The 2004 Amendments to Florida's Construction Defect Statute: Some Solutions and More Confusion

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Florida's construction defect statute, F.S. §558.001 *et seq*., which became effective on May 27, 2003, has caused considerable confusion among construction practitioners relating to its procedure and enforcement.[1] This statute dramatically altered the landscape for litigating construction defect claims by requiring homeowners to provide contractors and other allegedly responsible parties with prior written notice and an opportunity to cure the alleged defects prior to filing a lawsuit.[2] Never before had claimants in the construction setting been required to give contractors pre-suit notice and an opportunity to cure as a precondition to filing a defects lawsuit.

In practice, however, the statute has proved vexing to both contractors and claimants. This stems from the fact that the timelines for compliance with the statutory provisions have proved to be a bit unrealistic. For example, upon receiving the initial written notice of the alleged defects, the contractor was given only five business days to inspect the alleged defects regardless of whether they existed in a single-family home or a high-rise building containing 300 residential units.[3] This was not nearly enough time, especially as it pertains to large-scale construction projects, where inspecting multiple units could take many weeks, if not months. Further, the statute provided that a claimant's failure to respond to the contractor's written proposal to rectify a defect (whether through repair or by payment of money) within 45 days resulted in the offer being deemed "accepted," thereby releasing the contractor from any further liability.[4] These were just a few of the many areas of concern associated with the original statute.[5] During the 2004 legislative session, legislators rectified many shortcomings associated with the original statute, but some new provisions will likely generate their own share of controversy and confusion. These provisions, effective July 1, 2004, impose several new requirements, such as 1) mandating that the parties exchange expert reports and other discoverable evidence, 2) allowing a contractor to inspect all affected units in multifamily buildings, and 3) permitting destructive testing on the affected unit.[6] Failure to comply with these pre-suit requirements may limit a claimant's damages or result in court-imposed sanctions in the event of subsequent litigation. Additionally, the statutory time period for filing litigation, conducting inspections, offering to perform work, paying money, and/or disputing the claim have been extended.[7] As illustrated in the charts at the end of this article, the applicable time frames differ depending upon whether the residential building exceeds 20 units.[8] For ease of reference, however, this article addresses the effect that the controversial new amendments will have on a claimant community association representing in excess of 20 residential parcel owners.

Summary of New Procedure

Under the revised statutory scheme, the aggrieved claimant must provide the contractor and other allegedly responsible parties with 120-day prior written notification of the alleged construction defect(s), describing them in "reasonable detail."[9] Within 50 days after receiving a notice of a claim, the contractor has the right to inspect the dwelling and all affected units.[10] During the 30-day period after receiving notice of the alleged defect, the contractor must forward a copy of the notice to

any other person that the contractor believes is responsible for the alleged defect.[11] These secondary recipients may also inspect the dwelling within the same time period provided to the contractor. [12]

The new statute also extends the time frame for providing a written response to the claimant. Previously, the contractor had to provide a written response to the claimant within 25 days after receiving written notice of the alleged defect. Now, the contractor has 75 days to furnish the claimant with a written response.[13] This response must contain either: a) a written offer to repair the alleged defect at no cost to the claimant; (b) a written offer to compromise the claim by monetary payment; or c) a written statement that the contractor disputes the claim.[14] The contractor's response may also include a combination of the alternatives set forth above whenever multiple defects are alleged. [15]

If the contractor offers to pay for or repair the defect, the claimant has 45 days to accept or reject the offer.[16] If the claimant accepts the offer, and repair or payment is made, the claimant is thereafter barred from pursuing relief through litigation.[17] In either case, however, if the claimant accepts or rejects the offer it must be done by written notice in the form and manner set out in the statute.[18] A claimant that fails to comply with these specific requirements will be barred from litigating the dispute (and any previously commenced action will be "abated") until he or she has successfully complied with the statute's pre-suit dispute resolution procedures.[19] This represents a significant improvement from the original version of the statute, which had penalized a noncomplying claimant by deeming his inaction an "acceptance" of the contractor's offer.[20] Although the "deemed accepted" language has been eliminated in the amended statute, a claimant is still required to accept or reject the proposal before initiating a lawsuit.

