The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Regulated Industries

BILL:	SB 418
INTRODUCER:	Senator Richter
SUBJECT:	Construction Defect Claims
DATE:	March 29, 2015
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Kraemer	Imhof	RI	**Pre-meeting**
2.			BI	
3.			FP	

I. Summary:

SB 418 amends ch. 558, F.S., relating to construction defect claims. The opportunity to resolve claims without legal process is extended to insurers of a contractor, subcontractor, supplier, or design professional. The definition of completion of a building or improvement under construction is revised, which impacts the grant of warranties to purchasers of condominium and cooperative units, as well as to developers of those types of projects. Additional requirements for filing a notice of claim and the exchange of documents by the parties are imposed. Financial sanctions for notices of claim found to be improper by a court may be made.

II. Present Situation:

In 2003, the Legislature enacted an alternative dispute resolution process for certain construction defect matters,[1] in which where a claimant files a notice of claim with a contractor, subcontractor, supplier, or design professional that the claimant asserts is responsible for the defect, and provides the contractor, subcontractor, supplier, or design professional with an opportunity to resolve the claim without the need for court action. Actions for personal injuries arising out of an alleged construction defect are not covered by this process, which is set forth in ch. 558, F.S. (the construction defect procedure).[2]

[1] *See* ch. 2003-49; L.O.F.

[2] Pursuant to s. 558.004(12), F.S., except as specifically provided in ch. 558, F.S., the chapter does not: (1) bar or limit any rights, including the right of specific performance to the extent available in the absence of the chapter, any causes of action, or any theories on which liability may be based; (2) bar or limit any defense, or create any new defense; or (3) create any new rights, causes of action, or theories on which liability may be based.

Definitions

The term "action" means a lawsuit or arbitration proceeding for damages to or loss of real or personal property caused by an alleged construction defect.[3] Unless otherwise agreed in writing,[4] a claimant may not file an action until complying with the construction defect procedure by providing written notice of alleged construction defects to the contractor or other party that contracted[5] with the claimant to perform work.[6] However, the notice requirement is not intended to interfere with the ability to complete a project that has not been substantially completed, and a notice is not required for a project in which the building or improvement is not yet completed.

Completion of a building or improvement is evidenced by issuance of a certificate of occupancy (or its equivalent) for the entire building or improvement issued by the appropriate governmental body (such as a city or county).[7]

A construction defect, as defined in s. 558.002(5), F.S., is a deficiency in, or arising out of, the "design, specifications, surveying, planning, supervision, observation of construction, or construction, repair, alteration, or remodeling of real property[8] resulting from:"

- Defective material, products, or components used in the construction or remodeling;
- A violation of applicable building codes which allows an action under limited conditions;[9]
- A failure of the design of real property to meet applicable professional standards of care at the time of governmental approval; or
- A failure to construct or remodel real property in accordance with accepted trade standards for good and workmanlike construction at the time of construction.

A claimant is a property owner, including a subsequent purchaser or association,[10] 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

