

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 295 Construction Defects
SPONSOR(S): Civil Justice Subcommittee, Santiago
TIED BILLS: **IDEN./SIM. BILLS:** SB 1488

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	9 Y, 4 N, As CS	Mawn	Luczynski
2) Commerce Committee		Brackett	Hamon
3) Judiciary Committee			

SUMMARY ANALYSIS

A “construction defect” 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 real property (“property”). A property owner, including a subsequent purchaser or a community association (“claimant”), may bring a civil action alleging a construction defect claim against the person or party responsible for the construction defect (“respondent”) in a court of competent jurisdiction. A claimant must bring such an action within four years after project completion or, in the case of a latent defect, within ten years of the later of certain statutorily-specified events.

However, at least 60 days before a claimant may bring a construction defect claim in court, or at least 120 days before bringing such a claim if it involves an association representing more than 20 parcels, the claimant must serve written notice of the claim on the respondent. The respondent then has the right to inspect the allegedly defective property, to serve a copy of the notice of claim on any person the respondent believes is responsible for the alleged defect (“secondary respondent”), and to respond with a written settlement offer or to dispute the claim. A settlement offer may include defect repair, monetary payment, or a combination of repairs and monetary payment. If the respondent disputes the claim, or makes an offer to repair or for monetary payment but does not timely follow through, the claimant may bring the claim in court without further notice.

CS/HB 295:

- Creates real estate disclosure requirements relating to construction defect claims for sellers of real property, real estate agents, and brokers.
- Provides that a claimant must attempt to resolve a construction defect claim under any applicable warranty before filing a notice of claim relating to the defect.
- Increases the specificity of detail a claimant must provide in the notice of claim.
- Requires a claimant to affirm the claimant’s personal knowledge of the alleged defect, acknowledge that the claimant is aware of the real estate disclosure obligation and penalties for perjury, and sign the notice of claim under penalty of perjury.
- Requires a special verdict form for all construction defect litigation.
- Provides for notice of a construction defect settlement or judgment to a mortgagee or assignee under specified circumstances.

The bill does not have a fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2020.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

A “construction defect” 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 real property¹ (“property”) resulting from:

- Defective material, products, or components used in the construction or remodeling;
- A violation of the Florida Building Code;²
- A failure of real property’s design to meet the 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.³

A property owner, including a subsequent purchaser or a community association⁴ (“claimant”), may bring a civil action alleging a construction defect claim against the contractor, subcontractor, supplier, or design professional responsible for the construction defect (“respondent”) in a court of competent jurisdiction. A claimant must bring such an action within four years after project completion or, if the case of a latent defect,⁵ within ten years after the date of the later of:

- Actual possession by the owner;
- The issuance of a certificate of occupancy;
- Abandonment of construction if not completed; or
- Completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer.⁶

Notice of Claim

To reduce the need for litigation, Florida law requires a claimant to serve written notice of claim on the respondent at least 60 days before the claimant may bring a construction defect claim in court, or at least 120 days before bringing such a claim if it involves an association representing more than 20 parcels.⁷ The notice of claim must describe in reasonable detail the alleged defect’s nature and, if known, the damage or loss caused by the defect.⁸ The notice of claim must also identify the alleged defect’s location with enough detail to allow the respondent to easily locate the defect.⁹

Within 10 days after service of the notice of claim, or within 30 days after service if the claim involves an association representing more than 20 parcels, the respondent may serve a copy of the notice of claim (“notice copy”) to each contractor, subcontractor, supplier, or design professional the respondent

¹ “Real property” means land that is improved and the improvements on such land, including fixtures, manufactured housing, or mobile homes. S. 558.002(8), F.S.

² Any person or party damaged as a result of a Florida Building Code violation has a cause of action against the person or party who committed the violation, but if the person or party obtained the required building permit, any local government or public agency authorized to enforce the Florida Building Code approves the plans, the construction project passes all required inspections, and if there is no personal injury or damage to other property, there is no cause of action unless the person or party knew or should have known that the violation existed. S. 553.84, F.S.

³ S. 558.002(5), F.S.

