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 1246
INTRODUCER:	Senator Wright
SUBJECT:	Construction Defects
DATE:	March 15, 2019
REVISED:	

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

I. Summary:

SB 1246 overhauls Chapter 558 and makes court-ordered, non-binding arbitration mandatory in all construction defect cases. In overhauling ch. 58, F.S., the bill does the following:

- Amends the Legislature's findings in s. 558.001, F.S., clarifying that arbitration is not merely an alternative to litigation but is an effective and cost-efficient method of resolving construction defect claims.
- Repeals the pre-suit notice and opportunity to repair requirements set out in ss. 558.003, 558.004, and 558.005, F.S. and removes corresponding definitions in s. 558.002, F.S.
- Creates s. 558.0045, F.S. requiring court-ordered, non-binding arbitration for any action involving a construction defect.

Under the new procedures requiring non-binding arbitration for construction defect claims, although the parties must elect in writing within 30 days whether to be bound by the arbitrator's determination or to pursue a traditional lawsuit concerning any unresolved claims. In either event, the arbitrator or the jury must make specific written findings in determining the monetary award against a party (contractor, sub-contractor, etc.). These findings must relate to the:

- Nature of the defect;
- Amount awarded against each separate party; and
- Reasons the amount is being awarded against that party (including the amount of the award attributable to each party's repair or replacement of its own defective work as well as the cost to repair and replace damage cause to the non-defective work of other parties).

The bill also specifies that it should not be construed as precluding the parties from entering settlement agreements on their claims either before or after the arbitration process.

The bill is effective July 1, 2019.

II. Present Situation:

Construction Defect Claims

Florida law defines a construction defect as 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."[1] Construction deficiencies may result from:

- Defective material, products, or components used in the construction or remodeling.
- A code violation giving rise to a cause of action pursuant to s. 553.84, F.S.
- Construction design that fails to meet the applicable professional standards of care at the time of governmental approval.
- Construction or remodeling practices that fail to adhere to accepted trade standards, i.e., poor workmanship.

Alternative Dispute Resolution for Construction Defect Claims: Pre-Suit Notice and Opportunity to Repair

Before a property owner may file a lawsuit asserting a construction defect claim, he or she must first follow the pre-suit notice procedure set out in ch. 558, F.S.[2] The pre-suit notice procedure is meant to act as an alternative dispute resolution method[3] of resolving construction defect claims without resorting to lengthy and expensive traditional litigation.[4] The procedure gives the party responsible for the defect an opportunity to repair it, offer a monetary settlement, or both.[5]

The pre-suit notice procedures require the following steps. Note, the timelines are longer if the property owner is an "association" representing more than 20 parcels. [6]

Step 1 - Notice of Claim[7]

The property owner's first step is to serve a written notice of claim on the contractor, subcontractor, supplier, or design professional, as applicable, and provide a reasonably detailed description and location of the defect and any known damage or loss resulting from the defect. Although a property owner is encouraged to serve the notice of claim within 15 days of the discovery of a defect, a notice of claim must be served at least 60 days before the property owner files legal action, or at least 120 days prior if the property owner is an association.[8]

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[1] Section 558.002(5), F.S.
[2] Section 558.003, F.S. (noting that a lawsuit will be stayed until the claimant has complied with the pre-suit notice procedure).
[3] *Altman Contractors, Inc. v. Crum & Forseter Specialty Ins. Co.*, 232 So. 3d 273, 278 (Fla. 2017). See discussion, *infra*.
[4] Section 558.01, F.S.
[5] Section 558.04(5), F.S.
[6] "Association" means a condominium owners' association, different types of homeowners' associations, or association operating a property cooperative. *See* s. 558.002(2), F.S. ("'Association' has the same meaning as in s. 718.103(2), s. 719.103(2), s. 720.301(9), or s. 723.075").
[7] Section 558.005, F.S. provides statutory "Chapter 558 Notice of Claim" language that may be applicable based on the timeframe of the claim.
[8] Section 558.004(1), F.S.

