

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1755 w/CS 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	30 Y, 0 N w/CS	Livingston/Gallen	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. The bill makes numerous references to the "contractor, subcontractors, suppliers, and design professionals." This bill analysis will refer to that group as "potential defendants".

This bill requires that, prior to filing suit against potential defendants for a construction defect; the claimant must serve written notice of claim on the potential defendants. Within 25 days of notice, the potential defendants must respond to the claimant with a written offer to remedy the alleged defect, a written offer to compromise or settle the claim, or a written statement disputing the claim.

If the potential defendants reject the claim, the claimant can file suit. If the claimant and potential defendants agree that the potential defendants should remedy the defect, the potential defendants must do so within the agreed timetable. If the potential defendants do not meet the established timetable, the claimant may file suit. If the claimant does not respond to an offer within 15 days then the claimant is deemed to have accepted the offer.

An offer to settle, compromise, or remedy a construction defect does not constitute an admission of liability.

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

This bill takes effect upon becoming a law.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1755b.br.doc
DATE: April 10, 2003

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 checked="" type="checkbox"/> | N/A <input 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:

1. Reduce government: This bill creates a new procedure which must be followed before construction defect lawsuits may be filed. Currently these procedures do not exist in current law.
3. Expand individual freedom: The bill requires that an individual serve a notice of claim on any potential defendants before a claimant may file a lawsuit for a construction defect. Currently there is no pre-suit notice requirement regarding construction defects.

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 pre-suit 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 pre-suit 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 statutory procedure to follow in order to attempt to settle lawsuits relating to construction defects⁴. The bill requires that before an action can be brought against potential defendants for an alleged construction defect, the claimant⁵ must serve written notice of claim. The notice of claim must be served no later than 60 days prior to filing the action.

The notice of claim must describe the claim in reasonable detail sufficient to determine the nature of each alleged construction defect and a description of the damage or loss resulting from each defect.

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 or remodeling of a dwelling 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.”

⁵ This bill defines “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 defect in the design, construction, condition, or sale of a dwelling or in the remodel of a dwelling. The term ‘claimant’ does not include a contractor, subcontractor, supplier, or design professional.”

The potential defendants must forward the notice to all other potential defendants who they reasonably believe may be responsible for an alleged defect specified in the notice and give notice of the defect for which the potential defendants believe the other potential defendants are responsible. The potential defendants may inspect the dwelling within 5 days after service of claim and the claimant is required to provide reasonable access during normal business hours.

A claimant's written notice tolls the applicable statute of limitations 60 days after the potential defendants receive notice of claim, or 30 days after the repair timetable stated in an accepted offer, whichever occurs later.

Response to the Required Notice

Within 25 days after the initial notice of claim, each potential defendant that has received notice must serve:

- (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 to be paid within 30 days after claimant's acceptance of the offer; or
- (c) a written statement that the potential defendant disputes the claim and will not proceed further to remedy the alleged construction defect or to compromise and settle the claim.

If the potential defendant disputes the claim, refuses to remedy, refuses to compromise or settle, 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.

Accepting a Potential Defendant's Offer

When there is an offer to remedy the construction defect or an offer to compromise and settle, then the claimant may be deemed to have accepted the offer if following service of such written offer the claimant does not serve a written rejection within 15 days, or 60 days for an association⁶.

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.

If the claimant accepts the offer but the potential defendants do not proceed to make the monetary payment or repair the alleged construction defect within the agreed timetable or in the agreed manner, then the claimant may without further notice proceed with the claim described in the notice of claim.

If a claimant accepts the offer and the potential defendants proceed to make the monetary payments or repairs within the agreed timetable and manner, then the claimant is barred from bringing an action for the claim described in the notice of claim.

Accepting an offer does not constitute an admission of liability with respect to the alleged construction defect; however, the failure of a claimant or the offeror to comply with the procedures set forth in this act is admissible in any legal action.

⁶ "Associations", as defined in the bill, include condominium associations, cooperative associations, home owners associations, and mobile home park lot tenancies.

