

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 3046

SPONSOR: Regulated Industries Committee and Senator Bennett

SUBJECT: Construction Defects

DATE: April 5, 2004

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>RI</u>	<u>Fav/CS</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill amends the provisions of ch. 558, F.S., which provides a process to resolve legal claims related to construction defects arising out of the construction of a dwelling before a lawsuit is filed.

The bill extends the following required notice and response periods in s. 558.004, F.S.:

- The period for serving a written notice of a claim involving an alleged construction defect involving an association would increase from 60 days to at least 120 days before filing an action.
- The period within which a construction professional may inspect a dwelling after receiving a notice of claim would increase from five to 30 days for a claim involving a single-family home, manufactured or modular home, duplex, triplex, or quadruplex, or within 50 days for a claim involving an association of one or more units in a multifamily building.
- The period within which a person receiving a notice of claim involving an association may forward the notice to a construction professional would increase from 10 days to 30 days.
- The period within which a construction professional must respond to the notice of claim from another construction professional would increase from five days to 15 days after receiving a copy of the notice of claim involving a single-family home, manufactured or modular home, duplex, triplex, or quadruplex, and to 30 days after receipt of the notice of

claim for a claim involving an association of one or more units in a multifamily residential building.

- The period within which a construction professional must respond to a notice of claim received from a claimant would increase from 25 days to 45 days after receiving a copy of the notice of claim involving a single-family home, manufactured or modular home, duplex, triplex, or quadruplex, and to 75 days after receipt of the notice of claim for a claim involving an association of one or more units in a multifamily residential building

The bill amends the definitions of the terms “claimant,” “construction defect,” “contractor,” “dwelling,” “service,” “subcontractor,” and “design professional.”

The bill would require that a written offer to compromise and settle the claim by monetary payment must present a timetable for making payment. The bill provides that, in the event of a partial settlement or compromise, the claimant may, without further notice, proceed with an action on the unresolved portions of the claim. The bill requires the claimant to reject or accept an offer of compromise. The bill would also require that, before proceeding with an action, the claimant must first timely and properly serve a notice of the rejection of the settlement offer.

The bill provides that the initial list of construction defects may be amended by the claimant to identify additional construction defects as they become known to the claimant.

The bill would obligate insurers to indemnify construction professionals for the amount of the cost of repairs or the amount of monetary payment to the same extent that an insurer may be obligated to indemnify a construction professional for a judgment or other legal obligation.

The bill provides a general exception from the requirements of ch. 558, F.S., for every contract for the design, construction, or remodeling of a dwelling entered into on or after July 1, 2004, that does not provide written notice in substantially the form set forth in s. 558.005(2), F.S.

The bill makes several conforming changes to ch. 558, F.S.

This bill would take effect on July 1, 2004.

This bill substantially amends the following sections of the Florida Statutes: 558.001, 558.003, 558.004, and 558.005.

The bill creates an unnumbered section of the Florida Statutes.

II. Present Situation:

Chapter 558, F.S., provides a process to give homeowners, subsequent purchasers of a dwelling, tenants, associations, and construction professionals the opportunity to settle legal claims related to construction defects arising out of the construction of a dwelling before a lawsuit is filed.

Section 558.003, F.S., provides:

If a claimant files an action without first complying with the requirements of this act, on motion by a party to the action the court shall abate the action, without prejudice, and the action may not proceed until the claimant has complied with such requirements.

Section 558.004(1), F.S, requires that 60 days before filing a lawsuit against a contractor, subcontractor, supplier, or design professional (construction professionals) for a claim related to a construction defect¹ a claimant must serve a written notice of claim on the construction professional. The construction professional has a right to inspect the dwelling within five days of the notice of claim.² Within 10 days of the notice of claim the construction professional must serve a copy of the notice of claim to any other construction professional that he or she thinks is responsible for the construction defect. These construction professionals also have a right to inspect the alleged construction defect.

Within 20 after the notice of claim, the construction professional must respond to the claimant with a written offer to remedy the claim, a written offer to settle the claim, or a written dispute of the claim. The claimant has 15 days, or 45 days for an association, to accept or reject the offer to settle and compromise the claim or to remedy the alleged construction defect.³

The claimant can file suit without further notice if he or she rejects the construction professional's offer to remedy the alleged construction defect, or an offer to settle and compromise the claim. The claimant may also file a lawsuit without further notice after the construction professional rejects the claim or the construction professional does not meet the agreed timetable to remedy the construction defect or make the settlement payment.