Step 2 - Reasonable Inspection

Once the notice of claim is served, the recipient has either 30 days, or 50 days if the property owner is an association, to inspect the property. The purpose of the recipient's inspection is to determine the nature and cause of each alleged construction defect and the extent of any repairs or replacements necessary to remedy each defect.[9]

Step 3 - Settlement Offers

After inspecting the property, the recipient must decide whether it disputes or agrees there is a defect. In either event, the recipient must inform the owner of the property in writing within 45 days of service after the claim, or 75 days if the owner is an association, whether the recipient:
(1) disputes the claim and will not make an offer to repair or settle the claim;
(2) agrees there is a defect and offers to either (a) repair the defect, (b) settle the claim by the monetary payment, or (c) settle the claim by a combination of monetary payment and repairs; or
(3) agrees there is a defect but makes a conditional offer of insurance proceeds as payment or partial payment to be determined by the recipient's insurer within 30 days.[10]

In the case of an offer contingent on insurance proceeds, notice to the insurer must occur at the same time the property owner is notified of the settlement offer.[11]

If the recipient disputes the claim or fails to respond in writing, the property owner may proceed with a traditional lawsuit. However, if the property owner receives a timely settlement offer, the property owner must serve a written notice accepting or rejecting the offer within 45 days. Any court action will be stayed until the property owner complies with this requirement.[12]

Effects of Pre-Suit Procedure on Lawsuits, Arbitration Clauses, and Insurance Policies

The pre-suit notice procedure affects **traditional lawsuits** by tolling the applicable statute of limitations once the notice of claim is served, but provides these periods may be extended by stipulation of the parties.[13] Otherwise, the pre-suit notice procedure does not bar, limit, or create any rights, causes of action, or defenses in a traditional legal action.[14]

Additionally, the failure of a recipient of a notice of claim to respond with an offer a settlement is not construed as an admission of liability and is not admissible in a court proceeding as evidence of an admission against the recipient's interest.[15] Finally, if a party fails to provide information requested by another other party (such as design plans, photographs, etc.) during the

[9] Section 558.004(2), F.S.
[10] Section 558.004(5), (6), F.S.
[11] Section 558.004(5)(e), F.S.
[12] Section 558.004(7), F.S.
[13] Section 558.004(10), F.S. *See also* s. 95.11 F.S. for applicable statute of limitations provision.
[14] Section 558.004(12), F.S.
[15] Section 558.004(9), F.S. *Compare* Fla. R. Civ. P. 1.110(e) (providing that the defendant's failure in an answer or other responsive pleading to deny the claim and allegations in a complaint filed in a civil lawsuit may be deemed an admission). *See generally* s. 90.408, F.S. ("Evidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value.").

pre-suit notice period, such failure may result in sanctions for discovery violations if the claim proceeds to trial.[16]

Concerning another form of alternative dispute resolution, **arbitration**,[17] the pre-suit notice procedures control over a conflicting "arbitration clause in a contract for the sale, design, construction, or remodeling of real property."[18]

Additionally, the pre-suit notice procedure does not relieve any party from complying with its contractual obligations under a **liability insurance policy** as a condition precedent for coverage.[19] Also, a "notice of claim" for purposes of chapter 558, F.S. "shall not constitute a claim for insurance purposes unless the terms of the policy specify otherwise."[20]

The Florida Supreme Court's Decision in *Altman Contractors v. Crum & Forster Specialty Insurance Company*[21]

The pre-suit notice procedures of chapter 558, F.S., set out above, were recently examined in the case of *Altman Contractors v. Crum & Forseter Specialty Insurance Company (Altman)*. In *Altman*, the Florida Supreme Court was asked to the review the following question certified by the U.S. Court of Appeals of the Eleventh Circuit:

> Is the notice and repair process in chapter 558, F.S., a 'suit' within the meaning of the commercial general liability policy issued by C&F to Altman?[22]

The question in *Altman* arose after Altman, the general contractor on a commercial condominium project, was served with multiple notices of claim of construction defects by the property owner, a condominium association. Altman was insured by Crum & Foster Specialty Insurance Company (C&F) "through seven consecutive one-year commercial general liability (CGL) insurance policies, all of which were materially the same."23 The policy contained the following clause:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.[24]

[16] Section 558.004(15), F.S.
[17] Discussed further, *infra*.
[18] Section 558.004(14).
[19] Section 558.004(13), F.S.
[20] *Id.*
[21] 232 So. 3d 273 (Fla. 2017).
[22] *Id.* at 274.
[23] *Id.* at 275.
[24] *Id.*

The policy further defined the term "suit" as a "civil proceeding" for damages or injuries covered by the policy. It also provided that the term "suit" included mandatory arbitration proceedings and, with the insurer's consent, non-mandatory arbitration proceedings; and included "[a]ny other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent."[25]

