

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 Rules

BILL: CS/CS/CS/SB 736

INTRODUCER: Rules Committee; Community Affairs Committee; Judiciary Committee; and Senator Hutson

SUBJECT: Construction Defect Claims

DATE: February 4, 2022

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|----------------|----------------|-----------|---------------|
| 1. | <u>Cibula</u> | <u>Cibula</u> | <u>JU</u> | <u>Fav/CS</u> |
| 2. | <u>Hackett</u> | <u>Ryon</u> | <u>CA</u> | <u>Fav/CS</u> |
| 3. | <u>Cibula</u> | <u>Phelps</u> | <u>RC</u> | <u>Fav/CS</u> |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/CS/SB 736 expands on the existing “right to cure procedures” in chapter 558, F.S. These procedures establish an alternative dispute resolution process requiring a claimant and a contractor or similar person to attempt to resolve a construction defect claim before proceeding to litigation. Under the revised procedures, a claimant must provide an inspection report with a notice of a construction defect claim. Additionally in rejecting a settlement offer, the claimant must detail the reasons for rejecting the offer. The contractor must then be given an opportunity to make a supplemental offer.

The bill also provides for a 5-year repose period for one-family, two-family, or three-family residences not exceeding two habitable stories above ground and their accessory structures. For all other structures, the bill retains the 10-year repose period in current law.

The bill takes effect July 1, 2022.

II. Present Situation:

Alternative Dispute Resolution Mechanism for Construction Defects

Chapter 558, F.S., titled, “Construction Defects,” creates an alternative dispute resolution mechanism that must be used in an attempt to resolve many construction defect claims before the

claimant may resort to litigation. Under this dispute resolution mechanism, a claimant is required to file a notice of claim with a contractor or other similar person who is responsible for an alleged defect. Upon receipt of the notice of claim, the contractor or other person has an opportunity to resolve the claim through confidential settlement negotiations.¹ If a claimant files a civil action or arbitration proceeding before completing the requirements of chapter 558, F.S., the court must stay the action.² Legislation like chapter 558, F.S., is known as “right to cure” legislation.³

A construction defect, for purposes of chapter 558, F.S., 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 resulting from:

- Defective material, products, or components used in the construction or remodeling;
- 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 [for a violation of the building code];
- A failure of the design of real property 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

Notice of Claim

The specifics of the notice and cure process of chapter 558, F.S., begin with the service of a “written notice of claim” by the claimant upon the contractor, subcontractor, supplier, or design professional, who may be responsible for the alleged defect.⁵ The claimant must serve this notice “at least 60 days before filing any action, or at least 120 days before filing an action involving an association representing more than 20 parcels.”⁶ The notice must “describe in reasonable detail the nature of each alleged construction defect and, if known, the damage or loss resulting from the defect.”⁷ The location of each alleged construction defect must also be sufficiently described in the notice.

Inspection of Alleged Defect

Upon receipt of the notice of claim, the contractor or other person served with the notice may inspect the property or each unit described in the notice to assess the alleged defects and to determine the extent of necessary repairs. The inspections must occur within 30 days after

¹ Section 558.001, F.S.

² Section 558.003, F.S.

³ 4 TIFFANY REAL PROP. § 986.60 (3d ed.).

⁴ Section 558.002(5), F.S.

⁵ Section 558.004(1)(a), F.S.

⁶ *Id.*

⁷ *Id.*

service of the notice or within 50 days after service of the notice involving an association representing more than 20 parcels.⁸

Response to Notice of Claim & Settlement Offers

The contractor, or other person served with the notice of claim, must serve a written response to the claimant within 45 days after service of the notice of claim or within 75 days after service of a copy of the notice of claim involving an association representing more than 20 parcels. The written response must provide:

