



Several Steps Could Be Taken to Improve the Construction Complaint Process and Increase Homeowner Protection

at a glance

The Department of Business and Professional Regulation and Construction Industry Licensing Board carry out licensing and enforcement activities for the construction industry. In Fiscal Year 2006-07, department officials typically closed complaints filed against construction contractors within 112 days. Several factors affect how long it takes to close complaints including the type of complaint, the nature of the allegation, and the time to obtain documentation from homeowners.

The department's Office of Unlicensed Activity works to deter unlicensed contracting through public education and enforcement activities. Unlicensed individuals often provide investigators with inaccurate information thereby reducing the effectiveness of enforcement efforts. These individuals also have little incentive to pay department fines.

The Legislature created the Florida Homeowners' Construction Recovery Fund to help homeowners recover losses suffered by the actions of a licensed contractor. However, accessing the fund is a long and complex process that can take homeowners 16 months or more to complete.

Scope

As directed by the Legislature, this report examines Department of Business and Professional Regulation and Construction Industry Licensing Board efforts to process construction complaints, reduce unlicensed construction activity, and provide relief to consumers through the Homeowners' Recovery Fund. The report addresses four questions.

1. How long does it take to process construction complaints?
2. What outcomes result from the complaint process?
3. What steps does the department currently take to address unlicensed construction complaints, and could additional steps be taken?
4. What steps does a homeowner take to access the Florida Homeowners' Construction Recovery Fund and are there alternative approaches to address homeowner losses?

Background

The Florida construction industry is regulated by the Department of Business and Professional Regulation through the Construction Industry Licensing Board, with the goal of protecting public health, safety, and welfare by licensing contractors. Local governments also have authority to license and regulate contractors within their jurisdictions.

Contractors who lack required skills and experience or who fail to abide by regulatory guidelines pose a significant risk to the public when they provide substandard or otherwise flawed products and services. To protect citizens from such contractors, state law requires that certain construction professionals be licensed, meet minimal standards, complete annual continuing education requirements, and renew licenses biennially.

In Fiscal Year 2006-07, over 62,000 contractors were licensed (Exhibit 1 lists construction-related professions that are required to be licensed).

**Exhibit 1
More Than 62,000 Individual Contractors Held a License in Fiscal Year 2006-07 ¹**

Professions by Division	Number of Licensees
I General Contractors	20,739
Building Contractors	11,299
Residential Contractors	6,586
II Roofing Contractors	5,146
Sheet Metal Contractors	149
Air Conditioning Contractors	6,074
Mechanical Contractors	1,438
Pool/Spa Contractors	2,897
Plumbing Contractors	4,806
Underground Utility and Excavation Contractors	1,528
Solar Contractor	38
Pollutant Storage Systems Contractor	396
Specialty Contractor	1,446
Registered Tank Lining Applicator	2
Precision Tank Tester	57
Total	62,601

¹ Number of licensees includes contractors licensed at the local level but does not include construction business licenses.

Source: Department of Business and Professional Regulation.

The department’s Division of Professions processes license applications and prepares licensing documents for final approval or denial by the board. In addition, the department’s Division of Regulation is the enforcement authority for professional boards and investigates consumer complaints. The division includes the Office of Unlicensed Activity and Office of Alternative Dispute Resolution. The Office of Unlicensed Activity pursues action against individuals who engage in contracting professions without the required state license, while the Office of Alternative Dispute Resolution works to expedite complaint resolution through informal mediation.

The Construction Industry Licensing Board approves or denies license applications and approves continuing education providers and courses. Licensing and renewal fees are deposited into the Professional Regulation Trust Fund to pay for board expenses. In Fiscal Year 2006-07, revenues for the board were \$14.19 million, with expenditures of \$12.44 million. Expenditures for Fiscal Year 2006-07 included \$10 million paid to the department for licensing, enforcement, and administrative activities.

The board is also responsible for enforcement activities, including reviewing disciplinary cases to determine whether contractors should be disciplined and assessing fines or other penalties (e.g., license suspensions or revocations). The board also determines what types of disciplinary cases are eligible for alternative dispute resolution, which includes informal mediation. In addition, as part of its enforcement activities, the board reviews and decides claims made to the Florida Homeowners’ Construction Recovery Fund, which the Legislature established to compensate homeowners who suffer damages done by licensed contractors. The Legislature created the fund in the aftermath of Hurricane Andrew as a vehicle to compensate residents that suffered losses because of contractor violations.¹ Contractors provide the primary funding for the recovery fund through a required one-half cent per square foot surcharge for each building permit.²

Each year, the department and the board receive thousands of complaints concerning licensed and unlicensed activity. In recent years, the number of complaints has fluctuated, while those made to the recovery fund has increased steadily (see Exhibit 2). According to board officials, this increase resulted in part from aftermath of the hurricanes in 2004 and 2005, when thousands of residents sought the services of contractors to repair their storm-damaged homes and some encountered problems with contractors not completing repairs in an acceptable manner.

The process the construction board uses to resolve complaints is similar to those of other department licensing boards. To initiate a complaint, a consumer must submit a signed complaint form to the department, which staff reviews to determine if additional documents are needed to establish legal sufficiency.^{3,4} If a complaint is initially deemed

¹ Created in 1993, the fund was originally named the Florida Construction Industries Recovery Fund. In 2004, the Legislature renamed the fund, increased the maximum compensation from \$25,000 to \$50,000, increased the aggregate cap for claims against one contractor from \$250,000 to \$500,000, and limited the fund to building, residential, and general contractor violations.

² The fund only covers the actions of building, residential, and general contractors.

³ The department can also accept and investigate anonymous complaints.

