

# 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.)

Prepared By: Judiciary Committee

BILL: CS/SB 2036

INTRODUCER: Regulated Industries Committee and Senator Bennett

SUBJECT: Construction Defects/Property

DATE: April 24, 2006

REVISED: \_\_\_\_\_

|    | ANALYST       | STAFF DIRECTOR | REFERENCE | ACTION           |
|----|---------------|----------------|-----------|------------------|
| 1. | <u>Sumner</u> | <u>Imhof</u>   | <u>RI</u> | <u>Fav/CS</u>    |
| 2. | <u>Chinn</u>  | <u>Maclure</u> | <u>JU</u> | <u>Favorable</u> |
| 3. | _____         | _____          | _____     | _____            |
| 4. | _____         | _____          | _____     | _____            |
| 5. | _____         | _____          | _____     | _____            |
| 6. | _____         | _____          | _____     | _____            |

## I. Summary:

The bill expands the applicability of ch. 558, F.S., which provides an alternative method to resolve construction disputes, to include construction defects in any real property, including mobile homes and excluding public transportation projects. To conform to the chapter's broadened applicability, the bill deletes provisions that limit the application of ch. 558, F.S., to residential property.

This bill substantially amends the following sections of the Florida Statutes: 558.001, 558.002, 558.004, and 558.005.

## II. Present Situation:

The Legislature enacted ch. 558, F.S., in 2003 to provide an alternative dispute resolution process that persons must follow regarding construction defects in residential property in an effort to reduce litigation while still protecting the rights of homeowners.<sup>1</sup> The provisions of this chapter apply to the following types of construction:<sup>2</sup>

- Single family homes;
- Manufactured or modular homes;
- Duplexes;
- Triplexes;

<sup>1</sup> Chapter 2003-49, L.O.F. The legislative finding with regard to this chapter provides that it is beneficial to have an alternative method to resolve construction disputes that would reduce the need for litigation while protecting the rights of homeowners. Section 558.001, F.S.

<sup>2</sup> Section 558.002(7), F.S.

- Quadrplexes;
- Condominiums; and
- Cooperative Units.

## Definitions

Section 558.002, F.S., provides definitions for terms related to causes of action involving construction defects. Among the terms included in this section are the following:

- “Claimant” is defined as a **homeowner**, including a subsequent purchaser or association, who asserts a claim for damages against a contractor, subcontractor, supplier, or design professional concerning a construction defect or a subsequent owner who asserts a claim for indemnification for such damages. The term does not include a contractor, subcontractor, supplier, or design professional. (emphasis supplied)
- “Construction defect” is a defect that is a deficiency in, or a deficiency arising out of, the design, specifications, surveying, planning, supervision, observation of construction, or construction, repair, alteration, or remodeling of a dwelling, any appurtenance to the dwelling, or the real property to which the dwelling or appurtenance is affixed resulting from:
  - (a) Defective material, products, or components used in the construction or remodeling;
  - (b) A violation of the applicable codes in effect at the time of construction or remodeling which gives rise to a cause of action pursuant to s. 553.84, F.S.;
  - (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.
- “Dwelling” is defined as “a single-family house, manufactured or modular home, duplex, triplex, quadruplex, or other multifamily unit in a multifamily residential building designed for residential use.” It includes condominiums and cooperatives and common areas and improvements that are owned by the association.<sup>3</sup>

## Notice<sup>4</sup>

Before a cause of action can be initiated against a contractor, subcontractor, supplier, or design professional for an alleged construction defect, the claimant must serve written notice of the claim on the defendant and provide an opportunity to resolve the claim. The claimant must serve a notice of the claim within 15 days after discovering the alleged defect, but the failure to do so

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<sup>3</sup> Associations cross-referenced in s. 558.002(2), F.S., include condominium associations, cooperatives, and homeowner’s associations.

<sup>4</sup> Section 558.004, F.S.

does not bar the filing of an action.<sup>5</sup> The notice must be served no later than 60 days prior to the filing of an action involving a single family home, an association representing 20 or fewer residential parcels, a manufactured or modular home, a duplex, triplex, or a quadruplex or at least 120 days prior to the filing of an action involving an association representing more than 20 residential parcel owners. The notice must describe the claim in reasonable detail sufficient to determine the nature of each alleged construction defect, and it must include a description of the damage or loss resulting from the defect.

### **Opportunity to Repair<sup>6</sup>**

Within 30 days after receipt of the notice of claim or 50 days with a notice of claim involving an association representing more than 20 residential parcels, the recipient is entitled to perform a reasonable inspection of the dwelling alleged to have a construction defect. A claimant must provide access to the dwelling during normal working hours such that the nature and cause of the defect as well as the extent to which repairs are needed to remedy the defect can be determined. If destructive testing is necessary to determine the nature and cause of the alleged defect, the recipient must notify the claimant in writing, describing specific aspects of the test. If a claimant promptly objects to the testing, the recipient must provide the claimant a list of three qualified persons from which the claimant may select one person to perform the testing. If a claimant fails or refuses to agree to destructive testing, the claimant has no claim for damages which could have been avoided or mitigated had the destructive testing been allowed when requested.

