coordinate the timing of any property inspections with the secondary respondents to minimize the number of inspections. The bill also expressly requires a claimant to give a secondary respondent reasonable access to the property for defect inspections.

Disclosures – Current Situation

A claimant and a respondent must exchange, within 30 days after service of a written request, any design plans; specifications; photographs and videos of the alleged defect; expert reports describing the alleged defect; subcontracts; purchase orders for the allegedly-defective work or materials; and maintenance records and other documents related to the alleged defect's discovery, investigation, causation, and extent.[45] A party may assert any claim of privilege[46] recognized in state law with respect to a requested disclosure.[47]

Disclosures – Effect of the Bill

The bill modifies what the claimant and the respondent must exchange upon written request after the filing of a construction defect claim to exclude photographs and expert reports already provided in the notice of claim, so that the claimant does not have to make such disclosures twice.

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[36] S. 558.004(2), F.S.
[37] *Id.*
[38] S. 558.004(3), F.S.
[39] S. 558.004(2)(a) and (b), F.S.
[40] S. 558.004(2)
[41] Under Part I of ch. 713, F.S., a contractor, subcontractor, material supplier, laborer, or professional (such as an architect or landscape artist) may claim a lien on a property on or for which such person performed work or provided materials even where such person does not have a direct contract with the property owner.
[42] S. 558.004(2)(d), (f), and (g), F.S.
[43] S. 558.004(2)(e), F.S.
[44] S. 558.004(2)(g), F.S.
[45] S. 558.004(15), F.S.
[46] A claim of privilege protects certain information from disclosure or discovery. The Florida Evidence Code recognizes certain privileges, including the lawyer-client privilege, the husband-wife privilege, and the psychotherapist-patient privilege. *See* ch. 90, F.S.
[47] *Id.*

Settlement Offers – Current Situation

Within 15 days after the respondent serves a copy of the notice of claim on a secondary respondent or within 30 days, if the claimant is an association with more than 20 parcels, the secondary respondent must give the respondent a written reply.[48] Such reply must include a report, if any, of the scope of any property inspections conducted by the secondary respondent and the findings and results of such inspections.[49]

Additionally, within 45 days of service of the notice of claim, or within 75 days of service if the claim involves an association representing more than 20 parcels, the respondent must give the claimant a written reply.[50] Such reply must include a written:

- Offer to remedy the alleged defect at no cost to the claimant, a detailed description of proposed repairs, and a timetable for repair completion;
- Offer to compromise and settle the claim by monetary payment;
- Offer to compromise and settle the claim by a combination of repairs and monetary payment that includes a detailed description of proposed repairs and a timetable;
- Statement that the respondent disputes the claim and will not remedy the alleged defect or settle the claim; or
- Statement that a monetary payment will be determined by the respondent's insurer within 30 days after insurer notification.[51]

A claimant who receives a timely settlement offer must accept or reject the offer by serving written notice within 45 days after receiving the offer.[52] A claimant may bring an action if they timely reject a respondent's offer, including a respondent's offer to make repairs at no cost to the claimant.[53]

A claimant may without further notice, also bring an action against the respondent if the respondent disputes the claim and will not remedy the alleged defect or settle the claim, or does not timely respond to the notice of claim.[54]

If the claimant timely and properly accepts a repair offer, the claimant must give the respondent reasonable access to the property during normal working hours to perform the repairs by the agreed-upon completion date.[55] If the respondent completes the repairs or makes payment within the agreed time and in the agreed manner, the claimant cannot bring an action for the claim.[56]

However, a claimant may, without further notice, bring an action against the respondent if the claimant timely and properly accepted a repair or payment offer but the repairs or payment are not made within the agreed time and in the agreed manner.[57]

Settlement Offers – Effect of the Bill

The bill prohibits a claimant from bringing an action for an alleged construction defect, if the respondent offers to remedy the alleged defect at no cost to the claimant. The claimant may require the respondent to have an independent qualified third party make the repairs. However, a claimant must give the independent qualified third party reasonable access to the property.