⁴ Florida statutes broadly define legal sufficiency. According to s. 455.225(1)(a), *F.S.*, a complaint is legally sufficient if it contains ultimate facts that show that a violation of this chapter, of any of the practice acts relating to the professions regulated by the

legally sufficient, DBPR staff investigates. After the investigation is complete, attorneys review the case and decide if sufficient evidence exists for disciplinary action. If so, the attorneys present the disciplinary case to the board’s probable cause panel.⁵ If probable cause is not found, the case is closed with no further disciplinary action. If probable cause is found, the contractor is charged with regulatory violations and served with an administrative complaint. Contractors who dispute the facts of the case can petition for a hearing before the Division of Administrative Hearings. Otherwise, the board may hear the case and make a final disciplinary decision. Contractors who dispute the decision can appeal to the District Court of Appeals.

Exhibit 2
The Number of Construction Complaints Received Has Fluctuated Over the Last Three Fiscal Years

	Fiscal Year			Total
	2004-05	2005-06	2006-07	
Licensed Activity	5,927	8,134	7,553	21,614
Unlicensed Activity	3,035	2,499	2,989	8,432
Recovery Fund	141	154	352	647
Other	315	401	64	780
Total	9,418	11,188	10,867	31,473

Source: OPPAGA analysis of the Department of Business and Professional Regulation complaint data.

Questions and Answers

How long does it take to process construction complaints?

In Fiscal Year 2006-07, the typical construction complaint was resolved in slightly under four months.⁶ Several factors influence how long it takes to resolve construction complaints: the type of complaint and nature of allegation and how long the homeowner takes to provide necessary documents. The complaint process could be improved by expanding the use of electronic documents through the department’s new document management system.

department, or of any rule adopted by the department or a regulatory board in the department has occurred.

⁵ The department reported that for Fiscal Year 2006-07, 2,793 complaints resulted in a finding of probable cause to discipline the contractor.

⁶ We analyzed new complaints received by the department for Fiscal Year 2004-05 through Fiscal Year 2006-07.

Complaint and allegation type affects processing time. Overall, the typical construction complaint was closed within 112 days during Fiscal Year 2006-07.⁷ However, the time to process complaints varies depending on whether complaints are against licensed or unlicensed contractors or if they involve homeowners attempting to access the Florida Homeowners’ Construction Recovery Fund. In Fiscal Year 2006-07, department officials typically closed complaints against licensed contractors within 116 days and closed complaints against unlicensed contractors within 97 days. Complaints involving homeowners seeking to access the Homeowners’ Recovery fund took the most time, 206 days, or over six months.⁸

In addition, the type of allegation brought against contractors influences how long the process takes. For example, allegations of unlicensed activity are straightforward to handle, because the contractor either does or does not have a license. However, allegations against licensed contractors can involve a range of allegations, from a simple violation of a board rule about posting a license number to more complex allegations such as aiding unlicensed activity, financial mismanagement, and incompetence.

Complex allegations have increased markedly and take significantly longer to process. Exhibit 3 shows that over the past three fiscal years, the number of complaints involving aiding unlicensed contracting, abandonment, and financial mismanagement increased. Aiding unlicensed contracting occurs, for example, when a licensed contractor subcontracts with an unlicensed individual to perform work that requires a license. Abandonment occurs when a contractor fails to do any work on a project for 90 days, and financial mismanagement can take many forms but may involve using funds from one project to pay for materials on a different project.

⁷ We used the Kaplan-Meier technique to calculate the time to close a case, which allowed us to take into account all complaints in the database including those complaints that were open at the time the data was collected. The results of the Kaplan-Meier analysis show the time to close a typical case. For example, in Fiscal Year 2006-07, the typical construction complaint (51% of the total number of complaints) closed within 112 days.

⁸ While the typical complaint closes within four months, a separate analysis conducted on closed complaints showed that for some cases the time to close can exceed 1,000 days.

**Exhibit 3
Abandonment and Financial Mismanagement
Allegations Have Increased Significantly¹**

Allegation	Fiscal Year		
	2004-05	2005-06	2006-07
Abandonment	689	1,949	2,031
Aiding Unlicensed Construction	370	479	517
Financial Mismanagement	799	1,922	2,432
Referred to Local Government	70	182	144
Incompetence	1,426	2,259	1,273
No License	2,942	2,211	1,761
Other	354	373	459
Unlicensed Business	177	254	134
Violation of Building Code	41	223	109
Violation of Board Rule	301	437	347
Total	7,169	10,289	9,207

¹ A single complaint can include more than one allegation.
Source: OPPAGA analysis of Department of Business and Professional Regulation complaint data.

Complaints involving financial mismanagement increased more than 200%, from 799 complaints in Fiscal Year 2004-05 to 2,432 in Fiscal Year 2006-07. Moreover, our subsequent analysis of these complaints showed that cases involving allegations that are more complex took longer to close than other cases, 259 days compared to 151 days.

Investigations and attorney reviews take the most time when processing complaints. Department employees use a centralized database to track the hours they spend on complaint-related activities and the calendar dates when cases move through the complaint process. This database shows that the most time-consuming complaint processing activities are those related to investigations and attorney preparation of complaints to go before the Construction Industry Licensing Board. Exhibit 4 shows the proportion of total hours for different complaint-related activities. Investigations take about half of the total hours to process complaints. The

percentage of time taken for legal review has declined in recent years and took 15% of the total hours in Fiscal Year 2006-07. Taken together, investigations and attorney activities account for about two-thirds of the total hours to process complaints.

Employee time tracking data shows that investigators spend from a few hours to a week on a typical complaint. However, the total hours for investigations includes the time necessary for contacting the individual who filed the complaint and waiting to receive needed information from the complainant. For example, the investigators often need to request that the complainant submit a copy of their contract with a contractor and proof of payment. The process is delayed until the department receives requested information needed to complete its investigation.

