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The Construction Lawyer's Guide To Chapter 558, Florida Statutes A Practical Checklist

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This checklist will assist counsel when evaluating compliance with Florida's Construction Defects Statute, Chapter 558, Florida Statutes ("FCDS"). These issues arise frequently and must always be considered when claims for defective design/construction are pursued and defended. First conceived in 2003, the FCDS has undergone several revisions and constantly poses new legal challenges for property owners, contractors, design professionals and developers seeking to comply with this pre-suit process. *Practice Tips* have been included for consideration.

1. When does the FCDS apply?

- (a) The FCDS does not apply unless substantial completion of the building or improvement has been achieved.¹
- (b) It applies to all residential and commercial projects such as those described below, but excludes public transportation projects.²
 - 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;
 - Remodelling & Fixtures;
 - Commercial or non-residential properties.
- (c) The FCDS is not applicable to emergency repairs performed to protect the health, safety and welfare of the claimant or others.³

Practice Tip: Retain an engineer or design consultant to confirm that the repairs are of an emergency nature. Document by digital photographs and/or video to confirm the conditions. This documentation can be used to demonstrate that the repairs were necessary and satisfy the health, safety, welfare exception.

- (d) The FCDS applies to any claim for construction defects arising from improvements made after October 1, 2009, unless the parties have agreed in writing to opt out of these requirements.⁴

Practice Tip: A sample opt-out provision to be included in a contract is provided below. Since other

FCDS notices require conspicuous font, the opt out provision should also be conspicuous:

THE OWNER AND CONTRACTOR AGREE TO WAIVE ALL REQUIREMENTS ASSOCIATED WITH CHAPTER 558, FLORIDA STATUTES, ARISING FROM WORK PERFORMED RELATIVE TO THIS CONTRACT.

2. How Are "Construction Defects" Defined?

Construction defects include deficiencies in design, materials, construction, observation of construction, surveying, planning, repair alteration, supervision, remodeling, and building code violations giving rise to a cause of action under Sec. 553.84, F.S.⁵

3. Who Receives the Notice of Claim?

- (a) Potential recipients of the notice of claim are "contractors," which include those "legally engaged" in the business of designing, developing, constructing, manufacturing, repairing or remodeling dwellings and any attachments thereto.
- (b) The statutory definition of "contractors" includes developers, subcontractors, suppliers and design professionals, such as architects, interior designers, landscape architects, engineers, or surveyors.⁶
- (c) It should be noted that a contractor, subcontractor, supplier or design professional, or a surety is not a claimant under the statute⁷ or by case law, so the FCDS does not apply to them as claimants.⁸

4. Notice of Claim Requirements

- (a) The notice of claim must specifically reference Chapter 558, Florida Statutes.⁹

- (b) The defects must be described with "reasonable detail."¹⁰
- (c) Multiple defects may be included in one notice of claim.
- (d) The claimant may only pursue those construction defects included in the notice of claim as well as any construction defects reasonably related to or caused by the construction defects previously noticed.¹¹
- (e) Amend the notice of claim to identify additional or new construction defects as they become known to the claimant.

Practice Tip: At inception of the process, thoroughly investigate the property to include all alleged defects in the notice of claim. These efforts will avoid the necessity to issue supplemental notices which will "restart the clock" on the statutory time frames because of the newly alleged defects. Supplemental notices of claim can delay the overall resolution of all defect issues.

5. Service of the Notice of Claim

- (a) The FCDS requires that the claimant "serve written notice of the claim on the contractor."¹²
- (b) Serve a notice of claim upon those parties responsible for the defects.
- (c) The claimant accomplishes proper "service" by any one of the following:¹³
 - (i) Delivery by certified mail with a United States Postal Service record of evidence of delivery;
 - (ii) Attempted delivery to the last known address of the addressee; or,
 - (iii) Hand delivery or delivery by any courier with written evidence of delivery.

6. Tolling of the Statute of Limitations

A claimant's service of the written notice of claim tolls the applicable statute of limitations relating to the contractor and any bond surety.¹⁴

Practice Tip: This is one of the key benefits of the FCDS. If you are running up against the expiration of the statute of limitation, serving a notice of claim is an easier option to toll the statute of limitation as opposed to acquiring a tolling agreement or initiating a lawsuit or arbitration proceeding.

