CHAPTER 558, FLORIDA STATUTES

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History

- Original Act effective May 27, 2003 – only covers residential dwellings. Several controversial issues, including application of act through contract provisions and "deemed to accept" provision relating to claimant's failure to timely respond to offer to repair.

- July 1, 2004 – Act is amended to address initial concerns, though still only covers residential dwellings.

- October 1, 2006 – Act is amended and expanded to include all improvements to real property regardless of the type of structure. Act now covers improvements on residential, commercial and public property, with the only specified exclusion being public transportation projects. Also includes a new contractual notice provision to reflect that the Act covers property and structures other than residential.

- October 1, 2009 – multiple procedural and substantive amendments enacted, including:

- 558.002(4) added to define "completion of a building or improvement", which in conjunction with an amendment to 558.003 expressly provides that the notice requirements of the Act do not apply to a project that has not achieved substantial completion;

- 558.004(2)(b) revised to cover restorations (in addition to repairs) with regards to destructive testing;

- 558.004(2)(g) revised to eliminate lien rights caused by the destructive testing or for any repairs or restoration required due to the destructive testing. The exception to this lien prohibition is if the owner directly contracts for the destructive testing;

- 558.004(3) amended to expressly state that downstream notices cannot be construed as an admission of any kind. *See* Geller v. Aventura Land Holdings, Ltd., Case No. 06-09739-CA-06, Florida 17th Circuit. (Trial judge interpreted a secondary notice sent to a subcontractor as an admission of liability against a developer);

- 558.004(4) amended to require any contractor receiving notice from the owner to provide the owner with any responses received from notices sent downstream;

- 558.004(15) revised to limit the extent of allowable discovery responses; and

- 558.005(1) amended to automatically apply Act to every claim for construction defects under an agreement for improvements after October 1, 2009 unless the parties "opt-out" in writing. 558.005(6) also adds a new notice sentence to be included in all contracts, however the failure to include it does not subject any party to any penalty.

- July 1, 2013 – Act is amended to add 558.0035 which exempts individual design professional employed by a business from negligence occurring within the course and scope of a professional services contract if:

- The contract is made between the business entity and a claimant or with another entity for the provision of professional services to the claimant;

- The contract does not name as a party to the contract the individual employee or agent who will perform the professional services;

- The contract includes a prominent statement, in uppercase font that is at least 5 point sizes larger than the rest of the text, that, pursuant to this section, an individual employee or agent may not be held individually liable for negligence;

- The business entity maintains any professional liability insurance required under the contract; and

- Any damages are solely economic in nature and the damages do not extend to personal injuries or property not subject to the contract.

- Also amends 558.002(7) by adding geologist to definition of design professional.

Application

What does Act apply to?

558.002(5) "Construction defect" means a deficiency in, or a deficiency arising out of, the design, specifications, surveying, planning, supervision, observation of construction, or construction, repair, alteration, or remodeling of real property resulting from:

(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. 558.84;

(c) A failure of the design of real property to meet the applicable professional standards of care at the time of governmental approval; or

(d) A failure to construct or remodel real property in accordance with accepted trade standards for good and workmanlike construction.

Who does Act apply to?

- 558.002(3) “Claimant” means a property owner, 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 of such damages. The term does not include a contractor, subcontractor, supplier or design professional.

- Tenants excluded from requirements of Act – “claimant” defined as “property owner”

- 558.002(6) "Contractor" means any person, as defined in s.1.01, that is legally engaged in the business of designing, *developing*, constructing, manufacturing, repairing or remodeling real property. Developer is arguably defined as contractor and thus excluded from definition of "claimant".

- 558.002(8) "Real property" means land that is improved and the improvements on such land… Very broad definition - includes all construction projects except public transportation projects.

When does Act apply?

