

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 270

INTRODUCER: Senator Perry

SUBJECT: Construction Defects

DATE: February 12, 2021

REVISED: _____

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

I. Summary:

SB 270 revises and expands the mandatory procedures that govern how construction defect disputes are resolved. In broad terms, the bill amends three areas of the dispute resolution process:

- The preliminary notice of claim and corresponding requirements that allege building defects;
- The pre-litigation requirements that allege building code violations; and
- The notice a prevailing claimant must provide to someone who possesses a security interest in a property when a construction defect settlement or judgment is obtained.

A “notice of claim” is the written notice that a property owner must serve on a contractor or similar person to alert him or her to an impending dispute alleging construction defects. The notice requirements are expanded to incorporate more details including an acknowledgement that willfully including a false statement amounts to perjury. A person served with a notice of claim no longer has the discretion, but is required, to serve a copy on others who might be responsible for a construction defect. The bill expands the scope of people authorized to inspect for construction defects and requires the sharing of additional photographs and expert reports.

The bill requires a property owner who alleges a “material” violation of the building code to exhaust all claims that may be covered by a warranty with the warranty provider before serving a written notice of claim to a contractor, subcontractor, supplier, or design professional. The current phrase “violation” is replaced with “material violation” and a definition is provided for what constitutes a material violation.

If a property owner prevails in a construction defect claim and receives a monetary settlement or judgment and a mortgagee or assignee has a security interest in the property at issue, the property owner must notify the holder of the security interest of the result within 90 days. The bill specifies the details that must be included in the notice.

The bill takes effect July 1, 2021.

II. Present Situation:

Construction Defect Disputes (Section 2)

Background

Chapter 558, F.S., provides an alternative dispute resolution procedure that a property owner must follow before initiating a construction defect action against a contractor, subcontractor, supplier, or design professional.¹ An action under ch. 558, F.S., includes a lawsuit or arbitration proceeding. According to the stated purpose of the chapter, this procedure is necessary to reduce the need for litigation and protect the rights of property owners.^{2,3} Before a property owner may file an action, he or she is required to first provide to the contractor or other responsible person a notice and an opportunity to repair the alleged defect, thereby often resolving the matter before substantial legal costs are incurred. The pre-suit notice requirement is a mandatory procedure that must be complied with before a suit is filed.⁴

Written Notice Requirement

Before a claimant may file a civil action or arbitration proceeding for a construction defect, he or she must serve a written notice of claim on the contractor, subcontractor, supplier, or design professional.⁵ The notice of claim must be served at least 60 days before filing the action, but if the claim involves an association that represents more than 20 parcels, the notice must be served at least 120 days before the action is filed. If the claim in question arises from work that is performed under a contract, the written notice must be served on the person with whom the claimant contracted.⁶

Contents and Service of the Notice of Claim

The notice of claim must describe in reasonable detail the nature of each alleged construction defect and the damage or loss that results from the defect, if it is known. The notice must also

¹ Chapter 2003-49, Laws of Fla.

² Section 558.001, F.S.

³ A construction defect is defined as 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 resulting from:

(a) Defective material, products, or components used in the construction or remodeling;

(b) A violation of the applicable codes in effect at the time of construction or remodeling which gives rise to a cause of action pursuant to s. 553.84, F.S.;

(c) A failure of the design of real property to meet the applicable professional standards of care at the time of governmental approval; or

(d) A failure to construct or remodel real property in accordance with accepted trade standards for good and workmanlike construction at the time of construction. Section 558.002(5), F.S.

⁴ *Gindel v. Centex Homes*, 267 So. 3d 403 (Fla. 4th DCA 2018).

⁵ If a claimant files a construction defect action without first complying with the written notice requirement of the chapter, a party named in the action may make a motion to stay the action, and the court must stay the action, without prejudice. The action may not proceed until the claimant complies with the requirements of the chapter. Section 558.003, F.S.

⁶ Section 558.004(1)(a), F.S.

identify the location of each alleged defect with sufficient detail to allow the responding party to locate the alleged defect without an undue burden.⁷

The claimant must try to serve the notice of claim within 15 days after discovering the alleged defect, but failing to do so does not prevent the claimant from filing an action.⁸

Reasonable Inspection and Access

The person served with a notice of claim or the person's contractors or agents may perform a reasonable inspection of the property or of each unit subject to a claim to assess the alleged construction defect. The person who is served with the notice must reasonably coordinate the timing and manner of the inspections with the claimant in an effort to minimize the number of inspections.⁹

A person served with a notice of claim as described above *may* serve a copy of the notice of claim to each contractor, subcontractor, supplier, or design professional whom he or she reasonably believes is responsible for the defect specified in the notice of claim. The service of the notice on the potentially responsible party may not be construed as an admission of any kind. Each contractor, subcontractor, supplier, and design professional may also inspect the property as described above.¹⁰

Response Required

The contractor, subcontractor, supplier, or design professional who has been served with a notice of claim must serve a written response to the person who served a copy of the notice within the time frames specified in statute. The response must include a report, if any, of the scope of any inspection of the property and the findings and results of the inspection.¹¹

Sharing of Information

A claimant and each person served with a notice of claim are required to exchange¹² any design plans, specifications, and as-built plans, photographs of the alleged defect, expert reports, subcontracts, purchase orders, maintenance records, and other documents related to discovery, investigation, causation, and the extent of the alleged defect.

