

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1286

SPONSOR: Regulated Industries Committee and Senator Bennett

SUBJECT: Construction Industry

DATE: April 5, 2003

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>RI</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill creates a process to give homeowners, subsequent purchasers of a dwelling, tenants, associations, and construction professionals the opportunity to settle legal claims related to construction defects arising out of the construction of a dwelling before a lawsuit is filed.

Sixty days before filing a lawsuit against a construction professional for a claim related to a construction defect, the bill requires that the claimant must serve a written notice of claim on the construction professional. The construction professional has a right to inspect the dwelling within 5 days of the notice of claim. Within 10 days of the notice of claim the construction professional must serve a copy of the notice of claim to any other construction professional that he or she thinks is responsible for the construction defect. These construction professionals also have a right to inspect the alleged construction defect.

Within 20 after the notice of claim, the construction professional must respond to the claimant with a written offer to remedy the claim, a written offer to settle the claim, or a written dispute of the claim. The claimant has fifteen days to accept or reject the offer to settle and compromise the claim or to remedy the alleged construction defect.

The claimant can file suit without further notice if he or she rejects the construction professionals offer to remedy the alleged construction defect, or offer to settle and compromise the claim. The claimant may also file a lawsuit without further notice after the construction professional rejects the claim or the construction professional does not meet the agreed timetable to remedy the construct defect or make the settlement payment.

Failure by any party to follow the procedures in the bill is admissible in court. The procedures in the bill do not bar or limit a claimant from making any emergency repairs to the claimant's dwelling.

The bill requires approval by the board and membership of a homeowners', cooperative, or condominium association before a lawsuit can be commenced or destructive testing can be conducted. The destructive testing must be performed by a contractor. The bill provides for criminal penalties if a person gives, or an association board member accepts, anything of value to influence a decision as to whether to file a construction defect lawsuit.

II. Present Situation:

Civil actions relating to construction defects are filed like any other lawsuits relating to contract or tort. Current law does not require a pre-lawsuit screening process, or require notice to a contractor, subcontractor, supplier, or design professional ("construction professional") before a civil action can be initiated.

Current law requires pre-lawsuit notice before initiating a medical malpractice action. Florida's Medical Malpractice Act in chapter 766, F.S., requires the claimant to conduct a suit investigation before bring suit. Section 766.106, F.S., requires the claimant to notify the defendant of his or her intent to file suit. Section 766.106(2), F.S., requires the defendant to investigate the claim, and further requires that within 90 days he or she reject the claim, make a settlement offer, or admit liability and offer to arbitrate damages. The lawsuit may proceed if the pre-lawsuit suit process does not resolve the dispute. Several cases, including *Lindberg v. Hospital Corp. of America*, 545 So.2d 1384 (Fla. 4th DCA 1989), have held that the pre-lawsuit screening process for medical malpractice claims is constitutional and does not violate the access to the court's provision in art. I, s. 21, of the State Constitution.

Section 627.736(11), F.S., requires a notice of intent to initiate litigation against an insurer as a condition precedent for an action related to an overdue personal injury claim. This section gives the insurer an opportunity to pay the overdue claim before litigation is commenced. It also tolls the applicable statute of limitation for 15 business days.

Section 95.11(3)(c), F.S., provides a four year statute of limitations for:

[a]n action founded on the design, planning, or construction of an improvement to real property, with the time running from the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest; except that, when the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. In any event, the action must be commenced within 15 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer,

registered architect, or licensed contractor and his or her employer, whichever date is latest.

Section 95.11(3)(e), F.S., also provides a four year statute of limitations for:

[a]n action for injury to a person founded on the design, manufacture, distribution, or sale of personal property that is not permanently incorporated in an improvement to real property, including fixtures.

Section 718.203(2), F.S., defines an association as the term is used in the "Condominium Act." Section 719.103(2), F.S., defines association as the term is used in the "Cooperative Act." Section 720.301(7), F.S., defines the term association as the term relates to "homeowners associations" in chapter 720, F.S., and s. 723.075, F.S., provides for the formation of homeowners' associations for mobile home owners.

III. Effect of Proposed Changes:

Section 1. Legislative findings.

The bill contains the legislative finding that an alternative dispute resolution mechanism to resolve disputes arising from an alleged construction defect should involve the claimant filing a notice of claim against a contractor, subcontractor, supplier, or design professional ("construction professional") and should provide the construction professional with an opportunity to resolve the claim without further legal process.

Section 2. Definitions.

The bill provides definitions for the following terms as used in the bill: "action," "association," "claimant," "construction defect," "contractor," "design professional," "dwelling," "service," "subcontractor," and "supplier."