[3] *See* s. 558.002(1), F.S.
[4] Section 558.005(4), F.S., permits a claimant and the contractor or other person to whom notice is served or otherwise must be served with a notice of claim to agree in writing to mediation in advance of a lawsuit being filed, or to otherwise alter the construction defect procedure in ch. 558, F.S.
[5] After October 1, 2009, unless the parties agree that ch. 558, F.S., does not apply, s. 558.005, F.S., requires that any written contract for improvement of real property entered into between an owner and a contractor, or between an owner and a design professional, contain substantially the following notice: "ANY CLAIMS FOR CONSTRUCTION DEFECTS ARE SUBJECT TO THE NOTICE AND CURE PROVISIONS OF CHAPTER 558, FLORIDA STATUTES." The failure to include the required notice in the contract does not subject the contracting owner, contractor, or design professional to any penalty, however, as the purpose of the notice is to promote awareness of the procedure, not to be a penalty. Other notice requirements set forth in s. 558.005, F.S., apply to contracts entered into before October 1, 2009. However, s. 558.004(14), F.S., provides that if an arbitration clause in a contract for the sale, design, construction, or remodeling of real property conflicts with the construction defect procedure in s. 558.004, F.S., that section prevails over the arbitration clause.
[6] *See* s. 558.003, F.S.
[7] *See* s. 558.002(4), F.S. In cases where a certificate of occupancy or the equivalent authorization is not issued, completion means the substantial completion of construction, finishing, and equipping of the building or improvement according to the plans and specifications.
[8] Section 558.002(8), F.S., defines real property as improved land, and improvements on such land, such as fixtures, manufactured housing, or mobile homes; public transportation projects are excluded.
[9] *See* s. 553.84; F.S.
[10] An "association" is defined in s. 558.002(2), F.S., as having the same meaning as in s. 718.103(2), F.S., (condominiums), s. 719.103(2), F.S., (cooperatives), s. 720.301(9), F.S., (homeowners) or s. 723.075, F.S., (mobile home subdivisions).

for such damages. Under the construction defect procedure, a contractor, subcontractor, supplier, or design professional is not designated as a claimant.[11]

A contractor is any person[12] that is legally engaged in the business of designing, developing, constructing, manufacturing, repairing, or remodeling real property.[13] A subcontractor is a person who is a contractor who performs labor and supplies material on behalf of another contractor for construction or remodeling of real property,[14] and a supplier is a person who does not perform labor, but does provide materials, equipment, or other supplies for the construction or remodeling of real property.[15]

Notice of Claim Process

The notice of claim process is set forth in s. 558.004, F.S. Before an action may be brought by a claimant alleging a construction defect, the claimant must serve[16] a written notice of claim referring to ch. 558, F.S., on the contractor, subcontractor, supplier, or design professional, as applicable. The written notice must be provided at least 60 days before filing the action, or in the case of an association representing more than 20 parcels (association claimant), at least 120 days before the filing. Association claimants are granted longer time frames than other claimants.

If the construction defect claim arises from work performed under a contract, the written notice of claim must be served on the person with whom the claimant contracted, and must describe the claim in detail sufficient to determine the nature of the construction defect and a description of the damage or loss resulting from it, if known. The claimant must try to serve the notice of claim within 15 days after discovery of an alleged defect, but the failure to do so does not bar the filing of an action.[17] In limited circumstances after the construction defect procedure has been complied with by the claimant and persons served with the notice of claim, certain actions may be filed sooner than these time frames.[18]

Under s. 558.004(2), F.S., within 30 days after service of the notice of claim (within 50 days for a claim involving an association claimant), the person served with the notice of claim (claim recipient) may inspect the property or each unit subject to the claim to assess each alleged construction defect. The claimant shall provide the claim recipient, its contractors, or its agents reasonable access to the property during normal working hours to inspect the property to

[11] *See* s. 558.002(3), F.S.
[12] As defined in s. 1.01, F.S., a "person" includes "individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations."
[13] *See* s. 558.002(6), F.S.
[14] *See* s. 558.002(10), F.S.
[15] *See* s. 558.002(11), F.S.
[16] Service of a notice of a construction defect means delivery by certified mail with a United States Postal Service record of evidence of delivery or attempted delivery to the last known address of the addressee, by hand delivery, or by delivery by any courier with written evidence of delivery. *See* s. 558.002(9), F.S.
[17] Section 558.003, F.S., provides that a prematurely filed action may be stayed by the court to allow the parties to engage in the construction defect procedure.
[18] The construction defect procedure includes actions that a claimant or a contractor may take after the notice of claim is responded to, in the event a claim is disputed and no compromise or settlement is offered, if the claimant fails to accept or reject a timely offer, or if agreed-to payments or repairs are not made. *See* s. 558.004(6), (7), and (8), F.S.

determine the nature and cause of each alleged construction defect and the nature and extent of any repairs or replacements necessary to remedy each defect.