7. Inspection of the Premises and Destructive Testing

- (a) If the notice of claim involves an association representing 20 parcels or fewer, FCDS provides for 30 days to inspect for construction defects.¹⁵
- (b) If the notice of claim involves an association representing more than 20 parcels, the FCDS provides for 50 days to inspect.¹⁶
- (c) This also includes "reasonable inspection" of the dwelling of each unit subject to the claim for defects.

Practice Tip: There is no duty for the claimant to arrange for a "guided tour" by an engineer or consultant but it is recommended to avoid a later challenge from

the recipient of the notice of claim that the alleged defect could not be located and available for inspection. A claimant's failure to provide access to inspect may bar the right to later pursue the claim in litigation or arbitration.

- (d) A claimant is not required to perform destructive or other testing before providing a notice of claim; a visual inspection is sufficient. However, destructive testing of the premises is also allowed via written request and mutual agreement.¹⁷
- (e) The written request for destructive testing must describe the proposed testing. The request should also identify:¹⁸
 - (i) Who will perform the test;
 - (ii) A list of testing locations and testing methods;
 - (iii) The anticipated damage to the test site and surrounding areas;
 - (iv) The anticipated time needed to perform testing;
 - (v) Who will be responsible for repairing tested areas; and
 - (iv) Who will assume financial responsibility to cover the cost of testing and repairs.

Practice Tip: Consider entering into a written destructive testing and repair protocol agreement prior to allowing the destructive testing to take place. This agreement should set forth the above parameters for testing as well as memorialize the rights and duties of all participating parties to the testing.

8. Obtain Construction Documents and Maintenance Records

- (a) The FCDS permits the claimant and recipient to obtain certain records. The permissible records are described below. To obtain the records, the written request must include a specific reference to Sec. 558.004(15), F.S., otherwise the request for records is unenforceable.
- (b) Upon written request, claimants must produce maintenance records and other documents related to the discovery, investigation, causation and extent of alleged defects identified in the notice of claim.¹⁹ These documents can be valuable to enable recipients of a notice of claim to formulate potential defenses such as claimants' lack of maintenance, failure to mitigate damages, abuse, misuse, environmental causes, casualty losses, normal wear and tear, or acts of third parties.

Practice Tip: Maintenance records become relevant in condominium defect claims where Chapter 718, Florida Statutes, provides that a failure to perform routine maintenance is a defense to a claim for breach of the statutory implied warranties.²⁰

- (c) Broad categories of documents must be produced by both claimants and recipients such as: "All documents

related to the discovery, investigation, causation, and extent of the alleged defect."²¹ This can include expert reports. In addition, the recipient can be required to produce all its maintenance records.

Practice Tip: As discussed above, in a condominium defect dispute, the fact that the developer failed to perform routine maintenance can be instrumental in holding a developer responsible for a defect arising from its own failure to maintain. This approach could also counter any claim by the developer that the claimant failed to perform routine maintenance.

- (d) Ramifications of non-production: A failure to comply with pre-suit discovery can leave contractors exposed to court sanctions, after a construction defect lawsuit is filed.²²

9. Limitations on Document Production and Options

- (a) The FCDS does not require production of design plans and specifications.

Practice Tip: Claimants should obtain these documents from governmental agencies, including local building and zoning departments, to ascertain deviations from properly permitted plans and specifications as a basis to maintain the existence of an alleged defect. This avenue of production becomes significant since recently the FCDS was revised to eliminate any requirement to produce design plans and specifications.

- (b) On public projects, obtain design plans, specifications and other documents by using Florida's public records laws or "Sunshine Laws."²³

Practice Tip: Use the public records laws to acquire these documents. Because governmental agencies have no financial stake in the construction process or the litigation, actual records may be produced which otherwise may have been claimed as privileged or destroyed by those actually involved in the design and construction of the project.

10. Written Responses Under Chapter 558, Florida Statutes

- (a) Contractors must issue a written response to the notice of claim within 45 days for an association presenting 20 parcels or fewer, and 75 days for a claim involving an association representing more than 20 parcels.²⁴
- (b) The written response to a notice of claim must accept or dispute each and every defect reported.²⁵
- (c) The response may be accompanied by an offer to repair all or portions of the alleged defects. The repair offer should contain a detailed description of repairs to be made, locations where repairs will be performed, and a timetable to complete repairs.
- (d) The response may also include an offer to pay money for some or all of the defects.
- (e) The contractor may dispute the claims in whole or in part.