Greater use of electronic documents could improve the complaint process. A lengthy complaint process can frustrate consumers and contractors. However, some aspects of the disciplinary process cannot be streamlined because they are necessary to ensure due process or are not under the control of the department or the board (e.g., the timeliness of consumer and contractor responses to information requests). However, the department could improve the complaint process by developing procedures to use the department's new electronic document management system to allow homeowners to file complaints electronically with digital signatures. Allowing electronic signatures might reduce difficulty for consumers in filing signed complaint forms. Greater use of electronic documents might also facilitate electronic submission of required documentation, such as contracts and proof of payment. Department officials indicate that they will work to implement electronic signatures in the next phase of the document management system, in late 2008.

**Exhibit 4
Investigations and Attorney Reviews Take Up the Largest Proportion of Total Hours During the Complaint Process¹**

Closed Cases /Licensed Activity	Percentage of Time for				
	Initial Review	Investigations	Alternative Dispute Resolution Activities	General Counsel's Office	Miscellaneous Activities
2004-05	12.97	49.06	7.49	29.03	1.45
2005-06	14.17	51.93	10.84	22.27	0.79
2006-07	18.95	50.46	14.99	15.06	0.54

¹ At the time the data was collected, many complaints from Fiscal Year 2006-07 remain open, thus the hours included in the exhibit would be incomplete.
Source: OPPAGA analysis of Department of Business and Professional Regulation data.

What outcomes result from the complaint process?

To assess disciplinary outcomes, we analyzed the sanctions against and the discipline history of contractors with current complaints. It should be noted, however, that while the department receives thousands of complaints each year, many lack legal sufficiency and do not result in discipline (see Exhibit 5). In addition, many complaints are resolved through mediation. Department officials emphasized the importance of their mediation efforts in helping make consumers “whole” by assisting them in recovering their losses. As shown in Exhibit 5, the department successfully mediated 1,250 complaints in Fiscal Year 2006-07.

When the department determines that a violation has occurred, officials can handle lesser infractions through a citation or other discipline. The board’s probable cause panels hear cases that are more serious and decide which cases come before the board for possible disciplinary action.

**Exhibit 5
Only a Small Proportion of Complaints Are Referred to Probable Cause and Come Before the Board for Sanctions ¹**

	Fiscal Year		
	2004-05	2005-06	2006-07
Complaints Received	8,758	11,557	10,498
Legally Sufficient ²	5,262	9,906	7,500
Complaints Successfully Mediated	486	1,531	1,250
Probable Cause Found	2,947	2,981	2,793

¹ Because complaints are received and processed throughout the fiscal year, some complaints that resulted in a finding of probable cause may be carried over to the next year.

² The department handles some legally sufficient complaints through citations and fines.

Source: Department of Business and Professional Regulation.

Few contractors are subject to license suspension, revocation or voluntarily relinquishment; the board could consider increasing minimum penalties. The outcomes of disciplinary actions can be assessed by examining the proportion of contractors that receive serious sanctions. Florida law allows a range of disciplinary sanctions for contractors that violate state rules and regulations. For some violations, such as failing to obtain necessary permits or inspections, the department can issue a citation; like a speeding ticket, a citation always includes a

fine. ⁹ Other types of discipline include requiring additional continuing education, issuing a letter of noncompliance or reprimand, and/or levying fines. Serious violations can result in probation, larger fines, and restitution, with the most serious resulting in license suspension, revocation, and voluntary relinquishment of a license. ^{10, 11}

For the three fiscal years beginning in Fiscal Year 2004-05, the department received complaints against 7,733 licensed construction contractors. ¹² The Construction Industry Licensing Board (or the department on behalf of the board) took disciplinary action against 1,876 of these contractors (24% of the total). During the same period, the department issued restitution orders for 179 licensees. Department officials emphasize the importance of restitution in the disciplinary process. Restitution removes the contractor’s financial gain and results in license suspension if the contractor fails to comply with the restitution order. ¹³

In terms of other disciplinary outcomes, of the 1,876 contractors that received discipline, approximately one in five received the most serious disciplinary action (8.8% had their licenses revoked, 7.2% had license suspensions, and 3.2% relinquished their licenses).

Disciplinary outcomes can be interpreted in different ways. A low incidence of serious discipline may result from insufficient enforcement or may be an indication that licensing procedures successfully exclude incompetent contractors. However, the recent increase in the number of complaints alleging serious violations such as financial mismanagement and abandonment may indicate a need for greater emphasis on serious discipline.

⁹ Citations can be issued for less serious offenses that do not involve a substantial threat to the public health, safety, and welfare. If the contractor does not challenge the citation, it becomes a final order.

¹⁰ Fine amounts for minimum penalties and first offenses are typically less than \$5,000. We used fines greater than \$5,000 to represent serious discipline.

¹¹ Department officials consider revocation, suspension, and voluntary relinquishment the most “extreme” forms of discipline that should be used only as a last resort.

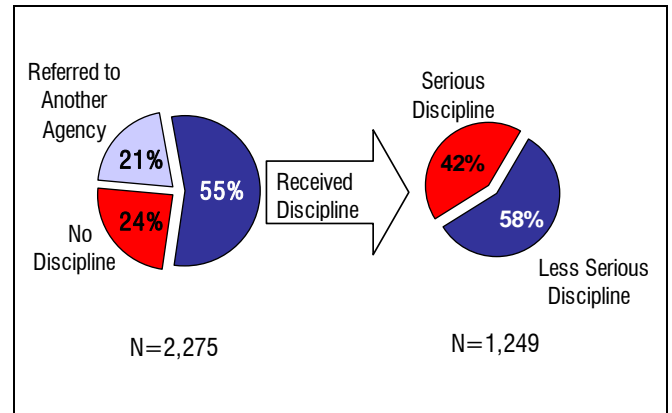
¹² Discipline outcomes are summarized over three years rather than by each fiscal year because of the number of complaints that were still open at the time the data was collected.