- Act applies to all actions accruing before July 1, 2004, but not yet commenced as of July 1, 2004 regardless of whether the contract contained the required notice provisions. *558.005(5)*

- Between July 1, 2004 and September 30, 2006 – Act applies if the contract for improvements contains the notice set forth in 558.005(3)(a). *558.005(2)(a)*

- Between October 1, 2006 and September 30, 2009 – Act applies if the contract for improvements contains the notice set forth in 558.005(3)(b). *558.005(2)(b)*

- After October 1, 2009 – Act applies to all contracts for improvements unless the parties have agreed in writing to opt out of the requirements. *558.005(1)*

- 558.005(6) requires all contracts to contain a notice stating "ANY CLAIMS FOR CONSTRUCTION DEFECTS ARE SUBJECT TO THE NOTICE AND CURE PROVISIONS OF CHAPTER 558, FLORIDA STATUTES." However the statute then goes on to say failure to include this notice does not subject anyone to a penalty, as it is only intended to promote awareness. Seems like a meaningless provision.

- **Practice Tip** – If the parties want Chapter 558 to apply, in addition to the notice requirement of 558.006, they should include a notice stating "THE PARTIES HAVE NOT AND WILL NOT ENTER INTO ANY WRITTEN WAIVER OF CHAPTER 558". While not required, doing so may negate a future argument that there is a "written" waiver agreement outside of the contract.

- If the parties do not want Chapter 558 to apply, they must agree in writing. While the statute does not provide any specific language or even require the "writing" to be in the contract, it is better to be safe than sorry. Express notice of the waiver should be clearly disclaimed in the contract itself. One example is: "PURSUANT TO F.S. 558.005(1), THE PARTIES EXPRESSLY OPT-OUT OF THE REQUIREMENTS OF CHAPTER 558 AND AGREE THAT NONE OF THE PROVISIONS CONTAINED IN CHAPTER 558 SHALL APPLY TO THIS PROJECT"

Pros and Cons of Application

- No real justification for contractor to opt out – can learn about claim (discovery, inspections, testing, etc.) and potentially fix before litigation. Also, while it is becoming more prevalent for attorneys to become involved in the 558 process, there is no requirement that the parties be represented by counsel. As such, the contractor may have an opportunity to work directly with the owner without interference from attorneys.

- Owner may want to opt out to avoid the hassle of sending notices, making property available for inspections, producing documents, etc.

558.004 notice process

- Step 1 (558.004(1)) - At least 60 days or 120 days if involving an association with more than 20 parcels (units), before filing lawsuit (or arbitration demand), claimant (owner or association) must serve(defined in 558.002(9) as delivery by certified mail with U.S.P.S record of evidence of delivery or attempted delivery to last known address, hand delivery, or delivery by courier with written evidence of delivery) written notice on applicable contractor, sub, supplier, or design professional. Notice must refer to chapter 558 and describe claim(s) in reasonable detail to allow determination of general nature of each alleged defect and a description of the damage or loss resulting from each defect if known.

- If defect arises from work performed pursuant to a contract, the notice must be served on the party who the claimant contracted with.

- Claimant shall endeavor to serve notice within 15 days of discovery of each defect, but failure doesn't bar filing of action.

- This requirement does not preclude filing of action sooner than 60 or 120 days after filing of notice as provided in subsections 6, 7 & 8.

-Step 2 (558.004(2)) – entity in receipt of notice under subsection (1) has 30 or 50 days after service to perform reasonable inspection of property or each unit subject to claim to assess each alleged defect (an association's right to access individual units for maintenance or repair gives authority to allow 558 inspection)

- Claimant must provide reasonable access for inspections during working hours.

- Person conducting inspection must coordinate inspection(s) to minimize number and length of inspections.

- Inspecting party has right to perform destructive testing –must notify claimant in writing of intent to perform destructive testing. Notice must describe testing to be performed, person selected to do testing, estimated anticipated damage and required repairs to property resulting from testing, estimated time to complete testing and resulting repairs and financial responsibility for covering cost of repairs resulting from testing.

- If claimant promptly objects to person selected to perform testing, person who wants to test shall provide claimant with list of 3 qualified people for claimant to select. The person ultimately selected to perform testing is an agent or sub of contractor and is solely responsible to contractor (only has to furnish reports to contractor). The testing must be done at a mutually agreeable time and the claimant is entitled to have a representative present during testing. Testing cannot render property uninhabitable.