Based on the policy language, the majority opinion in *Altman* answered the Eleventh Circuit's question in the affirmative, holding as follows:

> [W]e answer the certified question in the affirmative and hold that the notice and repair process set forth in chapter 558 constitutes a "suit" within the meaning *of the commercial general liability policy issued by C & F* to Altman. Although the chapter 558 process does not constitute a "civil proceeding," it is included in the policy's definition of "suit" as an "alternative dispute resolution proceeding" to which the insurer's consent is required to invoke the insurer's duty to defend the insured.[26]

In reaching this holding, the majority first reasoned that the chapter 558 pre-suit notice procedure did not meet the policy's initial definition of a "suit" as a "civil proceeding." The majority looked to the common definition of a "civil proceeding," which is a mandatory process to adjudicate or enforce rights, regulations, laws, and remedies. Because ch. 558, F.S., does not require that a contractor or other recipient of a notice of claim actually participate in the pre-suit notice procedure, the majority reasoned that the pre-suit notice procedure is not a "civil proceeding" for purposes of the policy's definition.[27] However, because the policy's definition of a "suit" includes "any alternative dispute resolution proceeding," the majority reasoned that the chapter 558 pre-suit notice procedure met the policy's definition of a "suit" because it explicitly refers to itself as a method of alternative dispute resolution.[28]

Both Justice Lewis, in his concurring opinion, and Justice Lawson, in his opinion concurring in part, dissenting part, pointed out that workmanship (construction) defects are not generally covered by the type of policy at issue in *Altman*, a general commercial liability policy.[29] General commercial liability policies "provide protection for personal injury or for property damage caused by the completed product, but not for the replacement and repair of that product."[30] Additionally, Justice Lawson pointed out that the pre-suit notice procedures in ch. 558, F.S., does not meet the common definition of a "proceeding" because it does not provide for third-party facilitation of the process, nor does it provide a way to determine damages.[31] Finally, Justice Lawson pointed out that the language of s. 558.004(13), F.S., stating that a notice of claim does not "constitute a claim for insurances purposes" makes it clear that "insurer participation is not intended."[32] As Justice Lawson explained,

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[25] *Id.*
[26] *Id.* at 279.
[27] *Id.* at 278.
[28] *Id.* at 278.
[29] *Id.* at 279-80, 283.
[30] *Id.* at 279 (quoting *LaMarche v. Shelby Mut. Ins. Co.*, 390 So. 2d 325, 326 (Fla. 1980)(citation omitted).
[31] *Id.* at 284.
[32] *Id.*

> To me, this reflects the Legislature's understanding that the singular type of claim for which it was establishing this process—a construction defect claim—does not generally involve insurance. And, in light of this understanding, the Legislature very carefully drafted the statute so as to exclude from the chapter 558 process secondary claims for personal injury or property damage caused by a construction defect (to which insurance would typically apply). Therefore, the majority construes the statute as applying to a type of claim that the plain language of the statute excludes from the chapter 558 process.[33]

Implications of the *Altman* Decision

The *Altman* decision has created questions concerning the decision's impact on the duties of insureds toward insurers in their commercial general liability (CGL) policies. Many of these questions were presented in a recent article in The Florida Bar Journal:

> If a Ch. 558 notice of claim is a "suit" for purposes of a CGL policy, is the insured now obligated to notify its insurer each time it receives a Ch. 558 notice of claim? The answer is not clear from the court's decision, and a wrong guess by an insured could result in a loss of coverage. The court's opinion, unfortunately, provides no answer.
>
> Assuming an insured provides notice of receipt of a Ch. 558 notice of claim, the immediate impact of the *Altman* decision is to shift the terms of the debate from whether a Ch. 558 notice of claim could *ever* constitute a suit for insurance purposes to a more fact-intensive inquiry. Did the insured provide timely notice to the insurer of the written notice of claim? Did the insurer consent (expressly or by implication) to the insured's participation in the Ch. 558 process? Did the insured make voluntary payments to resolve the claim for which there is no coverage under the policy? These matters were all contested in the *Altman* case, and are likely to be contested in future cases.[34]

Arbitration

Arbitration is a form of alternative dispute resolution, permitting the parties to resolve claims and disputes outside the traditional litigation process. When one or more parties submit a dispute to arbitration, the parties' claims are decided by one or more impartial persons known as arbitrators, who will render a final and potentially binding decision.[35]

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[33] *Id.* at 285.