¹³ Department officials also explained that the time required and legal procedures necessary to establish formal restitution orders also accounts for a substantial portion of time in the overall complaint process.

Department and board officials indicate that disciplinary decisions require a balanced approach that includes weighing the contractor’s ability to make restitution against the seriousness of the offense. For example, probation may allow a contractor to make restitution, thus helping to compensate the homeowner’s losses. However, given the increase in abandonment and other serious allegations, increased penalties for first offenses may be needed to highlight the seriousness of these problems. For example, the board should consider imposing enhanced penalties for first time offenders involving these more serious offenses. Currently, financial mismanagement or misconduct causing financial harm carries a minimum penalty of a \$1,500 fine and/or probation or suspension. Given the increase in these types of violations, the board should consider increasing the minimum penalty.

A small percentage of contractors have a history of prior discipline. Our analysis also determined that some contractors who were the target of complaints in the last three fiscal years had prior complaints resulting in discipline. Contractor complaint histories showed that 2,275 licensees who were the subject of complaints had prior complaints, and 1,249 had received prior board discipline. As shown in Exhibit 6, 42% of these contractors had received serious discipline and 58% received less serious discipline.^{14, 15} This analysis suggests that a small proportion of contractors fail to modify their practices after being disciplined, which makes them a continuing threat to consumer health and well-being.

Exhibit 6
526 Contractors Had Prior Complaints That Resulted in Serious Disciplinary Action



Source: OPPAGA analysis of Department of Business and Professional Regulation complaint data.

What steps does the department currently take to address unlicensed construction complaints, and could additional steps be taken?

To protect the physical and financial health, safety, and welfare of the public, Florida law prohibits an unlicensed person from engaging in construction contracting. Within the Division of Regulation, the Office of Unlicensed Activity works to prevent unlicensed activities across all regulated professions, including construction contracting. The office uses several methods to combat unlicensed activity, including educational and consumer awareness programs and complaint investigations. The department can seek administrative sanctions when it finds unlicensed contractors and must refer them to the local states attorney’s office for criminal sanctions.

Despite these efforts, unlicensed construction contracting continues and the department faces a growing workload from complaints about unlicensed activity. In addition, its current efforts to sanction unlicensed contractors are hampered by inaccurate information and non-payment of fines. Improved identification of these contractors and use of civil judgments to collect fines could enhance the department’s efforts to combat unlicensed construction contracting.

The department currently uses education and enforcement to address unlicensed activity. The office’s efforts to reduce unlicensed construction

¹⁴ Serious discipline includes license suspension, revocation, or relinquishment. Less serious discipline includes all other forms of discipline, including but not limited to letters of non-compliance, citations, and fines.

¹⁵ The 2,275 licensees with prior complaint histories include 473 contractors that were referred to another agency and are not included in the number who received prior board discipline. Contractors licensed at the local level only provide services in a particular county. Local agencies handle discipline of these contractors for events occurring in the local jurisdiction.

contracting include both proactive and reactive activities. The office encourages the public to hire only licensed contractors through educational efforts such as public service announcements, website postings, billboard advertisements, and brochures distributed to consumers at home improvement stores. In addition, the office maintains a licensing database that consumers can access to determine if a contractor holds a valid license.

The department's regional offices also conduct periodic sweep and sting operations to identify unlicensed contractors. When conducting sweeps, department staff visits construction sites looking for unlicensed contractors performing construction work that requires a license. When conducting stings, department staff poses as homeowners and invite contractors to bid on home repairs or other work. Once the contractors bid on the work, staff checks to ensure that the contractor is properly licensed.

The office also investigates complaints from consumers who suspect an unlicensed contractor has victimized them. Department staff located in the regional offices investigates unlicensed construction contracting complaints including those that originate with consumers and those resulting from sweeps. The investigators determine if the individual performing construction activities is subject to licensure and has the proper license to perform the construction activity.¹⁶ The office refers cases of unlicensed contractors to department attorneys for processing and possible sanctions.

Unlicensed complaint processing represents a significant portion of department workload. The department investigated and closed approximately 1,900 complaints involving unlicensed construction contracting in Fiscal Year 2006-07. The Office of Unlicensed Activity spent just over \$1 million for efforts related to unlicensed activities in Fiscal Year 2006-07, including approximately \$472,000 from the Construction Industry Licensing Board. Department attorneys who handle unlicensed cases indicate that approximately 75% of their

caseload involves unlicensed construction contracting. In its Fiscal Year 2008-09 Legislative Budget Request, the department requested 17 investigator specialists to meet its increased caseload, reduce the number of open cases per investigator, and decrease caseload-processing time.

The department is authorized to seek administrative sanctions against unlicensed contractors and refer them for criminal sanctions. The department can take several different administrative actions against unlicensed contractors including citations, cease and desist orders, and fines. Cease and desist orders require individuals to stop engaging in unlicensed activities; the department uses this action in less serious cases when there is no consumer harm. In calendar year 2007, the department reports that it closed 767 cases with cease and desist orders, compared to 595 in 2006.

Attorneys can also file a formal administrative complaint with the department's secretary. Formal administrative complaints may recommend fines up to \$10,000 plus investigative costs and are used when a consumer has been financially harmed or the contractor has previously been issued a cease and desist order. The secretary issues final orders for all administrative complaints where unlicensed construction contracting was found to have occurred. In calendar year 2007, the department reports that it filed 442 administrative complaints, compared to 460 in 2006.

Generally, Division of Regulation staff provides information on unlicensed construction contracting to local state attorneys for criminal prosecution. Such activity is illegal and can result in a misdemeanor conviction for a first offense or a felony conviction for a subsequent conviction. Unlicensed contracting that occurs during an emergency declared by the governor can result in a third degree felony arrest. Department officials reported that in Fiscal Year 2006-07, they referred 1,233 unlicensed construction contractors to local state attorney's offices. However, the department does not track the outcome of these cases because of inconsistent reporting by the state attorney's offices.