The bill provides that a claimant is not barred from bringing an action or accepting another offer to repair, if the claimant determines the repairs are unsatisfactory. However, a claimant is barred from

[48] S. 558.004(4), F.S.
[49] *Id.*
[50] S. 558.004(5), F.S.
[51] S. 558.004(4) and (5), F.S.
[52] S. 558.004(7), F.S.
[53] *Hebden v. Roya A. Kunnemann Construction, Inc.*, 3. So. 3d 417, 419 (Fla. 4th DCA 2009).
[54] S. 558.004(6), F.S.
[55] S. 558.004(8), F.S.
[56] *Id.*
[57] *Id.*

bringing an action if they reject the respondent's offer to make repairs, or does not respond to the offer within 45 days of receiving it.

The bill also provides that if a claimant accepts an offer to repair, the four-year statute of limitations is tolled for 90 days after the claimant accepts the offer.

Opt-Out Provision – Current Situation

The construction defect notice and cure provisions of ch. 558, F.S., do not apply to a construction defect claim if the claimant and respondent have agreed in writing to opt out of such provisions.[58] This means that, if a contract is silent, the parties to the contract must comply with the notice and cure provisions; however, a contract may, by its terms, expressly opt out of such provisions and may provide an alternative dispute resolution mechanism applicable to claims arising under the contract.

Unless a claimant and a potential respondent have agreed to opt out in writing, every construction contract entered into after October 1, 2009, must contain the following statement regarding ch. 558, F.S.,:

> ANY CLAIMS FOR CONSTRUCTION DEFECTS ARE SUBJECT TO THE NOTICE AND CURE PROVISIONS OF CHAPTER 558, FLORIDA STATUTES."

However, a contractor, subcontractor, supplier, or design professional may not be penalized for failing to include one of the above phrases in a contract.

Opt-Out Provision – Effect of the Bill

The bill provides that the notice and cure provisions provided in ch. 558, F.S., do not apply to any contract for improvement entered into after October 1, 2021, unless a responding party:

- enters into an agreement, which affirmatively incorporates the notice and cure provisions in ch. 558, F.S.; or
- agrees to participate in such notice and cure provisions.

However, the notice and cure provisions of ch. 558, F.S., apply to all actions accruing before October 1, 2021, but not yet commenced as of October 1, 2021.

The bill requires contracts entered into after October 1, 2021, to contain the following statement if the notice and cure provisions of ch. 558, F.S., apply:

> ANY CLAIMS FOR CONSTRUCTION DEFECTS ARISING FROM THIS CONTRACT ARE SUBJECT TO THE NOTICE AND CURE PROVISIONS OF CHAPTER 558, FLORIDA STATUTES.

The bill provides that failure to include the above statement in a contract does not prohibit any party from opting into the notice and cure provisions of ch. 558, F.S.

Notice to Mortgagee or Assignee – Current Situation

A mortgage is any conveyance, obligation conditioned or defeasible, bill of sale, or other instrument of writing conveying or selling property to secure the payment of money.[59] In Florida, a mortgage gives the mortgagee or its assignee a specific lien on the property described in the mortgage but does not convey legal title or the right of possession to the property to the mortgagee or its assignee.[60]

Some mortgage contracts require the mortgagor to notify the mortgagee if the property is damaged. Additionally, many payments on a property insurance claim are made out to both the mortgagor and the mortgagee, giving the mortgagee notice of property damage even where such notice is not required by

[58] S. 558.005, F.S.
[59] S. 697.01(1), F.S.
[60] S. 697.02, F.S.

contract. However, Florida law does not currently require a mortgagor to notify the mortgagee of any construction defects to the mortgaged property.

Notice to Mortgagee or Assignee – Effect of the Bill

The bill provides that, if a claimant serves a written notice of claim, and a mortgagee or assignee has a security interest in the real property related to the claim, the claimant must send a copy of the notice of claim to the mortgagee or assignee within 30 days after service of the notice.

If the construction defect claim results in repairs, a settlement, partial settlement, arbitration award, or a judgment obtained by the claimant, the claimant must provide notice to the mortgagee or assignee, by certified mail. The claimant must provide such notice within 60 days of the completion of the repairs, settlement, partial settlement, arbitration award, or judgment, whichever is later.