[34] Reese J. Henderson, Jr., *Altman Contractors, Inc. V. Crum & Forster Specialty Insurance Company: Balancing The Interests Surrounding Potential Insurance Coverage For Ch. 558 Notices Of Claim*, FLA. BAR JOURNAL, Vol. 92, No. 9, p. 11, available at https://www.floridabar.org/the-florida-bar-journal/altman-contractors-inc-v-crum-forster-specialty-insurance-company-balancing-the-interests-surrounding-potential-insurance-coverage-for-ch-558-notices-of-claim/ (last visited March 14, 2019).

[35] American Arbitration Association, *Arbitration*, available at https://www.adr.org/Arbitration (last visited March 14, 2019). *See also* s. 682.011(2), F.S. (defining "arbitrator").

The advantage of arbitration for the parties is it is quicker and more economical than traditional litigation.[36] Additionally, the arbitrators may have specialized industry knowledge concerning the subject matter of the dispute and, thus, a better understanding of the dispute than a judge or jury.[37] The disadvantage, at least to parties to binding arbitration, is that the parties give up substantial safeguards that litigants in court proceedings enjoy, which may include the discovery process where parties obtain information from one another.[38]

Revised Florida Arbitration Code

In Florida, arbitration proceedings are governed by the Revised Florida Arbitration Code (FAC).[39] The FAC prescribes a framework governing the rights and procedures under arbitration agreements made on or after July 1, 2013, and applies to all agreements to arbitration as of July 1, 2016.[40] Unless interstate commerce is implicated,[41] the FAC governs the arbitration process in its entirety, including, but not limited to the scope and enforceability of arbitration agreements, appointment of arbitrators, arbitration hearing process and procedure, entry and enforcement of arbitration awards, and appeals.[42]

Federal Arbitration Act

Pre-dispute arbitration agreements involving interstate commerce are governed by the Federal Arbitration Act (FAA).[43] The FAA established a federal policy that favors and encourages the use of arbitration to resolve disputes. Due to this federal policy, the use of pre-dispute arbitration agreements has expanded beyond use in commercial contexts between large businesses and those with equal bargaining power to use in noncommercial consumer contracts.[44]

Mandatory Non-binding Arbitration

In Florida, a court may "refer any contested civil action filed in a circuit or county court to non-binding arbitration" by either its own motion or the request of the party.[45] Non-binding arbitration is conducted in accordance with Florida Rule of Civil Procedure 1.820 and "provides

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[36] *Id. See also ManorCare Health Services, Inc. v. Stiehl*, 22 So. 3d 96, 105 (Fla. 2d DCA 2009) (Altenbernd, J., specially concurring) (noting "[a]rbitration was intended to create a speedy and economically efficient dispute resolution process").
[37] American Arbitration Association, *Vetted National Roster of Arbitrators*, available at https://www.adr.org/Arbitration (last visited March 14, 2019) (noting that arbitration panels are comprised of "distinguished judges as well as leaders in the legal and business communities with industry-specific knowledge and expertise.").
[38] Amanda Perwin, *Mandatory Binding Arbitration: Civil Injustice By Corporate America*, White Paper for the Center for Justice & Democracy, No. 13, p. 3 (August 2005), *available at* http://centerjd.org/content/white-paper-mandatory-binding-arbitration-civil-injustice-corporate-america (last visited March 14, 2019).
[39] *See* ch. 682. F.S. and ch. 2013-232, Laws of Fla., based on the 2000 revision of the 2000 revision of the Uniform Arbitration Act. The FAC was originally enacted in 1957, ch. 57-402, Laws of Fla., and is based on the 1955 Uniform Arbitration Act (UAA). It was subsequently amended in 1967. *See* ch. 67-254, Laws of Fla.
[40] Section 682.013, F.S.
[41] *O'Keefe Architects, Inc. v. CED Construction Partners, Ltd.*, 944 So. 2d 181, 184 (Fla. 2006).
[42] *See generally* ch. 682, F.S.
[43] See 9 U.S.C.A. ss. 1-16.
[44] Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 AM. BUS. L.J. 361, 366 (Fall 2010).
[45] *Contractor's Mgmt. Sys. of NH, Inc. v. Acree Air Conditioning, Inc.*, 799 So. 2d 320, 321 (Fla. 2d DCA 2001); s. 44.103(2), F.S.

the procedural processes of standard arbitration but with an informal hearing on the dispute's merits and without the finality of a binding decision."[46]

The Legislature has required non-binding mandatory arbitration in other situations. For example, s. 718.1255, F.S. provides for mandatory non-binding arbitration to resolve disputes between a condominium association board and the unit owners pertaining to issues within the scope of the condominium association's authority.

