

# 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.)

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Prepared By: Regulated Industries Committee

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BILL: CS/SB 2036

INTRODUCER: Regulated Industries Committee and Senator Bennett

SUBJECT: Construction Defects/Property

DATE: March 27, 2006

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sumner	Imhof	RI	Fav/CS
2.	_____	_____	JU	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

The bill revises provisions of ss 558.001, 558.002, 558.004, and 558.005, F.S., to expand the application to construction defects in any real property, including mobile homes and excluding public transportation projects. It deletes provisions that limit the application of the chapter to only residential property.

This bill substantially amends the following sections of the Florida Statutes: 558.001, 558.002, 558.004, and 558.005.

## II. Present Situation:

### Legislative findings

Section 558.001, F.S. provides for the legislative finding that an alternative method to resolve construction disputes that would reduce the need for litigation while protecting the rights of homeowners.

### Definitions

Section 558.002, F.S. provides definitions. It also provides definitions for the following terms as used in the bill:

“Claimant” is defined as a **homeowner**, including a subsequent purchaser or association, who asserts a claim for damages against a contractor, subcontractor, supplier, or design professional concerning a construction defect or a subsequent owner who asserts a claim for indemnification

for such damages. The term does not include a contractor, subcontractor, supplier, or design professional. (emphasis supplied)

“Construction defect” is a defect that 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 a dwelling, any appurtenance to the dwelling, or the real property to which the dwelling or appurtenance is affixed 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](#);
- (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.

“Dwelling” is defined as “a single-family house, manufactured or modular home, duplex, triplex, quadruplex, or other multifamily unit in a multifamily residential building designed for residential use.” It includes condominiums and cooperatives and common areas and improvements that are owned by the association.

### **Action; compliance**

Section 558.003, F.S. provides that 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.

The chapter is currently is limited to actions arising out of the construction of a dwelling that are related to a construction defect. Therefore, actions related to defects in construction that do not meet the definition in the chapter for a construction defect are not subject to the notice provisions of ch. 558, F.S.

### **Notice and opportunity to repair**

Section 558.004(1), F.S., requires that before a claimant can bring lawsuit against a contractor, subcontractor, supplier, or design professional (“contractor” or “construction professional”) for construction defects arising out of the construction or remodeling of a dwelling, the claimant must serve a written notice of claim on the construction professional. The notice of claim must describe the alleged construction defect and the resulting loss or damage, if known, in reasonable detail. The notice must be served no later than 60 days before filing the action.

The claimant must try to serve the notice of claim within 15 days after his or her discovery of the alleged construction defect; failure to serve the notice of claim within the 15 days does not bar the claimant’s right to file a lawsuit if the claimant complies with the other requirements of the act. The logical corollary to this provision is that if a the claimant fails to comply with any of the

requirements of this bill, including the various timeframes for responses, the claimant's action would be barred for failure to serve a notice of claim within 15 days of the claimant's discovery of the alleged construction defect.

Section 558.004(2), F.S., provides that the construction professional has the right to inspect the dwelling within five business days of the notice of claim. The claimant must give the construction professional or his or her agent reasonable access to the dwelling to inspect the alleged construction defect during normal working hours. The inspection may include destructive testing by mutual agreement. Before performing any construction defect, the construction professional must notify the claimant of the type of testing to be performed, the anticipated damage that will be caused by the testing, and the anticipated repairs that will be necessary the damage caused by the testing. The construction professional shall be responsible for the repair of any damage caused by the testing.

Section 558.004(3), F.S., provides that within 10 days after receiving the notice of claim involving a single-family home, an association representing 20 or fewer residential parcels, a manufactured or modular home, a duplex, a triplex or a quadruplex, or within 30 days after receipt of the notice of claim involving an association representing more than 20 residential parcels, the person receiving the notice under subsection (1) may forward a copy of the notice of claim to each contractor, subcontractor, supplier, or design professional whom it reasonably believes is responsible for each defect specified in the notice of claim and shall note the specific defect for which it believes the particular contractor, subcontractor, supplier, or design professional is responsible.

Section 558.004(4), F.S., provides that within 15 business days after receiving a notice of claim involving a single-family home, an association representing 20 or fewer residential parcels, a manufactured or modular home, a duplex, a triplex, or a quadruplex, or within 30 days after receipt of the copy of the notice of claim involving an association representing more than 20 residential parcels, the construction professional must serve a written response to the construction professional who sent him or her the notice. The written response must include:

- A report on the scope of the inspection of the dwelling, if any, and its findings and results of the inspection;
- A statement advising whether the construction professional is willing to make repairs to the dwelling;
- A statement advising whether the construction professional disputes the claim; and
- A description of any repairs the construction professional is willing to make to remedy the alleged construction defect and a timetable for completion of such repairs.

