Florida's New Construction Defect Statute

The Aggrieved Homeowner's Obstacle Course

by Steven B. Lesser

When residential buildings begin to decay and roof tiles blow off in high winds, homeowners can no longer simply march into court and commence litigation against responsible parties. With the recent enactment of Florida's new construction defect statute ("statute"),[1] the aggrieved homeowner now is required to provide contractors and other responsible parties with prior written notice of the alleged construction defects and an opportunity to resolve claims and/or correct construction defects before filing suit. This new law applies to damage claims arising from defects associated with residential construction and excludes claims for personal injury and specific performance.[2]

With the exception of claims arising from alleged medical malpractice,[3] the Florida Legislature had never mandated presuit procedures for any other area of the law. But the recent explosion of mold and mildew cases around the country and the staggering insurance payouts accompanying them prompted our legislature and others to enact "notice and right to cure" laws,[4] which were supposed to diffuse potential litigation and foster settlement. Instead, it is facially apparent that this new law will neither limit the number of mold-related lawsuits nor put construction lawyers and their experts out of business. To the contrary, given the numerous obstacles, ambiguities, and inconsistencies inherent in the statute it will only lead to more litigation and probable constitutional challenges.

This article will discuss and analyze the requirements imposed by Florida's new construction defect statute, identify potential constitutional infirmities associated with it, and offer practical advice for counseling unwary clients on how to avoid the numerous procedural and substantive traps associated with this legislation. The chart on page 26 sets out the statutory time line for compliance with the new provisions.

Summary of the Process

The statute prescribes a procedure for homeowners and contractors to follow prior to the commencement of a lawsuit.[5] First, a person alleging a construction defect ("claimant" or "homeowner") must provide the contractor, subcontractor, supplier, design professional, and others (for ease of reference, collectively referred to as the "contractor") with written notification of the alleged defect(s) at least 60 days before filing a lawsuit, describing that defect in "reasonable detail."[6] Within five business days after service of the notice of claim, the contractor has the right to inspect the dwelling.[7] The inspection may include "destructive testing" by mutual agreement.[8] Within 10 days of receiving notice of the claim, the contractor must forward a copy of it to any other person (*i.e.*, subcontractor, supplier, or design professional) the contractor believes is responsible for the defect.[9] Thereafter, those secondary recipients may also inspect the dwelling in the same manner within five business days after receipt of the notice and issue a written response to the contractor to either repair the defect or dispute the claim.[10] Within 25 days of receiving the notice, the contractor must serve a written response to the claimant.[11] That response must either 1) include a written offer to repair the alleged defect at no cost to the claimant;[12] 2) include a written offer to compromise the claim by monetary payment within 30 days;[13] or 3) dispute the claim.[14] If the contractor offers to repair or com-

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promise the claim by monetary payment, the claimant has 15 days (or, in the case of a condominium or homeowner association, 45 days) to accept or reject the offer.[15] If the claimant accepts the offer and repair or payment is made, the claimant is thereafter barred from pursuing relief through litigation. If the claimant rejects the offer, it must be done by written notice containing the text of the offer with the word "rejected" printed on it.[16] Significantly, the claimant's failure to reject an offer in strict accordance with this procedure constitutes an acceptance of the offer, whereas no such penalties exist for a contractor's failure to comply with any of these procedures.[17]

These mandatory procedures are the new hurdles a homeowner must clear before pursuing legal action.[18] To the extent a homeowner fails to comply with these specific requirements, the trial court "shall abate" the action without prejudice until the homeowner first complies with such requirements.[19]

Finally, the statute requires that upon entering into all contracts for the "sale, design, construction or remodeling of a dwelling" the contractor must provide the owner of a dwelling with notice of this dispute resolution procedure.[20] The statute does not create new rights, causes of action, or theories upon which liability may be based.[21]

Hurdles, Obstacles, and Advice

On its face the statute appears to be heavily stacked against the homeowner, but it also contains some provisions that could negatively and unfairly impact the rights of developers, contractors, design professionals, subcontractors, and suppliers.

1) What Constitutes "Reasonable Detail"?

The initial requirement that a claimant identify the alleged defects in "reasonable detail" serves as the only criterion when preparing a notice of claim.[22] As any lawyer can imagine, the use of the word "reasonable" is a pandora's box that inevitably will lead to controversy. Consequently, a contractor could conceivably question whether each and every notice of claim adequately describes an alleged construction defect with "reasonable detail" and immediately move to abate the litigation on this basis alone.