III. Effect of Proposed Changes:

SB 1246 overhauls ch. 558, F.S., and requires court-ordered mandatory arbitration in all construction defect cases.

Amended Provisions

Section 1 amends the Legislature's findings in s. 558.001, F.S., removing less definitive language and clarifying arbitration is not merely an alternative to litigation but an effective and cost-efficient method of resolving construction defect claims.

Section 2 removes three definitions in s. 558.002, F.S.:

(1) "Association," which includes, by cross-reference to their statutory definitions, a condominium owners' association, homeowners' associations, and association operating a property cooperative.[47]
(2) "Completion of building improvement" which means a "certificate of occupancy."
(3) "Service" means "delivery by certified mail . . . by hand delivery, or by and courier with written evidence of delivery."

Although the definition for (1) "association" is deleted by the bill, the definition of a "claimant" remains the same in s. 558.002, F.S., and means "a property owner, including a subsequent purchaser or *association*."[48] Otherwise, it appears all three definitions are removed because they correspond to the repealed provisions in sections 4, 5, and 6.

Repealed Provisions

Sections 4, 5, and 6 repeal the current pre-suit notice and opportunity to repair requirements set out in ss. 558.003, 558.004, and 558.005, F.S.

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[46] American Arbitration Association, *Non-binding Arbitration*, available at https://www.adr.org/Arbitration (last visited March 14, 2019) (stating further that "Non-binding arbitration can be valuable for less complex business-to-business and business-to-consumer disputes where the parties may be too far apart in their viewpoints to mediate or are in need of an evaluation of their respective positions.").
[47] *See* s. 558.002(2), F.S. ("'Association' has the same meaning as in s. 718.103(2), s. 719.103(2), s. 720.301(9), or s. 723.075").
[48] Section 558.002(3), F.S. (emphasis added).

New Provisions

Section 3 creates s. 558.0045, F.S. which requires court-ordered, mandatory, non-binding arbitration for any action involving a construction defect, including civil lawsuits and arbitration actions.

Procedurally, the bill provides that mandatory, non-binding arbitrations conducted under this section must be conducted in accord with ch. 682, F.S. The time arbitration must be commenced is (1) once all the proper parties have been joined to the action, but (2) no later than 180 days after the action is brought. However, any party joined to the action after 180 days is still subject to mandatory, non-binding arbitration.

The bill also requires that specific findings be made by the fact-finder, be it the arbitrator or a jury in the event the parties opt not to be bound by the arbitrator's determination and pursue a traditional law suit. The fact-finder must make the following specific findings in determining an award against a party (including a contractor, sub-contractor, supplier, of design professional):

- The nature of the defect;
- The amount awarded against each separate party (contractor, sub-contractor, design professionals, and suppliers); and
- The reasons the amount is being awarded against that party, including:
  - The amount attributable to each party's repair or replacement of its own defective work.
  - The amount attributable to the cost to repair and replace damage cause to the non-defective work of other parties.
  - Any other damages awarded against the party.

Although arbitration is mandatory, it is not binding. Each party must elect in writing to be bound by the arbitration award within 30 days after it is rendered. If a party does not agree to be bound by the arbitration award, that party may proceed with a traditional lawsuit on any unresolved portions of the claim.

However, the parties may still settle any claims during the arbitration process. The bill specifically states that it should not be construed to preclude partial settlements and compromises of claims by the parties either before or after arbitration.

Additionally, the bill states that it does not affect the rights and duties of insureds and insurance carriers under their policies. However, the bill provides that subrogation (the insurance company stepping in to defend its insured in arbitration or a lawsuit) applies only to the scope of work by the policy's named insured.

Section 7 provides that the bill is effective July 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill will affect insurers who insure contractors, subcontractors, and others under policies containing similarly written provisions to the one in *Altman Contractors* concerning the duty to provide a defense to a lawsuit. Mandatory, non-binding arbitration meets the definition of a "suit" in the policy provision at issue in *Altman Contractors*, and will trigger the insurance company's duty to defend the insured when an otherwise covered claim of construction defect is raised by a property owner.

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.
This bill creates the following sections of the Florida Statutes: 558.0045.
This bill repeals the following sections of the Florida Statutes: 558.003, 558.004, 558.005.

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.