

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 21 Construction Defects
SPONSOR(S): Andrade and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 270

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Property Rights Subcommittee	10 Y, 8 N	Mawn	Jones
2) Regulatory Reform Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

A “construction defect” is a deficiency in, or arising out of, the design, specifications, surveying, planning, supervision, or observation of construction, or the construction, repair, alteration, or remodeling of real property (“property”), and includes a Florida Building Code violation. 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 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 certain specified events.

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 and serve a copy of the notice of claim on any person the respondent believes is responsible for the alleged defect (“secondary respondent”). The respondent must respond to the notice with a written settlement offer or a statement disputing the claim. A settlement offer may include an offer to repair the defect, provide monetary payment, or a combination of both. If the respondent disputes the claim, or makes a settlement offer but does not timely follow through, the claimant may file suit without further notice.

HB 21:

- Limits actionable violations of the Florida Building Code to material violations.
- Requires a claimant to attempt to resolve a construction defect claim or Florida Building Code violation claim under any applicable warranty before sending a notice of claim or commencing legal action.
- Increases the specificity of detail a claimant must provide in the notice of claim and requires the claimant to include photographs of the damage and repair estimates or expert reports.
- Requires a claimant to affirm in the notice of claim that he or she has personal knowledge of the alleged defect and acknowledge that he or she is aware of the penalties for perjury.
- Requires a claimant to personally sign the notice of claim under penalty of perjury.
- Mandates that the respondent serve a copy of the notice of claim on each person the respondent believes is responsible for the defect.
- Requires a prevailing claimant to notify any mortgage company with a security interest in the property of the claim’s outcome and the defect’s repair.

The bill may have a positive insignificant fiscal impact on state government. The bill does not have a fiscal impact on local governments.

The bill provides an effective date of July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Florida Building Code

The Florida Building Code sets minimum standards for the design, construction, erection, alteration, modification, repair, and demolition of buildings, structures, and facilities in the state. A person harmed by a Florida Building Code violation has a civil cause of action against the culpable party. However, there is no cause of action against a party who did not know and had no reason to know of the violation if:

- The party obtained the required building permit;
- The party receive government approval of the plans;
- The construction project passed all required inspections; and
- There was no personal injury or damage to other property.¹

Any party responsible for a material Florida Building Code violation who failed to correct the violation within a reasonable time may be fined, and a failure to pay the fine will result in license suspension.²

Construction Defect Claims

A “construction defect” is a deficiency in, or arising out of, the design, specifications, surveying, planning, supervision, or observation of construction, or the construction, repair, alteration, or remodeling of real property³ (“property”) resulting from:

- Defective material, products, or components used in the construction or remodeling;
- A Florida Building Code violation;
- 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.⁴

A property owner, including a subsequent purchaser or a community association⁵ (“claimant”), may bring a civil action alleging a construction defect claim against the contractor, subcontractor, supplier, or design professional⁶ responsible for the construction defect (“respondent”) in a court of competent jurisdiction.⁷ A claimant must bring such action within four years after project completion or, in the case of a latent defect,⁸ 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

¹ S. 553.84, F.S.

² A “material violation” is a violation existing within a completed building, structure, or facility which may reasonably result, or has resulted, in physical harm to a person or significant damage to the performance of a building or its systems. Material violation fines must be at least \$500 but no more than \$5,000 per violation. S. 553.781, F.S.

³ “Real property” means land that is improved and the improvements thereon, including fixtures, manufactured housing, or mobile homes. S. 558.002(8), F.S.

⁴ S. 558.002(5), F.S.

⁵ “Community associations” are condominium, cooperative, homeowners’, and mobile home park homeowners’ associations. S. 558.002(2), F.S.

⁶ A design professional employed by a business entity or an agent thereof is not individually liable for damages resulting from negligence occurring within the course and scope of a professional services contract under certain conditions. S. 558.0035, F.S.

⁷ S. 558.004, F.S.

⁸ 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).

- Completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer.⁹

Notice of Claim

Florida law requires a claimant to serve a written notice of claim on the respondent at least 60 days before bringing a construction defect claim in court, or at least 120 days before bringing such claim if it involves an association representing more than 20 parcels. 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.¹⁰ The notice of claim must also identify the alleged defect's location with enough detail to allow the respondent to easily locate the defect.¹¹

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 reasonably believes is responsible for each defect specified in the notice ("secondary respondent") and must note therein the specific defect for which he or she believes each secondary respondent is responsible.¹²

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 necessary repairs or replacements.¹³ The claimant must give the respondent reasonable access to the property during normal working hours, and the respondent must reasonably coordinate the timing and manner of the inspections to minimize the number of inspections.¹⁴ Each secondary respondent is also entitled to inspect the property.¹⁵

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.¹⁶ 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.¹⁷ 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 lien¹⁸ rights unless the claimant personally contracts with such party.¹⁹ Additionally, the claimant has a right to observe the destructive testing.²⁰ However, if the claimant refuses to allow reasonable destructive testing, the claimant loses the right to claim damages which could have been avoided or mitigated by the destructive testing.²¹

Disclosures

⁹ S. 95.11(3)(c), F.S.

