by Larry R. Leiby and Steven B. Lesser

How to Comply with Chapter 558 Florida Statutes: Current Challenges and Future Changes

F.S. Ch. 558, otherwise known as the Florida Construction Defect Statute, requires owners to send a "notice of claim" to developers, contractors, subcontractors, suppliers, and/or design professionals identifying any alleged construction and/or design defects in "reasonable detail" before any litigation or arbitration for construction defects may be initiated.[1] In other words, before an owner may sue someone for a defect, a very specific set of rules must be followed or legal rights may be delayed or lost. Since the introduction of Ch. 558 in 2003, participating parties to design and construction along with construction lawyers, courts, and arbitrators have wrestled with how to inject practicality into the process. Recently reported episodes prove convincing that some change is necessary. In one unreported decision, a circuit court judge interpreted a secondary notice sent to a subcontractor as an admission of liability against a developer.[2] In another case, a federal trial court declined to dismiss or abate for failure of a claimant to serve the notice of claim.[3] Instead, the court allowed the case to proceed but required the parties to comply with the procedures of Ch. 558 during the early stages of litigation.[4]

In a landscape of uncertainty surrounding various provisions, only four appellate decisions exist, none of which have addressed substantive issues that frequently cause construction practitioners heartburn when unsettled issues arise during this presuit process.[5] More decisions challenging the various provisions will likely be on the horizon because in 2006, the Florida Legislature expanded the statute to apply beyond residential dwellings to commercial real property, such as businesses, schools, hospitals, office condominiums, hotels, and all other structures except for those involving public transportation.[6] As businesses struggle to stay afloat in this economy, many cannot afford to interrupt the daily routine to allow parties to herd inspectors through the structures, during normal working hours, to ponder repairs to be performed at a later date. Business owners may be hard-pressed to hold off fixing their leaking roof for a period of 45 days to enable a contractor to respond with an offer to fix the leak. The statute does provide some express relief from compliance if the repairs performed constitute an "emergency."[7] Although this term is not defined under the statute except to describe a repair to "protect the health, safety, and welfare of the claimant," a judge may be hard-pressed to understand why an unsightly condition in a business setting such as a restaurant gives rise to an emergency situation to relieve the business owner from following the statute. The result of all of these developments will create challenges to be sorted out by lawyers and fact finders. Many of these issues may also stall repairs being made, with some business owners electing to ignore the statute only to be later delayed from pursuing relief against responsible parties.[8]

While the statute expressly authorizes prenotice emergency repairs, it is silent as to whether the owner is precluded from making the repairs before the notice procedure is satisfied. One view of the effect of prenotice repairs would be that, by implication, the owner is barred from relief due to the inability to inspect, conduct destructive testing, or make a settlement offer (which seems rather harsh, particularly since this result would be only by implication and not express language). Another view would be that the potential defendants could argue that performing nonemergency repairs without satisfying the presuit notice requirements has prejudiced their statutory rights, giving rise to defenses, such as a) "it cost too much," *i.e.*, "it could have been done cheaper or I would have done it for nothing"; and b) "it wasn't my fault and you didn't let me see the condition before you spent money that you now seek to recover."

For the last five years, some lessons have been learned about complying with the statute, and this article will provide some suggestions to achieve compliance from the standpoint of both the owner and contractor.[9]

F.S. Ch. 558 requires an owner (claimant) to give notice and an opportunity to cure with respect to a building defect(s). The statute sets forth its purpose as to create "an alternative method to resolve construction disputes that would reduce the need for litigation as well as protect the rights of property owners."[10] In more practical terms, it is intended to allow both claimants and participants to design and construction to resolve alleged defects before both sides run to the courthouse and spend a pile of money on lawyers.

Owners and contractors have some

basic decisions to make with respect to this statute before a dispute hits the courthouse:

1) Should the parties elect to opt out of the procedure [11] (which the parties have the right to do at the time of making the contract or by later agreement)?

2) If you are a contractor, once you receive a notice of claim pursuant to the statute, how should you address downstream subcontractors and suppliers who may have involvement with the alleged defect?

3) Should the contractor serve a response to the notice of claim; and if so, what should it say?

The questions posed should be addressed before the matter hits the courthouse. Because of the implications and requirements to exchange documents and/or perform destructive testing, clients should involve legal counsel in such decisions. Although many clients may hesitate to involve counsel at the early stage of defect discovery, clients should be educated that significant legal fees may be avoided by following the statutory process in an effort to achieve an economical presuit resolution.