Building Construction Standards (Section 1)

Chapter 553, F.S., which establishes the state's building construction standards, is divided into eight parts. Part IV is devoted to the Florida Building Code and contains the statute that governs statutory civil actions.

⁷ Section 558.004(1)(b), F.S.

⁸ Section 558.004(1)(c), F.S.

⁹ Section 558.004(2), F.S.

¹⁰ Section 558.004(3), F.S.

¹¹ Section 558.004(4), F.S. Section 558.004(5), F.S., specifies the information that must be contained in a response.

¹² Section 558.004(15), F.S. Although parties must exchange information, a party may assert a claim of privilege with respect to any disclosure obligations specified in ch. 558, F.S.

The section provides that, notwithstanding any other available remedies, a person or party damaged as a result of a violation of the Florida Building Code has a cause of action against the person or party who committed the violation. However, if the person alleged to have violated the code obtained the required building permits and:

- The plans were approved by a local government or public agency having authority to enforce the Florida Building Code;
- The construction project passed all of the required inspections under the code; and
- If there is no personal injury or damage to property other than the property that is the subject of the permits, plans, and inspection;

Then the right to bring an action does not apply *unless* the person or party who allegedly committed the code violation knew or should have known that the violation existed.¹³

Implied Warranties of Fitness and Merchantability (Section 3)

The ancient doctrine of caveat emptor or “let the buyer beware” stood as the rule of law for centuries and governed disputes that arose from the sale of real property. The doctrine held that, unless there was a stated agreement to the contrary, the person who sold real property was not responsible to the purchaser for a defective condition that existed when the seller transferred possession of the property to the purchaser. In other words, purchasers bought real property at their own risk. Under the doctrine, the seller had no duty to communicate to the purchaser the existence of latent, or unseen, defects in the property unless the seller represented by act or implication, that the defects did not exist. The only protections that the buyer received were the ones for which the buyer specifically contracted.¹⁴

American courts have regularly enforced express warranties and, with time, have receded from an absolute doctrine of caveat emptor. As goods were mass produced, courts recognized that sellers were in a better position than buyers to discover and prevent defective goods. As such, courts recognized that fairness required them to place more responsibility on the seller for identifying defective goods by imposing the concept of implied warranties. This became especially apparent in the context of complicated real property development, sale, and construction.¹⁵

In 1972, the Florida Supreme Court determined that the implied warranties of fitness and merchantability applied to the purchase of new homes and condominiums.¹⁶ The Court later stated that a warranty is breached if the home “is rendered not reasonably fit for the ordinary or general purpose intended.”^{17,18}

¹³ Section 553.84, F.S.

¹⁴ *Maronda Homes, Inc. of Florida v. Lakeview Reserve Homeowners Association, Inc.*, 127 So. 3d 1258, 1263-1264 (Fla. 2013).

¹⁵ *Id.*

¹⁶ *Gable v. Silver*, 258 So. 2d 11 (Fla. 4th DCA) adopted, 264 So. 2d 418 (Fla. 1972).

¹⁷ *Maronda*, 127 So. 3d at 1268 (citing *Putnam v. Roudebush*, 352 So. 2d 908, 910 (Fla. 2d DCA 1977)).

¹⁸ There are time limitations, called statutes of repose, that limit how long a claimant has to bring an action. When a civil action is founded on the design, planning, or construction of an improvement to real property, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. Under Florida construction law, the action must be commenced within 10 years after the date of: actual possession by the owner; issuance of a certificate of occupancy, abandonment of construction if not completed, or completion of the contract or termination of the contract

III. Effect of Proposed Changes:

Construction Defect Disputes (Section 2)

Preliminary Requirement to Exhaust Warranty Claims

The statute requiring a property owner to first serve notice and provide an opportunity to repair before filing suit is amended to require the property owner to first exhaust any warranty claims before serving a notice of claim. Specifically, a claimant must first submit a claim to the warranty provider to determine whether the alleged defect might be covered under a warranty provision. If the warranty provider either denies the claim or does not offer a remedy satisfactory to the claimant within the time limits set forth in the warranty, the claimant may proceed with a notice of claim.

