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Recent Changes to Florida's Pre-Suit Process for Construction Defect Claims

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Chapter 558 of the Florida Statutes was enacted in 2003 in order to provide the design and construction industry with pre-suit notice and opportunity to cure before a claimant can file a lawsuit for construction defects. Under the statute, before a claimant can file a lawsuit against a developer, contractor, subcontractor, material supplier, or design professional alleging a construction defect, the claimant must first provide notice of the alleged defect, along with an opportunity to cure. The statute is highly specific, outlining the periods of time in which the recipient of such a notice has to put others on notice, inspect the alleged construction defect, and provide a response to the claimant. The most recent set of amendments to Chapter 558, which amend several provisions of the statute, took effect on October 1, 2009.

Here is an outline of the recent amendments:

- **§ 558.002**
  - § 558.002(4) — The definition of "Completion of a building or improvement" was added to the definitions section, as follows: "Completion of a building or improvement" means issuance of a certificate of occupancy for the entire building or improvement, or the equivalent authorization to occupy or use the improvement, issued by the governmental body having jurisdiction and, in jurisdictions where no certificate of occupancy or the equivalent authorization is issued, means substantial completion of construction, finishing, and equipping of the building or improvement according to the plans and specifications.
  - § 558.002(9) (former section 558.002(8) was amended to remove the requirement of using "return receipt requested" when delivering the notice of claim, and to add delivery "with a United States Postal Service record of evidence of delivery or attempted delivery" and "… by hand delivery, or by delivery by any courier with written evidence of delivery."
- **§ 558.003**
  - § 558.003 was amended to replace the word "abate" with "stay" with reference to actions filed without first complying with requirements of Ch. 558 (a similar change was made in s. 558.004(7), swapping the two terms with respect to a claimant filing an action without first either accepting or rejecting a settlement offer furnished pursuant to the statute). Section 558.003 was further amended to add the following language: "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." This amendment, presumably, is

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what necessitated the addition of the definition of "[c]ompletion of a building or improvement" in s. 558.002(4).

- **§ 558.004**
  - § 558.004 was amended to globally change the use of the term "receipt" or any variation thereof with the term "service" (and variations thereof). In reference to downstream 558 notices, the term "forward" (and variations thereof) was replaced with the term "serve" (and variations thereof). Similar changes were made in replacing the terms "notification" and "mailing" with the term "service."
  - § 558.004(2)(b) now includes "restoration" within the scope of damages contemplated by the destructive testing language of the statute. As a result, the notice outlining the need for destructive testing must now include the anticipated restoration of the property, the time needed for such restoration, and the financial responsibility being offered to cover the costs of such restoration. S. 558.004(2)(g) was added to expressly prohibit lien rights for the destructive testing and/or restoration work, unless such work is contracted for directly by the owner of the property. New s. 558.004(2)(g) provides as follows: "There shall be no construction lien rights under part I of chapter 713 for the destructive testing caused by a person served with notice under subsection (1) or for restoring the area destructively tested to the condition existing prior to testing, except to the extent the owner contracts for the destructive testing or restoration." In addition, the paragraph immediately following new subparagraph (2)(g) of s. 558.004 includes some grammatical changes pertaining to the claimant's waiver of any damages that could have been avoided or mitigated had the destructive testing been allowed. The amended language also provides that such destructive testing must be reasonable.
  - § 558.004(3) was amended to expressly provide that "[t]he notice described in this subsection may not be construed as an admission of any kind." Although I'm sure all construction law practitioners include language in their downstream 558 notices clearly outlining that it shall not be deemed an admission of any kind, it's good to know that the downstream notice will now be statutorily protected from being construed as one.
  - § 558.004(4) was amended to provide that the person receiving a downstream 558 notice, in addition to providing a response to the person serving it, may also provide a copy of their response to the initial claimant.
  - § 558.004(13) contains grammatical changes.
  - § 558.004(15) contains perhaps the largest single-subparagraph change to Chapter 558, pertaining to the pre-suit exchange of what was formally labeled as "discoverable evidence." The former language required the exchange of "all available discoverable evidence relating to the construction defects" without necessarily placing a limitation on the items requested. A list of examples was provided, but only by way of illustration, as the former section expressly included the pretext "… including, but not limited to …." The new section on the other hand is highly specific as to what documents are subject to being requested. They are: "… any design plans, specifications, and as-built plans; any documents detailing the design drawings or specifications; photographs, videos, and expert

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reports that describe any defect upon which the claim is made; sub-contracts; and purchase orders for the work that is claimed defective or any part of such materials." The term "such evidence" is replaced with "the requested materials." Finally, the request must cite to the subsection, include an offer to pay the reasonable costs of reproduction, and be fulfilled within 30 days after service of the written request.

- **§ 558.005**
  - § 558.005, the legislation's section on contract provisions and its application, was also amended. § 558.005(1) was amended to expressly provide that Chapter 558 is an opt-out statute, and as such, is applicable to any construction defect claim on a completed building or improvement arising out of a contract made after October 1, 2009, "[u]nless a claimant and a potential defendant have agreed in writing to opt out of the requirements of [the] section."
  - § 558.005(2) and § 558.005(3) are amended and specify the applicable notices required to be contained in construction contracts.
  - Other changes were made regarding the contract provisions and applicability of Chapter 558.

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