In order to minimize the likelihood of a successful "reasonable detail" challenge, a homeowner should retain a qualified consultant to thoroughly inspect the dwelling to discover the nature and extent of potential deficiencies.[23] This would include identifying defects that violate applicable codes or standards associated with the construction.[24] If the defect exists throughout a dwelling or condominium or homeowner community, this fact along with any known damages should be specified.[25] Omitted components required by the design documents should also be included in the notice.[26]

2) Logistical Nightmare Caused by Short Inspection Window

• *Not Enough Time to Inspect*

The statute provides a contractor with five business days' right of inspection following receipt of the initial claim.[27] While this short time frame may not appear to be problematic with respect to a single-family home, it is impractical for larger housing developments, especially since the statute permits multiple defects to be alleged in a single claim notice.[28] For example, suppose a developer receives a notice of claim listing 50 separate defects in a 200-unit condominium. Under this circumstance, the developer would only have five business days to investigate and conduct a comprehensive inspection of the multiunit residential condominium project. For that matter, arranging to conduct an inspection of just a single-family home within five business days could pose a challenge to most developers, contractors, subcontractors, suppliers, and design professionals.

Taking advantage of this one-time opportunity to inspect and resolve a construction defect claim without litigation is nearly impossible for out-of-state companies. By the time the notice is served and the contractor arranges for someone to conduct the inspection, the opportunity may have already expired. The practical result of these impractical procedures will be that these inspections may never occur.

• *Preparing for Investigation and Inspection*

As the above hypothetical illustrates, many participants in the construction process, particularly those involved in the development of large-scale residential communities, may not be equipped to promptly inspect, investigate, and respond to claims. This is especially true of development companies that often dismantle following a sellout of dwelling units, or those that no longer have a local presence. In dealing with the dilemma associated with these short time frames, developers, contractors, design professionals, subcontractors, and suppliers should develop a procedure that will be followed once a claim notice is received.[29] In the future, at the outset of a new residential construction project, developers should contractually obligate the general contractor and/or design professional to timely investigate, conduct an inspection, and evaluate the cost to correct the defect. Similarly, these same parties should negotiate indemnity agreements to address their respective obligations and liability for construction defects.[30] To the extent that the contractor and

other parties cannot internally handle the investigative and inspection phases, outside forensic construction professionals should be retained.

Prior to the inspection, the contractor should review the original plans, specifications, and warranty information as well as all original design and construction agreements. This effort also may reap benefits when seeking to shift ultimate responsibility for a construction defect to secondary parties. During the inspection, the contractor should photograph and videotape the alleged defective conditions as well as compile data to enable preparation of a cost estimate. Should a resolution not be reached, the contractor can later use this data during litigation to graphically demonstrate that the defective condition has gotten worse due to lack of maintenance and/or due to a claimant's failure to mitigate its damages.[31] The inspection also provides an opportunity to ascertain whether the defect is widespread or isolated to certain areas of the dwelling.

• *Avoiding Multiple Inspections*

The logistical nightmare caused by this short "inspection window" also impacts homeowners. To the extent that the contractor receiving the original claim notice forwards a copy to each subcontractor, supplier, or design professional apparently responsible for the alleged defect, these secondary parties would *each* be entitled to inspect the dwelling within five business days after receipt of that notice.[32] Clearly, this is burdensome and poses a hardship on the homeowner, who will need to arrange for multiple inspections on short notice. Compliance with these procedures may create hardships under an endless variety of circumstances, yet the statute creates no exceptions. For example, the legislation does not provide for an extension of time to the elderly or infirm homeowner, who may find it even more difficult to make the dwelling available for inspection within the given time frame.

• *Identifying All Culpable Parties*

At the outset, the claimant should endeavor to identify all potentially culpable parties and send each a claim notice for two reasons. First, the sending of a claim notice will automatically toll the statute of limitations as to each recipient without the necessity for these parties to execute a tolling agreement.[33] Second, this initiative will enable the claimant to make the dwelling available to all recipients within five business days and avoid successive inspections beyond that time frame. Otherwise, the claimant will be faced with attempting to comply with different deadlines depending upon the date the notice of claim was served upon the various parties. To identify potentially culpable parties, building department records such as permits, certificates of occupancy, and other official documents can be a valuable resource.

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In a condominium setting, extensive research should not be necessary, since the developer is required by statute to provide the association with a list showing who participated in the original construction and other construction documents.[34]

From a claimant's standpoint, if arranging for an inspection within five business days poses a hardship, it may be advisable to simply initiate a lawsuit and then, once the action is abated, make the dwelling available for inspection. The only downside risk is that the claimant's failure to follow the statutory procedure becomes admissible as evidence at trial.[35]

3) Destructive Testing Issues

• *Establishing Ground Rules for Destructive Testing*

The statute provides responsible parties with an opportunity to perform destructive testing, but this feature will likely have marginal success since it must be by mutual agreement.[36] In many instances, the homeowner will refuse a request to perform destructive testing because of potential damage to the dwelling. Ironically, remedies for protecting the homeowner such as failing to return the tested areas to their pretest condition are not addressed by the statute, leaving a damaged homeowner to head to court and pursue only common law remedies.[37] For this reason alone, homeowners should resist requests to perform destructive testing unless the contractor agrees to restore the tested areas to their original condition, post a bond, and maintain liability insurance to guard against theft or damage during the destructive testing process. The homeowner should also require that the testing be performed either by a recognized testing laboratory, a Florida registered professional engineer, or a licensed contractor, and insist upon receiving copies of all test results. Finally, the homeowner should demand that it be held harmless and indemnified against any claims or liens filed with respect to the property, should the contractor fail to pay the party that it retained to perform the destructive testing.[38]