Should the Contractor Opt Out in the Contract? Remember that the purpose of this statute is to resolve construction defect claims by affording an opportunity to inspect, including destructive testing if appropriate, and correct the defect or offer a settlement before the relationship deteriorates to litigation or arbitration. There is little justification for a contractor to opt out of this process in the contract. By this process, there is an invaluable opportunity to learn about the claim that ultimately may be asserted in litigation or arbitration. In an arbitration setting without an automatic opportunity for discovery,[12] this process could be very productive and meaningful. From the owner's standpoint, those educated about the statute may suggest that the procedure be waived (opt out) so that the owner has no duty to send any notices, offer any inspections, or exchange documents relating to the claim before filing suit.

Note also that the parties may stipulate or agree to opt out of the process at any time after a notice of claim has been given if it appears that the parties know the facts and are simply polarized in position, so that a third-party decision (litigation or arbitration) is the proper next step.[13] However, this would be a rare situation. With discussion, inspection, and the opportunity for expert input, knowledgeable parties may be able to understand and agree what the cause and/or the solution is or should be. Opting out in the contract would not appear to benefit the contractor, because it most certainly deprives the contractor and other potential defendants from being educated through receipt of a description of the defect in "reasonable detail," having an opportunity to inspect, perform destructive testing, and resolve the matter without litigation or arbitration.[14]

Owners may approach the matter differently, avoiding Ch. 558 altogether by opting out of the procedure in their contracts.[15] By this opt out approach, owners may gain flexibility when a defect arises by structuring their own dispute resolution process that adopts acceptable Ch. 558 features without being strictly bound to the statute. This could be accomplished by including a different resolution procedure in the contract to serve as a prerequisite to litigation or arbitration.[16] Opting out with different agreed-upon procedures carries the uncertainty of the enforcement of the contractual procedure on non-parties to the contract. Also, an alternative process could be proposed later, by the owner sending a demand letter to the contractor that outlines a dispute resolution process that the contractor may find acceptable. This approach may include providing the contractor with a detailed description of the alleged defect, an opportunity to inspect, some testing, and a shortened timeline for a contractor to respond with a proposal.

Without being bound to the statutory process, the owner may proceed forward without being confronted by motions to abate for failing to satisfy the statutory requirements. One major shortcoming of the statute that can also be rectified by using an alternative approach is to specify a time frame for completing repairs. The current statutory process permits the contractor to specify *any* time period to complete the repair, leaving the issue to a determination of whether the proposed time period is reasonable.[17] Of course, the owner may choose to accept or reject the offered repair in the offered time period. Tightening this up by fashioning a different process would be especially appealing to an ongoing business that cannot afford to wait for repairs to be completed.

Note also that the claimant and recipient of the notice have a mutual duty upon request to exchange "all available discoverable evidence" related to the defect issue.[18] Failure to exchange such information is punishable by the court (in any later litigation) by sanction.[19] Thus, if there is some benefit to be gained by not being obliged to furnish such information before a suit is filed, that may be a reason to opt out. This reason may not be particularly valuable if litigation is the forum for dispute resolution, since relevant information may be requested once the suit is filed. The same is not necessarily so in arbitration. As noted above, there is very little absolute right to discovery in arbitration.[20] One of the issues anticipated to be addressed by a proposed legislative amendment as described below is a better description of what must be produced in response to the request, so that the party and the party's lawyer are not left to guess about an omission of "available discoverable evidence" that may be subject to sanctions.

How Do You Address Downstream Subcontractors and Suppliers? Section 558.004(3) permits a contractor who receives a 558 notice from an owner to "forward a copy of the notice of claim to each contractor, subcontractor, supplier, or design professional whom it reasonably believes is responsible for each defect specified in the notice of claim and shall note the specific defect for which it believes the particular contractor, subcontractor, supplier, or design professional is responsible." Thus, if there is a water intrusion issue, the contractor may forward the notice to the subcontractors or suppliers whom the contractor believes are responsible for the defect, noting the

specific defect applicable to the downstream parties. The contractor would wish to include anyone who may have input for the defect, but should not be overbroad. Frequently, this process is stalled because the forwarding notice does not specify the alleged defects that fall within the scope of the secondary recipient's work. The contractor recipient of the notice simply shotguns the notice received from the owner to others, without specifically identifying those alleged defects for which the downstream person is perceived to be responsible. This shotgun approach often backfires when the contractor receives an objection to the downstream notice instead of a timely proposal to correct the alleged defect. Without having the proposal from the secondary recipient in a timely fashion, the contractor is frequently left without much to offer the owner from subcontractors when his or her own response becomes due. Counsel should educate contractor clients about the need to carefully segregate the defects to be included in notices to those responsible parties. Otherwise, the entire process may become an exercise in futility.

