

Florida's Construction Defect Statute: Chapter 558, Florida Statutes



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Chaos In The Courts : Florida's Construction Defect Statute

*“The Legislature finds that it is
beneficial to have an alternative
method to resolve construction
disputes that would reduce the need
for litigation as well as protect the
rights of property owners”
Section 558.001, Florida Statutes*



Reality of the Statute

- More difficult to sue for faulty construction
- Poor drafting and impractical approach
- Confusion



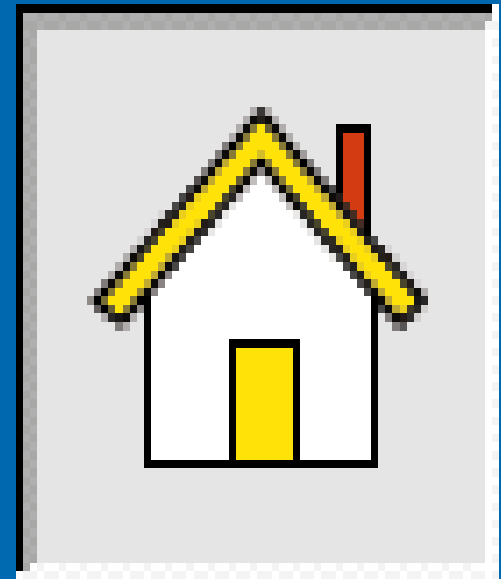
What Does The Statute Do?

- Before filing litigation or arbitration, a claimant must provide certain notices or follow certain procedures. Otherwise, a lawsuit filed can be stayed (put on hold) until the procedures have been satisfied.



Applies To Construction Defects In Dwellings, *Commercial And Public Property*

- Residential Construction
- Single Family Homes
- Condominium units and defects in common areas and improvements that are owned or maintained by an association
- Mobile Homes, Manufactured or Modular Homes, Duplexes
- Remodeling
- Real Property (Hospitals, Schools, Retail Centers) excludes public transportation



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.

558.003 – 558 Only Applies After Substantial Completion

- The notice requirement is not intended to interfere with an owner's ability to complete a project that has not been substantially completed. The notice is **not required** for a project that has not reached the **stage of completion of the building or improvement.**

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”



Who Does Act Apply To? cont'd.

- 558.002(6) “Contractor” means any person... 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”.
- *See also Specialty Engineering Consultants, Inc. V Hovstone Properties Florida LLC.* 968 So.2d 680 (Fla 4th DCA 2007) Contractor that is also the Owner is not a “claimant” per Chapter 558.

No New Rights Created

- This is a PROCEDURE
- Does Not Create Any New Rights, Defenses or Causes Of Action Or Theories On Which Liability May Be Based
- *Hebden v Kunnemann Construction, Inc.* 2009 WL 383570 (Fla 4th DCA Feb 18, 2009)



When Does Act Apply?

- 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.”
- Failure to include this notice does not subject anyone to a penalty, as it is only intended to promote awareness.

Practice Tip!

- If the parties want Chapter 558 to apply they should include a notice in the contract stating:

“THE PARTIES HAVE NOT AND WILL NOT ENTER INTO ANY WRITTEN WAIVER OF CHAPTER 558”

Another Practice Tip!

- If the parties do not want Chapter 558 to apply, they should include a notice in the contract stating:

“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 resolve before litigation.
- Contractor may have an opportunity to work directly with the owner without interference from attorneys.

Pros and Cons of Application cont.

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

Time Frame Before Filing Suit Differs Based Upon Number of Parcels

- 20 or fewer parcels -60 day notice before filing a lawsuit or arbitration claim.
- Association representing more than 20 parcels 120 day notice before filing a lawsuit or arbitration claim.



How Does The Process Begin?

- Claimant serves a Notice of Claim upon the party that it believes is responsible for the defect- “Reasonable Detail”
- Service- Certified Mail Return Receipt Requested, by hand delivery or by delivery by any courier with evidence of delivery
- Must Refer to the Statute To Apply

Practice Tip!

- Many attorneys attempt to fulfill “reasonable detail” requirement by attaching a copy of the engineer report to the 558 Notice.
- While opposing party may eventually be entitled to identification of expert and expert report, no need to gift wrap!

Who Are The Potential Recipients of a Notice of Claim-The Usual Suspects

- Contractors;
- Developers;
- Design Professionals, which include an architect, interior designers, landscape architect, engineer, surveyor, and as of 2013, a geologist;
- Subcontractors and Suppliers;
- Sureties Not Included

Who are the Recipients?