Mutual Exchange of Evidence

What is sure to be one of the most controversial and hotly contested aspects of the amended statute is the new requirement that each party produce, upon written request by the other parties, all "discoverable evidence," including any expert reports. Because "discoverable" evidence is broadly defined under Florida law,[21] the requirement that the parties produce (in advance of any lawsuit or arbitration proceeding) all discoverable evidence will undoubtedly prompt claimants to hire legal counsel to assemble and make a determination as to which materials should be provided to the requesting party. This evaluation is critical since the failure to produce these materials could later result in court-imposed sanctions against the claimant for pre-suit discovery violations.[22] In light of these pre-suit disclosure requirements, it is recommended that counsel for the claimant hire experts directly in order to control the content of expert reports and to protect these materials from disclosure based upon the work-product privilege or some other privilege.

Although this provision appears to be heavily stacked against the claimant, contractors also have the same duty to provide discoverable materials or likewise risk being subjected to court-imposed sanctions.[23] Thus, upon serving a notice of claim, the claimant should also serve a discovery demand upon the contractor, requesting, inter alia, expert reports, plans, shop drawings, contracts, photographs, videotapes, and correspondence generated during the original construction of the project. Never before could these documents be acquired except by subpoena issued in a lawsuit. This documentation could prove invaluable to engineers initially retained by a claimant to identify problematic areas that are not readily observed without destructive testing.[24]

This mutual obligation to produce documents also provides litigants engaged in arbitration with a unique opportunity to acquire discovery to which they otherwise might not be entitled. Generally, depending upon the case, discovery is not permitted during arbitration conducted under the rules of the Construction Industry American Arbitration Association except by agreement of the parties or at the discretion of the arbitration panel.[25] Consequently, this statutory mechanism may be the only opportunity for a party to obtain discovery, albeit pre-suit, from an adverse party in an arbitration proceeding.

The mutual obligation to provide pre-suit discovery is problematic on a number of levels. Since most documentation generated during the design and construction of a project is ordinarily not privileged material, the allegedly responsible contractor could be required to produce voluminous documentation even before a lawsuit is filed. This will undoubtedly enable claimants to allege the construction defects with greater particularity. Compounding this problem is the fact that the amended statute fails to specify when the requested documents must be produced or

who is responsible to pay for the cost of reproducing voluminous documents. Further, there is no pre-suit enforcement mechanism for resolving discovery disputes, thereby leaving the parties to resolve these disputes on their own. This will likely dilute the effectiveness and utility of pre-suit discovery.

The Right to Inspect

The amended statute also imposes an obligation on contractors to cooperate with the claimant in an effort to ameliorate the burden posed by inspections of multiple areas. A contractor receiving a notice of claim is required to "reasonably coordinate the timing and manner of all inspections with the claimant to minimize the number of inspections."[26] In a community association setting, coordination becomes significant because the statute now permits a contractor to gain access to *each unit* to inspect the defective condition.[27] Hardship in providing access to unit interiors throughout a multifamily residential building may be difficult and the consequences ultimately fatal to a community association's claim. For example, if the matter proceeds to trial, a court may bar the claimant's right to recover damages for defects found in units that were not made available for inspection[28] As a precautionary measure, a claimant should initiate early steps to advise unit owners that these inspections are necessary to prosecute a claim for defective construction. Toward that end, an inspection schedule should be generated to demonstrate the claimant's efforts to reasonably coordinate with the contractor so as to avoid later arguments that these units were not available for inspection. As a further precautionary measure, experts retained by the claimant should photograph and videotape defects located in interior units so that, ultimately, alternative proof can be introduced to the court in the event that access to the unit is not available.