Failure by a claimant or construction professional to follow the procedures in the bill is admissible in court.⁴ Section 558.004(11), F.S., provides that this section does not bar or limit a claimant from making any emergency repairs to the claimant's dwelling. Section 558.004(14), F.S., provides that ss. 558.001-558.003, F.S., which relate to the legislative findings, definitions, and abatement of the action for noncompliance with the requirements of this chapter, do not bar or limit any defense, or create any new defense, except as specifically provided in the act.

¹ Section 558.002(4), F.S., defines the term "construction defect" to mean:

- A deficiency in, or a deficiency arising out of, the design, specifications, surveying, planning, supervision, observation of construction, or construction or remodeling of a dwelling 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;
 - (c) A failure of the design of a dwelling to meet the applicable professional standards of care at the time of governmental approval; or
 - (d) A failure to construct or remodel a dwelling in accordance with accepted trade standards for good and workmanlike construction at the time of construction.

² Section 558.004(2), F.S.

³ Section 558.004(3), F.S.

⁴ Section 558.004(8), F.S.

Chapter 558, F.S., is also applicable to the following associations:

- condominium associations in ch. 718, F.S.;
- cooperatives in ch. 719, F.S.;
- homeowners associations in ch. 720, F.S.; and
- homeowners' associations for mobile home owners in ch. 723, F.S.⁵

Definitions

Section 558.002(3), F.S., defines the term "claimant" to mean:

a homeowner, including a subsequent purchaser, tenant, or association, who asserts a claim against a contractor, subcontractor, supplier, or design professional concerning a construction defect. The term does not include a contractor, subcontractor, supplier, or design professional.

Section 558.002(5), F.S., defines the term "contractor" to mean:

any person, firm, partnership, corporation, association, or other organization that is legally engaged in the business of designing, developing, constructing, manufacturing, selling, or remodeling dwellings or attachments thereto.

Section 558.002(6), F.S., defines the term "design professional" to mean a person licensed in this state as an architect, interior designer, landscape architect, engineer, or surveyor.

Section 558.002(7), F.S., defines the term "dwelling" to mean:

a single-family house, manufactured or modular home, duplex, or unit in a multifamily residential building designed for residential use and includes common areas and improvements that are owned or maintained by an association or by members of an association, and includes the systems, other components, and improvements that are part of the structure at the time of completion of construction.

Section 558.002(8), F.S., defines the term "service" to mean personal service or delivery by certified mail to the last known address of the addressee.

Section 558.002(9), F.S., defines the term "subcontractor" to mean a contractor who performs work on behalf of another contractor in the construction or remodeling of a dwelling.

Section 558.002(10), F.S., defines the term "supplier" to mean a person who provides materials, equipment, or other supplies for the construction or remodeling of a dwelling.

⁵ See s. 558.002(2), F.S., defining the term "association," and s. 558.004, F.S., which applies the notice provisions to associations.

Section 1.01(3), F.S., relating to the construction of statutes, defines the term "person" to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

III. Effect of Proposed Changes:

Section 1. The bill amends the legislative findings and declaration in s. 558.001, F.S., to provide that the legislature finds that it is beneficial to have an alternative method to resolve construction disputes that would reduce the need for litigation while protecting the rights of homeowners.

Section 2. The bill amends the definition of the term "claimant" in s. 558.002(3), F.S., to delete the term "tenant" from the list of persons that assert a claim, and to provide that the asserted claim is for damages. The bill also amends the definition of the term "claimant" to include a homeowner, including a subsequent purchaser, or association who asserts a claim for indemnification.

The bill amends the definition of the term "construction defect" in s. 558.002(4), F.S., to include a deficiency in, or arising out of, the repair or alteration of a dwelling, any appurtenances to the dwelling, or the real property to which the dwelling or appurtenance is affixed resulting from the listed circumstances in s. 558.002(4)(a)-(d), F.S. The bill amends s. 558.002(4)(b), F.S., which provides that a construction defect may result from a violation of the applicable code, to provide that the violation gives rise to a cause of action under s. 553.84, F.S.⁶

The bill amends the definition of the term "contractor" in s. 558.002(5), F.S., to delete the term "firm, partnership, corporation, association, or other organization that" and provides that the term "person" has the same meaning as in s. 1.01, F.S. The bill also amends the definition of the term "design professional" in s. 558.002(6), F.S., to provide that the term "person" has the same meaning as in s. 1.01, F.S.