Section 558.004(5), F.S., provides that within 45 days of service of the notice of claim involving a single-family home, an association representing 20 or fewer residential parcels, a manufactured or modular home, a duplex, a triplex, or a quadruplex, or within 75 days after receipt of a copy of the notice of claim involving an association representing more than 20 residential parcels, the person who received notice must serve a written response on the claimant, which must provide:

- A written offer to remedy the construction defect at no cost to the claimant, a detailed description of the proposed repairs necessary to remedy the defect, a timetable for the completion of the 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 forwarding the claim, which notification shall occur at the same time the claim, which notification shall occur at the same time the claimant is notified of this settlement option, which the claimant can accept or reject.

Section 558.004(6), F.S., provides that if the person receiving a notice of claim pursuant to subsection (1) disputes the claim and will neither remedy the defect nor compromise and settle the claim, or does not respond to the claimant's notice of claim within the time provided in subsection (5), the claimant may, without further notice, proceed with an action against that person for the claim described in the notice of claim. It 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 and, in that event, the claimant may, without further notice, proceed with an action on the unresolved portions of the claim.

Section 558.004(7), F.S., provides that a claimant who receives a timely settlement offer must accept or reject the offer by serving written notice of such acceptance or rejection on the person making the offer within 45 days after receiving the settlement offer. If a claimant initiates an action without first accepting or rejecting the offer, the court shall abate the action upon timely motion until the claimant complies with this subsection.

Section 558.004(8), F.S., provides that if a claimant timely and properly accepts the offer to repair an alleged construction defect, the claimant shall 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.

If the offeror does not make the payment or repair the defect within the agreed time and in the agreed manner, except for 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, the claimant may, without further notice, proceed with an action against the offeror based upon the claim in the notice of claim.

If the offeror makes payment or repairs the defect within the agreed time and in the agreed manner, the claimant is barred from proceeding with an action of for the claim described in the notice of claim or as otherwise provided in the accepted settlement offer.

Section 558.004(9), F.S., 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. Any offer or failure to offer pursuant to subsection (5) to remedy an alleged construction defect or to compromise and settle the claim by monetary payment does not constitute an admission of liability with respect to the defect and is not admissible in an action brought under this chapter.

Section 558.004(10), F.S., provides that a claimant's mailing of the written notice of claim under subsection (1) tolls the applicable statute of limitations relating to any person covered by this chapter and any bond surety until the later of:

- 90 days, or 120 days, as applicable, after receipt of the notice of claim pursuant to subsection (1); or
- 30 days after the end of the repair period or payment period stated in the offer, if the claimant has accepted the offer. By stipulation of the parties, the period may be extended and the statute of limitation is tolled during the extension.

Section 558.004(11), F.S., 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 court shall allow the action to proceed to trial only as to alleged construction defects that were noticed and for which the claimant has complied with this chapter and as to construction defects reasonably related to, or caused by, the construction defects previously noticed. It provides that nothing in this subsection shall preclude other actions.

Section 558.004(12), F.S., provides that the chapter does not:

- Bar or limit any rights, including the right of specific performance to the extent such right would be available in the absence of the chapter, any causes of action, or any theories on which liability may be based, except as specifically provided in the chapter;
- Bar or limit any defense, or create any new defense, except as specifically provided the chapter; or
- Create any new rights, causes of action, or theories on which liability may be based.

Section 558.004(13), F.S., provides that nothing in this section shall relieve the person receiving notice of claim under subsection (1) from complying with all contractual provisions of any liability insurance policy as a condition precedent to coverage for any claim under this section.

However, notwithstanding the foregoing or any contractual provision, the providing of a copy of the notice to the person's insurer, if applicable, shall not constitute a claim for insurance purposes. Nothing in this section shall be construed to impair technical notice provisions or requirements of the liability policy or alter, amend, or change existing Florida law relating to rights between insureds and insurers except as otherwise specifically provided herein.

Section 558.004(14), F.S., provides that to the extent that an arbitration clause in a contract for the sale, design, construction, or remodeling of a dwelling conflict with this section, this section shall control.

Section 558.004(15), F.S., provides that upon request, the claimant and the person receiving notice pursuant to subsection (1) shall have a mutual duty to exchange all available discoverable evidence relating to the construction defects, including, but not limited to, expert reports, photographs, information received pursuant to subsection (4), and videotapes, if any. In the event of subsequent litigation, any party who failed to provide such evidence shall be subject to such sanctions as the court may impose for discovery violation. Expert reports exchanged between the parties may not be used in any subsequent litigation for any purpose, unless the expert, or a person affiliated with the expert, testifies as a witness or the report is used or relied upon by an expert who testifies on behalf of the party for whom the report was prepared.

