



CONSTRUCTive Talk

VOLUME 1 ISSUE 2
2015 - 2016

CONSTRUCTION LAW COMMITTEE NEWSLETTER, A COMMITTEE OF THE
FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION



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The Shifting Intent of Chapter 558

Florida Legislature moves further away from original purpose of Chapter 558's dispute resolution mechanism. By: Sanjay Kurian, Esq., Becker & Poliakoff, Fort Myers, FL

Another legislative session has come and gone and the big news was, rightfully, the budget and Medicaid. However, for those of us in the construction world the changes were not as newsworthy as the state budget but will be important in the years to come. The legislature passed, and the Governor signed, House Bill 87 modifying some of the requirements of Chapter 558, Florida Statutes. The changes noted below will take effect October 1, 2015.

The original intent of Chapter 558, enacted in 2003, was to create a mandatory pre-suit process before claims for construction defects could be brought in court. In fact section 558.001 describes the "dispute resolution

mechanism" as "an opportunity to resolve the claim through confidential negotiations without resort to further legal process." For many reasons, including changes this year, it appears that the purpose of the statute is moving away from dispute resolution.



Originally claims subject to Chapter 558 were limited to residential defect claims but now include all residential and commercial project claims for defects. All public projects are also included except for projects involving the Florida Department of Transpor-

tation. However, Chapter 558 does not apply to projects that have not reached the stage of completion of the building or improvements.

Chapter 558 requires written notice from the claimant to the construction or design professionals believed to be responsible for defects or deficiencies and provide timeframes for the construction or design professionals to review the claims, inspect the property and respond. Responses from recipients of the claims could include an offer to repair the defects at no cost to the claimant, pay a monetary settlement, dispute the claim and decline to remedy or pay for some or all of the claimed defects, or a combination of these options.

Congratulations!

23 New Attorneys Achieve Board Certification in Construction Law.

Please join us in congratulating the following individuals on passage of the Board Certification Exam.

Chad Alvaro
Frederick Barnes
Miguel Brizuela
Monique S. Cardenas
Angela Covington
Stephen Gross
John Hanebrink
Patrick Howell

Dara Jebrock
Kevin Kelly
Honorable Mark Kiser
Terrence Lavy
Spencer Mallard
Scott Mason
Leo Meiroso

David Minacci
Joseph Passeretti
Karl Pearson
Scott Pence
William Rostock
Evan Small
Michal St. Jacques II.



The Shifting Intent of Chapter 558

Florida Legislature moves further away from original purpose of Chapter 558's dispute resolution mechanism (continued from page 1)

“The Amendments to Chapter 558 add a variety of requirements that ... will make pre-suit resolution more difficult.”

The amendments to Chapter 558 add a variety of requirements that, in the opinion of this author, will make pre-suit resolution more difficult. The changes are:

