

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1755 Construction Defects/Right to Cure
SPONSOR(S): Judiciary
TIED BILLS: None **IDEN./SIM. BILLS:** CSSB 1286

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary	15 Y, 2 N	Billmeier	Havlicak
2) Business Regulation		Livingston	Liepshutz
3)			
4)			
5)			

SUMMARY ANALYSIS

The bill is designed to create a process to settle potential lawsuits relating to construction defects before a lawsuit is filed. Under current law, civil actions relating to construction defects are filed like many other lawsuits relating to contract or tort. This bill requires that, prior to filing suit against a contractor for a construction defect, the claimant must serve written notice of claim on the contractor. Within 30 days of notice, the contractor must respond to the claimant with an offer to settle the claim, a proposal to inspect the dwelling, or a rejection of the claim. If the claimant agrees to the inspection, the contractor must either offer to repair or settle or reject the claim within 14 days after the inspection. If the contractor rejects the claim, the claimant can file suit. If the claimant and contractor agree that the contractor should remedy the defect, the contractor must do so within the agreed timetable. If the contractor does not meet the established timetable, the claimant may file suit. This bill places restrictions on a claimant's recovery if the claimant unreasonably rejects the contractor's offer to settle, repair, or inspect.

Chapter 718, F.S., the "Condominium Act," governs condominium associations. Chapter 719, F.S., relates to cooperative associations. Chapter 720, F.S., addresses "homeowners' associations."

HB 1755 requires special votes of an association board and membership before a lawsuit can be commenced or destructive testing can be conducted. This bill provides that destructive testing must be performed by a contractor. Finally, this 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.

This bill does not appear to have a fiscal impact on state and local governments.

This bill takes effect upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

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

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

This bill creates a new procedure which must be followed before certain lawsuits may be filed. Such procedures do not exist in current law. This bill also places restrictions on certain lawsuits filed by condominium, cooperative, or homeowners' associations and creates new criminal penalties.

B. EFFECT OF PROPOSED CHANGES:

Under current law, civil actions relating to construction defects are filed like many other lawsuits relating to contract or tort. There is no requirement that the defendant be notified of the potential lawsuit until the suit is actually filed and the defendant is served. In contrast, Florida's Medical Malpractice Act¹ requires the claimant to conduct a presuit investigation. Prior to filing suit, the claimant must notify the defendant of the intent to file suit.² Upon notification, the defendant must investigate the claim and must, within 90 days, reject the claim, make a settlement offer, or admit liability and offer to arbitrate damages.³ If the presuit process does not end the case, the lawsuit proceeds. Section 768.28(6) F.S., requires certain notice to a state agency prior to the filing of a lawsuit against a governmental entity.

HB 1755 creates a process to give consumers and construction professionals the opportunity to settle potential lawsuits relating to construction defects⁴ before the lawsuits are filed by imposing requirements that must be met prior to filing suit. The bill requires that in an action brought against a contractor arising out of the construction of a dwelling, the claimant⁵ must serve written notice of claim on the contractor. The notice must be served no later than 90 days prior to filing the action. The notice of claim must state that the claimant asserts a construction defect claim and the notice must describe the claim in reasonable detail. The contractor must forward the notice to all subcontractors, suppliers,

¹ Chapter 766, F.S.

² See s. 766.106, F.S.

³ See s. 766.106(2), F.S.

⁴ This bill defines "construction defects" 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 of residential improvements;

(b) a violation of the applicable codes in effect at the time of construction of residential improvements;

(c) a failure of the design of residential improvements to meet the applicable professional standards of care at the time of governmental approval; or

(d) a failure to construct residential improvements in accordance with accepted trade standards for good and workmanlike construction at the time of construction. Compliance with the applicable codes in effect at the time of construction shall conclusively establish construction in accordance with accepted trade standards for good and workmanlike construction, with respect to all matters specified in those codes."

⁵ This bill defines "claimant" as "a homeowner, including a subsequent purchaser, or association who asserts a claim against a construction professional concerning a defect in the design, construction, condition, or sale of a dwelling or in the remodel of a dwelling."

and design professionals⁶ who the contractor reasonably believes responsible for a defect specified in the notice and give notice of the specific defect for which the contractor believes the potential defendants are responsible. A claimant's written notice tolls the applicable statute of limitations until 90 days after the potential defendant receives the notice.

The claimant must supply, upon request by potential defendants, 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.