The contractor should carefully word the downstream notice. At least one trial court in Broward County has ruled that a downstream notice by the developer to the contractor and subcontractors was an admission against interest with respect to the developer.[21] Thus, to avoid that argument, the downstream notice should include some disclaimer language to make clear that the contractor does not necessarily agree that the alleged defect exists, but is only being sent to allow the subcontractor/supplier with an opportunity to inspect and respond to the notice of claim as provided by Ch. 558. The choices for responding to a downstream notice are the same that exist for the contractor[22] and are discussed below. The statute is silent on the effect of a failure to respond to the notice. Unlike the owner's notice to the contractor, there is no requirement for the contractor to serve a downstream notice as a precondition to the contractor bringing suit (as an original complaint or third-party complaint in the owner's action, should it be filed) against the downstream subcontractor or supplier.[23] Another puzzling question arises when a subcontractor receives a secondary notice from a contractor but does not receive a notice of claim directly from the owner. In that instance, can the owner directly sue the subcontractor based on the contractor's downstream notice, or will the subcontractor be able to move to abate because the owner failed to serve his or her own notice of claim upon that subcontractor? It seems that owners would be prudent to serve notices of claim on all potential parties the owners wish to directly pursue, in order to avoid this argument.[24]

If the contractor does send the downstream notice, the recipient subcontractor and/or supplier has the opportunity to request an inspection.[25] Note that the statute does not require the mutual exchange of information between subcontractors and suppliers and the contractor, which is required upon request between an owner and a contractor.[26] This is also one additional reason for owners to send notices of claim directly to the participating subcontractors and suppliers. Frequently, contractors request such information from subcontractors and suppliers, but the statutory sanction in a later action for failure to respond does not exist for the downstream parties.[27] However, subcontractors and suppliers may typically cooperate with their contractor customers by furnishing the requested information and perhaps avoid litigation (particularly where the subcontractor/supplier has a very good position on the issue).

How Does the Contractor Respond to the Owner's Notice of Defect? The first thing that the contractor will typically do is to identify the downstream people as well as an expert and make arrangements to inspect the alleged defect(s). Usually this will include photographs and perhaps a video, although a video should be arranged in advance of the inspection to avoid any objections by the owner or contractor at the inspection. The inspection may include destructive testing, although reasonable arrangements for the testing and restoration would ordinarily be required by the owner and may follow an initial inspection.[28] Although destructive testing is to be by "mutual agreement," business owners likely will not permit it because of the noise, mess, and interruptions it may create for everyday flow of business operations. Moreover, any proposal for destructive testing should address restoration of what is being destroyed and deal with posting some financial security to protect the claimant.[29] Nevertheless, owners should think twice before refusing contractors and others with access to destructively test their property for defects. An owner's failure to agree to destructive testing could void an owner's claim for those damages that could have been avoided or mitigated if such testing was allowed and "had a feasible remedy been allowed."[30] Based on the statutory language dealing with owners who refuse to permit destructive testing, it may be difficult for a court to determine what damages would result from the lack of destructive testing, especially since a feasible remedy has not been formulated or implemented. This defense to such damages would seem to call for speculation unless the request for testing (that is denied) identifies potential feasible remedies based on projected findings.[31]

The contractor will in most instances send the downstream notices to subcontractors and suppliers to obtain the benefit of their responses and possible financial input for a monetary offer prior to being obliged to respond to the owner (noting that there is no penalty for lack of response by anyone). The only penalty addressed in the statute for lack of response is that the owner may, after the time allowed for response, file the suit or demand arbitration.[32] However, the law is left to general evidentiary principles and is now developing with respect to whether or how the lack of response may be brought out in the case. It would appear that a lack of response where the statute requires one is something that may be relevant to the defect case to show disinterest by the recipient of the notice but likely nothing more.[33] With little to be lost other than an inference of disinterest,[34] it becomes understandable why some

simply ignore responding to secondary notices from contractors.

