

# WHAT WAS ONCE OPT-IN, IS NOW OPT-OUT:

*the latest changes to the ever-evolving chapter 558,  
florida statutes*

Chapter 558, Florida Statutes, which requires pre-suit dispute resolution procedures for construction defect claims, has changed almost every year since it was enacted in 2003. One such change was the statute's scope being expanded from only residential structures, to now being applicable to both residential and commercial structures. The purpose of this article is to describe some of this year's changes, which took effect on October 1, 2009.

- The statute, which is applicable to claims which arise after "completion of a building or improvement," now provides a definition for that phrase to include the issuance of a Certificate of Occupancy or equivalent, or substantial completion.
- Another change clarifies that when a party initiates the Chapter 558 process by serving a "Notice of Claim" ("Notice") on the parties believed to be responsible for the alleged defects, the Notice must be served by certified mail, hand-delivery or courier with evidence of delivery.
- The Notice is no longer required, however, for an incomplete project; an important point for contractors to appreciate. Therefore, if a project is ongoing and disputes arise between the owner and the contractor as to alleged defects, the statute does not apply and the owner may proceed with the dispute resolution process in the contract between them and/or, if allowed, immediately file suit against the contractor.
- The legislature has also made calculating the relevant response deadlines easier by starting them from the date the Notice was served rather than the date the Notice was received. This allows an owner to begin counting the response time with more confidence because the owner will know when the Notice was served, but might not know when the Notice was received. However, this makes it crucially important for contractors to note the date the Notice was mailed to make sure the contractor's response is timely.
- Next, Chapter 558 now makes clear that when a Notice recipient hires someone to perform destructive testing to investigate the defect allegations, the person performing the destructive testing does not have any lien rights, unless the owner contracts for the work.
- Also investigation-related, while Chapter 558 previously allowed for the exchange of discoverable information upon demand by any party, it provided no time frame within which the exchange was to occur. It now does; within 30 days. Further, Chapter 558 also now clarifies what is "discoverable information" to specifically include specifications, as-built plans, photographs and expert reports.
- Finally, Chapter 558 now applies to all contracts for improvements entered into after October 1, 2009, unless the parties mutually agree and indicate in their contract that Chapter 558 will not apply.

This year's changes are significant steps in trying to make the Chapter 558 process a more useful and prevalent tool to resolve construction defect claims without litigation. Further, the changes (like making Chapter 558 opt-out versus opt-in) make it even more important that all contractors be familiar with Chapter 558, Florida Statutes.

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