Florida Construction Defect Proposal Unfair To Homeowners

By **Nick Vargo and Greg Demers** (April 1, 2021)

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Typically, the most important, and largest, purchase in a person's life is their home. Due to negligence in the construction industry, many homes are built with construction defects that require tens or hundreds of thousands of dollars in repairs.[1]

In the last five years, numerous large builders have settled claims with the Florida Attorney General's Office for alleged violations of Florida's Unfair and Deceptive Trade Practices Act. Specifically, builders were accused of systemically violating the Florida Building Code and then denying righteous warranty claims made by the homeowners.

Unfortunately for homeowners in Florida, large builders and insurance companies are using their lobbying power to make it even harder for homeowners to make claims for construction defects. Florida representatives are taking aim at Chapter 558 of the Florida Statutes, which already requires homeowners to give builders notice of the defects and an opportunity to resolve the issues without litigation.

In addition to the Chapter 558 requirements, under the 10-year statute of repose, and four-year statute of limitations, the Florida Legislature placed hard deadlines on when construction claims could be brought. Now, a recent bill seeks to put even more limits on homeowners' rights to get what they paid for: a safe home that was built to last.

Before getting into the current legislation, it is important to note recent changes to Chapter 558. In 2019, the Florida Legislature amended Chapter 558 of the Florida Statutes, in response to Florida's Fourth District Court of Appeal's decision in Gindel v. Centex Homes,[2] to prevent the notice of construction defect from tolling the applicable 10-year statute of repose under Section 95.11(3)(c) of the Florida Statutes.

In practice, this meant that homeowners may now need to file suit before the expiration of the 10-year repose period, regardless of whether the Chapter 558 notice[3] was sent.

Now, Florida Rep. Alex Andrade's House Bill 21 aims to limit homeowners' ability to bring suit regarding construction defects affecting their homes.

Florida's elected representatives are narrowly passing it through their subcommittees, with the legislation passing through both the Civil Justice and Property Rights Subcommittee and Regulatory Reform Subcommittee.[4]

In essence, Andrade's bill adds more hurdles to homeowners seeking recovery for construction defects, by requiring:

- The homeowner to suffer from a "material violation" of the Florida Building Code, which the amendment defines as "a violation that exists within a completed building, structure, or facility which may reasonably result, or has resulted, in physical harm to a person or significant damage to the performance of a building or a system";

- The homeowner to "properly" submit a claim for the alleged construction defect under an applicable warranty and wait for the warranty provider to either deny or provide an unsatisfactory remedy to the claimant within time periods prescribed by the warranty;

- One photograph of the alleged defect or evidence of the defect, and a description of the damage or loss resulting from the alleged defect, if known;

- A personal statement from the claimant regarding their personal knowledge of the defect;

- Acknowledgement from the homeowner that they are aware of the penalties of perjury; and

- A signed statement declaring all facts alleged are true under penalty of perjury.

As seen above, Florida's Legislature wants to add more requirements to Florida Statutes' Chapter 558 notice of construction defects process by requiring homeowners to wait until after they have properly filed a warranty claim, and continue to wait until after the warranty provider at its discretion has resolved the warranty claim.

Anyone who has dealt with making a home warranty claim understands the onerous task that the Legislature would be forcing upon homeowners if House Bill 21 is passed. Indeed, typical builder contracts are contracts of adhesion, which contain shockingly oppressive terms that eliminate or limit every possible right a homeowner has against the builder.

In fact, the warranties that are provided typically eliminate all claims against the builder after one year other than for catastrophic failure of the structural capacity of the home.

The properly filed warranty condition is especially egregious, not only because it would allow a warranty provider to act as a gatekeeper to justice, but because it would also allow a warranty provider to simply not offer a remedy to the claimant and potentially run out the clock on the homeowners' ability to bring a lawsuit.

The purpose of adding this section of House Bill 21 to the current Chapter 558 requirements is not to curtail frivolous litigation, but rather, it is a clever maneuver to try and chip away at the owners' already limited timeline to bring suit for faulty construction.