The bill amends the definition of the term "dwelling" in s. 558.002(7), F.S., include triplex, quadruplex, or other multifamily unit. The bill further defines multifamily residential building as one in which title to each unit is transferred to the owner under a condominium or cooperative system. The bill includes as part of the house duplex, triplex, quadruplex, or other multifamily unit other structures or facilities, including, but not limited to, recreational, which are appurtenant to and located on the real property where the unit is located, but that are not necessarily a part of the structure at the time of completion of construction.

The bill amends the definition of the term "service" in s. 558.002(8), F.S., to delete personal service from the definition, and to provide that certified mail delivery is return receipt requested.

The bill amends the definition of the term "subcontractor" in s. 558.002(9), F.S., to provide that the term "person" has the same meaning as in s. 1.01, F.S. The bill also replaces the term "performs work" with the term "performs labor and supplies material." The bill also amends the definition of the term "supplier" in s. 558.002(10), F.S., to provide that the term "person" has the

⁶ Section 553.84, F.S., provides a civil cause of action based on a violation of the building construction standards in part IV of ch. 553, F.S., and the Florida Building Code.

same meaning as in s. 1.01, F.S., and to provide that such person provides only materials, equipment, or other supplies for the construction or remodeling of a dwelling.

Section 3. The bill amends s. 558.003, F.S., to provide:

A claimant may not file an action subject to this chapter without first complying with the requirements of this chapter. If a claimant files an action alleging a construction defect without first complying with this chapter, on timely motion by a party to the action the court shall abate the action, without prejudice, and the action may not proceed until the claimant has complied with such requirements.

This amendment does not alter the current obligations or rights of the parties to a legal action alleging a construction defect.

Section 4. The bill amends s. 558.004(1), F.S., to provide that written notice must be served at least, instead of no later than, 60 days before filing an action involving a single-family residential, manufactured or modular home, duplex, triplex, or quadruplex, or at least 120 days before filing an action involving an association of one or more units in a multifamily residential building. The bill requires that the notice refer to ch. 558, F.S. The bill requires that the notice must be served on the person with whom the claimant contracted if the construction defect claim arises from work performed under a contract.

The bill provides that this subsection does not preclude a claimant from filing an action sooner than 60 days, or 120 days as applicable, after service of written notice as expressly provided in s. 558.004(6), (7), or (8), F.S. Section 558.004(7), F.S., requires that claimant give written notice of his or her rejection of a settlement offer. However, subsections (6) and (8) of s. 558.004, F.S., do not expressly provide for a written notice.

The bill amends s. 558.004(2), F.S., regarding the construction professional's right to inspect a dwelling after service of a notice of claim. The bill increases the right to inspect period from five to 30 days from the receipt of service of the notice of claim involving a single-family home, manufactured or modular home, duplex, triplex, or quadruplex, or within 50 days after receipt of the notice of claim involving an association of one or more units in a multifamily building. The person inspecting the premises is required to coordinate all of the inspections to minimize the number of inspections. The bill further provides that the person receiving the notice of claim and such person's contractors or agents are responsible for repairing any damage to the dwelling caused by destructive testing. The bill requires that claimants must be given reasonable notice of the date and time of the testing and that claimants may be present to observe the testing. The bill provides that the testing may not render the dwelling uninhabitable and that failure to repair any damage shall be grounds for disciplinary proceedings pursuant to s. 489.129(1)(g), F.S.⁷

The bill amends s. 558.004(3), F.S., to increase from 10 days to 30 days the period of time within which the person receiving a notice of claim involving an association of one or more units in a multifamily residential building must forward a copy of the notice of claim to each construction

⁷ Section 489.129(1)(g), F.S., authorizes the Construction Industry Licensing Board to discipline certified or registered contractors for committing financial mismanagement or misconduct that causes harm to a consumer.

professional. The bill does not change the 10-day period for claims involving a single-family house, manufactured or modular home, duplex, triplex, or quadruplex.