4) Contractor's Written Response: Risks and Opportunities

• *Written Report Must Accompany Offer to Repair*

From the contractor's perspective, the statute's requirement that a written response be furnished to the claimant is most problematic.[39] The repair option is risky business for the contractor. First, disputes may arise over the quality of the work performed and damage may occur to other property during the repair. Second, in considering whether to offer to repair, the contractor should be mindful that he or she is required to provide claimant with a written report detailing the results of the inspection.[40] If the claimant rejects the offer to repair, the written report could provide guidance to the claimant during the subsequent litigation and discovery.

• *Paying Money to Cure Defects*

For these reasons, the contractor should seriously consider the payment option.[41] Indeed, offering money to compromise and settle the defect claim may be the most advantageous scenario for the contractor, because the statute does not require that a monetary offer be reasonable or sufficient to correct the alleged defect.[42] Obviously, the contractor has nothing to lose by making a low offer since the offer to compromise and settle a defect claim would be inadmissible in any subsequent litigation.[43] Although such an offer probably would be rejected, it is possible that a homeowner will not timely reject it, resulting in an acceptance of the offer and barring further litigation over the defect claim.[44] Even a bad offer may prompt negotiations with the claimant outside the confines of the statute and ultimately lead to a settlement.

While the new statute provides the contractor with various settlement options, the statute is dangerously silent at this juncture where the contractor's offer is accepted by the claimant and the contractor later decides not to honor the deal. Under these circumstances, no statutory enforcement mechanism exists to ensure that the contractor will perform in accordance with the offer accepted by a claimant. Here, the statute leaves the claimant in a familiar place, namely on the courthouse steps with nothing more than an action for breach of the agreement made with the contractor to pay or repair. Again, the statute does not create a private right of action for its violation and does not penalize the contractor in any meaningful way for walking away from such a commitment.[45] Other than the prospect of getting sued for what was offered, a contractor has nothing to lose by reneging on an offer to pay or repair.

• *Statute Fails to Establish Time Deadlines to Complete Repairs*

The statute requires that the offer to repair include a timetable for completion,[46] yet fails to prescribe any outside time limitations for completing the repairs. This loophole permits the contractor to specify *any* time period to complete the repair, conceivably forever, without any recourse to the claimant. This is especially unfair if the claimant fails to timely reject the offer and becomes bound to it.[47] The absence of statutory criteria to address these concerns may very well leave the judiciary with the task of resolving these issues that could have been addressed by the legislature.

5) Homeowner's Response to Contractor's Offer: A Trap for the Unwary

• *Failure to Reject Equals Acceptance*

Great care should be taken by a claimant to timely respond to the

contractor's offer, especially since the statute imposes grave penalties if a claimant does not timely respond. Again, the claimant will be deemed to have accepted the contractor's written offer to repair or pay if, within 15 days (or 45 days for an association) the claimant does not serve a written rejection of the offer.[48] Not just any letter of rejection will do—the statute requires that the claimant's rejection contain the settlement offer with the word "rejected" printed on it.[49]

Claimant's failure to properly and timely reject the contractor's offer results in the automatic *acceptance* of the offer and bars any further litigation by the claimant over the alleged construction defect.[50] In addition to being barred from the courthouse, a homeowner who fails to comply with the statute's acceptance/rejection mechanism could be forced to accept an inadequate monetary offer or Band-Aid repairs. Moreover, should the repairs not last, the homeowner is out of luck since the statute does not provide for a warranty to cover the repair work.

• *Initiating Steps to Avoid Acceptance of Offer by Failing to Respond*

This statutory time frame for accepting or rejecting the contractor's offer creates an undue hardship for Florida homeowners, particularly during the summer months when many residents are absent from the jurisdiction. Under these circumstances, a two-week summer vacation could have a devastating impact on a claimant who fails to timely receive or respond to a contractor's offer to repair or pay. The condominium or homeowner association setting poses even greater challenges. Although the time to respond is greater (45 days), the association may not have sufficient procedures in place to timely respond to a contractor's offer. In order to mitigate an unintended acceptance by default, the initial claim letter should specify that the response be furnished not only to the association but also to its manager, and/or legal counsel. The association's board of directors should take the initiative and schedule an emergency board meeting in anticipation of receiving any offer. Arrangements should also be made to enable the technical representative of the association to participate and provide input in this decision-making process. Reliance upon qualified professionals will enable the association to benefit from the business judgment rule should unit owners challenge a board decision to accept or reject an offer and further protect the directors from individual liability.[51]