¹⁶ Section 489.103, *F.S.*, lists a number of exceptions that allow persons to perform construction contracting without a license including construction on federal sites, work totaling less than \$1,000 for materials and labor, and owners of property acting as their own contractor.

Current sanctions against unlicensed contractors have limited impact. Several factors hamper the effectiveness of the sanctions the department can currently impose on unlicensed contractors. First, the department’s ability to take action against an unlicensed contractor is hampered when it receives inaccurate information. Department officials indicate that unlicensed construction contractors frequently provide false names and addresses to DBPR investigators. Because the investigators are not sworn law enforcement officers, they do not have authority to compel these individuals to provide identification. Without accurate identifying information, department staff cannot successfully impose administrative penalties and forward cases to the state attorney’s office.

Second, unlicensed construction contractors often fail to pay administrative fines imposed by the department. The department cannot compel individuals to pay fines unless they are attempting to obtain construction licenses, in which case the license is not issued until the fines are paid.

Third, the deterrent effect of potential criminal sanctions for unlicensed activity is often reduced due to negotiated plea offers. In practice, state attorneys place a priority on compensating victim losses, which is often accomplished by negotiating plea offers for less serious offenses that involve restitution but little or no jail time. Negotiated plea offers can also include withholding of adjudication of guilt. In such cases, the individual does not receive a criminal conviction; without a prior conviction for unlicensed contracting, an individual cannot be subsequently charged with a felony offense for repeated unlicensed contracting. In addition, if the plea bargain does not contain requirements to pay restitution, the victim would have to file suit in civil court against the unlicensed contractor to attempt to recover damages.

The department could take additional steps to enforce sanctions against unlicensed contractors. The department could take additional steps to collect administrative fines and facilitate payment when fines are imposed on unlicensed contractors. For example, the department could seek judgments in civil court against unlicensed construction contractors who do not pay fines. Obtaining these judgments would enable the department to take a number of actions to collect

monies owed, including seizing personal property and garnishing wages.¹⁷

Department officials reported that DBPR has the authority to take this type of civil action and has done so as recently as 2005. However, they indicated two concerns about continuing to seek such action: the need for additional staff and their desire not to compete with homeowners who are seeking a civil judgment against a contractor. In order to avoid competing with homeowners, the department could ensure that homeowners are paid first from any civil judgment against an unlicensed contractor.

In addition, the department could take steps to increase the role of local law enforcement officers in unlicensed contractor sweeps and stings. In Fiscal Year 2006-07, department staff conducted 4 sting operations and 144 sweeps; law enforcement participated in 2 sting operations and 3 sweeps. Because sworn law enforcement officers have the legal authority to arrest individuals who practice unlicensed contracting as well as access to law enforcement databases to confirm names and addresses, this action would enhance the department’s ability to obtain personal identifying information needed to pursue legal actions against unlicensed contractors.

What steps do homeowners take to access the Florida Homeowners’ Construction Recovery Fund, and are there alternative approaches to address homeowner losses?

The Florida Homeowners’ Construction Recovery Fund allows homeowners to recover a portion of their losses suffered due to the actions of a licensed contractor.¹⁸ The process to access the fund requires a number of steps and can take 16 months or longer to complete. Fund claims have declined as the aftermath of recent hurricanes has subsided, but due to the current downturn in the construction industry, recovery fund revenues have also declined. The Legislature may wish to consider alternatives for the recovery fund and create a funding stream that is less dependent on

¹⁷ The department would take these actions only when the individual had sufficient assets to justify the additional legal expenses to obtain these judgments.

¹⁸ The recovery fund only covers losses due to the actions of Division I contractors—general, building, and residential.

construction industry activity levels. In addition, the Legislature could enhance the current recovery program by establishing a lien recovery system to reduce the burden of subcontractor lien claims to the fund.

Current law allows homeowners with certain losses to access the state's recovery fund. Homeowners can access the recovery fund under three circumstances. First, homeowners may file claims if the contractor has committed mismanagement or misconduct in the practice of contracting that causes financial harm to a homeowner. Second, homeowners may file claims if their contractor has abandoned a construction project in which the contractor is engaged or under contract as a contractor. Finally, claims may be filed if a contractor has signed a statement with respect to a project or contract that falsely indicates that the work is bonded; falsely indicates that payment has been made for all subcontracted work, labor, and materials which results in a financial loss to the owner, purchaser, or contractor; or falsely indicates that workers' compensation and public liability insurance are provided

Approximately one-third of recovery fund claims involve construction liens filed by subcontractors against a homeowner. In these cases, homeowners may apply to the fund to pay subcontractors who the contractor did not pay after receiving payment from the homeowner. These subcontractors file a lien against the homeowner to secure payment for the labor and services they provided, which can result in the homeowner paying twice for the same work.

While the board pays all valid claims, not all homeowner losses are recovered. For example, the fund does not reimburse homeowners for court costs, attorneys' fees, or medical damages. The fund also does not cover construction losses in excess of \$50,000. According to department officials, 4 of the 94 claims in Fiscal Year 2007-08 exceeded the \$50,000 cap. While 90 claims were paid in full, the uncompensated losses for the 4 remaining claims totaled \$98,500.

Homeowners must complete a lengthy and complex process to access recovery funds. A homeowner who has suffered damages by the actions of a contractor must go through a lengthy

and complex process in order to receive compensation. After obtaining a board decision, civil judgment, or arbitration award, the homeowner must file a claim with the department to access the fund. While the time to obtain a board decision took 243 days in Fiscal Year 2006-07, the time to process a claim and receive payment took 206 days (see Exhibit 7).¹⁹ Once the board rules that a contractor is responsible for the homeowner's loss, department rules impose a waiting period of 45 days to allow the contractor to comply with or appeal the decision before the complainant may take further action. If the contractor does not pay total restitution, the homeowner must seek compensation from all available sources, such as surety bonds, insurance policies, warranties, and letters of credit. The complainant may file a recovery fund claim only after exhausting all available compensation sources.