Response to the Required Notice

Within 30 days after service of the notice of claim, each potential defendant must serve, by registered mail or personal service, a written response on the claimant. The written response shall:

- (a) offer to compromise and settle the claim by monetary payment without inspection;
- (b) propose to inspect the dwelling that is the subject of the claim; or
- (c) state that the potential defendant disputes the claim and will neither remedy the alleged construction defect nor compromise and settle the claim.

If the potential defendant disputes the claim or does not respond to the claimant's notice, the claimant may bring an action for the claim described in the notice of claim without further notice. If the claimant rejects the inspection proposal or the settlement offer made by the potential defendant, the claimant must serve written notice on the potential defendant. The notice shall include the basis for the claimant's rejection. After service of the rejection, the claimant may file suit without further notice.

Effect of Allowing Inspection

If the claimant elects to allow the potential defendant to inspect the dwelling, the claimant must provide reasonable access to the dwelling so the potential defendant may inspect the premises and the claimed defect to determine the nature and cause of the alleged defects and the nature and extent of any repairs or replacements necessary to remedy the alleged defects. Within 14 days following completion of the inspection, the potential defendant must serve on the claimant:

- (a) a written offer to remedy the construction defect at no cost to the claimant, including a report of the scope of the inspection, the findings and results of the inspection, a description of the additional construction necessary to remedy the defect described in the claim, and a timetable for the completion of construction;
- (b) a written offer to compromise and settle the claim by monetary payment; or
- (c) a written statement that the potential defendant will not remedy the defect.

Accepting a Potential Defendant's Offer

A claimant may accept a potential defendant's offer to remedy the construction defect by serving a written notice of acceptance no later than 30 days after receipt of the offer. If a claimant accepts a potential defendant's offer to repair a defect, the claimant must provide the potential defendant reasonable access to the claimant's residence during normal working hours to perform and complete the construction by the timetable stated in the offer.

⁶ The bill makes numerous references to the "contractor, subcontractors, suppliers, and design professionals". This bill analysis will refer to that group as "potential defendants".

If a claimant accepts a potential defendant's offer to remedy the defect or offer to settle with a monetary payment and the potential defendant does not make the monetary payment or remedy the construction defect within the agreed timetable, the claimant may bring an action against the potential defendant for the claim described in the initial notice of claim without further notice. If the potential defendant responds that it will not remedy the defect, the claimant may file an action without further notice.

Rejecting a Potential Defendant's Offer

If the claimant rejects the offer made by a potential defendant to remedy the construction defect or settle the claim by monetary payment, the claimant must serve written notice of the claimant's rejection on the potential defendant no later than 30 days after receipt of the offer. The notice must include the basis for the claimant's rejection of the offer. After service of the rejection the claimant may file suit without further notice.

If a claimant unreasonably rejects an offer made or does not permit the potential defendant a reasonable opportunity to repair the defect pursuant to an accepted offer of settlement, the claimant may not recover an amount in excess of:

(a) the reasonable cost of the offered repairs which are necessary to cure the construction defect and which are the responsibility of the potential defendant; or

(b) the amount of the monetary settlement offered by the contractor, subcontractor, supplier, or design professional.

A claimant's failure to allow a reasonable inspection requested by the potential defendant or provide a good faith written response to a potential defendant is admissible in any action and creates a rebuttable presumption that the claimant's damages could have been mitigated.

A Potential Defendant's Failure to Respond

The bill provides that, absent good cause, the potential defendant's failure to respond in good faith to the claimant's notice shall preclude the potential defendant from arguing that the claimant did not comply with the provisions of this bill.

Additional Actions

A construction defect which is discovered after a claimant has provided a contractor with the required notice may not be alleged until the claimant has given the potential defendant who performed the original construction:

(a) Written notice of the alleged defect as required the bill; and

(b) A reasonable opportunity to repair the alleged construction defect in the manner provided in the bill.

Effect of Not Complying with the Notice Requirements

If a claimant files an action without first complying with the provisions of this bill, the court shall dismiss the action, without prejudice, on motion by a party. The action may not be refiled until the claimant has complied with the requirements of this act.

Notice Requirements in a Sales Contract

The bill requires a contractor to provide notice, in the sales contract, to the owner of the dwelling of the contractor's right to cure construction defects before the owner can commence litigation. The notice must be in substantially the following form:

CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT FOR DEFECTIVE CONSTRUCTION AGAINST THE CONTRACTOR WHO CONSTRUCTED YOUR HOME. NINETY DAYS BEFORE YOU FILE YOUR LAWSUIT, YOU MUST DELIVER TO THE CONTRACTOR A WRITTEN NOTICE OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE YOUR CONTRACTOR AND ANY SUBCONTRACTORS, SUPPLIERS, OR DESIGN PROFESSIONALS THE OPPORTUNITY TO MAKE AN OFFER TO REPAIR OR PAY FOR THE 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 STATE LAW, AND FAILURE TO FOLLOW THEM MAY AFFECT YOUR ABILITY TO FILE A LAWSUIT.

