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 Judiciary

BILL:	SB 1164
INTRODUCER:	Senator Passidomo
SUBJECT:	Construction
DATE:	April 18, 2017
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Cibula	JU	**Pre-meeting**
2.			CA	
3.			RC	

I. Summary:

SB 1164 revises the requirements for pre-suit notice and pre-suit settlement negotiations regarding claims based on construction defects. As to these claims, the bill:

- Bars all claims by a person who purchases a property "as-is";
- Requires the claimant or the claimant's agent, as well as any retained experts, to join the respondent for an inspection of the allegedly defective property;
- Requires mediation before a claimant may reject a settlement offer;
- Specifies the time and place of mediation;
- Requires the respondent to pay for mediation unless the sides cannot agree on a mediator; and
- Requires the mediation to be conducted by an independent, certified circuit court mediator, pursuant to the Florida Supreme Court's rules and procedures for circuit court mediation and pursuant to ss. 44.401-44.406, F.S.

II. Present Situation:

Overview of the Pre-suit Notice Requirement in Construction-Defect Disputes

Before a person may file a lawsuit based on a construction defect, he or she must first follow the pre-suit notice procedure set forth in the Florida Statutes.[1] Very generally, the law requires a property owner who asserts that his or her property has a construction defect to give notice to the contractor and then engage in settlement discussions before filing a lawsuit. This requirement is intended to reduce the need for costly litigation in those cases where litigation is not necessary for those involved to reach a resolution.[2]

[1] *See* ch. 558, F.S.
[2] *See* s. 558.001, F.S.

A property owner may find that the property has several distinct construction defects. And some of these might not be discovered until the settlement discussions fail and the matter of the other claimed defects has proceeded to trial. However, any defect for pre-suit notice that was not given to the defendant may not be raised at this trial.

Although, chapter 558, F.S., the chapter setting forth the pre-suit notice requirements regarding construction defects does much to govern these disputes, the chapter does not:[3]

- Bar or limit any rights, including the right of specific performance to the extent the right would be available in the absence of the chapter, any causes of action, or any theories on which liability may be based, except as specifically provided in the chapter;
- Bar or limit any defense, or create any new defense, except as specifically provided in the chapter; or
- Create any new rights, causes of action, or theories on which liability may be based.

Pre-suit notice requirements are not unique to construction-defect disputes. Similar pre-suit requirements exist in other areas of law, including for claims relating to medical negligence, nursing homes, and eminent domain.[4]

Substance and Procedure of the Pre-Suit Notice Requirement

Notice of Claim

A claimant must provide pre-suit notice of an alleged construction defect to the contractor, subcontractor, supplier, or designer at least 60 days before filing any action.[5, 6] However, a claimant must provide notice 120 days before filing an action involving an association representing more than 20 parcels.[7]

The notice of claim must describe in reasonable detail the nature of each alleged construction defect and, if known, the damage or loss resulting from the defect. The notice must also identify the location of each alleged construction defect well enough to enable the responding parties to locate the alleged defect without undue burden.[8] And the claimant must attempt to serve the notice of claim within 15 days after discovery of the defect, though failing to do so does not bar a claim.[9]

Within 10 days after service with the notice, or within 30 days after service if the claimant is an association representing more than 20 parcels, the recipient *may* serve a copy of the notice on other contractors, subcontractors, suppliers or design professionals whom the recipient reasonably believes to be responsible. In passing on the notice to these other, potentially

[3] Section 558.004(12), F.S.
[4] See s. 720.311, F.S., regarding homeowners' association disputes; ch. 766, regarding medical negligence claims; s. 429.293(3), F.S., regarding assisted care communities; s. 400.0233(3), F.S. regarding nursing homes; and s. 73.015, F.S., regarding eminent domain.
[5] Section 558.004(1)(a), F.S.
[6] However, if the claim is based on work performed under a contract, the written notice of claim must be served on the person with whom the claimant contracted. Section 558.004(1)(a), F.S.
[7] *Id*.
[8] Section 558.004(1)(b), F.S.
[9] Section 558.004(1)(c), F.S.

responsible, persons, the recipient must note the specific defect for which the recipient believes each person is responsible.

Reasonable Inspection

Once the recipient is served with notice, the recipient has 30 days to inspect the property or each unit subject to the claim in order to assess each alleged construction defect. However, a recipient has 50 days to perform this inspection if the claimant is an association representing more than 20 parcels.[10] The claimant must provide the recipient or the recipient's agents access to the property during normal working hours in order to perform the inspection, the purpose of which is to determine the nature and cause of each alleged construction defect and nature and extent of any repairs or replacements necessary to remedy each defect.

As for scheduling the inspections, a notice recipient is required to coordinate with the claimant, but need not coordinate with other recipients.