Over the past three fiscal years, it took a typical homeowner 494 days (16 months) to complete the disciplinary process and apply and receive payment from the recovery fund (see Exhibit 7). Some recovery fund claims, excluding time for the original board decision, took over 500 days to complete, and one took 1,110 days, or over three years. According to department officials, these lengthy processing times usually occurred when contractors filed for bankruptcy and a recovery fund claim could not move forward without specific authority from the bankruptcy court.

**Exhibit 7
A Typical Disciplinary Case and Recovery Fund Claim Can Take 16 Months to Complete**

Action	Days to Complete
File a complaint and obtain a board decision	243
Allow contractor to appeal or comply	45
File application to access the recovery fund and receive a check	206
Total days from initial complaint to the board until payment from Recovery Fund	494

Source: OPPAGA analysis of claims paid between Fiscal Years 2004-05 and 2006-07.

¹⁹ The department does not track cases resolved by arbitration or civil action. However, the time to obtain a court judgment would likely increase the time it takes a homeowner to access the recovery fund.

Processing fund claims is lengthy for three reasons. First, department officials reported that many cases are delayed when homeowners fail to provide complete claim packages or do not respond to requests for additional information in a timely manner. Second, cases can be delayed if the claimant or contractor asks for an extension because s/he is unable to attend the meeting in which the claim is being reviewed. Third, as noted above, several statutory and department timelines must be met for the department to investigate claims, the board to consider claim cases, and contractors to respond to board actions. Department officials reported that they are considering a rule change that would reduce required waiting periods from 45 to 35 days.

The number of recovery claims processed has fluctuated and fund revenues have declined. As shown in Exhibit 8, the number of recovery fund claims processed has fluctuated over the last three years. From Fiscal Year 2004-05 to Fiscal Year 2006-07, approved claims declined from 232 to 152. During the same period, disbursements declined from \$3.1 million to \$1.7 million. The increase in claims and disbursements during Fiscal Year 2005-06 reflects the impact of hurricanes that struck Florida during the period.

**Exhibit 8
All Eligible Recovery Fund Claimants
Receive Reimbursements**

Fiscal Year	Approved	Denied ¹	Disbursements
2004-05	182	62	\$2,215,646
2005-06	232	31	3,108,077
2006-07	152	27	1,692,036

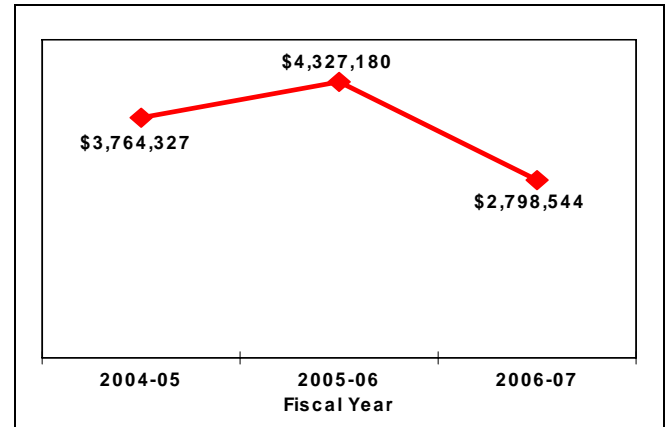
¹ The board denies only those applications that do not meet statutory requirements.

Source: Department of Business and Professional Regulation.

Department officials reported that while the recovery fund has sufficient revenues to pay claims in Fiscal Year 2007-08, they expect the fund to continue to significantly decline during Fiscal Year 2008-09 because its revenue source is decreasing. Specifically, the building permit assessments used to pay recovery fund claims have declined significantly due to a downturn in the residential construction industry. Assessments declined from \$4.3 million in Fiscal Year 2005-06 to \$2.8 million in Fiscal Year 2006-07, a 35% decrease (see Exhibit 9).

In addition, for the first half of Fiscal Year 2007-08, department officials report that assessments are behind the prior year by \$500,000. ²⁰

**Exhibit 9
Recovery Fund Revenues Have Declined Significantly
Due to Industry Downturn**



Source: Department of Business and Professional Regulation.

The Legislature could consider approaches used by other states to mitigate homeowner losses. Several states that offer programs to compensate consumers for losses caused by contractors use different approaches than does Florida. Recovery programs in Alabama and North Carolina allow homeowners to recover the total amount of damages they incur and do not place a limit on the amount a homeowner may be compensated. North Carolina is also different in that it requires contractors to obtain a performance and payment surety bond for any project in excess of \$300,000; these bonds guarantee that a project will be completed in accordance with the terms of the contract and subcontractors and suppliers are paid. Arizona operates a recovery fund program but caps payment at \$30,000, well below Florida’s \$50,000 maximum payment. ²¹

²⁰ Recovery fund revenues are also reduced by funding retained by local governments. Municipal governments that issue building permits can retain up to 10% of the surcharge to fund improvements in building code enforcement. The Department of Business and Professional Regulation deposits the funds in a separate trust fund account. Funds from the surcharge are also used to pay for the Building Code Administrators and Inspectors Board. A significant portion (58%) of the surcharge revenues in Fiscal Year 2006-07 were used to cover board expenses totaling \$1.6 million.

²¹ Florida requires a payment and performance surety bond for all state public work projects with contracts greater than \$200,000.