Rejecting a Potential Defendant's Offer

If the claimant intends to reject the offer, then the claimant must serve written notice of the rejection to the potential defendants within 15 days following service of the settlement offer. The claimant's rejection must contain the settlement offer with the word "rejected" printed on the settlement offer. After service of such rejection, the claimant may proceed with the claim without further notice.

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 is required to abate the action upon motion by a party to the action, and the action may not proceed until the claimant has complied with the requirements of this act.

Notice Requirements in a Sales Contract

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

FLORIDA LAW CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT FOR DEFECTIVE CONSTRUCTION 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 YOUR CONTRACTOR AND ANY SUBCONTRACTORS, SUPPLIERS, OR DESIGN PROFESSIONALS THE OPPURTUNITY 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 STATE LAW, AND FAILURE TO FOLLOW THEM MAY AFFECT YOUR ABILITY TO FILE A LAWSUIT.

Severability Clause

This bill specifically states that if any provision of this act or the application of this act to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provisions or application. Therefore the provisions in this act are declared severable.

C. SECTION DIRECTORY:

- Section 1. Contains legislative findings.
- Section 2. Provides definitions.
- Section 3. Provides court action upon non-compliance; Abatement.
- Section 4. Provides for notice and opportunity to repair.
- Section 5. Specifies contract of sale disclosures.
- Section 6. Severability clause.

Section 7. This act shall take effect upon becoming law.

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.⁷, by restricting a litigant's access to courts unless certain actions are taken prior to filing suit. However, the courts have upheld the pre-suit requirements in the medical malpractice statute. In Weinstock v. Groth⁸, the court explained that a narrow construction of the medical malpractice statute is necessary to protect the right of access to courts:

This narrow construction of chapter 766, F.S., pre-suit notice requirements is in accord with the rule that restrictions on access to the courts must be construed in a manner that favors access.

⁷ 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."

⁸ 629 So. 2d 835, 837 (Fla. 1993).

Moreover, the purpose of chapter 766, F.S., pre-suit 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.⁹

This bill contains specific findings that the intent of the legislation is to resolve claims relating to construction defects without resorting to further legal processes. 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

On April 9, 2002 the Committee on Business Regulation adopted a committee substitute to HB 1755. This committee substitute revised the procedure and deadlines that claimants must follow when alleging a construction defect.

Accordingly, claimants must serve a notice of claim within 60 days before filing suit, rather than the 90 day requirement contained in the original bill. Claimants must endeavor to file the notice of claim within 15 days of identifying the construction defect; however, failure to serve notice within 15 days of identifying the defect does not bar suit if the claimant is in compliance with the requirements of this act. Claimants are no longer required, as per the original bill, to provide all evidence, if requested, of the nature and extent of the repairs necessary to remedy the defect.

A claimant is not barred from suit, nor limited in recovery for any damages, if the claimant “unreasonably” rejects an offer. The original bill provided that if a claimant unreasonably rejected an offer or did not permit the potential defendant a reasonable opportunity to repair the defect pursuant to the offer, the claimant may not recover in excess of the reasonable costs of the necessary repairs or the amount of the monetary settlement offered by the potential defendant.

Additionally, there is no rebuttable presumption that damages could have been mitigated if the claimant does not allow inspection or provide a “good faith” written response. The claimant’s failure to respond to an offer within 15 days may automatically deem the offer accepted by the claimant. A different provision in the original bill created a conflict by allowing a claimant up to 30 days to respond to the offer. Consequently, the revised bill requires claimant to respond to an offer within 15 days of receiving the offer rather than within 30 days.

Potential defendants must respond to a notice of claim within 25 days, rather than the 30 day requirement in the original bill. The potential defendants must forward the notice of claim to other potential defendants within 10 days of receipt of the notice of claim, as opposed the 15 day requirement in the original bill. There is no longer the need for potential defendants to respond to a notice of claim within 14 days following an inspection.

⁹ Weinstock, 629 So. 2d at 838.

There is no admission of liability for offers to settle, compromise, or remedy a construction defect. The statute of limitations may be tolled 30 days or 60 days, rather than the 90 day toll provided in the original bill.