Destructive Testing

Under the original statute, the right to perform destructive testing was by mutual agreement only.[29] Destructive testing under the revised statute is still by mutual agreement, but has been modified to require that the person performing the test offer "financial responsibility" to cover the cost of repairing the tested areas.[30] Moreover, the person selected to perform the destructive testing must be identified in advance with an opportunity for the claimant to object to his or her designation.[31] Under these circumstances, the party requesting the destructive testing must then offer a list of three additional candidates to perform the testing.[32] The claimant or its representative may be present during the testing, which must be conducted at a mutually convenient time.[33]

Overall, destructive testing may have a potentially greater adverse impact upon the claimant because there is no assurance that the testing will be properly performed to minimize damages to the affected unit. The requirement of "financial responsibility" is vague, ambiguous, and fails to specify what type of information or security must be provided. For this reason alone, a claimant should refuse 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 testing process. Moreover, the claimant should request that its property be kept free and clear of any liens or encumbrances should the testing party not be paid by the contractor that ordered it.[34]

The amended statute fails to provide any meaningful remedy to a claimant damaged by destructive testing other than to authorize the commencement of a legal action to recover damages against the responsible parties. To make matters worse, the only requirement that protects the claimant against damage caused by destructive testing is the provision stating that "destructive testing shall not render the dwelling uninhabitable."[35] This language may be of little benefit to claimants, for it suggests that a contractor can leave a large gaping hole in the living room ceiling and avoid liability for damage caused by destructive testing so long as the claimant can still reside in the unit.

But even denying destructive testing has its drawbacks. Should the defect become worse after the request for destructive testing is denied, the claimant's damages may be severely limited. In this regard, the amended statute provides that the claimant shall have no claim for damages "which could have been avoided or mitigated had destructive testing been allowed when requested and had a feasible remedy been promptly implemented."[36] As with other portions of the amended statute, this provision is ambiguous and likely to generate litigation over its meaning. For example, how would a party ascertain if a condition became progressively worse if destructive testing is not conducted and a benchmark has not been established? From a claimant's standpoint, if destructive testing is requested, it may be advisable for a claimant to obtain input from its own technical representative as to whether destructive testing is

needed in light of the alleged defect. Alternatively, the claimant may elect to perform its own testing to accurately assess the defective condition subject to implementing the guidelines referenced above such as requiring insurance and other financial assurances by the party performing the destructive testing. The reasonable guidelines actually followed could later be used, during litigation, to justify why the claimant objected to destructive testing proposed by a contractor that failed to address these concerns. Documenting these efforts may allow a claimant to defeat a contractor's attempt to limit the claim for damages at trial for failing to permit destructive testing. Because of the benefits which would be discovered during litigation should a claimant refuse destructive testing, contractors will likely request an opportunity to perform destructive testing in virtually every instance so as to preserve a potential defense in subsequent litigation if a claimant objects to it.

Applicability of the Amended Statute

The foregoing statutory provisions do not automatically apply in every construction defect case. For design, construction, and remedial work contracts entered into after July 1, 2004, the amended statute will apply only if the contract contains the specified statutory language in conspicuous capitalized letters.[37] Contracts entered into prior to July 1, 2004, however, are not treated in the same manner. As to those earlier contracts, the amended statute applies to an action for damages commenced by a claimant after July 1, 2004, regardless of whether the statutory language is conspicuously displayed in the parties' contact. This is true even where no written contract exists.[38] Regardless of the date of the contract, the parties may waive the statutory requirements by written agreement once the initial written notice of the alleged defect is served.[39]

If the statute is applicable and the claimant has not complied with the statutory procedure, the court would be required to "abate" the lawsuit pending the claimant's compliance.[40] Therefore, counsel for claimants need to be acutely aware of the statutory procedure since the failure to comply with the statute will undoubtedly lead to the filing of a motion to abate the lawsuit by one or more of the defendants. In such instance, the claimant will lose considerable time and money for not having followed the statutory procedure, and the lawsuit will be delayed considerably. Likewise, counsel for the contractor can seize upon the claimant's noncompliance as a basis for staying the action.

Other Issues Not Yet Addressed by Legislature

1) *The contractor fails to honor the deal.* Despite curing a number of deficiencies associated with the original statute, the amended statute still fails to address several key issues. For example, consider what would happen where the contractor's written offer is accepted by the claimant, but the contractor later decides not to honor the deal. Under such circumstances, the claimant is without a statutory cause of action to enforce the agreement nor does the statute penalize the contractor in any meaningful way for walking away from such a commitment.[41]

2) *The lack of time limits for a contractor to complete repairs.* The statute also fails to prescribe any time limits for completing the offered repairs. This loophole permits the contractor to specify *any* time period to complete the repair, conceivably forever, without any recourse to the claimant except for rejection.