• *Acceptance by Inaction Violates Access to Courts*

This provision of the new statute will likely serve as the cornerstone of a constitutional challenge predicated upon unduly restricting access to the courts. For example, if a homeowner is deemed to have "accepted" the contractor's offer through silence or inaction, or by failing to timely serve a written notice of rejection upon the contractor, in essence the claimant will have waived access to the courts through an act that clearly is not "voluntary" or "knowing." A homeowner faced with this scenario may seek to challenge the statute on constitutional grounds by arguing that the "deemed acceptance" provision unduly restricts access to the courts, in contravention of Art. I, §21 of the Florida Constitution. If the recent reported decisions in the medical malpractice setting are any indication, a homeowner or association advancing such an argument is likely to prevail on such a constitutional claim.[52]

Litigation Potpourri: Unanswered Questions

The new statute presents a plethora of dilemmas for practitioners. The absence of critical definitions, coupled with impractical but strict procedural time frames, poses various traps for the unwary claimant.

• *Definitional Problems*

The statute's "definitions" section likely will generate confusion among practitioners. The statutory definition of a "claimant," incredibly, includes a "tenant" who has no ownership interest in the dwelling. Under these circumstances, a tenant's acceptance of an offer to pay money or repair a construction defect could never vitiate the rights of the actual owner.[53]

The statutory definition of "contractor" is too broad, bringing within its grasp those legally engaged in the business of "designing, developing, constructing, manufacturing, selling or remodeling dwellings or

attachments thereof."[54] This definition arguably includes both professionals and nonprofessionals, and even goes so far as to include not only persons engaged in design or construction, but also those who simply buy new or used homes and "flip" them for profit.[55] And, the ambiguous terms do not stop there. The term "remodeling"[56] is so broad and vague it can conceivably cover defects ranging from an improper hanging of wallpaper to those arising from roof repair, painting, waterproofing, or concrete restoration performed to a 20-year-old residential condominium building. The term "attachment"[57] is not defined and could mean something other than adding a room to an existing home. One commentator has opined that this reference could apply to any persons or entities engaged in the business of selling interior decorations "attached" to a dwelling.[58] Arguably, the seller of a barbecue grill "attached" to the backyard patio could be entitled to notice and an opportunity to fix crooked brickwork housing the grill before being sued in small claims court.

The statutory framework has also cast its wide net to capture unspecified persons who "observe construction."[59] Although the typical individual who observes construction includes those retained by the owner to approve a contractor's application for payment, or an inspector hired to monitor construction by a construction lender, this nebulous definition could arguably cover a galaxy of individuals including a 24-hour security guard hired to watch over a construction project.

For design professionals, liability arising from "observation of construction" has been resisted for years and imposing these procedures upon them[60] will likely cause uproar in the insurance marketplace. At a time when professional liability insurance premiums are on the rise,[61] some insurance carriers require the recipient of a claim to promptly notify their professional liability carrier. This simple act of claims reporting could translate into increased administrative costs associated with investigation, analysis, and preparing a response to a claim, which in turn can cause an increase in professional liability premiums and corresponding deductibles.

• *Is the Mandatory "Abatement" Mechanism Constitutional?*

One of the most controversial and impractical aspects of the new legislation is the mandatory requirement that an action be "abated" if the homeowner (not the contractor) fails to comply with the statutory requirements prior to filing suit.[62] It could be argued that such language forges an unconstitutional incursion into the authority of the Florida Supreme Court to promulgate rules of practice in the courts of this state.[63] Under the Florida Constitution, only the Florida Supreme Court has the power to promulgate rules for the procedural aspects of civil litigation through the Florida Rules of Civil Procedure.[64] In the medical malpractice framework, for example, the Supreme Court has promulgated Fla. R. Civ. P. 1.650, which provides for the "abatement" of an action where the plaintiff has not first complied with the presuit notice requirements prescribed by F.S. §766.106. Unless and until a similar procedural rule is promulgated to correspond with the new construction defect statute, this attempt by the Florida Legislature to require courts to "abate" causes of action once they have begun will be looked upon with disfavor by Florida courts.

This provision further courts disaster by providing for a mandatory abatement upon "motion by a party to the action."[65] This abatement requirement will delay the prompt resolution of disputes and thwart otherwise legitimate claims during litigation. For example, amending a complaint to add a newly discovered construction defect or an additional culpable party defendant would first require the homeowner to comply with these statutory requirements. Otherwise, the action could be subject to abatement. Similarly, contractor lien foreclosure actions typically prompt counterclaims by the owner for allegedly defective work; however, if the homeowner fails to comply with presuit notification, either party could move to abate the action and bring the litigation to a standstill pending compliance. By the same token, the contractor with a weak lien claim could move to abate, leaving an indefinite cloud on the owner's title. In that instance, the homeowner might be motivated to comply promptly in order to avoid encumbering his property.