In addition, if builders do perform warranty work, it is commonly a Band-Aid repair rather than a proper long-term fix. If the Band-Aid repair lasts long enough to pass the four-year

statute of limitations, the builder could be safe from litigation.[5]

As a reminder, the purpose of Chapter 558 was to encourage builders and homeowners to try and resolve their disputes informally before resorting to litigation. However, this new legislation adds more unnecessary complications.

By requiring specific detail of the defects and photographs of the alleged defects, it virtually requires homeowners to seek out counsel and hire forensic engineers before serving a Chapter 558 notice of claim.

If this is supposed to be an opportunity for both the builder and the homeowner to resolve the issues, why does the Legislature continue to make it more difficult for homeowners to simply notify their builder that there is something wrong with the construction by causing homeowners to expend thousands of dollars before even starting the conversation?

As further evidence of House Bill 21's attempt to limit owners' access to justice by driving up the cost of bringing construction defect claims, the proposed language requires a homeowner to sign a statement in big bold text that says they can go to jail if they state something inaccurate in their notice to the builder.

This requirement can only serve to intimidate and bully homeowners with righteous claims into abandoning those claims, in fear that the big builder with deep pockets will seek to put them in jail. Any reasonable layperson would be reluctant to sign something under penalty of perjury without consulting with a lawyer, which defeats the purpose of this presuit resolution process. Again, this is an attempt to limit owners' access to justice by driving up the cost of starting a discussion about potential defects.

The Chapter 558 process already allows for builders to verify the allegations in the Chapter 558 notice by performing inspections of the property. This new requirement is simply a scare tactic, added for the builders, to prevent homeowners from seeking remedies for their construction defects.

Notably, there is no comparable requirement in House Bill 21 that the home builders' response to the Chapter 558 notice be signed under penalty of perjury. Under the legislation, builders are free to state that defects do not exist with no threat of jail. Without question, this bill does not seek to benefit the homeowners, only the builders.

Lastly, builders argue that the current Chapter 558 process is hurting small contractors because they are facing litigation costs before they even know what is wrong with their products, as well as increased insurance rates as a result.

Most people support contractors that want to stand behind their work and fix any issues they have. We should work toward legislation that protects good contractors and penalizes bad contractors with shoddy workmanship.

Rather than put additional burdens on homeowners suffering from construction defects, the Legislature should focus on additional requirements for general contractors and developers that ensure they properly supervise their subcontractors' work.

Accordingly, the Florida Legislature should also be discussing revisions to Chapter 553 and the Florida Building Code requirements to ensure proper building practices that protect the investments of Florida's consumers.

Why are our Florida representatives adding more hurdles to homeowners' access to justice, rather than protecting consumers? If we want to fix the problems affecting both homeowners and small contractors, House Bill 21 is a step in the wrong direction.

Instead, we need to begin enforcing stricter construction practices and supervision requirements for general contractors, and place more responsibility on large developers to ensure their building practices conform to the Florida Building Code and industry standards.

Homeowners, consumer rights advocates, condominium associations and homeowners associations should strongly oppose this legislation and contact their representatives to express their concerns.

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[1] "Florida's Billion Dollar Stucco Problem" is nothing new to Florida homeowners, as many news outlets have reported on the issues throughout the state.

[2] Gindel v. Centex Homes, 272 So. 3d 417 (Fla. Dist. Ct. App. 2019).

[3] 558 notice isn't a defined term; "notice" is referred to herein as "558 notice," "Chapter 558 notice of construction defects," and "Chapter 558 notice of claim."

[4] On February 17, 2021, the Florida House Civil Justice and Property Rights Subcommittee voted 10 to 8 in favor and, on March 8, 2021, the Regulatory Reform Committee voted 9 to 8 in favor of HB 21.

[5] This issue opens a whole new can of worms that are provided under Florida's statutes governing statute of limitations and statute of repose under §95.11(3)(c), which are beyond the scope of this article.