3) *Monetary offers need not be reasonable and repairs are not guaranteed to last.* Although the statute permits the contractor to make monetary offers to the claimant, there is no requirement that the offer be reasonable or tied to any "real world" cost estimates for repair. Likewise, with respect to repairs performed by the contractor, the amendments fail to provide any warranty for remedial work performed. Thus, in the event the repairs do not last, the claimant, by virtue of his acceptance of the contractor's offer, is barred from seeking relief for substandard remedial work performed.

4) *Abatement of an action and imposing sanctions for pre-suit discovery violations give rise to a constitutional challenge.* Finally, the amended statute, like its predecessor, is riddled with constitutional infirmities. At the center of any constitutional challenge would be those provisions requiring the trial court to "abate" the action if the claimant fails to comply with the statutory requirements prior to filing a lawsuit.[42] It could be argued that requiring a trial court to abate the action usurps the authority of the Florida Supreme Court to promulgate rules of civil practice in the courts.[43] In addition, the amended statute can be seen as further encroaching upon the Florida Supreme Court's exclusive rule-making authority by permitting a trial court to impose discovery sanctions upon a party who fails to produce discoverable evidence to the other party before a lawsuit is even filed.[44] It is only a matter of time before the Florida appellate courts are confronted with these issues.

Conclusion

Ironically, these recent amendments enacted to rectify shortcomings with the original statute will likely generate many disputes over its new terms and conditions. The ultimate result will be more confusion in the courts, as the judiciary will inevitably be tasked to sort it all out for the second year in a row. As the 2004 legislative session ended, there was already talk of a new "glitch bill" to be proposed next year, which, hopefully, will resolve the controversies created during the past two legislative sessions.