It is this portion of the statute that potentially creates a contractor's biggest nightmare and hands the homeowner a trump card in every conceivable court proceeding where both parties seek only money from each other. Consider a contractor seeking to collect an unpaid balance representing the cost for building an addition to the homeowner's residence. During the proceeding, the homeowner may elect to bypass compliance with any statutory presuit requirements and file a counterclaim for defective work. Immediately thereafter, the homeowner could file a motion to abate the entire proceeding pending his or her own compliance. But what if the homeowner delays compliance or simply never complies? The homeowner has just thrown the entire action into abeyance, thereby stifling the contractor's efforts to collect. This tactic will likely clog up the court system and prompt the contractor to seek a bifurcation of claims to overcome this impasse.

Conclusion

It is ironic that Florida's new construction defect statute, enacted to stem the tide of construction litigation, instead will most likely generate a flood of disputes over its terms and conditions. This statute is fraught with inherent infirmities that will provide fertile ground for constitutional and other challenges to its enforcement. Claimants will undoubtedly argue that this statutory framework whittles away at the rights of consumers in favor of contractors and that it is one-sided, heavy-handed, and even illusory. Not to be left out, contractors will take issue with impractical and unreasonable statutory deadlines for

performance rendering any perceived benefit to be meaningless. The ultimate result of this legislation will be chaos in the courts as the judiciary will inevitably be tasked to sort it all out. The next time around, homeowners and the building industry should work together to formulate a reasonable statutory framework that protects valuable rights and imposes workable, practical deadlines that are fair for all concerned. ❑

[1] Fla. Stat. §558.001–558.005 (May 27, 2003).

[2] Fla. Stat. §558.002(7) defines a "dwelling" to include a single-family house, multifamily residential units in community associations as well as manufactured or modular homes. Fla. Stat. §558.002(1) excludes personal injury claims from the definition of "action." Fla. Stat. §558.004(14)(a) recognizes that emergency repairs may be performed without prejudice to the claimant for failing to follow the statutory procedures.

[3] *See* Fla. R. Civ. P. 1.650 and Fla. Stat. §766.106 (presuit notice requirement for medical malpractice claims).

[4] *See* Bridget McCrea*, Fla.: Mold Bills Could Mitigate Lawsuits*, Realtor Magazine Online (www.realtor.org), May 23, 2003 (quoting an official from Florida Association of Realtors as stating that the new statute "would head off the problem of insurance providers attempting to limit their exposure to mold-related claims."). In Texas, for example, mold claims in 2001 cost insurance companies more than $850 million compared to virtually nothing just three years earlier, according to Robert Harwig, chief economist and vice president of the Insurance Information Institute. *See* Matt Griswold, *Mold Experts Disagree on Extent of Problems Mold is Capable of Creating*, Bradenton Herald, June 1, 2003. Many insurers believe that Florida is "where Texas was two years ago," with one major insurance carrier, State Farm, reporting that homeowners' mold claims in Florida have risen from 37 in 2000 to 900 in 2002—a 2400-percent increase. *See Ballard v. Fire Ins. Exchange*, No. 99-05252 (Tex. Dist. Ct., Travis Cty., June 1, 2001) $32 million verdict in favor of plaintiff in mold-related litigation fueled an uprising although the award was later reduced on appeal. Arizona, California, Nevada, Texas, Kentucky, and West Virginia have enacted similar laws within the past year, and as many as 16 additional states are presently considering such legislation. *See also* Roger B. Coven, *California Attempts to Resolve Residential Construction Defect Claims Without Litigation*, 23 Constr. Law 2 (Spring 2003). In addition, the National Association of Home Builders has indicated that it will seek "federal" right to cure legislation.

[5] Fla. Stat. §558.004(1).

[6] *Id.* The statutory definition of "contractor" also includes developers. *See* Fla. Stat. §558.002(5).

[7] Fla. Stat. §558.004(2). Those subject to the statute should be mindful that the statutory time frame combines calendar and business days which could lead to confusion.

[8] *Id.*

[9] Fla. Stat. §558.004(3).

[10] *Id.* Fla. Stat. §558.004(4).

[11] Fla. Stat. §558.004(5).

[12] Fla. Stat. §558.004(5)(a). A written offer to repair must include a written report of their findings including the results of their inspection and a timetable for completing the repairs. It is interesting to note that a secondary recipient that receives a notice of claim from the contractor must also prepare a written report and furnish it to the contractor. However, that report need not be furnished to the claimant.

[13] Fla. Stat. §58.004(5)(b).

[14] Fla. Stat. §58.004(5)(c).

[15] Fla. Stat. §558.006.

[16] Fla. Stat. §558.008.

[17] Fla. Stat. §558.004(11).

[18] Fla. Stat. §558.004(8).

[19] Fla. Stat. §558.003.