- No lien rights for destructive testing unless owner directly contracts with tester. If owner refuses to allow testing it will have no claim for damages that could have been avoided or mitigated had testing been allowed

- Step 3 (558.004(3)) – within 10 or 30 days the person receiving prime notice can serve a downstream notice (copy of original notice) on anyone who it reasonably believes responsible for each defect in prime notice. Downstream notice will not be construed as an admission of liability. Downstream recipients have same inspection and testing rights as prime recipient.

- Step 4 (558.004(4) – within 15 or 30 days, downstream recipient(s) must serve a written response to person who served downstream notice. Response shall include any reports involving results of inspections and any offer to repair, including details of the repair and timetable to complete, or, whether liability is disputed. G.C. may serve copy of this on claimant. (**Note:** downstream recipients can only offer to repair, not pay money).

- Step 5 (558.004(5)) – within 45 or 75 days after service of prime notice, prime recipient(s) must serve written response to claimant. Must be served on person who signed notice unless otherwise designated and provide:

1) written offer to repair that details the proposed repairs and timetable for completion (repairs must be done at no cost to claimant);

2) written offer to pay money that will not affect claimant's insurance and a timetable for payment;

3) written hybrid offer to make repairs and pay money that includes detailed description of repairs and payment terms and timetable for repairs and payment;

4) written statement claim is disputed and contractor will not repair or settle;

5) written statement that monetary payment, including any insurance proceeds will be determined by contractor's insurer within 30 days of insurer notification (service to insurer must be made at same time claimant notified of settlement option). If insurer makes no response in 30 days claimant can file lawsuit.

- If prime recipient(s) dispute claim, or do not respond in writing within 45 days, claimant can proceed with lawsuit. (558.004(6))

- Step 6 (558.004(7)) – Claimant must accept or reject settlement offer in writing within 45 days. No penalty if claimant doesn't respond, but action can be stayed until written acceptance or rejection served.

- if claimant timely accepts settlement offer for repair, must provide reasonable access during normal working hours. If offeror does not make repairs or payment within agreed upon time, except for reasonable delays beyond control of offeror (i.e. weather, delivery of materials, issuance of permits), claimant can proceed with lawsuit. If repairs or payment is made within agreed time, claimant is barred from suing over defects specified in notice. (partial settlements are authorized by statute).

558.004 general notice facts

- 558.004(9) Any offer or failure to offer does not constitute an admission of liability and is inadmissible in litigation.

- 558.004(10) Claimant's service of written notice tolls applicable statute of limitations (including bond claims) until the later of 90 or 120 days after service of notice, or, 30 days after the end of the agreed upon repair or payment deadline if claimant has accepted offer. Statute expressly authorizes parties to extend tolling period.

- 558.004(11) The 558 procedures apply to each individual defect, however claimant can include multiple defects in one notice. Claimant can also amend notice if additional defects are found after original notice is served.

- Can only proceed to trial on defects listed in notice.

- 558.004(13) does not relieve contractors from complying with any applicable insurance requirements, however, furnishing the insurer with copy of notice does not constitute claim for insurance.

- 558.004(14) - Act trumps any contractual arbitration provisions in the event of conflict.

Emergency Repairs

- 558.004(9) authorizes emergency repairs without notice. What exactly is an emergency? Emergency is not defined in the definition section and the provision authorizing emergency repairs just says "as required to protect the healthy, safety and welfare of the claimant"

- "Welfare" can potentially be very broad. What if the roof has non-structural leak (slow drips) and the business owner has a bunch of pots and pans catching the water and it drives customers away? Similarly, what if there is a defect that doesn't affect the integrity of the building but forces the owner to limit access or use to this portion? Could these repairs be considered preserving the welfare of the claimant?

Discovery

- 558.004(15) allows for exchange of limited documents (design plans, specs, and as built plans; documents detailing the design drawings or specs; photos, videos and expert reports that describe the alleged defects; subcontracts and purchase orders relating to defective work).

- Discovery request must be in writing, cite this subsection and offer to pay reasonable copying costs. Failure to provide requested documents can result in sanctions for a discovery violation if lawsuit initiated (**NOTE**: no sanctions if lawsuit never filed).

- Only claimant and recipients served with notice pursuant to 558.004(1) required to exchange discovery.

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