Utah and Michigan take a different approach to protecting both homeowners and subcontractors. Neither state has a homeowners' recovery fund, but instead each has Residence Lien Recovery Funds that protect homeowners, suppliers, and subcontractors. The states fund these programs through mandatory fees paid by contractors and voluntary fees paid by other construction workers. Utah program participants are required to pay a \$295 annual fee. In Michigan, contractors pay a \$10 program fee, while subcontractors, suppliers, or laborers that wish to participate pay an initial \$50 membership fee and a \$30 renewal fee every three years.

Homeowners in Utah and Michigan are exempt from liens if they can show that they contracted in writing with a licensed contractor and paid the contract price in full. Subcontractors who pay an annual fee to participate in the program are paid from the fund if the contractor defaults. Utah and Michigan lien laws differ significantly from Florida's law, which allows subcontractors to recover payments from homeowners and can result in homeowners paying twice for the same materials and labor, once to the contractor (who already received payment) and again to the subcontractor if the contractor defaults.

To address concerns regarding the long-term viability of Florida's Homeowners' Construction Recovery Fund and its ability to provide relief to homeowners, the Legislature could consider similar alternatives. For example, the Legislature could establish a recovery lien fund system similar to those in Utah or Michigan. Currently, the only recourse for subcontractors and suppliers to recoup losses is to file a lien against the homeowner. Under a lien recovery program, the subcontractor would still file a lien. However,

if the homeowner can prove that s/he has paid the contractor, then the lien recovery fund would pay the subcontractor and/or supplier. To cover 30% of current disbursements from the fund, licensed contractors would need to pay a fee of approximately \$8 to \$10 per year.²²

If the Legislature implemented the lien program, it would extend the life of the recovery fund by addressing all lien claims and provide a funding source less subject to fluctuations in the construction industry. To provide funding for such a program, the Legislature could direct the Construction Industry Licensing Board to establish a participation fee as part of their biennial licensing and renewal process.²³ Subcontractor cases involving liens would be handled by the new system and all other cases would be processed through the existing recovery fund program.

Agency Response

In accordance with the provisions of s. 11.51(5), *Florida Statutes*, a draft of our report was submitted to the Secretary of the Department of Business and Professional Regulation for review and response.

The secretary's written response is reproduced in its entirety in Appendix A. Where necessary and appropriate, OPPAGA comments have been inserted into the response.

²² In Fiscal Year 2006-07, one-third of total disbursements equaled approximately \$500,000. While one-third of claims may include subcontractor liens, these cases may also include other allegations such as abandonment.

²³ The board, with the department's assistance, would need to establish a fee and payment mechanism for suppliers not licensed by the board who wish to participate.

OPPAGA supports the Florida Legislature by providing evaluative research and objective analyses to promote government accountability and the efficient and effective use of public resources. This project was conducted in accordance with applicable evaluation standards. Copies of this report in print or alternate accessible format may be obtained by telephone (850/488-0021), by FAX (850/487-3804), in person, or by mail (OPPAGA Report Production, Claude Pepper Building, Room 312, 111 W. Madison St., Tallahassee, FL 32399-1475). Cover photo by Mark Foley.

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Appendix A

Florida Department of
**Business
Professional
Regulation**

Office of the Secretary
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Chuck Drago, Interim Secretary

Charlie Crist, Governor

March 25, 2008

Gary R. VanLandingham, Director
Office of Program Policy Analysis and Government Accountability
Claude Pepper Building, Room 312
111 West Madison Street
Tallahassee, FL 32399-1450

Dear Mr. VanLandingham:

Enclosed is the Department's response to your March 10, 2008 draft report:

**Several Steps Could be Taken to Improve the
Construction Complaint Process and Increase Homeowner Protections**

We have worked closely with your staff in providing information for your report, and offer the following additional information in response to the specific OPPAGA findings, conclusions and recommendations.

We appreciate the time and energy put forth by your staff and we look forward to reviewing the final report. Please contact me if you need further information or have additional questions.

Sincerely,



Chuck Drago
Interim Secretary

CD/RF/vbh

Enclosure

Department of Business and Professional Regulation
Response to OPPAGA Report No. 08-21
Several Steps Could Be Taken to Improve the
Construction Complaint Process and Increase Homeowner Protection

Finding 1:

Greater use of electronic documents could improve the complaint process.

Recommendation:

The department could improve the complaint process by developing procedures to use the department's new electronic document management system to allow homeowners to file complaints electronically with digital signatures. Department officials indicate that they will work to implement electronic signatures in the next phase of the document management system, in late 2008.

Agency Response:

As indicated in the recommendation, the Division of Regulation is in the process of adopting the electronic document management system (DDMS) with funding provided by the Legislature. This new system will enable us to digitize much of the paper which is currently transferred between offices. We, along with the Division of Technology, will explore opportunities to receive complaints electronically using the DDMS. Under the current web-based system, one area of concern for the division is with duplicate complaints. When the department previously enabled complainants to be filed via the department's website, duplicate complainants were frequently generated for the same incident. This resulted in additional workload for complaint analysts. Prior to enabling the DDMS capability of electronic complaint filing, the inability of the system to identify duplicate complaints needs to be addressed.

Finding 2:

Few contractors receive extreme discipline; the board could consider increasing penalties.

Recommendation:

The board should consider imposing enhanced penalties for first time offenders involving these more serious offenses. Currently, financial mismanagement or misconduct causing financial harm carries a minimum penalty of a \$1,500 fine and/or probation or suspension. Given the increase in these types of violations, the board should consider increasing the minimum penalty.

Agency Response:

The department has found no evidence to support the proposition that raising the minimum penalties will have a deterrent effect on those contractors who have never offended or on those contractors who have re-offended. Although the recommendation appears to suggest that the increase in contractor violations correlates to the low minimum penalties, it appears not to take into account the increase in overall construction activity due to the demands and health of the Florida construction industry.