The bill amends s. 558.004(4), F.S., to increase the period within which a construction professional must respond to the notice of claim from another construction professional. The bill would increase the response period from five days to 15 days after receiving a copy of the notice of claim involving a single-family home, manufactured or modular home, duplex, triplex, or quadruplex, and to 30 days after receipt of the notice of claim for a claim involving an association of one or more units in a multifamily residential building.

The bill amends s. 558.004(5), F.S., to increase the period within which a construction professional must respond to a notice of claim made pursuant to s. 558.004(1), F.S. The bill would increase the period from 25 days to 45 days after receiving a copy of the notice of claim involving a single-family home, manufactured or modular home, duplex, triplex, or quadruplex, and to 75 days after receipt of the notice of claim for a claim involving an association of one or more units in a multifamily residential building. The bill would require that the response must be served to the attention of the person who signed the notice of claim, unless otherwise designated in the notice of claim.

The bill deletes the provision in s. 558.004(5)(a), F.S., that provides that a report, if any, of the scope of the inspection and the findings, and results of the inspection, must be included in a written offer to remedy the alleged construction defect.

The bill deletes the requirement in s. 558.004(5)(b), F.S., that a written response may contain a written offer to compromise and settle the claim by monetary payment to be paid within 30 days after the claimant's acceptance of the offer. The bill would require that a written offer to compromise and settle the claim by monetary payment must present a timetable for making payment. The bill would also permit a written response to include a written offer to compromise and settle the claim by a combination of repairs and monetary payment. Such a response must include a detailed description of the proposed repairs and a timetable for the completion of such repairs and a time table for making payment.

The bill would delete the provisions of s. 558.004(6), F.S., which deems that a written response from a construction professional that offers to compromise the claim by monetary payment shall be deemed accepted if, within 15 days, or 45 days for an association, the claimant does not serve a written rejection of the offer.

Section 558.004(6), F.S., of the bill also provides that nothing in ch. 558, F.S., shall be construed to preclude a partial settlement or compromise of the claim as agreed to by the parties. It also provides that, in the event of a partial settlement or compromise, the claimant may, without further notice, proceed with an action on the unresolved portions of the claim.

Section 558.004(7), F.S., of the bill requires the claimant to reject or accept an offer of compromise. The bill would also require that, before proceeding with an action, the claimant must first timely and properly serve a written notice of the acceptance or rejection of the settlement offer to the person making the offer. If a claimant files an action without first accepting or rejecting the offer, the bill would require the court to abate the action upon a timely

motion until the claimant complies with this action. The bill does not prescribe what would constitute a timely motion.⁸

Section 558.004(8), F.S., requires that if a claimant timely and properly accepts an offer to repair an alleged construction defect, the claimant must provide the offeror and the offeror's agents reasonable access to the claimant's dwelling during normal working hours to perform the repair by the agreed-upon timetable as stated in the offer. The provides that reasonable delays beyond the control of the offeror, including, but not limited to, weather conditions, delivery of materials, claimant's actions, or issuance of any required permits, are excepted from the agreed time in which to make repairs.

The bill makes a conforming change by deleting the same requirement in s. 558.004(10), F.S.

Section 558.004(9), F.S., of the bill provides that an offer to remedy an alleged construction defect does not constitute an admission of liability and are not admissible in an action to show the existence of a defect. The bill provides that this section does not prohibit or limit the claimant from making any necessary emergency repairs to the dwelling as are required to protect the health, safety, and welfare of the claimant.

Section 558.004(11), F.S., of the bill provides that the initial list of construction defects may be amended by the claimant to identify additional construction defects as they become known to the claimant. However, the bill provides that in no event may the court allow the action to proceed to trial before all alleged construction defects have been noticed and processed as set forth in ch. 558, F.S. It provides that nothing in this subsection shall preclude other actions.

Section 558.004(13), F.S., provides:

The person receiving notice of claim under subsection (1) shall be deemed, for insurance purposes, to have been legally obligated to make the repairs or the monetary payment as if the claimant had recovered a judgment against such person in the amount of the cost of the repairs, and the amount of the monetary payment, if any, if the claimant has accepted the offer.

The effect of this provision would be to obligate insurers to indemnify construction professionals for the amount of the cost of repairs or the amount of monetary payment to the same extent that an insurer may be obligated to indemnify a construction profession for a judgment or other legal obligation.

