

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 709

Construction Defects

SPONSOR(S): Aubuchon

TIED BILLS: None

IDEN./SIM. BILLS: SB 2064

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Civil Justice & Courts Policy Committee	10 Y, 0 N	Bond	De La Paz
2)	Insurance, Business & Financial Affairs Policy Committee			
3)	Criminal & Civil Justice Policy Council			
4)				
5)				

SUMMARY ANALYSIS

Current law provides a means by which a person who intends to sue for construction defects can notify the contractor of the claim to offer the contractor an opportunity to fix the problem before suit is filed. Significant changes to the construction defects law include:

- The requirements of the construction defect law apply unless the parties specifically waive the requirement in the contract.
- The construction defect law only applies to defects discovered after completion.
- The notice required in a construction contract is simplified.
- The contractor may not impose a construction lien for destructive testing and must repair damage caused by destructive testing.

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

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

Chapter 558, F.S., provides a pre-suit method for resolving construction defect lawsuits. In short, it provides for notice and an opportunity to cure. That is, before the property owner may sue a contractor, the property owner is required to notify the contractor of the defect and to give the contractor the opportunity to examine the defect. If the contractor agrees that the defect exists, the contractor is given a reasonable opportunity to repair the defect or make some other offer in settlement. If the parties still disagree, the matter may go to court. This bill makes a number of changes to ch. 558, F.S.:

##### Applicability: opt out or opt in

Sections 558.003 and 558.005(4) F.S., provide that the chapter applies to all construction defect litigation. Some attorneys practicing in this area, however, believe that the failure of a contractor to include the required language in the contract makes compliance with the chapter optional, not required (that is, they believe that the chapter is "opt in").

This bill amends ch. 558, F.S., to specifically provide that notice and opportunity to cure applies to all construction defect litigation related to any construction contract entered into on or after July 1, 2004. This bill also provides that the parties may, in the initial contract or by later agreement, agree that ch. 558, F.S., will not apply. In other words, this bill rejects the view that current law is "opt in" and creates a means by which the statute allows an "opt out".

##### Applicability: defects discovered during construction

Current law does not distinguish between defects discovered during the construction process and defects discovered after completion of the construction. It is common to discover defects during construction; indeed, it would be unusual for defects not to be discovered during the construction process. During construction, the contractor usually finds and quickly corrects defects. Where the owner discovers a defect during construction, the owner can easily communicate with the contractor and has an easy remedy for the failure to correct such defects by withholding progress payments.

This bill defines "completion of a building or improvement" and provides that the notice and opportunity to cure provisions do not apply prior to completion of the building or improvement. The term is defined as:

"Completion of a building or improvement" means issuance of a certificate of occupancy for the entire building or improvement, or the equivalent authorization to occupy or use the improvement, issued by the governmental body having jurisdiction and, in jurisdictions where no certificate of occupancy or the equivalent authorization is issued, it means substantial completion of construction, finishing, and equipping of the building or improvement according to the plans and specifications.

#### Service of notices

Section 558.002(8), F.S., defines "service" as service by certified mail, return receipt requested. This bill amends the definition to:

- Substitute proof of mailing for the return receipt requested
- Allow hand delivery
- Allow delivery by private courier that provides a written evidence of delivery

#### Statutory notice in construction contracts

Current law provides a notice regarding ch. 558, F.S. that must be included in every construction contract, There are two forms of the notice, based on the date of the contract. This bill alters and substantially shortens the notice, effective October 1, 2009, to read:

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

The bill also provides, related to the notice, that:

- Notice is not required where the parties opt out of ch. 558, F.S.
- Failure to give the notice, without specific opt-out, does not create opt-out
- There is no penalty for failure to provide the notice.

#### Destructive testing

Section 558.004(2), F.S., provides that the contractor is allowed to inspect an alleged construction defect prior to agreeing to assume responsibility for the defect. The parties may agree to destructive testing<sup>1</sup> as part of that inspection. This bill amends the provision on destructive testing to reference and include related repair and reconstruction. This bill also provides that any person performing destructive testing under this section, or repairing the destruction, may not impose a construction lien against the property, unless the person was employed by the property owner.

#### Effect of notices

An owner typically has a direct contract with a general contractor. That general contractor does not work alone, but relies on subcontractors, suppliers, and other professionals in designing and completing the work. The chapter contemplates having the owner give notice to the general contractor. Section 558.004(3), F.S., provides for subsequent notice from the general contractor to the subcontractors, suppliers, and professionals that may be legally liable to the owner and the general contractor for repairing the defect. Once notified, those persons may then share in the inspection, negotiation, and opportunity to cure the defect. A trial court ruled in one recent case, however, that the notice given to subcontractors was in effect an admission by the general contractor of liability for the defect. This bill amends s. 558.004(3), F.S., to provide that a notice to a subcontractor, supplier or professional is not an admission of liability.

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<sup>1</sup> For instance, if the owner complains of improperly installed plumbing, the contractor may have to remove drywall, tile, or even part of a slab to inspect the plumbing. Of course, the owner will want that inspection-related destruction repaired whether or not there is a plumbing problem discovered.

### Information exchange

In litigation, the parties engage in a process of requesting information from other parties known as "discovery." Section 558.004(15), F.S. provides that any party may, during the ch. 558, F.S. process, request an exchange of all "discoverable evidence" relating to the claimed construction defects. This bill amends this provision to provide that:

- The request must be in writing.
- The party has 30 days to reply.
- The request must offer to pay the reasonable costs of reproduction.

Rather than simply refer to the term "discoverable evidence", the bill references the following documents that the parties must exchange:

- Design plans, specifications, and as-built plans.
- Any documents detailing the design drawings or specifications.
- Photographs, videos, and expert reports that describe any defect upon which the claim is made.
- Subcontracts.
- Purchase orders for the work that is claimed defective or any part of such materials.

### Mediation

Section 558.005(3), F.S., allows for mediation between the owner and the general contractor of construction claims after receipt by the general contractor of the initial notice. This bill provides that:

- Mediation may be conducted at any time.
- Subcontractors, suppliers, and others who receive notice from the general contractor may participate in the mediation.
- The parties may agree to mediation in the contract or at any time thereafter.

## B. SECTION DIRECTORY:

Section 1 amends s. 558.002, F.S., relating to definitions.

Section 2 amends s. 558.003, F.S., relating to lawsuits for construction defects.

Section 3 amends s. 558.004, F.S., relating to notice and opportunity to repair a construction defect.

Section 4 amends s. 558.005, F.S., relating to application of provisions regarding construction defects.

Section 5 provides an effective date of October 1, 2009.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

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 take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

None.