### **Contract provisions; application**

Section 558.005(1), F.S., provides that except as otherwise provided in subsection (3) and (4), the provisions of this chapter shall control every contract for the design, construction, or remodeling of a dwelling entered into on or after July 1, 2004, which contains the following notice in the following form under s. 558.005(2), F.S.:

CHAPTER 558, FLORIDA STATUTES CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY BRING ANY LEGAL ACTION FOR AN ALLEGED CONSTRUCTION DEFECT IN YOUR HOME. SIXTY DAYS BEFORE YOU BRING ANY LEGAL ACTION, YOU MUST DELIVER TO THE OTHER PARTY TO THIS CONTRACT A WRITTEN NOTICE REFERRING TO CHAPTER 558 OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE SUCH PERSON THE OPPORTUNITY TO INSPECT THE ALLEGED CONSTRUCTION DEFECTS AND TO CONSIDER MAKING AN OFFER TO REPAIR OR PAY FOR THE ALLEGED CONSTRUCTION DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER WHICH MAY BE MADE. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER THIS FLORIDA LAW WHICH MUST BE MET AND FOLLOWED TO PROTECT YOUR INTERESTS.

Section 558.005(3), F.S., provides that after receipt of the initial notice of claim, a claimant and the person receiving notice under s. 558.004(1), F.S., may by written mutual agreement, alter the procedure for the notice of claim process described in this chapter.

Section 558.005(4), 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 a certificate of occupancy or its equivalent, or substantial completion of the dwelling. Notwithstanding the notice requirements of this section for contracts entered into on or after July 1, 2004, this chapter applied to all actions accruing before July 1, 2004, but not yet commenced as of July 1, 2004, and failure to include the notice requirements of this section 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.

Representatives of the Construction Coalition and Associated Builders and Contractors state that s. 558.005(1), F.S. is language that makes ch. 558, F.S., an opt-in procedure. The representatives state that only when the notice provision as provided in subsection (2) is in a contract for design, construction, or remodeling of a dwelling entered into on or after July 1, 2004 is ch. 558, F.S., applicable.

### **III. Effect of Proposed Changes:**

The bill revises provisions of ss. 558.001, 558.002, 558.004, and 558.005, F.S., to expand the application to construction defects in any real property. It deletes provisions that limit the application to only residential property.

It defines “real property” to mean land that is improved and the improvements on such land, including fixtures, manufactured housing, or mobile homes and excluding public transportation projects.

It amends the contract provisions and application language of s. 558.005(1)(a), F.S. to provide that the provisions of ch. 558, F.S., except as provided in subsections (3) and (4), apply to every contract for the design, construction, or remodeling of real property entered into between July 1, 2004, and September 30, 2006, which contains the notice in s. 558.005(2)(a), F.S.

It creates s. 558.005(1)(b), F.S., to provide the provisions of ch. 558, F.S., except as provided in subsections (3) and (4), apply to every contract for the design, construction, or remodeling of real property entered into on or after October 1, 2006, which contains the notice set forth in paragraph (2)(b).

It creates s. 558.005(2)(b), F.S., to provide that the notice required for real property by paragraph (1)(b) must expressly cite ch. 558, F.S. and be in substantially the following form:

#### CHAPTER 558 NOTICE OF CLAIM

CHAPTER 558, FLORIDA STATUTES, CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY BRING ANY LEGAL ACTION FOR AN ALLEGED CONSTRUCTION DEFECT. SIXTY DAYS BEFORE YOU BRING ANY LEGAL ACTION, YOU MUST DELIVER TO THE OTHER PARTY TO THIS CONTRACT A WRITTEN NOTICE REFERRING TO CHAPTER 558 OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE SUCH PERSON THE OPPORTUNITY TO INSPECT THE ALLEGED CONSTRUCTION DEFECTS AND TO CONSIDER MAKING AN OFFER TO REPAIR OR PAY FOR THE ALLEGED CONSTRUCTION DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER WHICH MAY BE MADE. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER THIS FLORIDA LAW WHICH MUST BE MET AND FOLLOWED TO PROTECT YOUR INTERESTS.

It amends s. 558.005(4), F.S., to provide that this chapter applies to all actions accruing or commenced on or after July 1, 2004 for a construction contract. It further provides that,

notwithstanding the notice requirements of this section, this chapter applies to all contracts entered into between July 1, 2004 and September 30, 2006 and failure to include the notice requirements in a contract entered into prior to July 1, 2004, does not operate to bar the procedures of ch. 558, F.S. from applying to all such actions.

It provides that notwithstanding the notice requirements of this section for contracts entered into on or after October 1, 2006, ch. 558, F.S., applies to all actions accruing before July 1, 2004, but not yet commenced as of July 1, 2004, and failure to include such notice requirements in a contract entered into before July 1, 2004 does not operate to bar the procedures of ch. 558, F.S., from applying to all such actions.

The bill provides an effective date of October 1, 2006.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

#### **V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill expands the option to resolve legal claims related to construction defects to all types of real property. This will consequently expand the number of persons who will have to comply with the notice provisions of chapter 558 before bringing a legal action.

C. Government Sector Impact:

The bill may reduce civil suits in the court system related to construction defects arising from the construction of nonresidential property.

#### **VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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

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## **VIII. Summary of Amendments:**

None.

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