¹⁰ S. 558.004(1)(b), F.S.

¹¹ *Id.*

¹² S. 558.004(3), F.S.

¹³ S. 558.004(2), F.S.

¹⁴ *Id.*

¹⁵ S. 558.004(3), F.S.

¹⁶ S. 558.004(2)(a) and (b), F.S.

¹⁷ S. 558.004(2)

¹⁸ Under Part I of chapter 713, F.S., a contractor, subcontractor, material supplier, laborer, or 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.

¹⁹ S. 558.004(2)(d), (f), and (g), F.S.

²⁰ S. 558.004(2)(e), F.S.

²¹ S. 558.004(2)(g), F.S.

A claimant and a respondent must exchange, within 30 days after service of a written request, any design plans; specifications; photographs and videos of the alleged defect; expert reports describing the alleged defect; subcontracts; purchase orders for the allegedly-defective work or materials; and maintenance records and other documents related to the alleged defect's discovery, investigation, causation, and extent.²² A party may assert any claim of privilege²³ recognized in state law with respect to a requested disclosure.²⁴

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.²⁵ 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.²⁶ 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.²⁷ Such reply 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;
- 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;
- Statement that the respondent disputes the claim and will not remedy the alleged defect or settle the claim; or
- Statement that a monetary payment will be determined by the respondent's insurer within 30 days after insurer notification.²⁸

A claimant who receives a timely settlement offer must accept or reject the offer by serving written notice within 45 days after receiving the offer.²⁹ 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 settle the claim, or does not timely respond to the notice of claim.³⁰

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.³¹ 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.³² 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.³³

²² S. 558.004(15), F.S.

²³ A claim of privilege protects certain information from disclosure or discovery. The Florida Evidence Code recognizes certain privileges, including the lawyer-client privilege, the husband-wife privilege, and the psychotherapist-patient privilege. See ch. 90, F.S.

²⁴ *Id.*

²⁵ S. 558.004(4), F.S.

²⁶ *Id.*

²⁷ S. 558.004(5), F.S.

²⁸ S. 558.004(4) and (5), F.S.

²⁹ S. 558.004(7), F.S.

³⁰ S. 558.004(6), F.S.

³¹ S. 558.004(8), F.S.

³² *Id.*

³³ *Id.*

Opt-Out Provision

The notice and cure provisions of chapter 558, F.S., described above, do not apply to a construction defect claim if the claimant and respondent have agreed in writing to opt out of such provisions.³⁴ This means that, if a contract is silent, the parties to the contract must comply with the notice and cure provisions; however, a contract may, by its terms, expressly opt out of such provisions and may provide an alternative dispute resolution mechanism applicable to claims arising under the contract.

New Home Warranties

New home warranties guarantee the repair or replacement of certain elements of a newly-constructed home, if necessary, within a specified time. Builders often back new home warranties; however, builders sometimes purchase warranties from independent companies that assume responsibility for the claims, and homeowners may purchase additional coverage from third-party warranty companies.³⁵

The duration of coverage offered under a new home warranty varies based on the type of element at issue. Most new home warranties cover workmanship and materials, such as drywall and paint, for one year after construction.³⁶ Coverage for elements such as air conditioning, plumbing, and electricity typically lasts for two years, and some new home warranties cover major structural defects making a home unsafe for up to ten years.³⁷ However, new home warranties typically do not cover expenses a homeowner incurs due to a construction defect or repair, such as temporary relocation costs, or superficial defects, such as small cracks in tile or cement.³⁸

Generally, a new home warranty contract specifies how a claim must be made under the warranty. Many new home warranties require mediation³⁹ of disputed warranty claims, followed by mandatory binding arbitration⁴⁰ if mediation is unsuccessful.⁴¹

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.⁴² In Florida, 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 its assignee.⁴³

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, Florida law does not currently require a mortgagor to notify the mortgagee of any construction defects to the mortgaged property.

³⁴ S. 558.005, F.S.