Section 558.004(15), F.S., of the bill requires that the parties exchange all available discoverable evidence relating to the construction defect. The bill provides that in the event of subsequent litigation, any party who failed to provide such evidence shall be subject to such sanctions as the

⁸ Rule 1.140(a), Fla.R.Civ.P., requires that a defendant serve an answer to an initial pleading within 20 days after service of original process and the initial pleading. Rule 1.140(b), Fla.R.Civ.P., requires that every defense in law or fact to the claim for relief must be pleaded in the responsive pleading, except for the following defenses that may be made by motion at any time: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a cause of action, and (7) failure to join indispensable parties.

court may impose for a discovery violation. The bill also provides that expert reports exchanged between the parties may not be used in subsequent litigation for any purpose, unless the expert testifies as a witness or the report is used or relied upon by an expert who testifies.

The bill also makes several nonsubstantive conforming changes to s. 558.004, F.S.

Section 5. The bill amends s. 558.005, F.S., to provide a general exception from the requirements of ch. 558, F.S. The bill provides that except as provided in s. 558.005(3) and (4), F.S., ch. 558, F.S., shall control every contract for the design, construction, or remodeling of a dwelling entered into on or after July 1, 2004, if notice in substantially the form set forth in s. 558.005(2) is conspicuously set forth in capitalized letters. Under current law, s. 558.005(1), F.S., requires that construction professionals provide notice to the owner of the dwelling of the contractor's right to cure. The bill deletes this notice requirement. The effect of s. 558.005(1), F.S., as amended by the bill, is to exempt from the requirements of ch. 558, F.S., construction professionals that choose to not conspicuously provide the notice in s. 558.005(2), F.S.

Section 558.005(3), F.S., provides that, after receipt of a notice of claim, the parties may by written mutual agreement alter the procedures for notice of claims process in ch. 558, F.S.

Section 558.005(4), F.S., provides for the applicability of ch. 558, F.S. provides that this chapter applies to all actions accruing on or after July 1, 2004, and all actions commenced on or after such date regardless of the date of sale, issuance of certification of occupancy, or substantial completion of the dwelling. The bill also provides that, notwithstanding the notice requirements for contracts entered into on or after July 1, 2004, ch. 558, F.S., applies to all actions accruing before July 1, 2004, but not yet commenced as of July 1, 2004. It provides that failure to include the notice requirements of s. 558.005, F.S., in a contract entered into prior to July 1, 2004, does not operate to bar the procedures of this chapter from applying to all such actions. Section 558.005(4), F.S., references notice requirements in this section, but this section does not establish any mandatory notice requirement for construction contracts.

Section 6. The bill provides that its provisions are severable, and if any provision is declared invalid, the invalidity shall not affect any other provision of the bill.

Section 7. This bill would take effect on July 1, 2004.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The retroactive application of this bill to construction contracts entered into before the effective date of the bill may impair contracts in violation of art. I, s. 10 of the Florida Constitution. Section 558.004(13), F.S., may unconstitutionally impair insurance contracts. To prevent an unconstitutional impairment of contracts, Florida law generally requires that the law in effect at the time the insurance contract is executed governs any issues arising under that contract.⁹

The retroactive application of this bill to construction contracts entered into before the effective date may implicate a violation of the due process clause of the Fourteenth Amendment of U.S. Constitution. A statute may be applied retroactively if: 1) there is clear evidence that the Legislature intended the statute to apply retroactively; and 2) the retroactive application of the statute is constitutionally permissible.¹⁰ The bill explicitly provides for its retroactive application. Therefore, at issue is whether its retroactive application is constitutionally permissible. A retroactive application of a statute is impermissible where the statute impairs vested rights, creates new obligations, or imposes new penalties.¹¹

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

⁹ See *State Farm Mutual Auto Ins. Co. v. Hassen*, 650 So.2d 128 (Fla. 2nd DCA 1995), review granted 662 So.2d 932, approved 674 So.2d 106, rehearing denied.

¹⁰ *Promontory Enterprises, Inc., v. Southern Engineering & Contracting, Inc.*, 864 So.2d 479 (Fla. 5th DCA 2004)

¹¹ *Id.*

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