- If the defect arises from work performed under a contract, the written notice ***must be served on the person with whom the claimant contracted.*** *Section 558.004(1)*
- Otherwise, serve it upon the developer, contractor, subcontractor, supplier or design professional, as applicable.

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)

Opportunity To Inspect Is A Nightmare

- 30/50 Days- Practical ?
- Condominium Project- Contractor Receives a single notice of claim containing multiple defects



Scheduling Can Be Challenging

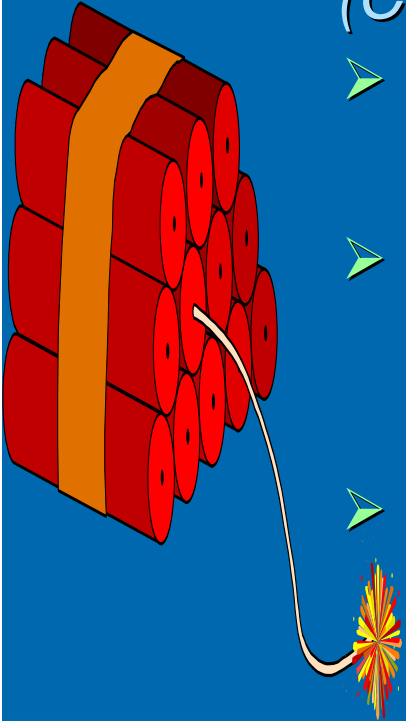
- Consider the expertise required for different defects
- Scheduling Alone Within 30/50 Days Can Be A Challenge-Consider the defect!
- “Reasonable inspection of the property or each unit subject to the claim”
- Duty to coordinate with others
- Consequences of not providing access? (limits at trial if a failure to comply- fuel for abuse)



“Destructive Testing”

(Claimant Should Resist -Contractor Should Insist)

- Request must be written;
- Request must describe all relevant testing details (type, location, person, security, etc.)
- Prompt objection by claimant to person designated to test- then 3 candidates must be provided and claimant may select
- Testing shall not render the dwelling uninhabitable ?????
- No lien rights for destructive testing unless owner directly contracts.



Failure To Permit Destructive Testing

- “In the event the claimant fails or refuses to agree to destructive testing, the claimant shall have no claim for damages which could have been avoided or mitigated had destructive testing been allowed when requested and a feasible remedy been promptly implemented”
- How would you ever know whether feasible remedy ever existed or if it would have been offered?



Owners Make A Record

- Require Destructive Testing By Qualified Consultants (Insured & Reputable)
- Risky Business-No Statutory Remedy If Not Repaired (Wallpaper etc..)
- Demand Financial Security for Repairs
- Hire Own Consultant to Justify Why Destructive Testing Is Not Necessary
- Let Own Consultant Perform Destructive Testing To Document Conditions (be mindful of liens)



Step 3 - Contractor Must Notify Others in 10/30 Days (558.004 (3))

- Those that may be liable to you for the specified defects such as the design professional, subcontractors, suppliers-*Must note the specific defect that is the responsibility of the secondary party .*
- Notify everyone- Opportunity to inspect again and no prohibition as to the number of people to attend – another opportunity to gather information- look at different locations!
- Hardship to the Homeowner – Another Inspection! But Contractor has duty to coordinate.



Step 4 – Downstream Responses

- Optional: Written report of findings as to the scope and findings of any inspection conducted-Contractor is not required to furnish this report to the claimant
- Within 15/30 days from receipt of the notice-must offer to repair, timetable for repair, description of repairs or intent to dispute the claim (no explanation required) No provision to offer money to satisfy the claim!



Step 5 Contractor Must Issue A Written Response In 45/75 Days



- A) Repair- detailed description of repairs to remedy and timetable to complete - No requirement that timetable be reasonable- No requirement to warrant or guarantee repairs
- B) Pay \$\$\$\$: Specify time but no **reasonable time requirement** for payment after acceptance
- C) Combination
- D) Dispute the claim
- E) Check with the insurance carrier and respond in 30 days
- Partial Settlement Permitted

Step 6 – Claimant Response – 558.004(7)

- Claimant must accept or reject any offer in writing within 45 DAYS AFTER receiving offer.
- No penalty if Claimant doesn't respond, but action can be stayed until written response provided.



Claimant Duties - 558.004(8)

- If claimant timely accepts settlement offer for repair, must provide reasonable access during normal working hours.
- If repairs or payment made within agreed time, claimant is barred from suing over defects specified in notice. (partial settlements are authorized by statute).

Downside Risk To Contractor For Failing To Comply With The Statute ?