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[1] **Fla. Stat.** §558.001-558-005 (2003).
[2] **Fla. Stat.** §558.004 (2003).
[3] **Fla. Stat.** §558.004(2) (2003).
[4] **Fla. Stat.** §558.004(8) (2003).
[5] *See generally* Steven B. Lesser, *Florida's New Construction Defect Statute: The Aggrieved Homeowner's Obstacle Course*, 77 **Fla. B.J.** 18 (Oct. 2003).
[6] **Fla. Stat.** §§558.001-558.005 (July 1, 2004). Governor Bush approved the amended statute on June 18, 2004.
[7] **Fla. Stat.** §§558.004(1)-(5).
[8] Generally speaking, the time frames for compliance are considerably shorter for claims involving a single-family home, a duplex, a triplex, a quadruplex, or an association representing less than 20 units. As to these categories of claimants, the initial claim notice must be provided 60 days before a lawsuit is filed (as opposed to the 120 days afforded associations representing more than 20 units). Further, inspections must be completed in 30 days (as opposed to 50 days for associations representing more than 20 units). The original contractor receiving notice thereafter has 10 days to notify secondary recipients, such as subcontractors, suppliers or design professionals that they maybe liable for the defects in the original notice of claim. These secondary recipients must then provide their response to the contractor within 15 days. The contractor that receives the original notice of claim thereafter has 45 days (instead of 75 days), to make a settlement proposal. The charts that accompany this article highlight the differences in the various timelines.
[9] **Fla. Stat.** §558.004(1). Previously, the aggrieved claimant was required to give only 60 days' prior written notice to the contractor. **Fla. Stat.** §558.004(1) (2003). The initial requirement that claimants identify the defects in "reasonable detail" remains a veritable Pandora's box that will inevitably lead to controversy. What constitutes "reasonable detail" remains an elusive concept that will differ markedly from case to case, and the amended statute provides no guidance to assist practitioners and judges in this regard.
[10] **Fla. Stat.** §558.004(2). Under the predecessor version of the statute, the contractor had only five business days to conduct an inspection. **Fla. Stat.** §558.004(2) (2003). The additional time to inspect is justified when dealing with community associations due to the new statutory definition of a "dwelling." *See* **Fla. Stat.** §558.002(7) which expands the definition of "dwelling" to include other structures or facilities, including, but not limited to, recreational structures or facilities that are appurtenant to the real property where the dwelling is located but not necessarily part of the structure at the time construction has been completed. For example, the amended statute would apply to defect found in a clubhouse that is part of a condominium or homeowner community even though it is not attached to a building that contains residential units.
[11] **Fla. Stat.** §558.004(3).
[12] *Id.*
[13] **Fla. Stat.** §558.004(5).
[14] *Id.*
[15] *See also* **Fla. Stat.** §558.004(6), which provides that a partial settlement on some issues can be achieved. In that event, a claimant can accept an offer on some items and proceed to file an action on disputed or unresolved items.
[16] **Fla. Stat.** §558.004(7).
[17] **Fla. Stat.** §558.004(8).
[18] A claimant who receives a timely settlement offer must accept or reject the offer by serving written notice of such acceptance or rejection on the person making the offer within 45 days after receiving the settlement offer. **Fla. Stat.** §558.004(7).
[19] *Id.*
[20] *See* **Fla. Stat.** §558.004(6) (2003).
[21] **Fla. Stat.** §558.004(15). "Discoverable evidence" is generally defined under Florida law as any matter, not privileged, that is relevant to the subject matter of the dispute or is reasonably calculated to lead to the discovery of admissible evidence. *See* **Fla. R. Civ. P.** 1.280(b)(1); *Allstate Ins. Co. v. Boecher*, 733 So. 2d 993, 995 (Fla. 1999).
[22] **Fla. Stat.** §558.004(15).
[23] *Id.*
[24] Consultants retained to investigate defects, prior to filing an action, are often stifled by their inability to access plans, shop drawings and other documentation generated during the original construction process. These documents can assist a claimant and its consultant in identifying the method for installation of components that have since been covered up finish material. For example, construction documents can describe the manner that balcony handrails have been anchored into concrete balcony slabs. In addition, similar documentation could be used to verify the type and quality of construction components such as sliding glass door assemblies that have been incorporated into the construction. Absent this information, a claimant would be left with performing costly destructive testing or conducting formal discovery after a lawsuit was filed to acquire this information.
[25] *See, e.g.,* American Arbitration Association, Construction Industry Arbitration Rules and Mediation Procedures (including Procedures For Large, Complex Construction Disputes), §§R-22(d) and F-7 (July 1, 2003). In fact, §F-7 of the AAA Rules expressly provides that "[t]here shall be no discovery, except as provided in Section F-6 or as ordered by the arbitrator in extraordinary cases when the demands of justice require it." Parties served with a pre-suit discovery demand where a claim is subject to arbitration will likely attempt to resist discovery on the basis that the arbitration rules—which will ultimately govern—do not permit such open-ended discovery. The amended statute does not address this situation.