- A written offer to remedy the alleged construction defect at no cost to the claimant, a detailed description of the proposed repairs necessary to remedy the defect, and a timetable for the completion of such repairs;
- A written offer to compromise and settle the claim by monetary payment, that will not obligate the person’s insurer, and a timetable for making payment;
- A written offer to compromise and settle the claim by a combination of repairs and monetary payment, that will not obligate the person’s insurer, that includes a detailed description of the proposed repairs and a timetable for the completion of such repairs and making payment;
- A written statement that the person disputes the claim and will not remedy the defect or compromise and settle the claim; or
- A written statement that a monetary payment, including insurance proceeds, if any, will be determined by the person’s insurer within 30 days after notification to the insurer by means of serving the claim, which service shall occur at the same time the claimant is notified of this settlement option, which the claimant may accept or reject.⁹

Initiation of Legal Action

The claimant may initiate an action against the contractor or other person served with the notice of claim if the contractor or other person served with the notice disputes the claim or fails to timely respond.¹⁰ If the contractor or other person makes a settlement offer, the claimant may not initiate an action, unless the claimant rejects the settlement offer in writing within 45 days after receiving it.¹¹ The claimant may also initiate an action for the construction defect if the person making the settlement offer does not make the agreed upon repairs or payments within the agreed-upon time or manner.¹²

Statutes of Limitation and Repose

Legal actions must be brought within the timeframes authorized by law. With respect to construction defect actions, there are two timeframes: a 4-year limitations period¹³ and a 10-year

⁸ Section 558.004(2), F.S.

⁹ Section 558.004(5), F.S.

¹⁰ See s. 558.004(7), F.S.

¹¹ Section 558.004(6), F.S.

¹² Section 558.004(8), F.S.

¹³ A statute of limitations “set[s] a time limit within which an action must be filed as measured from the accrual of the cause of action, after which time obtaining relief is barred.” *National Auto Service Centers, Inc., v. F/R 500, LLC*, 192 So. 3d 498, 509 (Fla. 2d DCA 2016) (quoting *Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687, 695 (Fla. 2015) (quoting *Merkle v. Robinson*, 737 So. 2d 540, 542 n. 6 (Fla.1999)). The purpose of a statute of limitations is to “require that a plaintiff with a known cause of action prosecute that claim diligently and within a predictable time that will allow for finality of claims prior

statute of repose.¹⁴ The 4-year limitations period applies to actions based on a patent defect,¹⁵ which is an obvious defect, and to a latent or hidden defect¹⁶ once it is discovered or should have been discovered.¹⁷ However, any action based on a latent or hidden defect must be brought within the 10-year statute of repose.¹⁸

The 4-and 10-year periods for bringing a construction defect action begin to run from:

the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion of the contract or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest.

The specific point at which the 4 or 10-year periods commence has been a subject of litigation and refined somewhat through legislation over the years.

III. Effect of Proposed Changes:

As detailed below, the bill expands on the existing policy in chapter 558, F.S., of requiring the parties to a potential construction defect action to attempt to resolve their disputes before initiating a civil action or arbitration proceeding.

Supplemental Offers, Attorney Fees, & Settlement Payments (Section 2)

Notices of Claims

The bill increases the quality and quantity of information that must be included in a notice of claim. The notice of claim must be prepared by a contractor, engineer, building code inspector, or other person having a state license and experience relevant to the type of construction that is the basis of the claim. The report must clearly describe the defect, supply pictures of the defect, videos, or test results. Moreover, the report must describe the maintenance and repair history of the portion of the structure containing the alleged defect.

to the potential loss of available evidence over time.” *Id.* at 510 (citing Statute of limitations, BLACK’S LAW DICTIONARY (10th ed. 2014)).

¹⁴ A statute of repose “precludes a right of action after a specified time . . . rather than establishing a time period within which the action must be brought measured from the point in time when the cause of action accrued.” *Id.* at 509 (citing *Univ. of Miami v. Bogorff*, 583 So. 2d 1000, 1003 (Fla.1991)).

¹⁵ A patent defect is “either one about which the owner had actual knowledge or one about which the owner would have known had he or she made a reasonably careful inspection.” *U.S. Lodging of Jacksonville, Ltd., v H.B. Daniel Const. Co., Inc.*, 617 So. 2d 448, 449 (Fla. 1st DCA 1993).