- Offer to settle by repair or payment of money -Not an admission of liability
- Failure to offer payment or repair – Not an admission of liability
- Failure to make accepted repair or payment - Not an admission of liability



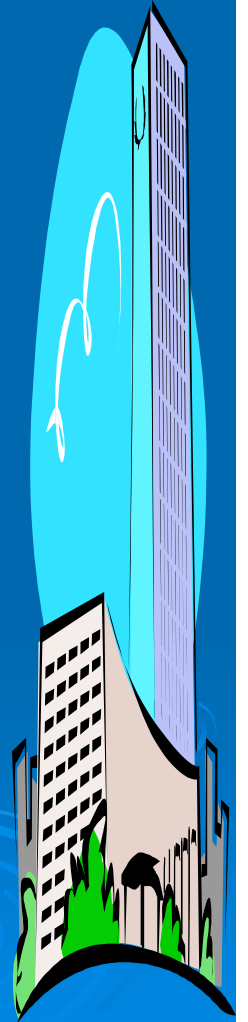
558.004(9) – Emergency Repairs

- Emergency repairs authorized without notice "as required to protect the healthy, safety and welfare of the claimant"
- “Welfare” can potentially be very broad.

558.004(10) Tolling The S.O.L.

- Automatic tolling upon the later of:
- 90/120 Days after service of Notice pursuant to subsection (1) ; or
- 30 Days after the end of the repair period or payment period as stated in the offer, if offer is accepted.
- Parties may stipulate to extend tolling period which likewise extends the statute of limitations

See also Saltponds Condominium Association, Inc. v Walbridge Aldinger Company 979 So. 2d. 1240 (3rd DCA 2008)



Newly Discovered Defects

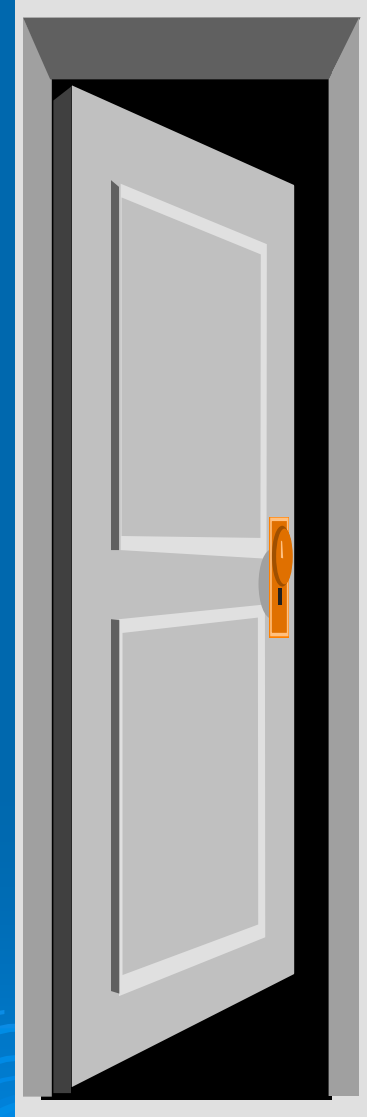
- 558.004(11) – Can include multiple defects in one Notice of Claim.
- Can only proceed to trial on defects listed in notice.
 - *See also, J.S.L Construction Company v. Levy*, 994 So. 2d 394 (Fla. 3rd DCA 2008) (Homeowners not entitled to recover cost of replacing roof where statutory notice and pleadings gave no hint they were seeking such damages)

Miscellaneous

- 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.

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.



Discovery cont'd.

- Only claimant and recipients served with notice pursuant to 558.004(1) required to exchange discovery.
- Failure to provide requested documents can result in sanctions for a discovery violation if lawsuit initiated (**NOTE:** no sanctions if lawsuit never filed).

July 1, 2013 Addition of 558.0035

- Exempts individual design professional employed by a business from negligence occurring within the course and scope of a professional services contract if:
 - Contract is made between the business entity and a claimant or with another entity for the provision of professional services to the claimant;
 - Individual employee is not a party to the contract;
 - Contract includes a prominent statement that 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.

Question 1

- ***A “claimant” under Chapter 558 includes the following:***
- a) Owner of a Hospital
- b) Homeowner Association consisting of 18 units
- c) School Board
- d) Owner who is also the contractor of a residential condominium project
- e) a, b and c only
- f) b & c only
- g) b & d only

Question 2

- *Chapter 558 does not apply to the following:*
- a) Office Condominium Building
- b) Tri-Rail Station
- c) Shopping Center
- d) Museum owned by the City of Orlando