[20] Fla. Stat. §558.005. This requirement would apply to new and existing construction. Drafters of contracts must reconcile these provisions with opportunity to cure and warranty provisions included in contracts that fall within the ambit of the statute. Fla. Stat. §558.004(15) provides that these procedures take precedent over any conflicting dispute resolution mechanisms in arbitration agreements. Settlement agreements that include repair work would also require a contractor to provide this conspicuous statutory notice to the owner of a dwelling. TThe statute is silent as to any adverse consequences to a contractor that fails to provide this statutory notice language. It is questionable whether a claimant would be required to follow the procedures if the statutory language is omitted from a contract.

[21] Fla. Stat. §558.004(14)(c). Statutory requirements are often strictly construed. *See Broward County School Board v. Joseph*, 756 So. 2d 1077 (Fla. 4th D.C.A. 2000). Here, the requirements appear to be a condition precedent to initiating litigation and therefore may be subject to a waiver by the parties. Parties should be careful when modifying or waiving these statutory requirements. The party failing to comply strictly with any requirement will bear the burden of proving a justifiable excuse or that the parties modified or waived the requirement. *Hanley v. Kajak*, 661 So. 2d 1248 (Fla. 4th D.C.A. 1995).

[22] Fla. Stat. §558.004(1). In light of the statutory definition of "construction defect," as set forth in §558.002(4)(a)–(d), a knowledgeable construction professional should be retained by the claimant to determine whether the defect constitutes a building code violation, plan deficiency, departure from applicable professional standards of care, accepted trade standards for good and workmanlike construction.

[23] *See Conquistador Condominium VIII Association, Inc. v. Conquistador Court*, 500 So. 2d 346 (Fla. 4th D.C.A. 1987), where the Fourth District Court of Appeal emphasized the importance of acquiring a building survey to determine whether defects exist in the condominium buildings and improvements once unit owners gain control of a condominium association from the developer. This would be prudent advice to any claimant seeking to pursue a claim for construction defects.

[24] Fla. Stat. §558.002 4)(a)–(d) inclusive.

[25] Fla. Stat. §558.004(1).

[26] *See* Fla. Stat. §558.002(4)(a–(d) inclusive.

[27] Fla. Stat. §558.004(2). The statute makes the inspection optional and not mandatory.

[28] Fla. Stat. §558.004(13).

[29] The contractor and others should implement procedures to process anticipated notices of claims promptly. Toward this end, a database should be assembled to identify the participants to the original design and construction such as subcontractors, design professionals, insurance carriers, and surety companies along with updated contact information including facsimile numbers and e-mail addresses. This information will enable the recipient of a claim to promptly forward a claim notice to applicable insurance carriers and others who may ultimately be responsible for the construction defects.

[30] Fla. Stat. §725.06(2001).

[31] In a condominium context, Fla. Stat. §718.203(4) provides that statutory implied warranties are conditioned upon routine maintenance being performed.

[32] Fla. Stat. §558.004(3). This is also a hardship on the secondary party who must inspect and provide a proposal to repair or dispute the claim within five business days. The statute fails to address the consequences of a secondary party who fails to follow the procedure except that noncompliance will be admissible into evidence. Oddly, the secondary party is not authorized by statute to make a monetary proposal—only an offer to repair or dispute the claim.

[33] Fla. Stat. §558.004(12).

[34] Fla. Stat. §718.301(4)(f)–(k). Once the developer relinquishes control of the association to the unit owners, certain documents must be furnished to the association including plans; specifications; list of all contractors, subcontractors, and suppliers utilized in the construction of the condominium; certificates of occupancy; written warranties; and permits.

[35] Fla. Stat. §558.004(11).

[36] Fla. Stat. §558.004(2).

[37] *Id.* The statute only provides that the person performing the testing (as opposed to the recipient of the claim notice) is responsible for repairing any damage caused by the testing. However, the obligation leaves the claimant without a statutory remedy to enforce this obliga-

tion. Notwithstanding the statutory language, the reader should note that this provision is of little consequence because destructive testing can only be performed by "mutual agreement." Therefore, the parties can formulate their own procedures and conditions before destructive testing will be permitted.

[38] *See* FLA. STAT. ch. 713 (2002). Under these circumstances, the party performing destructive testing could file a claim of lien on the dwelling because destructive testing could fall within the scope of the definition of "improvement" as set forth in FLA. STAT. §713.01(13).

[39] FLA. STAT. §558.004(5).

[40] FLA. STAT. §558.004(5)(a). In the event a written offer to repair is provided, the contractor must include a written report of the inspection, the findings and results of the inspection along with a detailed description of the repairs to remedy the defect and a timetable for the completion of such repairs.

[41] FLA. STAT. §558.004(5)(b).

[42] *Id*. The statute only requires that the monetary payment be made within 30 days without providing any information such as a cost estimate submitted by a party available to actually perform the repair or other information to enable a party to determine if the amount offered is sufficient to remedy the defect.

[43] FLA. STAT. §558.004(11).

[44] FLA. STAT. §558.004(6).

