

**CONDOMINIUM CONSTRUCTION DEFECT CERTIFICATION UNDER 718.301(7),
FLORIDA STATUTES**

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Condominium living is a way of life in Florida and condominium associations are creatures of the Florida Statutes. “The peculiar features of condominium development, ownership, and operation require the providing of procedural vehicles for handling disputes affecting condominium unit owners concerning matters of common interest”. Avila South Condo Ass’n, v. Kappa Corp. 347 So.2d 599 (Fla. 1977). Such vehicles are provided in the statutes and rules of procedure, but one curious statutory provision requires the association to examine and certify the construction defect via licensed engineer and/or contractor.

Specifically, Section 718.301(7), Florida Statutes states:

In any claim *against a developer* by an association alleging a defect in design, structural elements, construction, or any mechanical, electrical, fire protection, plumbing, or other element that requires a licensed professional for design or installation under chapter 455, chapter 471, chapter 481, chapter 489, or chapter 633, such defect must be examined and certified by an appropriately licensed Florida engineer, design professional, contractor, or otherwise licensed Florida individual or entity. (emphasis added)

First, this statutory provision seems to only apply to an action against the developer. Therefore, this construction defect examination and certification does not apply to claims for negligence or violation of the building code against the contractor or subcontractors (assuming no common identity exists with the developer and contractor). In its class action complaint for the construction defects, the condominium association would generally plead compliance with all conditions precedent to satisfy this requirement. If plead in the construction defect complaint, the association should make sure the statutory examination and certification has actually occurred. The burden would then shift to the developer to deny with specificity and particularity any conditions precedent that have not been fulfilled by the condominium association.

Unfortunately there is zero guidance in the statute on how this condominium construction defect examination and certification works. The statute does not say that the report must be obtained prior to filing the condominium construction defect action, nor does it create a condition precedent to filing the lawsuit. There is no guidance in Section 718.301(7) as to any penalty for initiating the condominium construction defect action without obtaining the examination and certification. Additionally, there is no private right, cause of action or defense which are expressly created with this statutory provision.

Section 718.301(7) may be a statutory provision where some legislative revisions could provide some direction, but the lack of Florida case law interpreting this provision may suggest that it is rarely an issue for the parties in condominium construction defect actions. Seemingly because when the condominium association serves its Chapter 558, Florida Statutes, Notice of Construction Defects, the condominium association will have likely already had the examination

and certification performed to identify with reasonable certainty the exact nature of the construction defects. If the condominium association has not performed such examination and certification, could it then use the report of the developer when it conducts its inspection during the Chapter 558 inspection period? Hopefully the condominium association is not relying on the developer to certify his own construction defects, but the complete lack of procedure and silence in the statute leaves this open to interpretation. Nevertheless, the condominium association considering pursuing class action construction defect litigation should have its examination and certification of the construction defects well in advance of initiating the construction defect lawsuit.

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