The bill provides an effective date of July 1, 2021.

B. SECTION DIRECTORY:

Section 1: Amends s. 553.84, F.S., relating to statutory civil action.
Section 2: Amends s. 558.001, F.S., relating to Legislative findings and declaration.
Section 3: Amends s. 558.003, F.S., relating to action and compliance.
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.
Section 6: Creates s. 558.006, F.S., relating to notice to mortgagee or assignee.
Section 7: Provides an effective date of July 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill may have a positive insignificant impact on state government, as it may reduce the number of construction defect claims and statutory claims filed in the state court system.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may reduce fraudulent construction defect claims and prevent costly litigation in cases where the builder is willing to repair the defect, resulting in savings for builders and contractors. However, the bill may increase costs to homeowners unable to bring civil actions and recover damages for "immaterial" Florida Building Code violations and who may, consequently, bear the cost of repairing any damage themselves.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The Florida Constitution provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."[61] In *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), the Florida Supreme Court established a test to determine when the Legislature may restrict a judicial remedy. Where citizens have had a historical right of access to the courts, whether through statute or common law,[62] the Legislature can only eliminate a judicial remedy under two circumstances. First, if it asserts a valid public purpose, the Legislature may restrict access to the courts if it provides a reasonable alternative to litigation.[63] Second, if the Legislature finds that there is an overpowering public necessity and that there is no alternative method for meeting that necessity, it may restrict access to the courts.[64]

Section 553.84, F.S., created a statutory civil cause of action for certain violations of ch. 553, F.S., and the Florida Building Code. The bill limits actionable violations to only “material” violations. However, because s. 553.84, F.S., was not effective until 1974 – after the 1968 Florida Constitution’s Declaration of Rights was adopted – there is no “historical right of access to the courts” in this area under *Kluger*; thus, the Legislature may restrict the right.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 8, 2021, the Regulatory Reform Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The committee substitute:

- Provides that the construction defect notice and cure process provided in current law, does not apply unless the responding parties agree to opt in to the process.
- Changes the statutory standard for a cause of action based on a Florida Building Code violation by removing the provision that allowed causes of action if the contractor or licensee knew or should have known of the violation.
- Requires a person prior to bringing a cause of action, to submit a written claim under an existing applicable warranty alleging a material violation and provide access for inspection within 30 days of serving a written warranty claim prior to serving a notice of claim or a cause of action.
- Provides that if a warranty provider offers to repair, then the person has 30 days to provide written authorization to proceed with the repair and allow access.
    - If no written authorization is provided, then the person is barred from filing a cause of action.

[61] Art. I, s. 21, Fla. Const.
[62] A historical right of access to the courts is a right provided by statutory law predating the adoption of the Florida Constitution’s Declaration of Rights in 1968 or a right now part of the state’s common law that existed in common law as of July 4, 1776. *See Kluger*, 281 So. 2d at 4.
[63] *Id.*
[64] *Id.*

    - If written authorization is provided, then the warranty provider has 120 days from the inspection to complete the repair or offer a remedy.
    - If the warranty provider denied the claim, does not complete the repair or the remedy offered is unsatisfactory, then the person may file a cause of action.
- Provides that a claimant does not have a cause of action for a construction defect, if the contractor offers to fix the repairs at no cost to the claimant, and the claimant is satisfied with the repairs. It also:
    - Allows a claimant to require the contractor to have an independent qualified third party make the repairs.
    - Allows a claimant to bring a cause of action if the claimant determines the repairs are unsatisfactory.
    - Tolls any statute of limitations, if the claimant accepts the contractor's offer.
    - A claimant is barred from filing an action, if a claimant denies a contractor's offer to fix repairs or does not respond within 45 days of receiving the offer.
- Provides that any applicable statute of limitations are tolled, if a claimant submits a construction defect claim under an existing applicable warranty.
- Requires a claimant to send a notice of claim alleging a construction defect and the resolution of the claim to a mortgagee or assignee within a certain time-period.

The analysis is drafted to the committee substitute as passed by the Regulatory Reform Subcommittee.