### **Forwarding a Copy of the Notice of Claim<sup>7</sup>**

Within 10 days after receipt of the notice of claim or 30 days with a notice of claim involving an association representing more than 20 residential parcels, the recipient may forward a copy of the notice of claim to each contractor, subcontractor, supplier, or design professional reasonably believed to be responsible for each defect, noting the specific defect for which each person is believed to be responsible. Such persons will be entitled to inspect the dwelling as provided for in s. 558.004(2), F.S.

### **Written Response to Copy of Notice of Claim<sup>8</sup>**

Within 15 days after receipt of the copy of the notice of claim or 30 days with a copy of the notice of claim involving an association representing more than 20 residential parcels, the recipient must serve a written response to the person who forwarded the copy of the notice of claim. The response should indicate the findings and results of the inspection, a statement as to whether the recipient is willing to make repairs to remedy the alleged defect, and a timetable for when repairs will be completed.

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<sup>5</sup> If a claimant files an action alleging a construction defect without first serving the required notice, on timely motion by a party to the action the court shall abate the action, without prejudice, and the action may not proceed until the claimant has complied with the notice requirement and the procedures provided in ch. 558, F.S., that follow such notice. The action is abated without prejudice, however, meaning that if the claimant still wishes to pursue the action after complying with ch. 558, F.S., the action can be maintained. *See* s. 558.003, F.S.

<sup>6</sup> Section 558.004(2)(a) - (f), F.S.

<sup>7</sup> Section 558.004(3), F.S.

<sup>8</sup> Section 558.004(4), F.S.

### **Written Response to Claimant After Receipt of Initial Notice of Claim<sup>9</sup>**

Within 45 days after receiving notice of claim, or 75 days with a notice of claim involving an association representing more than 20 residential parcels, the recipient must serve a written response on the claimant that provides one of the following:

- A written offer to remedy the alleged construction defect at no cost to the claimant, a detailed description of the proposed repairs necessary to remedy the defect, and a timetable regarding completion;
- A written offer to compromise and settle the claim by monetary payment that will not obligate the person's insurer, and a timetable for making payments;
- A written offer to compromise and settle the claim by a combination of repairs and monetary payment in the manners stated above;
- A written statement that the person disputes the claim and will not remedy the defect or compromise and settle the claim; or
- A written statement that a monetary payment will be determined by the person's insurer within 30 days after simultaneous notification to the insurer and the claimant of this settlement option, which the claimant can accept or reject. If the insurer does not respond within the 30 days following notification, the claimant shall be deemed to have met all conditions precedent to commencing an action.

### **Claimant's Acceptance of an Offer<sup>10</sup>**

If a claimant accepts an offer to repair the alleged construction defect, the claimant shall provide the offeror and the offeror's agents reasonable access to the dwelling during normal working hours. If the offeror does not repair or make payment within the agreed time and manner, except for reasonable delays beyond the offeror's control, the claimant may proceed with an action against the offeror. If the offeror does make payment or repairs within the agreed time and manner, the claimant is barred from proceeding with a cause of action.

Any offer or failure to offer to remedy an alleged defect, or to compromise and settle the claim by monetary payment, does not constitute an admission of liability and is inadmissible in an action brought under ch. 558, F.S.<sup>11</sup>

### **Contract Provisions; Application of Ch. 558, F.S.**

Section 558.005(1), F.S., provides that the provisions of ch. 558, F.S., control every contract for the design, construction, or remodeling of a dwelling entered into on or after July 1, 2004, that includes the following notice as part of the contract:<sup>12</sup>

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<sup>9</sup> Section 558.004(5)(a)-(e), F.S.

<sup>10</sup> Section 558.004(8), F.S.

<sup>11</sup> Section 558.004(9), F.S.

<sup>12</sup> Section 558.005(2), F.S.

CHAPTER 558, FLORIDA STATUTES CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY BRING ANY LEGAL ACTION FOR AN ALLEGED CONSTRUCTION DEFECT IN YOUR HOME. SIXTY DAYS BEFORE YOU BRING ANY LEGAL ACTION, YOU MUST DELIVER TO THE OTHER PARTY TO THIS CONTRACT A WRITTEN NOTICE REFERRING TO CHAPTER 558 OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE SUCH PERSON THE OPPORTUNITY TO INSPECT THE ALLEGED CONSTRUCTION DEFECTS AND TO CONSIDER MAKING AN OFFER TO REPAIR OR PAY FOR THE ALLEGED CONSTRUCTION DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER WHICH MAY BE MADE. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER THIS FLORIDA LAW WHICH MUST BE MET AND FOLLOWED TO PROTECT YOUR INTERESTS.