The bill defines a "claimant" as:

[A] homeowner, including a subsequent purchaser, tenant or association who asserts a claim against a contractor, subcontractor, supplier or design professional concerning a construction defect in the design, construction, or sale of a dwelling or in the remodel of a dwelling. The term does not include a contractor, subcontractor, supplier or design professional.

The bill defines an action as:

[A]ny civil action or arbitration proceeding for damages or indemnity asserting a claim for damage to or loss of a dwelling or personal property caused by an alleged construction defect.

The bill defines a "construction defect" as:

[A] deficiency in, or a deficiency arising out of, the design, specifications, surveying, planning, supervision, observation of construction, or construction of residential improvements resulting from any of the following:

- (a) Defective material, products, or components used in the construction or remodeling of a dwelling;
- (b) A violation of the applicable codes in effect at the time of construction or remodeling of a dwelling;
- (c) A failure of the design of a dwelling to meet the applicable professional standards of care at the time of governmental approval; or
- (d) A failure to construct or remodel a dwelling in accordance with accepted trade standards for good and workmanlike construction at the time of construction. Except to the extent the claimant's contract for construction or remodeling requires compliance with standards that exceed those set forth in the applicable codes in effect at the time of construction or remodeling, compliance with the applicable codes in effect at the time of construction or remodeling shall conclusively establish construction or remodeling in accordance with accepted trade standards for good and workmanlike construction with respect to all matters specified in those codes.

The bill defines "association" as having "the same meaning as set forth in section 718.103(2), section 719.103(2), section 720.301(7), or section 723.025, Florida Statutes."

The bill defines service " as personal service or delivery by certified mail to the last known address of the addressee."

Section 3. Dwelling action; dismissal without prejudice.

The bill provides that if a claimant files an action arising out of the construction or remodeling of a dwelling without first complying with the notice provision in the act, on motion of a party to the action, the court shall dismiss the action without prejudice to the party. The action may not be refiled until the claimant has complied with the requirements of the act.

The bill's application is limited to residential construction, and does not apply to commercial construction.

The bill is limited to actions arising out of the construction of a dwelling that are related to a construction defect as the term is defined in subsection (4) of the section 2. Therefore, actions related to defects in construction that do not meet the definition in the bill for a construction defect are not subject to the notice provisions of this act.

Section 4. Notice and opportunity to repair.

The bill requires a homeowner, a subsequent purchaser of a dwelling, a tenant, or an association (claimant) who has a claim against a contractor, subcontractor, supplier, or design professional for damage or loss caused to a dwelling by an alleged construction defect to comply with a timetable for written notices and responses before litigation may begin.

Subsection (1) requires that before a claimant can bring lawsuit against a contractor, subcontractor, supplier, or design professional (“contractor” or “construction professional”) for construction defects arising out of the construction or remodeling of a dwelling, the claimant must serve a written notice of claim on the construction professional. The notice of claim must describe the alleged construction defect and the resulting loss or damage, if known, in reasonable detail. The notice must be served no later than 60 days before filing the action.

The claimant must try to serve the notice of claim within 15 days after his or her discovery of the alleged construction defect; failure to serve the notice of claim within the 15 days does not bar the claimant’s right to file a lawsuit if the claimant complies with the other requirements of the act. The logical corollary to this provision is that if a the claimant fails to comply with any of the requirements of this bill, including the various timeframes for responses, the claimant’s action would be barred for failure to serve a notice of claim within 15 days of the claimant’s discovery of the alleged construction defect.

The bill conflicts with the statute of limitations for actions, including actions for injury to a person, founded on the design, planning, or construction of an improvement to real property in s. 95.11(3), F.S., which provides a four year limitation. In the case of a latent defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. Under s. 95.11, F.S., the claimant could have up to 15 years to bring an action.

Subsection (2) provides that the construction professional has the right to inspect the dwelling within 5 business days of the notice of claim. The claimant must give the construction professional or his or her agent reasonable access to the dwelling to inspect the alleged construction defect during normal working hours. The inspection may include destructive testing. Before performing any construction defect, the construction professional must notify the claimant of the type of testing to be performed, the anticipated damage that will be caused by the testing, and the anticipated repairs that will be necessary the damage caused by the testing. The construction professional shall be responsible for the repair of any damage caused by the testing.

Subsection (3) provides that within 10 days after receiving the notice of claim the construction professional must provide a copy of the notice of claim to any other construction professional that he or she believes is responsible for an alleged construction defect described in the notice of claim. It must include the specific alleged construction defect for which the person is responsible. The construction professional who receives a copy of the notice of claim from another construction professional is entitled to inspect the alleged construction defect with 5 business days of service.

Subsection (4) provides that claimant must supply, upon request by a construction professional, any evidence that depicts the nature and cause of the defect and the nature and extent of repairs necessary to remedy the defect, including expert reports, photographs, and videotapes, if that evidence would be discoverable under the Florida Rules of Civil Procedure.