Contents of the Notice of Claim Provision

The content of a notice of claim is amended to require additional information. The claimant must:

- Describe in specific, not reasonable, detail each alleged construction defect;
- Include at least one photograph of the alleged defect or evidence of the defect if it is visible, any repair estimates or expert reports relating to the alleged defect, and a description of the damage or loss that results from the alleged defect if that information is known;
- Identify the specific location of each alleged construction defect;
- Affirm that he or she has personal knowledge of the alleged construction defect;
- Acknowledge that he or she is aware of the penalties of perjury as imposed under ch. 837, F.S.; and
- Sign the notice and include the following statement directly above the claimant's signature line in 18-point uppercase and boldfaced type: "Under penalty of perjury, I declare that I have read the foregoing statement and the facts alleged are true to the best of my knowledge and belief."

If anyone willfully includes a false statement in the notice of claim, he or she commits perjury. However, a cross-reference to a specific perjury statute is not included. Chapter 837, F.S., contains several perjury provisions and accompanying penalties. Perjury that does not occur in an official proceeding,¹⁹ which seems to fit this situation, is a misdemeanor of the first degree, punishable by a fine not to exceed \$1,000²⁰ and incarceration not to exceed 1 year.²¹

between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest. Section 95.11(3)(c), F.S.

¹⁹ Section 837.012, F.S. An "official proceeding" means a proceeding heard, or which may be or is required to be heard, before any legislative, judicial, administrative, or other governmental agency or official authorized to take evidence under oath, including any referee, general or special magistrate, administrative law judge, hearing officer, hearing examiner, commissioner, notary, or other person taking testimony or a deposition in connection with any such proceeding.

Section 837.011(1), F.S.

²⁰ Section 775.083, F.S.

²¹ Section 775.082(4)(a), F.S.

Duty to Serve a Notice of Claim on Others

Section 558.004(3), F. S., as currently written, *permits* a person served with a notice of claim to serve a copy of the notice to each contractor, subcontractor, supplier, or design professional that he or she believes is responsible for the construction defect. According to changes made in the bill, the person who is served with the notice is now *required* to serve a copy of the notice of claim on others who might be responsible for the defect.

Additional Persons Authorized to Inspect for Defects

Additionally, s. 558.004(2), F.S., is amended to permit a contractor, subcontractor, supplier, or design professional who is served with a copy of the notice the right to reasonably inspect the property or unit subject to the claim for purposes of assessing each alleged defect.

Sharing of Information

The bill adds “additional photographs” and expert reports “not already provided” to the list of information that must be shared between a claimant and a person served with a notice of claim.

Building Construction Standards (Section 1)

“Material” Violations

The statutory civil cause of action for building code violations is amended to limit lawsuits to those alleging a “material” violation of the code. A claimant must now experience a “material” violation in order to have a cause of action against a violator. A material violation is defined as a violation that exists within a completed building, structure, or facility which may reasonably result, or has resulted, in physical harm to someone or significant damage to the performance of a building or its systems.

Warranties

A provision is also added to this section which requires a person, before bringing a cause of action for damages resulting from a building code violation, to first properly submit a claim for the alleged construction defect under any existing applicable warranties. If the warranty provider denies the claim or has not offered a remedy that is satisfactory to the claimant within the time limitations provided in the warranty, the claimant may proceed with a cause of action.²²

In addition to implied warranties that flow between a builder and a buyer, there are also third-party warranties that may be purchased by builders that protect them in the event of a property owner’s claim. These third party-party warranties often provide protection against structural defects and defects in workmanship.

²² Builder warranties and home warranties are often confused. While the builder’s warranty covers new construction or modifications to an existing property, a home warranty, which is purchased by the buyer, generally covers appliances and household systems.

Notice to Mortgagee or Assignee (Section 3)

A new section is created in ch. 558, F.S., which requires a prevailing claimant to notify the holder of a security interest in a property of a favorable settlement or judgment in the resolution of a construction defect claim. If a claimant prevails and receives a monetary settlement or judgment and a mortgagee or assignee has a security interest in the real property that is the subject of the claim, a claimant has 90 days after the resolution of the claim to notify the mortgagee or assignee in writing of:

- The specific nature of the defect.
- The outcome of the claim, specifying the amount of any monetary settlement reached or any judgment that is awarded.
- Any repairs made or plans to repair the property.

If the repairs are completed after the claimant notifies the mortgagee or assignee, the claimant must update the notice within 30 days after the repairs are completed.

The bill takes effect July 1, 2021.

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 expanded information-sharing requirements in the bill may aid contractors and property owners in resolving construction defect claims.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

Section 3 of the bill requires a prevailing claimant to notify a mortgagee or assignee who has a security interest in the claimant's property within 90 days after a favorable monetary settlement or judgment. This lengthy time period might be in conflict with provisions in mortgages that require the property owner to notify a security interest holder in a shorter time period.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 553.84; 558.004. This bill creates section 558.006, Florida Statutes.

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.