An exception to the applicability of the chapter's provisions is provided for situations where a claimant and the recipient alter the procedure for the notice of claim process by written, mutual agreement after the initial receipt of a notice of claim.<sup>13</sup>

Section 558.005(4), F.S., provides that this chapter applies to all actions accruing on or after July 1, 2004, and all actions commenced on or after such date, regardless of the date of sale, issuance of a certificate of occupancy or its equivalent, or substantial completion of the dwelling. Further, this section provides that:

Notwithstanding the notice requirements of this section for contracts entered into on or after July 1, 2004, this chapter applies to all actions accruing before July 1, 2004, but not yet commenced as of July 1, 2004, and *failure to include the notice requirements of this section in a contract entered into prior to July 1, 2004, does not operate to bar the procedures of this chapter from applying to all such actions.*<sup>14</sup> (emphasis added)

This provision seems to be in conflict with s. 558.005(1), F.S., (discussed above) which requires the prescribed notice to be included in the contract for the ch. 558, F.S., to apply. Representatives of the Construction Coalition and Associated Builders and Contractors state that s. 558.005(1), F.S., makes ch. 558, F.S., an opt-in procedure. The representatives state that only when the notice provision as provided in s. 558.005(2), F.S., *is in a contract* for design, construction, or remodeling of a dwelling entered into on or after July 1, 2004, is ch. 558, F.S., applicable.

### III. Effect of Proposed Changes:

The bill expands the applicability of ch. 558, F.S., which provides an alternative method to resolve construction disputes, to include construction defects in any real property, including mobile homes and excluding public transportation projects. To provide for the chapter's broadened applicability, the bill makes conforming changes throughout ch. 558, F.S., that previously only addressed residential property.

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<sup>13</sup> Section 558.005(3), F.S.

<sup>14</sup> Section 558.005(4), F.S.

## Definitions

The bill replaces the definition for “dwelling” with the definition of “real property,” which means land that is improved and the improvements on such land, including fixtures, manufactured housing, or mobile homes and excluding public transportation projects. In addition, the bill revises the definitions for “action,” “claimant,” “construction defect,” “subcontractor,” and “supplier” to reflect that ch. 558, F.S., now applies to construction defects in nonresidential projects.

## Contract Provisions; Application of Ch. 558, F.S.

The bill amends the contract provisions and application language of s. 558.005(1)(a), F.S., to provide that the provisions of ch. 558, F.S., except as provided in subsections (3) and (4), apply to every contract for the design, construction, or remodeling of real property entered into between July 1, 2004, and September 30, 2006, which contains the notice in s. 558.005(2)(a), F.S.

It creates s. 558.005(1)(b), F.S., to provide that the provisions of ch. 558, F.S., except as provided in subsections (3) and (4), apply to every contract for the design, construction, or remodeling of real property entered into on or after October 1, 2006, which contains the notice set forth in paragraph (2)(b).

It creates s. 558.005(2)(b), F.S., to provide that the notice required for real property by paragraph (1)(b) must expressly cite ch. 558, F.S. and be in substantially the following form:

### CHAPTER 558 NOTICE OF CLAIM

CHAPTER 558, FLORIDA STATUTES, CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY BRING ANY LEGAL ACTION FOR AN ALLEGED CONSTRUCTION DEFECT. SIXTY DAYS BEFORE YOU BRING ANY LEGAL ACTION, YOU MUST DELIVER TO THE OTHER PARTY TO THIS CONTRACT A WRITTEN NOTICE REFERRING TO CHAPTER 558 OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE SUCH PERSON THE OPPORTUNITY TO INSPECT THE ALLEGED CONSTRUCTION DEFECTS AND TO CONSIDER MAKING AN OFFER TO REPAIR OR PAY FOR THE ALLEGED CONSTRUCTION DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER WHICH MAY BE MADE. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER THIS FLORIDA LAW WHICH MUST BE MET AND FOLLOWED TO PROTECT YOUR INTERESTS.

The bill amends s. 558.005(4), F.S., to provide that this chapter applies to all actions accruing or commenced on or after July 1, 2004, for a construction contract. It further provides that, notwithstanding the notice requirements of this section, this chapter applies to all contracts entered into between July 1, 2004 and September 30, 2006, and failure to include the notice in a contract entered into prior to July 1, 2004, does not operate to bar the procedures of ch. 558, F.S., from applying to all such actions.

The bill provides that, notwithstanding the notice requirements of this section, for contracts entered into on or after October 1, 2006, this chapter<sup>15</sup> applies to all actions accruing before July 1, 2004, but not yet commenced as of July 1, 2004. Failure to include such notice in a contract entered into before July 1, 2004, does not operate to bar the procedures of ch. 558, F.S., from applying to all such actions.

The bill provides an effective date of October 1, 2006.

**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:

The bill expands the option to resolve legal claims related to construction defects to all types of real property. This will consequently expand the number of persons who will have to comply with the notice provisions of ch. 558, F.S., before bringing a legal action.

C. Government Sector Impact:

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

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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<sup>15</sup> Chapter 558, F.S.

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This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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## **VIII. Summary of Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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