- (f) The contractor may respond by any combination of the foregoing options.
- (g) Partial settlements are permitted.
- (h) The claimant has 45 days to accept or reject a timely settlement offer before it may initiate an action for construction defects.²⁶ The FCDS is silent as to what happens if the claimant takes longer than 45 days to accept or reject the settlement offer. Nevertheless, the contractor can move to stay the claimant's lawsuit until it tenders its formal acceptance or rejection of the offer.²⁷

Practice Tip: Even if a partial settlement is proposed, nothing prevents the parties from agreeing to participate in a mediation to arrive at a global settlement of the entire matter.

11. The Role of Consultants in Pre-Suit Construction Defect Claims

Practice Tip: Although not required by statute, Florida licensed consultants (e.g., engineers, architects, design professionals or licensed contractors) should be involved as early as possible in the FCDS process. Note that in condominium turnover matters, a properly licensed consultant must have prepared the report when seeking relief from a developer.²⁸

Practice Tip: The following issues should be thoroughly explored with the consultant both at the outset of the construction defect claim, and throughout the FCDS process:

- (a) Has the consultant reviewed the documents on file with the building department to make sure they conform with the plans furnished to the property owner?
- (b) Has the consultant evaluated all components of construction in light of any applicable requirements in contract documents and state statutes, building codes, and any applicable implied or express warranties?
- (c) Does the consultant's report include a repair methodology for each defective condition, and a cost estimate for completing the repairs? This information will enable the owner to evaluate the cost-effectiveness of pursuing resolution through settlement or litigation. It will also enable developers and contractors to understand their potential exposure in litigation.

12. Be Specific When Reporting Defects

The FCDS was recently amended to require that claimants provide more specific information as to the locations of the defects throughout a building.²⁹ As a result, the consultant's report should identify the locations of each and every example of each defect as thoroughly as possible.

Practice Tip: In light of these more stringent reporting requirements, consider the following:

- (a) The consultant's retainer agreement should require the report to comply with the requirements of the FCDS so that the report can ultimately be attached to the notice of claim and withstand judicial scrutiny.
- (b) Require that the written report be accompanied by

digital photographs or videos of the alleged defective conditions with a log showing the location of the condition. Doing so will assist both the claimant and the recipient of the notice of claim in understanding the extent and nature of each defect.

- (c) For each defect discovered, the engineer's report should specify whether the defective conditions are the result of building code violations, deviations from the project plans and specifications, design errors, or failures to comply with industry standards and good workmanship practices.
- (d) The report should describe the widespread nature of the defects. For example, if the engineer is investigating claims of stucco defects, the report should describe the elevations and floors from which any stucco samples were taken, as well as the locations of all stucco cracks seen during the investigation.
- (e) If any testing or sampling was performed, the consultant should explain the sampling in terms of the size and magnitude of the building from which the samples have been taken.
- (f) Has the consultant identified any defective materials? Has the consultant located and reviewed applicable manufacturer specifications and identified the supplier of the materials?

Practice Tip: In light of recent decisions in a condominium setting, the liability of a "supplier" under Sec. 718.203(2), F.S., may be limited.³⁰

- (g) Does the consultant's report specify which version of the building code applies and which sections of the code were violated?
- (h) Does the consultant's report list deviations from plans or specifications?
- (i) Does the consultant's report specify which plans and specifications were reviewed?
- (j) Does the consultant's report identify which portions of the plan or specifications sections do not conform to the actual construction?
- (k) Has the engineer had the opportunity to review the final signed and sealed "as-built" set of plans during its investigation?

Practice Tip: Often, consultants are furnished with a "permitted" set of plans and drawings that do not accurately reflect the changes noted on the subsequent "as-built" set of plans and drawings. When in doubt, the prudent course of action would be to obtain the "as-built" set of project drawings through the FCDS pre-suit discovery, and have the consultant review them as early as possible.