⁴ S. 558.002(2), F.S. “Association” has the same meaning as in sections 718.103(2) (Condominium association), 719.301(9) (Cooperative association), 720.301(9) (Homeowners’ association) and 723.075, F.S. (Mobile home park homeowners’ association).

⁵ A “latent defect” is a hidden or concealed defect that could not be discovered by reasonable and customary observation or inspection made with ordinary care. Blacks Law Dictionary 611 (6th ed. 1996).

⁶ S. 95.11(3)(c), F.S.

⁷ Ss. 558.001 and 558.004(1)(a), F.S.

⁸ S. 558.004(1)(b), F.S.

⁹ *Id.*

reasonably believes is responsible for each defect specified in the notice (“secondary respondent”) and must note the specific defect for which he or she believes each secondary respondent is responsible.¹⁰

Inspection and Testing

Within 30 days after service of the notice of claim, or within 50 days after service if the claim involves an association representing more than 20 parcels, the respondent has a right to perform a reasonable inspection of the property to assess each alleged defect and the extent of any repairs or replacements necessary.¹¹ The claimant must provide the respondent reasonable access to the property during normal working hours, and the respondent must reasonably coordinate the timing and manner of the inspections with the claimant to minimize the number of inspections.¹² Each secondary respondent is entitled to inspect the property in the same manner as the respondent.¹³

If the respondent determines that destructive testing is necessary to reveal the alleged defect’s nature and cause, the respondent must give the claimant written notice describing the destructive testing to be performed, the person chosen to do the testing, the estimated amount of time needed for testing and repairs, and the money offered for repair costs.¹⁴ If the claimant objects to the person chosen to perform the testing, the respondent must provide the claimant with a list of three qualified persons from which the claimant may choose one person to perform the testing.¹⁵ Any destructive testing must be done at a mutually agreeable time, must not make the property uninhabitable, and does not give the party performing the destructive testing or associated repairs construction lien¹⁶ rights unless the claimant personally contracts with such party.¹⁷ Additionally, the claimant has a right to observe the destructive testing.¹⁸ However, if the claimant refuses to agree to and subsequently allow reasonable destructive testing, the claimant loses the right to claim damages which could have been avoided or mitigated had destructive testing been done when requested and a remedy properly executed.¹⁹

Settlement Offers

Within 15 days after service of a notice copy, or within 30 days of service if the claim involves an association with more than 20 parcels, the secondary respondent must give the respondent a written reply.²⁰ Such reply must include a report, if any, of the scope of any property inspections conducted by the secondary respondent and the findings and results of such inspections.²¹ Additionally, within 45 days of service of the notice of claim, or within 75 days of service if the claim involves an association representing more than 20 parcels, the respondent must give the claimant a written reply.²² Such replies must include a written:

- Offer to remedy the alleged defect at no cost to the claimant, a detailed description of proposed repairs, and a timetable for repair completion;
- Offer to compromise and settle the claim by monetary payment and a timetable for making payment;
- Offer to compromise and settle the claim by a combination of repairs and monetary payment that includes a detailed description of proposed repairs and a timetable for repair completion and monetary payment;
- Statement that the person disputes the claim and will not remedy the alleged defect or compromise and settle the claim; or

¹⁰ S. 558.004(3), F.S.

¹¹ S. 558.004(2), F.S.

¹² *Id.*

¹³ S. 558.004(3), F.S.

¹⁴ S. 558.004(2)(a) and (b), F.S.

¹⁵ S. 558.004(2)

¹⁶ Under Part I of chapter 713, F.S., a contractor, subcontractor, material supplier, laborer or a professional (such as an architect or landscape artist) may claim a lien on a property on or for which such person performed work or provided materials even where such person does not have a direct contract with the property owner.

¹⁷ S. 558.004(2)(d), (f), and (g), F.S.

¹⁸ S. 558.004(2)(e), F.S.

¹⁹ S. 558.004(2)(g), F.S.

²⁰ S. 558.004(4), F.S.

²¹ *Id.*

²² S. 558.004(5), F.S.