Claim recipients must reasonably coordinate the timing and manner of any and all inspections with the claimant to minimize the number of inspections. If mutually agreed, the inspection may include destructive testing under these terms and conditions:[19]

- If the claim recipient determines that destructive testing is necessary to determine the nature and cause of the alleged defects, the claimant must be notified in writing;
- The notice shall describe the destructive testing to be performed, the person performing the testing, the estimated anticipated damage and repairs to or restoration of the property resulting from the testing, the estimated amount of time needed for the testing and to complete the repairs or restoration, and the financial responsibility offered for covering the costs of repairs or restoration;
- If the claimant promptly objects to the person who is to perform the destructive testing, the claim recipient must provide a list of three qualified persons from which the claimant may select a person to perform the testing. The person performing the testing shall operate as an agent or subcontractor of the claim recipient who must communicate with, submit any reports to, and be solely responsible to the claim recipient;
- The testing shall be done at a mutually agreeable time;
- The claimant or a representative of the claimant may be present to observe the destructive testing;
- The destructive testing may not make the property uninhabitable; and
- There are no statutory construction lien rights for the destructive testing caused by a claim recipient, or for restoring the area destructively tested to the condition existing prior to testing, except to the extent the owner of the property contracts for destructive testing or restoration.

If the claimant refuses to agree and thereafter permit reasonable destructive testing, the claimant has no claim for damages that could have been avoided or mitigated if requested destructive testing had been allowed and a feasible remedy been promptly implemented.

Under s. 558.004(3), F.S., within 10 days after service of the notice of claim (within 30 days for a claim involving an association claimant), the claim recipient has the option to serve a copy of the notice of claim to each contractor, subcontractor, supplier, or design professional whom the claim recipient reasonably believes is responsible for each defect specified in the notice of claim (the subsequent claim recipient). The claim recipient must identify the specific defect for which it believes the particular subsequent claim recipient is responsible. This notice to the subsequent claim recipient may not be construed as an admission of any kind, and each subsequent claim recipient may inspect the property in the same manner as the claim recipient, as described above.

Under s. 558.004(4), F.S., within 15 days after service of a copy of the notice of claim to a subsequent claim recipients (within 30 days for claims involving an association claimant), the subsequent claim recipient must serve a written response to the claim recipient, to include:

- A report, if any, of the scope of any inspection of the property;

[19] *See* s. 558.004(2), F.S.

- The findings and results of the inspection;
- A statement of whether the subsequent claim recipient is willing to make repairs to the property or whether such claim is disputed;
- A description of any repairs the subsequent claim recipient is willing to make to remedy the alleged construction defect; and
- A timetable for the completion of such repairs.

This response may also be served on the claimant by the claim recipient.

Under s. 558.004(5), F.S., within 45 days after service of the notice of claim (within 75 days for a claim involving an association claimant), the claim recipient must serve a written response to the claimant. The response shall be served to the attention of the person who signed the notice of claim, unless otherwise indicated in the notice of claim. The written response must provide:

- 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 for the completion of such repairs;
- 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 payment;
- A written offer to compromise and settle the claim by a combination of repairs and monetary payment, that will not obligate the person's insurer, that includes a detailed description of the proposed repairs and a timetable for the completion of such repairs and making payment; (the (5)(c) option);
- 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, including insurance proceeds, if any, will be determined by the person's insurer within 30 days after notification to the insurer by means of serving the claim, which service shall occur at the same time the claimant is notified of this settlement option, which the claimant may accept or reject. A written statement under this option may also include an offer under the (5)(c) option above, but such offer shall be contingent upon the claimant also accepting the determination of the insurer whether to make any monetary payment in addition thereto. If the insurer for the claim recipient makes no response within the 30 days following service, then the claimant shall be deemed to have met all conditions necessary to filing an action on the noticed claim.