13. Insurance in Pre-Suit Construction Defect Claims

The FCDS now provides that a notice of claim does not constitute a claim for insurance purposes "unless the terms

of the policy specify otherwise."³¹ The following are some practical considerations when representing claimants or recipients of a notice of claim:

In *Altman Contractors, Inc. v. Crum & Forster Specialty Insurance Company*,³² the court determined that an insurer's duty to defend is triggered by a formal "suit" defined as litigation, arbitration or other formal dispute resolution proceeding. The court decided that under the specific language of the standard commercial general liability insurance policy form CG 00 01 at issue, while the FCDS provides a notice and right to cure mechanism for resolving a dispute, it is not the same thing as a formal proceeding which would trigger the insurer's duty to defend.

Many commercial general liability insurance carriers still use the standard form CG 00 01 insurance policy language discussed in *Altman Contractors, Inc.*, to deny coverage to developers, contractors and others.

Practice Tip: In the wake of *Altman Contractors, Inc.*, when securing new or additional insurance coverage for new Florida construction projects, counsel for contractors and developers should consider negotiating better policy terms that would trigger insurance coverage once a notice of claim is served, as opposed to waiting until a lawsuit or arbitration proceeding is filed.

Practice Tip: From the claimant's standpoint, it is imperative to obtain the contractor's and developer's insurance information as soon as possible, to determine whether their policies exclude insurance coverage and/or a defense for pre-suit construction defect claims. This information may be obtained by serving an insurance demand letter upon the contractor and developer, in accordance with Sec. 627.4137, F.S.

14. Use the FCDS to Lead to Settlement Negotiations and Mediation

Practice Tip: Compliance with the FCDS may provide parties with enough information and motivation to participate in a mediation to resolve all disputes.³³

All parties should take advantage of the Chapter 558, Florida Statutes, provisions for pre-suit discovery to further narrow the issues for settlement purposes and to gain information to assist in defending the claim.

The FCDS can be challenging for counsel representing claimants and recipients of a notice of claim. It is critical to understand the statutory requirements to perfect a claim, as well as what constitutes proper service; how the statute can be used to toll the applicable statute of limitations; and how the failure to investigate a claim may limit those defects that could be pursued in litigation. Be mindful that ignoring a legitimate discovery request may expose your client to sanctions for non-production.

Most importantly, strategically use the FCDS to resolve claims through mediation, and take advantage of the opportunity to assess your client's potential exposure through this process. 



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Endnotes

- 1 F.S. §558.003.
- 2 F.S. §558.002(8).
- 3 F.S. §558.004(9).
- 4 F.S. §558.005(1).
- 5 F.S. § 558.002(5).
- 6 F.S. §558.002(6).
- 7 F.S. §558.002(3).
- 8 *Specialty Engineering Consultants, Inc. v. Hovstone Properties Florida LLC*, 968 So. 2d 680 (Fla. 4th DCA 2007).

- 9 F.S. §558.004(1)(a).
- 10 F.S. §558.004(1)(b).
- 11 F.S. §558.004(11).
- 12 F.S. §558.004(1)(a).
- 13 F.S. §558.002(9).
- 14 F.S. §558.004(10).
- 15 F.S. §558.004(2).
- 16 *Id.*
- 17 *Id.*
- 18 F.S. §558.004(2)(b).
- 19 F.S. §558.004(15).
- 20 F.S. §718.203(4).
- 21 F.S. §558.004(15).
- 22 *Id.*
- 23 E.g., F.S. §§ 119.01-.15 (Florida's Public Records Act).
- 24 F.S. §558.004(5).
- 25 *Id.*
- 26 F.S. §558.004(7).
- 27 F.S. §558.003.
- 28 F.S. §718.301(7)(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, of the Florida Statutes, such defect must be examined and certified by an appropriately licensed Florida engineer, design professional, contractor, or otherwise licensed Florida individual or entity).
- 29 F.S. §558.004(1)(b).
- 30 See e.g., *Port Marina Condominium Ass'n, Inc. v. Roof Services, Inc.*, 119 So.3d 1288 (Fla. 4th DCA 2013); *Harbor Landing Condominium Owners Ass'n, Inc. v. Harbor Landing, L.L.C.*, 78 So. 3d 120 (Fla. 1st DCA 2012).
- 31 F.S. §558.004(13).
- 32 -- F. Supp. 3d, -- 2015 WL 3539755 (S.D. Fla. June 4, 2015).
- 33 F.S. §558.005(4).