OPPAGA Comment

The report does not suggest that the number of violations results from low minimum penalties, but notes that there has been an increase in the number of certain serious allegations in recent years. The recommendation to increase penalties would have the benefit of placing licensees on notice of the increased attention by the board because of the rise in these types of serious infractions. While the report does not address the health of the construction industry in Florida, the background section of the report specifically mentions the recent increase in complaints that resulted in part, according to department officials, from Florida's recent hurricanes (see pages 2 and 3).

Fairly regulating the Florida construction industry and preventing consumer harm are primary goals of the department. Section 455.2273(2), Florida Statutes, requires that professional boards “shall specify a meaningful range of designated penalties based upon the severity and repetition of specific offenses.” Board discipline is utilized to achieve these goals. The statement that “few contractors receive extreme discipline” is confusing because, as the report indicates for the complaints reviewed, approximately 20% of the contractors that received discipline had their licenses revoked, suspended, or relinquished. As defined in the report extreme discipline is license suspension, revocation, or relinquishment, while all other forms of discipline are considered minor. The report notes that there may be a need for a greater emphasis on serious discipline, which is defined in the report as “fines greater than \$5,000.” The department maintains that other types of discipline, such as, to place a licensee on probation where the licensee may be monitored, required to obtain additional training, and required to pay restitution, costs, and fines is serious discipline. The penalty guidelines currently utilized by the board seems to achieve the meaningful range of discipline required by statute.

OPPAGA Comment

As we discussed with department officials, we analyzed the construction complaint data in terms of licensees, rather than complaints, because one contractor can have multiple complaints and one complaint can result in several different disciplinary actions. As stated on page 5 of the report, we identified 7,733 licensees with complaints over three fiscal years. Of those 7,733 licensees, the department and the board took action against 1,876. Of the 1,876 licensees that had disciplinary action, a small portion received a license suspension, revocation, or voluntary relinquishment.

Under penalty guidelines, restitution is required when consumer harm is proven. The department's data indicates that for complaints originating between July 1, 2004, and July 1, 2007, where probable cause was found, the Construction Industry Licensing Board imposed 680 orders of restitution. This number does not include final orders imposed after June 2007 for complaints that originated during that period or those cases that are still in process. The Construction Industry Licensing Board ordered \$7,699,000 to injured consumers in 2007. Restitution orders are enforced by suspension terms that allow a contractor to work as long as the contractor is making restitution payments. Serious discipline, as defined by the department, supports the goals of the department to aid the harmed consumer, protect future consumers through education of the licensee, and fairly regulate the industry.

OPPAGA Comment

We recognize that the department views restitution orders as an important method for addressing injured consumers, as evidenced by the \$7.7 million in restitution orders that they report for 2007. However, as noted on page 6 of the report, only 179 licensees received restitution orders over the three fiscal years we analyzed—beginning in July 2004 and ending in June 2007.

Finding 3:

The department could take additional steps to enforce sanctions against unlicensed contractors.

Recommendation:

The department could seek judgments in civil court against unlicensed construction contractors who do not pay fines and restitution. Obtaining these judgments would enable the department to take a number of actions to collect monies owed, including seizing personal property and garnishing wages.

In addition, the department could take steps to increase the role of local law enforcement officers in unlicensed contractor sweeps and stings. In Fiscal Year 2006-07, department staff conducted 4 sting operations and 144 sweeps; law enforcement participated in 2 sting operations and 3 sweeps. Because sworn law enforcement officers have the legal authority to arrest individuals who practice unlicensed contracting as well as access to law enforcement databases to confirm names and addresses, this action would enhance the department's ability to obtain personal identifying information needed to pursue legal actions against unlicensed contractors.

Agency Response:

The report states that “the department could seek judgments in civil court against unlicensed contractors who do not pay fines” so that the department could collect on the judgments through wage garnishments and property seizure. Between 2001 and 2005, the department pursued such judgments and found the staffing requirements to accomplish this task, the costs, and the time it would take to procedurally progress through the congested civil dockets in the Florida civil court system made it an ineffective solution. The filing fees, which have nearly tripled since 2005, combined with the time and cost of having an attorney pursue, obtain, and record the judgments, significantly enhanced the department's costs. These costs were further increased when measures such as garnishing wages and levying property were undertaken to collect on the judgment. Meanwhile, the recovery of unpaid fines and costs through the judgments remained minimal. Combined with the fact that the department was competing for limited resources with consumers who were harmed by unlicensed contractors, the department found that seeking civil judgments against unlicensed contractors was neither cost-effective for the department nor beneficial to the public.

OPPAGA Comment

We understand that the department, like all agencies in state government, is working with limited funds. Our recommendation regarding the use of civil judgments is made to support the department's future efforts to hold unlicensed contractors accountable for fines assessed by the department.

The report states that the department may “ensure that homeowners are paid first from any civil judgment against an unlicensed contractor.” This statement presupposes the department has the authority to make any judgment against an unlicensed contractor for unpaid fines and costs have priority above any and all other judgments that may exist against that unlicensed contractor. The department does not have jurisdiction to determine the priority of civil claims and judgments, as such jurisdiction lies exclusively with the judicial branch.

OPPAGA Comment

We do not presuppose any department authority regarding judicial matters but rather conclude that the department, in its efforts to pursue the payment of fines, could take steps to ensure that it seeks payment of fines only after homeowners have been compensated.

As noted in the report, the department participates in joint enforcement sweeps and stings with law enforcement personnel. During the current fiscal year we have already increased by over five times the number of sweeps in which we have worked in cooperation with law enforcement personnel. We will continue to work to increase these joint efforts. Additionally, confidential information between agencies is able to be shared pursuant to statute, and is shared by law enforcement agencies and the department to combat illegal activity. While the department cannot seek criminal sanctions against unlicensed contractors, the department, pursuant to section 455.2277, Florida Statutes, reports any criminal violations relating to the practice of contracting to the proper prosecuting authorities.