Under s. 558.004(6), F.S., if the claim recipient disputes the claim and will neither remedy the defect nor compromise and settle the claim, or does not timely respond to the claimant's notice of claim, the claimant may, without further notice, proceed with an action against that the claim recipient for the noticed claim. A partial settlement or compromise of the claim may be agreed to by the parties, and in that event, the claimant may without further notice proceed with an action on the unresolved portions of the claim.

Under s. 558.004(7), F.S., a claimant who receives a timely settlement offer must accept or reject the offer by serving written notice of acceptance or rejection on the person making the offer within 45 days after receiving the settlement offer. If a claimant initiates an action without first accepting or rejecting the offer, the court shall stay the action upon timely motion until the claimant serves the required written response respecting the offer.

Under s. 558.004(8), F.S., if the claimant timely and properly accepts an offer to repair an alleged construction defect, the claimant shall provide the offeror and the offeror's agents reasonable access to the claimant's property during normal working hours to perform the repair by the agreed-upon timetable stated in the offer. If the offeror does not make the payment or repair the defect within the agreed time and in the agreed manner, except for reasonable delays beyond the control of the offeror, including, but not limited to, weather conditions, delivery of materials, claimant's actions, or issuance of any required permits, the claimant may, without further notice, proceed with an action against the offeror based upon the claim in the notice of claim. If the offeror makes payment or repairs the defect within the agreed time and in the agreed manner, the claimant is barred from proceeding with an action for the noticed claim or as otherwise provided in the accepted settlement offer.

Emergency Repairs, Statute of Limitations, and Multiple Claims

The construction defect procedure does not prohibit or limit the claimant from making any necessary emergency repairs to the property to protect the health, safety, and welfare of the claimant.[20] In addition, any offer or failure to offer a remedy as contemplated by the construction defect procedure[21] or to compromise and settle the claim by monetary payment is not an admission of liability and is not admissible in an action brought under ch. 558, F.S.[22]

Service of a written notice of claim tolls the applicable statute of limitations for those persons covered by the construction defect procedure in ch. 558, F.S., (and any bond surety) until the later of:

- Ninety days, or 120 days,[23] after service of the notice of claim; or
- Thirty days after the end of the repair period or payment period stated in the offer, if the claimant has accepted the offer; this time period may be extended by stipulation of the parties, which tolls the statute of limitations during the extension.

The construction defect procedure applies to each alleged construction defect, but multiple defects may be included in one notice of claim; in addition, the initial list may be amended by the claimant to identify additional or new construction defects as they become known.[24] Only alleged construction defects that are noticed and for which the claimant has complied with the construction defect procedure (or those reasonably related to, or caused by, the noticed defects) may be addressed in a trial, but subsequent or further actions may be pursued.[25]

Insurance Claims

Section 558.004(13), F.S., provides that the construction defect procedure does not relieve persons served with a notice of claim from compliance with the terms of any liability insurance policy. Further, the providing of a copy of a notice of claim to an insurer does not constitute a claim for insurance purposes, and nothing in the construction defect procedure may be construed

[20] *See* s. 558.004(9), F.S.
[21] *See* s. 558.004(5)(a)-(e), F.S.
[22] *See supra* note 17.
[23] The longer time period appears to be applicable to associations representing more than 20 parcels. *See* s. 558.004(10, F.S.
[24] *See* s. 558.004(11), F.S.
[25] *Id.*

to impair technical notice provisions or requirements of the liability policy or alter, amend, or change existing Florida law relating to rights between insureds and insurers.

Exchange of Documents and Other Information

Within 30 days after service of a written request that cites s. 558.004(15), F.S., and contains an offer to pay the reasonable costs of reproduction, the claimant and any claimant recipient must exchange:

- Any 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; and
- Purchase orders for the work that is claimed defective or any part of such materials.