¹⁶ A latent defect is a defect that is not discernable by the exercise of reasonable care. *Kala Investments, Inc. v. Sklar*, 538 So. 2d 909, 914 (Fla. 3d DCA 1989) (citing *Maas Bros., Inc. v. Bishop*, 204 So.2d 16 (Fla. 2d DCA 1967)).

¹⁷ Section 95.11(3)(c), F.S.

¹⁸ *Id.*

The report must be verified¹⁹ by the person preparing it, and the preparer is subject to discipline by the relevant licensing board for preparing a report in bad faith.

Supplemental Offers

Existing law requires a contractor or other person who is served a notice of claim for a construction defect to make an offer to settle the claim or dispute the claim. If a settlement offer is made, the claimant may not initiate a civil action or an arbitration proceeding based on the claim unless the claimant timely serves a written notice of rejection on the offeror.

The bill requires the claimant to include more information in a notice of rejection. Specifically, the notice must state the reasons for rejecting the offer, identify any items that the claimant believes were omitted from the offer, and detail all reasons why the claimant believes that the offer is unreasonable. The claimant's provision of additional information seems to function as a counteroffer or a request for clarification of the offer. Once the offeror is served the claimant's notice of rejection, the bill authorizes the offeror to make a supplemental offer of repair or monetary payment, or both, to the claimant within 15 days after service of the notice of rejection.

A claimant who rejects an initial settlement offer may not initiate an action for a construction defect until the claimant rejects any supplemental offer or the offeror has had 15 days to make a supplemental offer.

Attorney Fee Limitation

Existing law does not directly discourage a claimant from rejecting a reasonable settlement offer and initiating an action for a construction defect claim. However, the bill discourages the claimant from rejecting a reasonable settlement offer by limiting the potential for an award of attorney fees. Specifically, the bill provides that if:

[t]he claimant rejects a timely settlement offer or supplemental offer provided to remedy the alleged construction defect at no cost to the claimant, in any action brought for that defect, the claimant may not recover attorney fees from the offeror on any basis unless the claimant proves by a preponderance of the evidence that, at the time of the offer, additional repairs beyond those offered were necessary to remedy the defect. This [provision, however,] does not apply to any claim for attorney fees based on a contract between the claimant and the offeror.

Court Appointed Expert (Section 4)

The bill requires the court in a civil action for a construction defect to appoint an engineer, contractor, building code inspector, or another expert to examine the alleged defect. The expert must then submit a written report which contains the expert's findings to the court for its consideration and to the parties. But the expert may not be appointed if all of the parties object or

¹⁹ The verification requirement is an assertion that the facts stated in the report are true. A person who makes a false declaration in a verified document commits perjury by false written declaration, which is a third degree felony. Section 92.525, F.S.

if the court finds that the costs of an expert outweigh any potential benefits to the resolution of the action. If appointed, the expert's report must:

- Describe how the expert conducted the examination of the alleged defect.
- Identify persons present at the site of the improvement while the expert conducted the examination.
- Include photographs or other documentation of the alleged defect including any relevant test results.
- State whether the damages claimed by the claimant are more likely than not the result of a construction defect, another identified cause, or a construction defect and another identified cause.
- Address other matters related to the alleged defect as directed by the court.

If the expert's report wholly or partially validates the claimant's construction defect claim, the report "must state the actions necessary to repair the defect and any repairs related to the defect, provide an estimate of the reasonable cost of repairs, and state the anticipated time needed for repairs under the current market conditions for construction services and materials."

The bill provides for the expert to be compensated by the parties, but the prevailing party is entitled to reimbursement by the nonprevailing party. Moreover, the expert may not be employed to repair the alleged defect or recommend contractors to repair the defect.

Payment of Repair Costs (Sections 3 & 5)

Nothing in chapter 558, F.S., currently requires a claimant to use any funds recovered as a result of a construction defect claim to repair the defect.