The response is to include a report, if any, of the scope of any inspection of the property, the findings and results of the inspection, and may also include an offer to pay money, repair the defect, a combination of repairs and payment, a monetary payment contingent upon an insurer's decision, or that the notice of claim is disputed.[35]

What Are the Time Constraints? The statute says that an owner is to endeavor to send the notice of defect within 15 days of learning of the defect, but there is no penalty for serving the notice after expiration of the 15 days.[36] However, there may be some questions at a later trial about why an owner delayed sending a notice beyond 15 days from learning of the defect. As is often the case, owners initially focus only on the major parties such as the developer, general contractor, and design professionals who participated in the design and construction that led to causing the alleged defect. Although these main parties may receive an engineering report dated within the last 15 days, many times it is only much later that owners seek to serve a notice of claim on other participants such as subcontractors and suppliers.[37] But by that time, the 15 days or other applicable time deadlines may have long passed. In that instance, the expert report dated 10 months ago is first served on the subcontractor with the notice of claim (which on its face runs afoul of the 15-day statutory requirement). This delay may arguably serve to support an objection to the notice of claim and a motion to abate a lawsuit or arbitration from proceeding.[38]

The contractor may send the downstream notice to the believed affected subcontractors and suppliers within 10 days if there are 20 or less affected parcels or within 30 days if there are more than 20 affected parcels.[39] Again, the statute does not address the consequences of sending the downstream notice later. One could argue that the notice is a creature of statute and that failure to timely send the notice eliminates the need for a response, since the notice would be outside of the statute.

Within 30 days of receipt of the notice for 20 or less parcels, or within 50 days of receipt of the notice for more than 30 parcels, the person receiving notice is entitled to perform a reasonable inspection of the property during normal working hours of each unit subject to the claim to assess each alleged construction defect.[40]

Within 15 days after receipt of the notice for 20 or less parcels, or within 30 days of receipt of the notice for more than 20 parcels, the downstream subs and suppliers are to serve their written response.[41] Again, there is no statutory penalty for a late response or no response, except as it may be addressed at a later trial or arbitration.

Within 45 days after receiving the notice of claim, or within 75 days after receipt of a copy of the notice of claim involving an association representing more than 20 parcels, the person(s) who received the original notice must

serve a written response to the claimant.[42]

What is on the Horizon?

A bill is anticipated to be filed in the 2009 Florida legislative session to amend F.S. Ch. 558 to address many shortcomings associated with the statute. The bill is the product of a Florida Bar study committee, consisting of construction lawyers who represent owners, contractors, design professionals, and suppliers.[43] The amendments were fashioned to address some glitches in the current law and clear up some confusing terminology and also to change some of the procedures.[44] The study committee discussed imposing penalties for lack of compliance or timely compliance, and decided that the law is intended to serve as an avenue for settlement, not another weapon or remedy to be asserted in the courts. The *concepts* expressed above, for the most part, are expected to remain the same, other than a change that would prohibit the sending of a downstream notice being used as an admission against interest.❑

[1] FLA. STAT. §558.004(1) (2006). For a general discussion of Ch. 558, *see* Steven B. Lesser, *The 2004 Amendments to Florida's Construction Defect Statute: Some Solutions and More Confusion,* 78 FLA. B.J. 47 (October 2004).

[2] *Geller v. Aventura Land Holdings, Ltd.,* Case No. 06-09739-CA-06, Florida 17th Circuit.

[3] *See CC-Aventura, Inc. v The Weitz Co*., Case No. 06-21598, U.S.D.C. S.D. Fla.

[4] *Id.* The order in *CC-Aventura, Inc.* appeared to be a reasonable solution such that no one sought review of the order. *See also* FLA. STAT. §§558.003 and 558.004 (7) (2006).

[5] *Saltponds Condominium Association, Inc. v. McCoy*, 972 So. 2d 230 (Fla. 3d D.C.A. 2007) (reiterating that mailing of the written notice of claim letter tolls the applicable statute of limitations for the timeframes specified in FLA. STAT. §558.004). *Specialty Engineering Consultants, Inc. v. Hovstone Properties Florida LLC*, 968 So. 2d 680 (Fla. 4th D.C.A. 2007) (holding that Ch. 558 does not apply to an owner who is also the contractor, since the contractor is not a "claimant" as defined in Ch. 558, citing, *Centex Homes v. Mr. Stucco Inc*., 2007 WL 2264622 (M.D. Fla. Aug 6, 2007)(same)). *Infinity Design Builders Inc. v. Hutchinson*, 964 So. 2d 752 (Fla. 5th D.C.A. 2007) (Trial court denied builder's motion to stay arbitration for owner's failure to comply with notice requirements under Ch. 558. The district court reversed and granted builder's motion to stay arbitration on the grounds that builder had not exhibited any knowing intent to waive its right to litigate. (Note: The court did not engage in any further discussion of whether Ch. 558 requirements apply to arbitrations.)). *Saltponds Condominium Association, Inc. v. Walbridge-Aldinger Co.,* 979 So. 2d 1240 (Fla. 3d D.C.A. 2008) (notice acts to toll running of statute of limitations for the notice period under the statute).