In addition, this bill requires each contractor who constructs a new residential dwelling shall, within 30 days after the close of the sale, provide in writing to the initial purchaser of the residence:

(a) The name, license number, business address, and telephone number of each subcontractor or design professional who performed any work related to the design or construction of the dwelling; and

(b) A brief description of the work performed by each subcontractor identified pursuant to this section.

Associations

Chapter 718, F.S., the "Condominium Act," governs condominium associations. A condominium is "that form of ownership of real property which is created pursuant to the provisions of this chapter, which is comprised of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements."

Chapter 719, F.S., governs cooperative associations. A cooperative is "that form of ownership of real property wherein legal title is vested in a corporation or other entity and the beneficial use is evidenced by an ownership interest in the association and a lease or other muniment of title or possession granted by the association as the owners of all the cooperative property."⁷ A cooperative association operates similarly to a condominium association.

Pursuant to chapter 720, F.S., a "homeowners' association" is "a Florida corporation responsible for the operation of a community or a mobile home subdivision in which the voting membership is made up of parcel owners or their agents, or a combination thereof, and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel."

Requirements Placed on Associations

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. The

⁷ Section 719.103(12), F.S.

association shall 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 within 21 calendar days before the meeting.

Criminal Sanctions for Instigating Litigation

The bill provides that a person who provides or offers 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. The bill also makes it a crime for a property manager to accept anything of value given to him or her in exchange for encouraging or discouraging the filing of a claim by the association that he or she manages for damages arising from a construction defect. Finally, a member or officer of an association board shall not accept anything of value given to him or her in exchange for encouraging or discouraging the filing of a claim by the association which he or she is a member or officer damages arising from a construction defect. Violation of these provisions is punishable as a second degree misdemeanor.

Limits on Investigation

This bill 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.

C. SECTION DIRECTORY:

Section 1. Contains legislative findings.

Section 2. Provides definitions.

Section 3. Requires claimant to comply with notice provisions; gives the court the power to dismiss a case for noncompliance.

Section 4. Creates a procedure for notice prior to filing suit and a procedure for remedy or settlement prior to filing suit.

Section 5. Establishes procedures for addressing additional construction defects.

Section 6. Requires contractors to makes certain disclosures in the contract for sale.

Section 7. Requires contractors to provide a buyer with names and addresses of subcontractors and business professionals.

Section 8. Places restrictions on the ability of condominium, cooperative, and homeowners' associations to file construction defect lawsuits.

Section 9. Provides that the bill is effective upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill does not appear to impact state revenues.

2. Expenditures:

This bill does not appear to impact state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not appear to impact local government revenues.

2. Expenditures:

This bill does not appear impact local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to spend funds or to take action requiring the expenditure of funds. It does not appear to reduce the authority of counties or municipalities to raise revenue in the aggregate and does not appear to reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

It could be argued that the requirements of this bill violate Art. I, s. 21, Fla. Const.⁸, by restricting a litigant's access to courts unless certain actions are taken prior to filing suit. However, the courts have upheld the presuit requirements in the medical malpractice statute. In Weinstock v. Groth⁹, the court explained that a narrow construction of the medical malpractice statute is necessary to protect the right of access to courts:

⁸ Art. I, s. 21, Fla. Const., provides that the "courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay."

⁹ 629 So. 2d 835, 837 (Fla. 1993).

This narrow construction of the chapter 766 presuit notice requirement is in accord with the rule that restrictions on access to the courts must be construed in a manner that favors access. Moreover, the purpose of the chapter 766 presuit requirements is to alleviate the high cost of medical negligence claims through early determination and prompt resolution of claims, not to deny access to the courts to plaintiffs such as Groth.¹⁰

This bill contains specific findings that the intent of the legislation is to reduce the need for litigation while protecting the rights of homeowners. Like the medical malpractice statute, there is no statement in this bill that it is intended to deny access to courts. Accordingly, a court could construe the act in a manner to allow lawsuits to proceed if a dispute arises over the terms of the act.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

N/A

¹⁰ Weinstock, 629 So. 2d at 838.