- Section 558.001, previously stated that the “contractor, subcontractor, supplier, or design professional” should have the opportunity to resolve the claim without further legal process but now includes “the insurer of the contractor, subcontractor, supplier, or design professional” as parties that should have such an opportunity. However, there remains no requirement that notices of claim be served on insurers which from the claimant’s standpoint is appropriate as they often will not know who the insurers are.
- Section 558.001 was further changed to add that such opportunity to resolve the claim was “through confidential settlement negotiations” which is a point made in section 558.001.
- Several changes were made to Section 558.004(1)(b). The first is that the words “if known” were added to modify the requirement that claimant identify the damage or loss resulting from the defect.
- The second change to 558.004(1)(b) is potentially more significant for all parties involved. The notice of claim must now “identify the location of each alleged construction defect sufficiently to enable the responding parties to locate the alleged defect without undue burden.” Such identification must be based upon a visual inspection. Such a requirement for identification may be easy for a single family home. Such a requirement becomes more difficult in condominiums, hotels, schools and other end users with multiple units or rooms where the same defect may exist in numerous locations. I expect there to be much dispute pre-suit, and likely in litigation, about the quality of the notices of claim and what the terms “undue burden” mean. Such dispute and disagreement will result in parties attempting not attempting to resolve defect claims but arguing statutory compliance which is anathema to the intent of the statute. Further, this provision takes some of the “burden of proof” that a claimant may have at trial and attempts to force claimants to incur those costs up front.
- The third change made to section 558.004(1)(b), is stating that the claimant has “no obligation to perform destructive or other testing for purposes of this notice.” This change makes clear that the visual observation referenced previously is just that, a visual observation.
- Section 558.004(13) provides that a notice of claim does not constitute a claim for insurance purposes “unless the terms of the policy specify otherwise.” I have yet to see a policy make the notices of claim a policy claim so this change may be of little impact.
- Section 558.004(15) requires exchange of certain documents related to the alleged defects in the notice of claim. This section was revised to delete the requirement that “design drawings or specifications” be exchanged.
- Section 558.004(15) is further revised to require that maintenance records can be requested. Although the failure to maintain components may be a defense to some claims, the requirement to turn over non-construction maintenance records pre-suit is another cost for the owner.
- Section 558.004(15) now also requires that, upon request, “documents related to the discovery, investigation, causation, and extent of the alleged defect” be produced. This is subject to the next change providing that a party may assert any privilege recognized under Florida law. This latter change may do away with the worst applications of the former. However, the new change combined with the existing language suggests that in any subsequent litigation that any materials withheld, including claims of privilege, may lead to sanctions as a discovery violation in subsequent litigation. Practitioners should tread cautiously in this area.
- Completion of a building has been modified to include temporary certificates of occupancy to reflect the actual practice of building departments in allowing occupancy of buildings.

Given the number of changes it is likely that more amendments will be made in the next few years as some of the new changes may prove unworkable.

Case Law Update

By: Steve Sellers, Esq., Dudley, Sellers and Healy, P.L., Tallahassee, FL

- ♦ **Pennsylvania National Mutual Casualty Insurance Company v. St. Catherine of Siena Parish**, 790 F.3d 1173 (11th Cir. 2015).

After its insured suffered an adverse judgment for damages caused during faulty installation of roofing materials, the roofer's insurer filed a declaratory judgment action seeking a determination of no indemnification coverage for the loss. The Eleventh Circuit, *applying Alabama law*, reversed holding the insurer was liable to its insured for the damages resulting from faulty work. The damages resulted when the insured misapplied the shingle fasteners when re-roofing a church. The roof leaked and caused damages to the gypsum roof deck and interior ceilings. The Eleventh Circuit held that because repairing the gypsum roof deck (which was *not* a part of the original scope of work) would require removal and replacement of the damaged roof deck *and existing shingles*, that the *full repair costs* would be considered a covered loss. The court also held the contractual liability exclusion would not exclude liability for this type of loss, as the contractual liability exclusion would only apply where a contractor was assuming liability for another contractor's work.



- ♦ **The State of Florida v. Florida Workers' Advocates, et al, Florida** 167 So. 3d 500 (3rd DCA 2015).

The District Court of Appeal reversed a trial court decision that had declared the exclusiveness of liability provision of the Florida Workers' Compensation Law to be facially unconstitutional. The Court reversed the judgment based on mootness and lack of standing and declined to review the constitutional issues regarding the constitutionality of Florida's Worker's Compensation framework.

Summary of Prior CLC Speakers.