Subsection (5) provides that within 5 business days after service of a notice of claim, each construction professional who has received the notice from another construction professional must serve a written response to the construction professional who sent him or her the notice. The written response must include:

- A report on the scope of the inspection of the dwelling, if any, and its findings and results of the inspection.
- A statement advising whether the construction professional is willing to remedy the alleged construction defect.
- A statement advising whether the construction professional disputes the claim.
- A description of any repairs the construction professional is willing to make to remedy the alleged construction defect and a timetable for completion of such repairs.

Subsection (6) provides that within 25 days of service of the notice of claim from the claimant, each construction professional that has received a copy of the notice of claim must serve a written response on the claimant, which must provide:

- A written offer to remedy the construction defect at no cost to the claimant, including a report on the scope of the inspection of the dwelling, if any, and the findings and results of the inspection, a description of the necessary repairs, and the timetable for making the repairs.
- A written offer to compromise and settle the claim by monetary payment to be paid within 30 days of claimant's acceptance of the offer, or
- A written statement that the construction professional disputes the claim, and will not remedy the alleged construction defect or compromise and settle the claim.

If the construction professional makes a written offer to remedy the construction defect or to settle and compromise the claim by monetary payment, the written offer must state that the claimant shall be deemed to have accepted the offer if, within 15 days following service of the offer, the claimant does not reject the offer in writing. The rejection must be served on the construction professional.

Subsection (7) provides that if the contractor does not respond to the claimant's notice or if the contractor disputes the claim and states that he or she will not settle and compromise the claim, the claimant may bring a lawsuit without further notice.

Subsection (8) provides that if the claimant rejects the offer from a construction professional, the claimant must serve a written notice of the claimant's rejection to the construction professional within 15 days following service of the offer of settlement. The claimant may reject the offer by simply writing "rejected" on the written offer and serving the rejection on the construction professional. The claimant may then bring a lawsuit without further notice.

Subsection (9) provides that the claimant may bring an action without further notice if the claimant accepts the construction professional's offer to remedy the defect at no cost to the claimant, or offer to settle the claim by monetary payment, and the contractor does not remedy the defect or make the payment within the agreed time and manner. The claimant may also bring an action without further notice if the contractor makes a written statement that he or she will not proceed further to remedy the defect.

This section also provides that if the claimant accepts a construction professional's offer to remedy the defect at no cost to the claimant or offer to settle the claim by monetary payment and the construction professional makes the repair or monetary payment in the agreed manner and timetable, the claimant is barred from bringing an action against the construction professional for the claim described in the notice of claim.

Subsection (10) provides that if the claimant accepts the construction professional's offer to remedy the alleged construction defect, the claimant must provide the contractor reasonable access to the dwelling during normal working hours to perform and complete the construction within the timetable stated in the offer.

Subsection (11) provides that a claimant or construction professional's failure to follow the procedures in this section is admissible in any court action. The bill provides that the procedures in this section do not limit or prohibit a claimant from making any needed emergency repairs to the claimant's dwelling.

This subsection further provides that an offer by a construction professional does not constitute an admission with respect to the alleged construction defect. The bill does not address the issue of whether a claimant's acceptance of an offer of compromise and settlement may constitute an admission against interest by the claimant. A claimant's acceptance of an offer of compromise and settlement may serve as an admission in a lawsuit following a construction professional's failure to comply with the terms of his or her offer. The admission may be against the claimant's interest if the amount accepted was less than the remedy sought in the subsequent lawsuit.

Subsection (12) provides that the claimant's notice of claim tolls the applicable statute of limitations until the later of (a) 60 days after the construction professional receives the notice of claim, or (b) 30 days after the end of the repair timetable stated in a construction professional's offer to remedy the construction defect at no cost to the claimant, if the claimant has accepted the offer. By stipulation, the parties may extend the foregoing period and the statute of limitations is tolled during the extension.

It is not clear how the toll of the applicable statute of limitations in this subsection relates to the requirements of subsection (1). This subsection is inconsistent with the requirement in subsection (1) that the claimant must try to serve the notice of claim within 15 days after his or her discovery of the construction defect. Although the claimant's failure to comply with this requirement does not bar the claimant's right to file a lawsuit if the claimant complies with the other requirements of the act, the claimant's failure to comply with any of the requirements of this bill, including the various timeframes for responses, would bar the claimant's action for failure to serve a notice of claim within 15 days of the claimant's discovery of the alleged construction defect. Failure to comply with the provisions of this bill would create a 15 day statute of limitations for actions related to construction defects. This limitation would conflict with the four year limitations for actions, including actions for injury to a person, founded on the design, planning, or construction of an improvement to real property in s. 95.11(3), F.S.

Subsection (13) provides that the procedures in this section apply to each construction defect, but that a claimant may include multiple construction defects in a single notice of claim.