³⁵ Federal Trade Commission ("FTC"), *Warranties for Newly Built Homes*, <https://www.consumer.ftc.gov/articles/0186-warranties-newly-built-homes> (last visited Feb. 9, 2021).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Mediation is a process whereby a neutral third person helps the parties discuss and try to voluntarily resolve their dispute.

⁴⁰ Mandatory binding arbitration is a process whereby parties to a contract agree to submit their disputes to a third party instead of to the courts, and there are no appellate rights.

⁴¹ FTC, *supra* note 35.

⁴² S. 697.01(1), F.S.

⁴³ S. 697.02, F.S.

Effect of the Bill

Florida Building Code

The bill limits an actionable Florida Building Code violation to a “material” violation. The bill also requires any person bringing a Florida Building Code violation claim to first submit a claim for the alleged violation under any applicable warranty and have such claim denied or an unsatisfactory remedy offered by the warranty provider within the time limits provided in the warranty.

Construction Defect Claims

Notice of Claim

The bill prohibits a claimant whose contract is subject to Ch. 558, F.S., from filing a notice of claim and commencing litigation on a construction defect claim before first submitting a claim for the alleged defect under any applicable warranty and having such claim denied or an unsatisfactory remedy offered by the warranty provider within the time limits provided in the warranty.

The bill also provides that a notice of claim must:

- Describe the alleged defect and its location in specific (instead of “reasonable”) 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 the penalties for perjury.⁴⁴
- Be signed by the claimant directly below a statement declaring that, under penalty of perjury, the claimant has read the notice of claim and the facts alleged are true to the best of his or her knowledge or belief.

Further, the bill requires a respondent to serve a notice copy on any secondary respondent and provides that a person who willfully includes a false statement in the notice of claim commits perjury and is subject to punishment as provided by law.

Inspection and Testing

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

Disclosures

The bill modifies what the claimant and the respondent must exchange upon written request prior to the filing of a construction defect claim to exclude photographs and expert reports already provided in the notice of claim, so that the claimant does not have to make such disclosures twice.

Notice to Mortgagee or Assignee

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, send written notice to the mortgagee or assignee of:

- The defect’s specific nature;
- The claim’s outcome, including the amount of any monetary settlement reached or judgment awarded; and

⁴⁴ Perjury is a false statement made under oath. Perjury not in an official proceeding is a first degree misdemeanor punishable by up to one year in the county jail and a \$1,000 fine. Ss. 775.082, 775.083, and 837.012, F.S.

- 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.

The bill provides an effective date of July 1, 2021.

B. SECTION DIRECTORY:

Section 1: Amends s. 553.84, F.S., relating to statutory civil action.

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

Section 3: Creates s. 558.006, F.S., relating to notice to mortgagee or assignee.

Section 4: Provides an effective date of July 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill may have a positive insignificant impact on state government, as it may reduce the number of construction defect claims and Florida Building Code violation claims filed in the state court system.

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 and prevent costly litigation in cases where the builder is willing to repair the defect, resulting in savings for builders and contractors. However, the bill may increase costs to homeowners unable to bring civil actions and recover damages for “immaterial” Florida Building Code violations and who may, consequently, bear the cost of repairing any damage themselves.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The Florida Constitution provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."⁴⁵ In *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), the Florida Supreme Court established a test to determine when the Legislature may restrict a judicial remedy. Where citizens have had a historical right of access to the courts, whether through statute or common law,⁴⁶ the Legislature can only eliminate a judicial remedy under two circumstances. First, if it asserts a valid public purpose, the Legislature may restrict access to the courts if it provides a reasonable alternative to litigation.⁴⁷ Second, if the Legislature finds that there is an overpowering public necessity and that there is no alternative method for meeting that necessity, it may restrict access to the courts.⁴⁸

Section 553.84, F.S., created a statutory civil cause of action for certain Florida Building Code violations. The bill limits actionable Florida Building Code violations to only "material" violations. However, because s. 553.84, F.S., was not effective until 1974 – after the 1968 Florida Constitution's Declaration of Rights was adopted – there is no "historical right of access to the courts" in this area under *Kluger*; thus, the Legislature may restrict the right.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

⁴⁵ Art. I, s. 21, Fla. Const.

⁴⁶ A historical right of access to the courts is a right provided by statutory law predating the adoption of the Florida Constitution's Declaration of Rights in 1968 or a right now part of the state's common law that existed in common law as of July 4, 1776. See *Kluger*, 281 So. 2d at 4.

⁴⁷ *Id.*

⁴⁸ *Id.*