JUNE 8, 2015: CASE LAW UPDATE: 2015

At the June meeting Brian Stayton presented a comprehensive case law update on 33 construction related cases from May 2014 — May 2015. The materials from Mr. Stayton's presentation can be obtained at: http://www.rpptl.org/index.php?option=com_attachments&task=download&id=2184 *



July 13, 2015: Construction Licensing

At the July meeting, Neal Sivyler, presented detailed analysis of the recent decision in *Taylor Morrison Services, Inc., v. Carol Ecos and Susan Bessing*, 163 So. 3d 1286 (1st DCA 2015) which related to unlicensed contracting, qualifying agent, and treble damage issues. The materials from Mr. Sivyler's presentation can be obtained at:

http://www.rpptl.org/index.php?option=com_content&view=article&id=250&grp=69&cat=5&Itemid=188 *



August 10, 2015: Federal Rules 34 and 45: Possession, Custody, or Control

At the August meeting, Laura Stipanowich, provided an informative presentation of when documents are deemed to be within possession, custody, or control and a party's obligations related to the retention of the same. Ms. Stipanowich's presentation can be obtained at:

http://www.rpptl.org/index.php?option=com_attachments&task=download&id=2202 *

*You must log on the RPPTL website as a member in order for links to open presentation materials. www.rpptl.org

Interested in joining the Construction Law Committee?

It's as easy as 1, 2, 3:

1. Become a member of the Florida Bar.
2. Join the Real Property Probate and Trust Law Section.
3. Email Arnie Tritt at arnold.tritt@atritt.com advising you would like to join the CLC and provide your contact information.

Editor's Corner:

Do you have an article, case update, or topic you would like to see in Constructive Talk? Submit your article, note, or idea to jsmith@rumberger.com or zscharlepp@rumberger.com



Jared E. Smith, Tampa
Editor



Zackery Scharlepp, Tallahassee
Assistant Editor

Upcoming Events

Subcommittee Practice-Get On Board!

Interested in getting involved? Contact one of the persons listed below.

ABA Forum Liaison - Cary Wright (cwright@cfjblaw.com)

ADR - Deborah Mastin (deborahmastin@gmail.com)

Certification Exam - Fred Dudley (dudley@mylicenselaw.com)

Certification Review Course - Deborah Mastin (deborahmastin@gmail.com) and Bryan Rendzio (brendzio@fi-law.com)

CLE Subcommittee - Angela Covington (acovington@cowmpa.com)

Construction Law Institute - Reese Henderson (Reese.Henderson@gray-robinson.com)

Construction Litigation - Neal Sivyer (nsivyer@sbwlegal.com)

Construction Regulation - Fred Dudley (dudley@mylicenselaw.com) and Steve Sellers (steve@dhsattorneys.com)

Construction Transactions - Claramargaret Groover (cgroover@bplegal.com)

Contractor's University - Lee Weintraub (lweintraub@bplegal.com) and Cary Wright (cwright@cfjblaw.com)

Legislative Subcommittee - Scott Pence (spence@cfjblaw.com)

Membership Subcommittee - Arnie Tritt (Arnold.tritt@atritt.com)

Newsletter - Jared Smith (jsmith@rumberger.com)

Publications Subcommittee - Sean Mickley (smickley@gouldcooksey.com)

Small Business Programs - Lisa Colon-Heron (lcheron@smithcurrie.com)

Website Subcommittee - Brent Zimmerman (bzimmerman@jimersoncobb.com)

Construction Law Committee Meetings

Join us for our upcoming Construction Law Committee meetings. Benefits of the meetings include .5 hours of CLE each meeting, a timely update on developing case law, statutes and administrative rulings, and informative reports from our subcommittees.

The CLC meetings occur the second Monday of every month beginning promptly at 11:30 a.m. EST. To join, call: (888) 376-5050. Enter PIN number 7542148521 when prompted.

Schedule of Upcoming RPPTL Events

September 30-October 4, 2015
Executive Council Meeting
(Out of State)
The Ritz Carlton
Berlin, Germany

November 11-15, 2015
Executive Council Meeting
Boca Raton Resort and Club
Boca Raton, Florida

March 10-12, 2016
[Construction Law Institute](#) and [Construction Law Certification Review Course](#)
JW Marriot Orlando Grande Lakes
Orlando, Florida