The bill requires a claimant who accepts a settlement offer that includes a monetary payment for repairs to enter into a contract for repairs within 90 days. The payments, however, are to be made by the offeror directly to the claimant's contractor as the work is performed and expenses are incurred. The repairs generally must be completed within 12 months after the claimant contracts for repairs. The provision of payment from the offeror to the claimant's contractor is similar to procedures that an insurer may follow to pay for the repair of property damaged by a sinkhole.²⁰

If a claimant recovers funds for a construction defect as the result of a civil action or arbitration, the bill requires the claimant to use the funds to repair the defect. If the claimant fails to fully repair the defect, the claimant is liable to a subsequent purchaser of the property for any damages resulting from the failure to disclose the defect.

The liability for failing to repair or disclose the defect is consistent with the duties of a seller of real property under existing law. The seller of real property has a duty to disclose "facts materially affecting the value of the property which are not readily observable and are not known to the buyer."²¹

²⁰ Section 627.707(5)(e), F.S., upon approval by any lienholder, authorizes an insurer to pay for repairs due to a sinkhole directly to the persons selected by the policyholder to perform the land and building stabilization and foundation repairs.

²¹ *Johnson v. Davis*, 480 So. 2d 625, 629 (Fla. 1985).

Timeframe for Construction Defect Action (Section 1)

Existing law specifies a 4-year statute of limitations for a claimant to bring a construction defect action based on a patent or obvious defect and a 10-year statute of repose for a claimant to bring a construction defect action based on a latent or hidden defect. The bill provides for different repose periods depending on the type of structure. There is a 5-year repose period for one-family, two-family, or three-family residences not exceeding two habitable stories above ground and their accessory structures,²² and for all other structures, the bill retains the 10-year repose period in current law.

The commencement of this time period in current law is “the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion of the contract or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is *latest*.” The bill provides that the time period commences on any of the same triggers, whichever date is *earliest*.

Effective Date, Application & Savings Cause (Sections 6 & 7)

The bill takes effect on July 1, 2022, and the provisions of the bill amending the presuit procedures of ch. 558, F.S., apply to civil actions and arbitration proceedings initiated on or after that date.

The reduced time period for bringing a construction defect action applies to construction defects occurring before the effective date of the bill. However, the bill provides a savings clause that enables a person to bring an action for a construction defect within 1 year after the effective date of the bill if the action would otherwise be time barred by the bill.

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.

²² This category of single family residences matches the definition of “residential contractor” in s. 489.105(1)(c), F.S.

E. Other Constitutional Issues:

None identified.

V. **Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

CS/CS/SB 736 may reduce litigation costs to parties to a construction contract by requiring a claimant to detail the reasons for rejecting a presuit settlement offer and by authorizing counteroffers. Provisions requiring the use of any recovery for a construction defect to repair the defect may discourage the bringing of claims that are not well-founded.

C. Government Sector Impact:

The bill may reduce costs of the judicial branch to the extent that the bill reduces litigation.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

None.

VIII. **Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 95.11 and 558.004.

This bill creates the following sections of the Florida Statutes: 558.0045 and 558.0046.

IX. **Additional Information:**

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS/CS by Rules on February 3, 2022:

The CS by the Rules Committee replaces the three different repose periods for bringing a construction defect action in the underlying CS with two repose periods. There is a 5-year repose period for most single family residences and a 10-year repose period for all other structures. Additionally, the CS requires a notice of claim to include an inspection report prepared by a contractor, engineer, building code inspector, or other person having relevant experience.

CS/CS by Community Affairs on January 12, 2022:

The committee substitute revises the timeline for bringing a construction defect action based on obvious and hidden defects in improvements to real property. A 4-year time limit to commence an action regarding an obvious defect will run from completion of the project, while the same limit will run from when a hidden defect is or should have been discovered, as current law provides. Additionally, the substitute applies a variable statute of repose, from 5 to 10 years depending on the type of property improved.

CS by Judiciary on November 30, 2021:

The committee substitute does not include section 5 of the original bill. The section required a claimant who served a notice of claim on a contractor or similar person to also provide notice of the claim to a mortgagee or assignee having a security interest in the relevant property. Additionally, the section required the claimant to notify the mortgagee or assignee of the completion of repairs that correct a construction defect.

B. Amendments:

None.