[6] Ch. 2006-281, Laws of Florida; FLA. STAT. §558.002 (7) (2006).

[7] FLA. STAT. §558.004(9) (2006).

[8] FLA. STAT. §558.003 (2004).

[9] References to "contractor" throughout this article include those identified in FLA. STAT. §558.002(5) that are legally engaged in the business of designing, developing, constructing, manufacturing, repairing, or remodeling real property.

[10] FLA. STAT. §558.001 (2006).

[11] FLA. STAT. §§558.005(1) and 558.005 (3) (2006).

[12] *See* FLA. STAT. §558.004(15) (2006) contrasted with, for example, Rule R-24 Construction Industry Dispute Resolution Procedures (American Arbitration Association) which permits discovery only in the discretion of the arbitrator(s).

[13] FLA. STAT. §558.005(3) (2006).

[14] FLA. STAT. §558.004(15) and 558.004 (2) (2006).

[15] FLA. STAT. §§558.005(1) and 558.005 (4) (2006).

[16] *E.g.,* "The parties hereby agree to opt out of the provisions of Ch. 558, Fla. Stat. In the event of a claimed defect, the parties agree to pursue mediation by written demand from the owner claiming a construction defect to any party believed by the owner to be responsible for the defect as a condition precedent to any final dispute resolution procedure, arbitration or litigation [as appropriate]. Moreover, the parties agree that if mediation is requested, the other party(ies) who have been requested to mediate may inspect the alleged defect(s) upon prompt and reasonable written notice prior to the mediation."

[17] FLA. STAT. §558.004(5)(a) (2006).

[18] FLA. STAT. §558.004(15) (2006).

[19] *Id.*

[20] *See, e.g*., Rules R-24 and L-5(b), Construction Industry Dispute Resolution Procedures (American Arbitration Association).

[21] *Geller v. Aventura Land Holdings, Ltd*., Case No. 06-09739-CA-06, Florida 17th Circuit.

[22] FLA. STAT. §558.004(5) (2006).

[23] FLA. STAT. §§558.002(3) and 558.004(3) (2006).

[24] FLA. STAT. §558.004(1) (2006).

[25] FLA. STAT. §558.004(2) (2006).

[26] FLA. STAT. §558.004(15) (2006).

[27] *Id.*

[28] FLA. STAT. §558.004(2) (2006).

[29] FLA. STAT. §558.004(2)(b) (2006).

[30] FLA. STAT. §558.004(2) (2006).

[31] It is difficult to imagine how a court could make this determination absent expert testimony based on observations conducted at the time destructive testing is requested.

[32] FLA. STAT. §558.004(1) and (6) (2006).

[33] There is no penalty set forth in the statute.

[34] Of course, one never knows whether such disinterest could be a hot button for the trier of fact.

[35] FLA. STAT. §§558.004(4) and (5) (2006).

[36] FLA. STAT. §558.004(1) (2006).

[37] At this juncture, the only option to identify other culpable parties is through informal means, such as by a review of client documents and building department records, especially in the absence of formal discovery.

[38] Practitioners often raise this issue as the basis for an objection yet the statute appears advisory at best as it states: "The claimant shall endeavor to serve the notice of claim within 15 days after discovery or an alleged defect, but the failure to serve the notice of claim within 15 days does not bar the filing an action subject to 558.003."

[39] FLA. STAT. §558.004(3) (2006).

[40] FLA. STAT. §558.004(2) (2006).

[41] FLA. STAT. §558.004(4) (2006).

[42] FLA. STAT. §558.004(5) (2006).

[43] The study committee was comprised of Bruce Alexander, Fred Dudley, Tim Ford, Larry Leiby, Steve Lesser, Joy Lundeen, Lee Weintraub, and Brian Wolf.

[44] The text of the bill is not offered here since it has not yet been introduced as of this writing and is subject to change.

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This column is submitted on behalf of the Real Property, Probate and Trust Law Section, Sandra F. Diamond, chair, and William P. Sklar and Richard R. Gans, editors.