[45] *Id*. The offer would be inadmissible based upon FLA. STAT. §90.408 (2002) but, if a contractor failed to pay or otherwise perform, the claimant could introduce the offer in a breach of contract action to prove liability for the breach and damages. In that instance, the provisions of FLA. STAT. §558.004(11) that prohibit the introduction of evidence at trial as an "admission of liability with respect to the defect would not be applicable.

[46] FLA. STAT. §558.004(5)(a).

[47] FLA. STAT. §558.004(6).

[48] FLA. STAT. §558.004(8). Interestingly, the contractor, subcontractor, supplier, or design professional's written response to the claimant is the only area of the statute that mentions that the offer is deemed accepted if not rejected. Otherwise, this "accepted if not rejected" language does not appear elsewhere in the statute.

[49] *Id.*

[50] *Id. See also* FLA. STAT. §558.004(9). If the claimant rejects the contractor's offer by separate letter without affixing the word "rejected" on the face of the offer, would the court apply a prejudice standard or simply order the offer accepted since the rejection does not comply with the statute? Alternatively, could the court abate or bar the ability to proceed with the litigation? The interpretations are endless and so will the resulting litigation over this issue.

[51] Directors of community associations are protected from personal liability when relying upon information, opinions, reports, statements prepared or presented by professionals, unless a director derives an improper personal benefit, either directly or indirectly, from the decision; such as a bribe from the developer or contractor. FLA. STAT. §617.008(30), (31) (2002). Directors are also shielded from liability under the "business judgment" rule, which requires a court to presume that a corporate director acted in good faith, no matter how poor the business judgment may have been, absent a showing of abuse of discretion, fraud, bad faith, or illegality. *Kloha v. Duda*, 246 F. Supp. 1237, 1243–44 (M.D. Fla. 2003); *Munder v. Circle One Condominium, Inc.*, 596 So. 2d 144, 145 (Fla. 4th D.C.A. 1992).

[52] In the medical malpractice context, for example, Florida courts have emphasized that the presuit notice requirement must be interpreted so that an individual's access to the courts is not unduly restricted. *See Kukral v. Mekras*, 679 So. 2d 278, 284 (Fla. 1996) (holding that "the medical malpractice statutory scheme must be interpreted liberally so as not to unduly restrict a Florida citizen's constitutionally guaranteed access to the courts, while at the same time carrying out the legislative policy of screening out frivolous lawsuits and defenses."); *De La Torre v. Orate*, 785 So. 2d 553, 555–56 (Fla. 3d D.C.A. 2001).

[53] FLA. STAT. §558.002(3). To emphasize that including a tenant in the definition of "claimant" was perhaps misplaced consider that the statutory notice set forth in §558.005(1)(2) must be directed to the owner of the dwelling. A tenant can pursue a claim against a landlord for constructive eviction arising from construction defects but not against those parties responsible to the owner of the dwelling for improper design or construction. *See Smith v. Glen Cove Apartments Condominiums Master Association, Inc.,* 2003 WL 21396741 (Fla. 4th D.C.A. June 18, 2003), holding that tenants could bring a class action against condominium association and lessors for failure to maintain roofs on condominium buildings. However, a tenant could have a claim for an alleged construction defect against a contractor it has hired for causing damages to a tenant's leasehold improvements.

[54] The definition of "contractor" goes beyond the definition utilized in FLA. STAT. §489.105(3) (2003), included in Chapter 489, Part 1 entitled Construction Contracting. Note that use of the term "legally engaged" would require the contractor to be properly licensed and, therefore, this presuit procedure would not apply to those not properly licensed.

[55] FLA. STAT. §558.002(5). This definition would include a developer, design-builder, and conceivably a lender that forecloses on a construction project *See Chotka v. Fidelco Growth Investors*, 383 So. 2d 1169 (Fla. 2d D.C.A. 1980). It is questionable whether the statute will subject a surety company issuing a performance or maintenance bond on a residential project to the presuit notification procedures.

[56] FLA. STAT. §558.002(4).

[57] FLA. STAT. §558.002(5). "Attachments" is referenced in the definition of a "contractor" but not in the definition of a "construction defect."

[58] James W. Martin, *Law Limits Homeowners' Rights to Sue Contractors*, FLA. BAR NEWS, June 1, 2003.

[59] FLA. STAT. §558.002(5).

[60] Design professionals have challenged being held liable for defects arising from simply an observation of construction. Courts have held that architects who "make periodic visits to the site" and simply "observe" construction are not liable contractually for construction defects. *See, e.g.*, *Shepard v. City of Palatka*, 399 So. 2d 1044 (Fla. 4th D.C.A. 1981), republished at 441 So. 2d 1077 (noting that such professionals are hired to ensure compliance with the design plans and not to ensure against construction defects). However, other courts have explicitly held that even absent a duty to inspect, and notwithstanding explicit exculpatory language, if a professional observed and actually noticed a defect and failed to notify the owner or should have noticed the defect because it was obvious, contractual liability can be imposed for simple observation even though there was no duty to inspect. *Public Health Trust of Dade County, Florida v. George Hyman Construction Company*, 606 So. 2d 728 (Fla. 3d D.C.A. 1992).