Settlement Offers

If the recipient desires to make a settlement offer, the recipient must do so within 45 days after being served with the notice of claim. However, if the notice of claim is served by an association representing more than 20 parcels, the recipient has 75 days to make a settlement offer. A claimant who receives a timely settlement offer must accept or reject the offer by serving written notice on the person making the offer within 45 days after receiving the offer.[11]

Statute of Limitations

Service of written notice of claim tolls the applicable statute of limitations[12] for those persons covered under the chapter of law at issue or any bond surety until the later of:

- Ninety days, or 120 days,[13] as applicable, 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.

However, these periods may be extended by stipulation of the parties.

III. Effect of Proposed Changes:

As-Is Purchasers Barred from Bringing Action Based on Construction Defect

The bill expressly states that "a right of action based on the design, planning, or construction of an improvement to real property does not pass to subsequent purchasers of the real property if purchased as-is." In contrast, current law does not appear to include any similar restriction.

[10] Section 558.004(2), F.S.
[11] Section 558.004(7), F.S.
[12] Section 95.11(3), F.S., is the applicable statute of limitations provision.
[13] A claimant that is an association representing more than 20 parcels has 120 days to serve a notice of claim. Section 558.04(1)(a), F.S.

Notice of Claim

The bill specifies that the notice of claim alleging a construction defect must be signed by the claimant, not by the claimant's attorney or agent. The bill also requires the recipient of the claim, within 10 days after the day on which the recipient is served, to serve any other person whom the recipient reasonably believes is responsible for a defect specified in the notice of claim. Under current law, the notice recipient is merely *permitted* to serve any contractor, subcontractor, supplier, or design professional whom it reasonably believes is responsible for the claimed defect.

Reasonable Inspection

As under current law, the bill entitles a recipient of a notice of claim to perform a reasonable inspection of the property or of each unit subject to the claim in order to assess the alleged defects. However, the bill requires the claimant or claimant's agent, as well as any experts the claimant has retained with respect to the claim to be present for the inspection. These additional persons must point out the location of the alleged construction defects.

The bill also requires the recipient to coordinate the inspection with the claimant, as under current law, but also with all parties served with a copy of the notice of claim.

Settlement Offers and Mediation

Before filing a lawsuit, current law requires a claimant to serve the recipient with written notice of acceptance or rejection of any settlement offer.

Under the bill, before the claimant may reject the offer, he or she must serve a written demand for mediation on the recipient(s) of the notice, explaining why the claimant considers the offer inadequate. Unless mediation is waived in writing by the person making the settlement offer, the mediation must be scheduled in the county where the property is located. The mediator must be an independent, certified circuit court mediator. This mediator must choose a mutually convenient date, time, and place for the mediation.

The cost of mediation must be paid by the person making the settlement offer, unless this person and the claimant do not agree on a mediator. In this case, each party bears the costs of its own mediator and must split any other mediation costs.

The mediation must be conducted pursuant to the mediation rules of practice and procedures for circuit court adopted by the Florida Supreme Court and pursuant to ss. 44.401-44.406, F.S., unless otherwise agreed by the parties. During mediation, the time to respond to the settlement offer at issue is tolled. The mediation also tolls the time for the statute of limitations for the claim itself. Specifically, the bill authorizes the claimant to file a lawsuit within 30 days after the termination or conclusion of mediation.

This appears to mean that if the claim was not time-barred before mediation began, then claimant has until 30 days after mediation concludes to file suit, even if the filing date would otherwise be outside of the statute of the limitations.

However, serving a notice of claim does not toll any applicable statute of repose.

Attorney Fees

The bill states that "Unless such a contract exists and entitles the claimant to recover attorney fees, the claimant must bear its own attorney fees and may not recover such fees under this chapter." This provision appears to be a restatement of the common law American Rule on attorney fees. This rule provides that a "court may award attorney fees only when authorized by statute or by agreement of the parties."[14] Nothing in chapter 558, F.S., expressly authorizes attorney fee awards, and the bill does not appear to preclude the award of attorney fees under laws outside of chapter 558, F.S.

Effective Date

The bill takes effect July 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

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:

The bill could encourage settlement of claims based on construction defects, thus saving all involved the costs of taking these claims to trial. The bill could have a positive impact on the construction industry as the bill bars all claims for construction defects by purchasers of properties "as-is." On the other hand, a purchaser of a building "as-is" may have no recourse for construction defects that are otherwise actionable. However, real estate attorneys may respond to the bill by drafting contracts for the sale of real property to include any causes of action that the seller may have.

[14] *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1148 (Fla. 1985) (citing *Hampton's Estate v. Fairchild-Florida Construction Co.*, 341 So. 2d 759 (Fla. 1976); *Webb v. Scott*, 176 So. 442 (1936); *State v. Barrs*, 99 So. 668 (1924); *Zinn v. Dzialynski*, 14 Fla. 187 (1872)).

C. Government Sector Impact:

The bill could encourage settlement of claims before they enter the court system, thus reducing costs to the court system.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 95.11, 558.004, and 627.441.

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.