In the event of subsequent litigation, any party who failed to provide the requested materials may be sanctioned for a discovery violation by the court. Expert reports exchanged between the parties may not be used in any subsequent litigation for any purpose, unless the expert, or a person affiliated with the expert, testifies as a witness, or the report is used or relied upon by an expert who testifies on behalf of the party for whom the report was prepared.

III. Effect of Proposed Changes:

SB 418 adds the insurer of the contractor, subcontractor, supplier, or design professional as a party that should be provided the opportunity to resolve a construction defect claim through the construction defect procedure. The bill also confirms that the procedure is a confidential settlement negotiation.

The bill amends the definition of "completion of a building or improvement," to mean the issuance of a certificate of occupancy whether temporary or otherwise. Currently, completion of a building or improvement evidenced by issuance of a certificate of occupancy (or its equivalent) for the entire building or improvement issued by the appropriate governmental body (such as a city or county).[26]

A temporary certificate of occupancy may be issued prior to completion of an entire building or improvement for a portion of the property being constructed or improved, pending the completion of those portions that remain under construction. This identical definition for "completion of a building or improvement" appears in ch. 718, F.S., the Condominium Act, and in ch. 719, the Cooperative Act.[27] The warranties commence with the completion of a building or improvement. Express warranties are granted to purchasers by developers, and other warranties are granted by contractors, subcontractors, and suppliers to both developers and purchasers. As temporary certificate of occupancy may be issued earlier in a construction project than a certificate of occupancy

[26] *See* s. 558.002(4), F.S. In cases where a certificate of occupancy or the equivalent authorization is not issued, completion means the substantial completion of construction, finishing, and equipping of the building or improvement according to the plans and specifications.

[27] *See* s. 718.203, F.S., and s. 719.203, F.S. These provisions provide for a warranty of three years beginning with the completion of the building.

The bill requires the claimant to specifically identify in the notice of claim each construction defect by location. The notice of claim must also identify the provisions of the building code, project plans, project drawings, project specifications, or other documentation, information, or authority serving as the basis of the claim. Failure to include the required information in the notice is evidence of a defective notice of claim.

The bill requires that a subsequent claim recipient (who receives a copy of the notice of claim from the person who was served a notice by the claimant) must advise in writing if it disputes the claim, and is willing to attempt to settle all or a portion of the claim through a monetary settlement offer, including the proposed amount and timetable for payment.

The bill provides that if a claimant proceeds with an action that was previously resolved by the payment of money, the making of repairs, or any combination, that portion of any claim is to be deemed frivolous by the court and stricken from the claim. The claim recipient may request monetary sanctions against the claimant for the costs and attorney fees associated with responding to the frivolous claim.

Current law provides that sending a copy of a claim to an insurer does not constitute the making of a claim for insurance purposes. The bill provides that an insurance policy may allow for such action to constitute a valid claim for coverage under the policy.

The bill requires claimants to provide only expert reports that are not subject to a claim of privilege from disclosure to opposing parties. The bill requires claimants to provide maintenance records and other documents related to the discovery, investigation, causation, and extent of alleged construction defects in a notice of claim, as well as any resulting damages.

The bill mandates the award of monetary sanctions for costs against a claimant, including costs of inspection, investigation, testing, related costs, and attorney fees, upon a finding by the court that the claimant or its attorney knew or should have known that a claimed defect was not supported by the facts needed to establish the claim, or would not be supported by the application of law to those facts. Sanctions may not be awarded against attorneys of claimants if they act in good faith based on the claimant's representations as to the facts supporting the claim.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Revision to the term "completion of a building or improvement" may affect persons and associations eligible to file or receive notices of claim (and insurers of those persons) by changing the calculation of the time period for which warranties under s. 718.203, F.S., and s. 719.203, F.S. are effective.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 558.001, 558.002, 558.004, 718.203, and 719.203.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.