[61] Kermit Baker, *Keep a Watchful Eye on Liability Insurance Rates*, AIARCHITECT ECONOMICS (March 2001). Baker predicted a future increase in professional liability insurance rates. *Claims Against Architects On The Rise*, DPIC July 7, 2003 Web site (www.dpic.com) (quoting from this article: "By project type, residential condos proved to be the riskiest for architects.")

[62] FLA. STAT. §558.003.

[63] *See* FLA. CONST. art. V, §2(a).

[64] *See Grip Development, Inc. v. Coldwell Banker Residential Real Estate, Inc.*, 788 So. 2d 262 (Fla. 4th D.C.A. 2000) (citing FLA. CONST. art. V, §2(a).

[65] FLA. STAT. §558.003.

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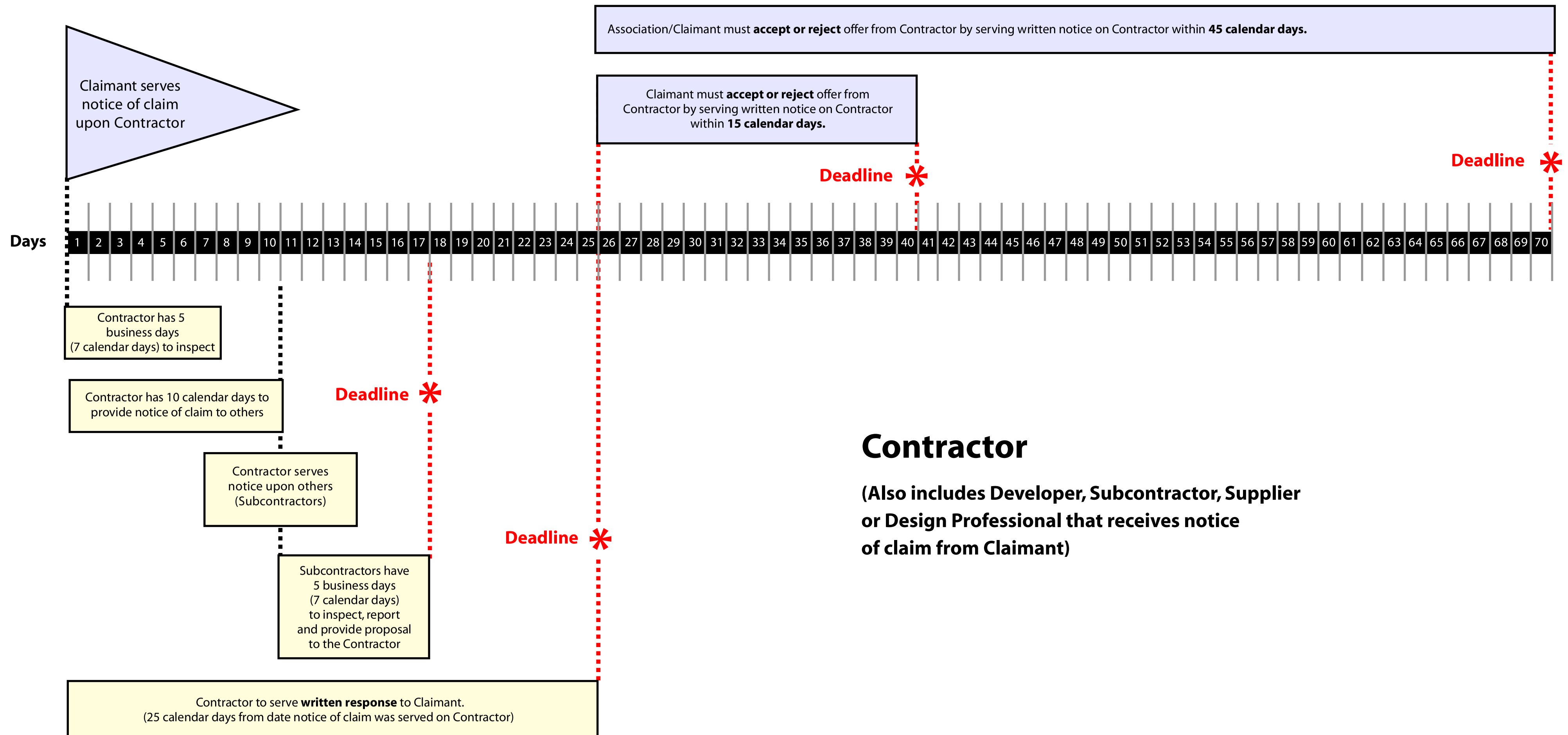
Time Line

Chapter 558, Construction Defects
§§558.001 - 558.005, Florida Statutes



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