Subsection (14) provides that nothing in sections 1 through 4 of the bill bars or limits any rights, causes of action, or theories on which liability may be based, except as specifically provided in the bill. The bill specifically bars actions arising out of the construction of a dwelling that do not comply with the pre-lawsuit notice procedure set forth in the bill.

This subsection also provides that nothing in the bill bars or limits any defense, or creates any new defense, except as specifically provided in the bill. The only defense specifically provided in the bill is the defense of failure to comply with the pre-lawsuit notice procedure set forth in the bill. It provides that nothing in the bill creates any new rights, causes of action, or theories on which liability may be based.

This section does not require the construction professional to provide to the claimant with any written notice describing the claimant's rights and obligations under this section. The notice required under section 5 for contracts for sale also does not provide notice of the claimant's specific rights and obligations under this section.

Section 5. Contract of sale; provisions.

Subsection (1) requires a construction professional to provide notice, which may be included as part of the sales contract, to the owner of the dwelling of the construction professional's right to cure construction defects before the owner can commence litigation. Subsection (2) provides that the notice must be in substantially the following form:

FLORIDA LAW CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT AGAINST A CONTRACTOR, SUBCONTRACTOR, SUPPLIER, OR DESIGN PROFESSIONAL FOR AN ALLEGED CONSTRUCTION DEFECT IN YOUR HOME. SIXTY DAYS BEFORE YOU FILE YOUR LAWSUIT, YOU MUST DELIVER TO THE CONTRACTOR, SUBCONTRACTOR, SUPPLIER, OR DESIGN PROFESSIONAL A WRITTEN NOTICE OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE THE CONTRACTOR AND ANY SUBCONTRACTORS, SUPPLIERS, OR DESIGN PROFESSIONALS THE OPPORTUNITY TO INSPECT THE ALLEGED CONSTRUCTION DEFECTS AND MAKE AN OFFER TO REPAIR OR PAY FOR THE ALLEGED CONSTRUCTION DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER MADE BY THE CONTRACTOR OR ANY SUBCONTRACTORS, SUPPLIERS, OR DESIGN PROFESSIONALS. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER FLORIDA LAW, AND FAILURE TO FOLLOW THEM MAY AFFECT YOUR ABILITY TO FILE A LAWSUIT.

Section 6. Actions of associations.

The bill prescribes the conduct of condominium, cooperative, and homeowners associations and their officers, board members and management. Subsection (1) provides that a person may not provide or offer to provide anything of value to a property manager of an association or to a member or officer of the board of directors to induce the property manager, member, or officer to encourage or discourage the filing of a claim by the association for damages arising from a construction defect.

Subsections (2) and (3) provide that a property manager, member, or officer of an association may not accept anything of value in exchange for inducing the property manager, member, or officer to encourage or discourage the filing of a claim by the association for damages arising from a construction defect. Subsection (4) makes it a misdemeanor of the second degree for a person to willfully violate any of the provisions in Section 8.

Subsection (5) prohibits an association or an attorney for an association from employing a person to perform destructive tests to determine any damage or injury to a unit, common element, or limited common element caused by a constructional defect unless:

- (a) the person is licensed as a contractor;
- (b) the association has obtained the prior written approval of each unit's owner whose unit or interest in the common element or limited common element will be affected by such testing;
- (c) the person performing the tests has provided a written schedule for repairs;
- (d) the person performing the tests is required to repair all damage resulting from such tests; and
- (e) the association or the person so employed obtains all permits required to conduct such tests and to repair any damage resulting from such tests.

Subsection (6) provides that if an association brings an action for damages resulting construction defects in any of the units, the attorney representing the association must provide to the board of directors and to each unit's owner a statement that describes in reasonable detail the defects and damages, cause of the defects, location of the defects, estimate the cost of the action, and explain the potential benefits and adverse consequences of the action.

Subsection (7) provides that an association may commence an action only upon a vote or written agreement of the owners of the units to which at least a majority of the votes of the members of the association are allocated. This subsection requires that the association must provide written notice to the owner of each unit of the meeting at which the commencement of an action is to be considered or action is to be taken at least 21 calendar days before the meeting.

Section 6. Severability

The bill's provisions are severable, and if any provision is declared invalid, the invalidity shall not affect any other provision of the bill.

Section 7. Effective date.

The bill will take effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Homeowners, subsequent purchasers of a dwelling, tenants, or associations and their attorneys will have to comply with the notice provisions of this bill before bringing a legal action for construction defects arising out the construction of a dwelling. Construction contractors, subcontractor, suppliers and design professionals will have to make the disclosures in section 5, and will also have to comply with the notice and response requirements in the bill.

C. Government Sector Impact:

The bill may reduce civil suits in the court system related to construction defects arising from the construction of a dwelling.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.