

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 583 Construction Defect Claims
SPONSOR(S): Civil Justice & Property Rights Subcommittee, Yarborough
TIED BILLS: IDEN./SIM. **BILLS:** CS/CS/SB 736

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---|------------------|---------|--|
| 1) Civil Justice & Property Rights Subcommittee | 16 Y, 0 N, As CS | 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, and includes a Florida Building Code violation. Chapter 558, Florida Statutes, creates an alternative dispute resolution mechanism for construction defect claims to reduce the need for litigation and protect property owner rights. Under this chapter, 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”) if certain pre-suit requirements are met. However, chapter 558 does not create any new rights, causes of action, or theories on which liability may be based, and the parties to a construction contract may agree to opt out of chapter 558 in writing and allow the contract’s terms to control.

Where chapter 558 applies, at least 60 days before bringing a construction defect lawsuit, or at least 120 days before doing so if the claim 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 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 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.

CS/HB 583 repeals chapter 558, F.S., so that a property owner with a construction defect claim may sue on the claim without the need to first comply with chapter 558’s current alternative dispute resolution process. Further, a design professional would no longer benefit from chapter 558’s construction defect liability limitation for design professionals employed by a business entity. However, parties to a construction contract retain the ability to negotiate a mandatory alternative dispute resolution process as part of the contract’s terms, and liability limitations of the type contemplated in chapter 558 presumably remain negotiable under any employment contract.

The bill also conforms ss. 471.023, 472.021, 481.219, 481.319, and 492.111, F.S., to changes made by the bill.

The bill may have an indeterminate fiscal impact on state government but does not appear to have a fiscal impact on local governments.

The bill provides an effective date of July 1, 2022.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

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 property¹ (“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.²

Chapter 558, Florida Statutes, creates an alternative dispute resolution mechanism for construction defect claims to reduce the need for litigation and protect property owner rights.³ Under this chapter, a property owner, including a subsequent purchaser or a community association⁴ (“claimant”), may only bring a civil action alleging a construction defect claim against the contractor, subcontractor, supplier, or design professional⁵ responsible for the defect (“respondent”) after following the statutory alternative dispute resolution process, unless the claimant and the respondent have opted out of chapter 558 in writing.⁶ A claimant must bring a construction defect claim within four years after project completion or, in the case of a latent defect,⁷ 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.⁸

However, chapter 558 does not create any new rights, causes of action, or theories on which liability may be based.⁹

Notice of Claim

Chapter 558 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 doing so if the claim involves an association representing more than 20 parcels.¹⁰ 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.¹¹

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

² S. 558.002(5), F.S.

³ S. 558.001, F.S.

⁴ “Community associations” are condominium, cooperative, homeowners’, and mobile home park homeowners’ associations. S. 558.002(2), F.S.

⁵ A design professional, such as an architect, landscape architect, engineer, surveyor, or geologist, 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. Ss. 558.002(7) and 558.0035, F.S.

⁶ Parties who opt out of chapter 558 may negotiate as part of any construction contract a mandatory alternative dispute resolution process. Ss. 558.003, 558.004, and 558.005(1), F.S.

⁷ 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. Black’s Law Dictionary 611 (6th ed. 1996).

⁸ S. 95.11(3)(c), F.S.

⁹ S. 558.004(12)(c), F.S.

¹⁰ Service of the notice of claim tolls the applicable statute of limitations relating to any person covered under chapter 558 and any bond surety for a specified time period. Ss. 558.004(1)(a) and (10), F.S.

¹¹ S. 558.004(1)(b), F.S.

The notice of claim must also identify the alleged defect's location with enough detail to allow the respondent to easily locate the defect.¹²

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.¹³

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.¹⁴ 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.¹⁵ Each secondary respondent is also entitled to inspect the property.¹⁶

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.¹⁷ 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.¹⁸ 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 lien¹⁹ rights unless the claimant personally contracts with such party.²⁰ Additionally, the claimant has a right to observe the destructive testing.²¹ 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.²²

Disclosures

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.²³ A party may assert any claim of privilege²⁴ recognized in state law with respect to a requested disclosure.²⁵

Settlement Offers

¹² *Id.*

¹³ S. 558.004(3), F.S.

¹⁴ S. 558.004(2), F.S.

¹⁵ *Id.*

¹⁶ S. 558.004(3), F.S.

¹⁷ S. 558.004(2)(a) and (b), F.S.

¹⁸ S. 558.004(2)

¹⁹ 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 but was not paid, even where such person does not have a direct contract with the property owner.

²⁰ S. 558.004(2)(d), (f), and (g), F.S.

²¹ S. 558.004(2)(e), F.S.

²² S. 558.004(2)(g), F.S.

²³ S. 558.004(15), F.S.

²⁴ 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.

²⁵ *Id.*

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.²⁶ 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.²⁷

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.²⁸ 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.²⁹

A claimant who receives a timely settlement offer must accept or reject the offer by serving written notice on the respondent within 45 days after receiving the offer; if a claimant brings a construction defect claim without first doing so, the court must stay the action upon timely motion until the claimant complies.³⁰ 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.³¹

Effect of Proposed Changes

CS/HB 583 repeals chapter 558, F.S., so that a property owner with a construction defect claim may sue on the claim without the need to first comply with chapter 558's current alternative dispute resolution process. Further, a design professional would no longer benefit from chapter 558's construction defect liability limitation for design professionals employed by a business entity. However, parties to a construction contract retain the ability to negotiate a mandatory alternative dispute resolution process as part of the contract's terms, and liability limitations of the type contemplated in chapter 558 presumably remain negotiable under any employment contract.

The bill also conforms ss. 471.023, 472.021, 481.219, 481.319, and 492.111, F.S., to changes made by the bill.

The bill provides an effective date of July 1, 2022.

²⁶ S. 558.004(4), F.S.

²⁷ *Id.*

²⁸ S. 558.004(5), F.S.

²⁹ S. 558.004(4) and (5), F.S.

³⁰ S. 558.004(7), F.S.

³¹ S. 558.004(6), F.S.

B. SECTION DIRECTORY:

Section 1: Repeals ch. 558, F.S., consisting of ss. 558.01, 558.002, 558.003, 558.0035, 558.004, and 558.005, F.S., relating to construction defects.

Section 2: Amends s. 471.023, F.S., relating to qualification of business organizations.

Section 3: Amends s. 472.021, F.S., relating to certification of partnerships and corporations.

Section 4: Amends s. 481.219, F.S., relating to qualification of business organizations.

Section 5: Amends s. 481.319, F.S., relating to corporate and partnership practice of landscape architecture.

Section 6: Amends s. 492.111, F.S., relating to practice of professional geology by a firm, corporation, or partnership.

Section 7: Provides an effective date of July 1, 2022.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have an indeterminate fiscal impact on state government by increasing construction defect litigation in the state court system.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may increase costs associated with a construction defect claim by removing the requirement that the parties to a defect claim first participate in a statutory alternative dispute resolution process before suing on the claim, which may lead to increased litigation. However, the parties to a construction contract would retain the option to negotiate a mandatory alternative dispute resolution process as part of the contract's terms. The bill may also subject a design professional employed by a business entity to individual construction defect claim liability as it repeals a liability limitation for such persons.

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:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On January 19, 2022, the Civil Justice and Property Rights Subcommittee adopted a proposed committee substitute ("PCS") and reported the bill favorably as a committee substitute. The PCS differed from the original bill as it repealed chapter 558, Florida Statutes, consisting of ss. 558.001, 558.002, 558.003, 558.0035, 558.004, and 558.005, F.S.

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