- Statement that a monetary payment will be determined by the person's insurer within 30 days after notification to the insurer.²³

A claimant who receives a timely settlement offer must accept or reject the offer by serving written notice of such acceptance or rejection on the respondent within 45 days after receiving the offer.²⁴ However, a claimant may, without further notice, bring an action against the respondent if the respondent disputes the claim and will not remedy the alleged defect or compromise and settle the claim, or does not timely respond to the notice of claim.²⁵

If the claimant timely and properly accepts a repair offer, the claimant must give the respondent reasonable access to the property during normal working hours to perform the repairs by the agreed-upon completion date.²⁶ If the respondent completes the repairs or makes payment within the agreed time and in the agreed manner, the claimant cannot bring an action for the claim described in the notice.²⁷ However, a claimant may, without further notice, bring an action against the respondent if the claimant timely and properly accepted a repair or payment offer, but the repairs or payment are not made within the agreed time and in the agreed manner.²⁸

Special Verdicts

A verdict is the final decision of the jury concerning those matters of fact which were submitted to it by the court for its determination.²⁹ A general verdict is the jury's final declaration as to the truth of the matter submitted to their determination and which is at issue, while a special verdict is one in which the jury, in a civil case, makes separate findings on the basis of the evidence presented.³⁰ While special verdicts are required in some jury trials, such as those involving comparative negligence, special verdicts are allowed, but not required, in construction defect claims.³¹

Real Estate Disclosures

Where the seller of a home knows of facts materially affecting the property's value which are not readily observable to and are not known by the buyer, which may include latent construction defects, the seller must disclose such facts to the buyer.³² A real estate agent and a broker must also disclose such facts when they are known to him or her.³³

Notice to Mortgagee or Assignee

A mortgage is any conveyance, obligation conditioned or defeasible, bill of sale or other instrument of writing conveying or selling property to secure the payment of money.³⁴ A mortgage gives the mortgagee or its assignee a specific lien on the property described in the mortgage but does not convey legal title or the right of possession to the property to the mortgagee or assignee.³⁵

Some mortgage contracts require the mortgagor to notify the mortgagee if the property is damaged. Additionally, many payments on a property insurance claim are made out to both the mortgagor and the mortgagee, giving the mortgagee notice of property damage even where such notice is not required by contract. However, if a claimant succeeds on a construction defect claim related to a property on which a mortgagee or its assignee has a security interest, Florida law does not require the claimant to notify the mortgagee or assignee of the defect.

²³ S. 558.004(4) and (5), F.S.

²⁴ S. 558.004(7), F.S.

²⁵ S. 558.004(6), F.S.

²⁶ S. 558.004(8), F.S.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Fla. Jur. 2d Trial § 282.

³⁰ *Id.*

³¹ See *Lawrence v. Florida East Coast Railway Co.*, 346 So. 2d 1012 (Fla. 3d DCA 1958); see also ch. 558, F.S.

³² *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985).

³³ *Johnson v. Davis*, 480 So. 2d at 625.

³⁴ S. 697.01(1), F.S.

³⁵ S. 697.02, F.S.

Effect of Proposed Changes

Notice of Claim

CS/HB 295 prohibits a claimant from filing a notice of claim unless the claimant has first submitted a claim for the alleged defect under any applicable warranty and the warranty provider has denied the claim or failed to offer a satisfactory remedy. The bill also provides that, in addition to information required under current law, a notice of claim must:

- Describe the nature of the alleged defect and its location in specific detail.
- Include any repair estimates or expert reports the claimant obtained relating to the alleged defect and, if the alleged defect is visible, at least one photograph of such defect.
- Affirm the claimant has personal knowledge of the alleged defect.
- Acknowledge the claimant is aware of real estate disclosure obligations and perjury penalties.
- Be signed by the claimant under penalty of perjury.

Further, the bill requires a respondent to serve a notice copy on any secondary respondent, removing the respondent's discretion over whether to involve the secondary respondents.

Inspection and Testing

The bill expressly provides that a respondent must reasonably coordinate the timing of any property inspections with the claimant and any secondary respondents to minimize the number of inspections. The bill also requires a claimant to give a secondary respondent reasonable access to the property for defect inspections.

Special Verdicts

The bill requires both a jury verdict and a final judgment³⁶ issued in a construction defect claim to include a detailed description of the nature of the defect and the monetary amount awarded against each party separately as well as the monetary amount of the judgment attributable to:

- Repairing or replacing the party's defective work.
- Repairing or replacing other non-defective property damaged by the defective work.
- Other damages awarded against the party.

Real Estate Disclosures

The bill requires the seller of real property to disclosure to a buyer, in a written disclosure statement set forth in the sale contract or a separate writing:

- Whether the seller, or an association acting on the seller's behalf, made a construction defect claim relating to the real property subject to the sale contract;
- The specific nature of the defect alleged;
- The claim's outcome; and
- Whether the defect was repaired, and if so, a repair description.

Further, the bill requires a real estate agent or broker to disclose, if known, whether the seller or an association acting on the seller's behalf made a construction defect claim relating to the property subject to the sale contract, the outcome of the claim, and what, if any, repairs were made. These provisions ensure a prospective buyer has notice of any unrepaired construction defects prior to purchasing a property.

Notice to Mortgagee or Assignee

³⁶ A final judgment is the last decision from a court that resolves all issues in dispute and settles the parties' rights with respect to those issues. A final judgment leaves nothing except decisions on how to enforce the judgment, whether to award costs, and whether to file an appeal. Legal Information Institute, *Final Judgment*, https://www.law.cornell.edu/wex/final_judgment (last visited Jan. 31, 2020).

The bill provides that, if a construction defect claim results in a monetary settlement or judgment in the claimant's favor, and a mortgagee or assignee has a security interest in the real property related to the claim, the claimant must, within 90 days of the claim's resolution, send written notice to the mortgagee or assignee of:

- The specific nature of the defect;
- The claim's outcome, including the amount of any monetary settlement reached or judgment awarded; and
- Whether the defect was repaired and a repair description or, if repairs have not begun, the anticipated repair start date.

If defect repairs are completed after the claimant sends such notice, the bill requires the claimant to supplement the notice within 30 days of repair completion. This ensures that the mortgagee or assignee has knowledge of property defects which may decrease the value of property in which it has a security interest.

The bill provides an effective date of July 1, 2020.

B. SECTION DIRECTORY:

Section 1: Amends s. 475.278, relating to authorized brokerage relationships; presumption of transaction brokerage; required disclosures.

Section 2: Amends s. 558.004, F.S., relating to notice and opportunity to repair.

Section 3: Creates s. 558.0045, F.S., relating to construct defect litigation; special requirements.

Section 4: Creates s. 558.006, F.S., relating to construction defect disclosure statement.

Section 5: Creates s. 558.007, F.S., relating to notice to mortgagee or assignee.

Section 6: Provides an effective date of July 1, 2020.

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:

The bill may reduce fraudulent construction defect claims, resulting in savings for home builders and contractors which may then be passed on to consumers. The bill may also reduce litigation costs as legitimate claims are resolved through the warranty process or settled.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to effect counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 29, 2020, the Civil Justice Subcommittee adopted a strike-all amendment, as amended, and reported the bill favorably as a committee substitute. The strike-all:

- Restored the authority of a condominium, cooperative, or homeowners' association to bring a construction defect claim.
- Deleted provisions:
 - Requiring mandatory non-binding arbitration of construction defect claims.
 - Conditioning payment after a settlement or judgment on a construction defect claim on the claimant entering into a repair contract.
 - Requiring the claimant to enter into a repair contract within a specified time.
 - Reducing the amount of any settlement or judgment to full contract price.
 - Increasing the response period after service of a copy of the notice of claim.
- Created real estate disclosure requirements relating to construction defect claims for sellers of real property, real estate agents, and brokers.
- Provided that a claimant must attempt to resolve a construction defect claim under any applicable warranty before filing a notice of claim relating to the defect.
- Increased the specificity of detail a claimant must provide in the notice of claim.
- Required a claimant to affirm the claimant's personal knowledge of the alleged defect, acknowledge that the claimant is aware of the real estate disclosure obligation and penalties for perjury, and sign the notice of claim under penalty of perjury.
- Required a special verdict form for all construction defect litigation.
- Provided for notice of a construction defect settlement or judgment to a mortgagee or assignee under specified circumstances.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.