[26] **Fla. Stat.** §558.004 (2).
[27] *Id.*
[28] **Fla. Stat.** §558.004(2).
[29] **Fla. Stat.** §558.004(2) (2003).
[30] **Fla. Stat.** §558.004(2)(b).
[31] *Id.*
[32] **Fla. Stat.** §558.004(2)(c).
[33] **Fla. Stat.** §558.004(2)(e).
[34] *See generally* **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). Documenting reasonable requests for appropriate financial security and reasonable assurances before destructive testing is permitted will assist a claimant in overcoming arguments by a contractor that the failure to allow destructive testing should subsequently bar a claimant from recovering damages at trial.
[35] **Fla. Stat.** §558.004(2)(f).
[36] **Fla. Stat.** §558.004(2).
[37] **Fla. Stat.** §558.005(1). The statutory language is as follows: "Chapter 558, Florida Statutes contains important requirements you must follow before you may bring any legal action for an alleged construction defect in your home, sixty days before you bring any legal action, you must deliver to the other party to this contract a written notice referring to chapter 558 of any construction conditions you allege are defective and provide such person the opportunity to inspect the alleged construction defects and to consider making an offer to repair or pay for the alleged construction defects. You are not obligated to accept any offer which may be made. There are strict deadlines and procedures under this Florida law which must be met and followed to protect your interests."
[38] One common example is where a contractor is sued for breach of a statutory implied warranty or some other claim that arises in the absence of contractual privity. Under the Florida Condominium Act, unit owners and the association benefit from statutory implied warranties as to the developer, contractor, subcontractors, and suppliers. **Fla. Stat.** §§718.203 (1)-(2) (2003). These statutory implied warranties, along with a cause of action for violation of the state minimum building code, arise as a matter of law, even in the absence of a written contract. *See* **Fla. Stat.** §553.84 (2003). Likewise, an association or a unit owner may pursue a construction defect claim against a "professional" such as an architect or engineer even in the absence of contractual privity. *See*, *e.g.*, *Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999).
[39] **Fla. Stat.** §558.005(3).
[40] **Fla. Stat.** §558.003.
[41] **Fla. Stat.** §558.004(9). The lack of a meaningful statutory remedy is prejudicial to the claimant. If the contractor reneges on a proposal, the claimant's only remedy would be to file an action to recover damages for the original claim or initiate a separate action to enforce the settlement. In the future, the legislature should consider providing a claimant with a statutory remedy such as the recovery of attorneys' fees expended to enforce the settlement through a summary procedure. This remedy is justified when considering the hurdles that the claimant must overcome before filing an action such as the requirement to wait 120 days before filing an action, furnish expert reports and provide the contractor with access to inspect all affected units.
[42] **Fla. Stat.** §558.003.
[43] *See* **Fla. Const.** art. V. §2(a).
[44] *See Grip Development Inc. v. Caldwell Banker Residential Real Estate, Inc.*, 788 So. 2d 262 (Fla. 4th D.C.A. 2000) (citing **Fla. Const.** art. V, §2(a). In this scenario, the statute suggests that a trial court ignore the traditional prerequisites for obtaining discovery pursuant to the Florida Rules of Civil Procedure. Typical procedures that must be followed before conducting inspections of property and obtaining documents have not been incorporated into the amended statute. According to the Florida Rules of Civil Procedure, the recipient of a request for discovery is allowed a time period to object. With respect to documents withheld from production the recipient of the document request must prepare a privilege log. *See* **Fla. R. Civ. P.** 1.280 & 1.350.

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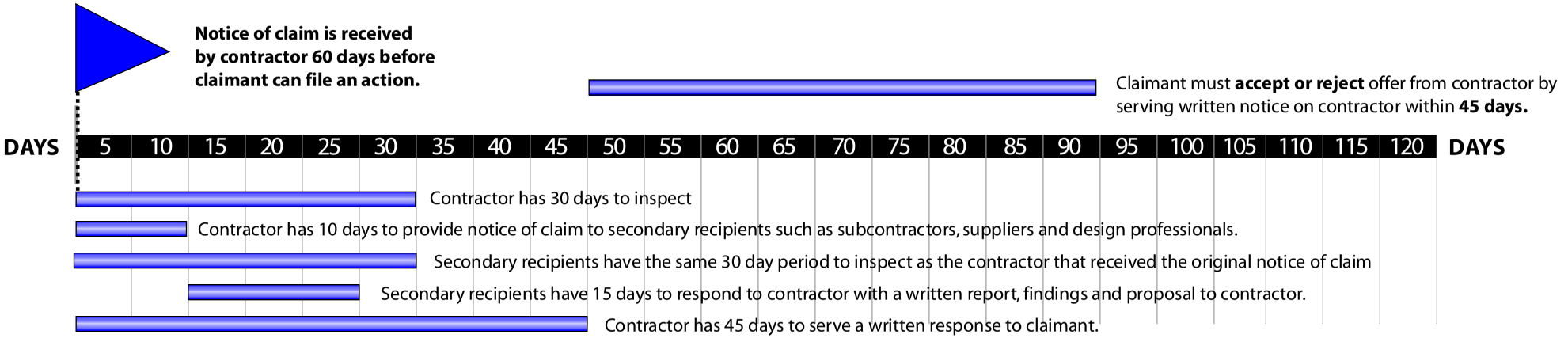
This column is submitted on behalf of the Real Property, Probate and Trust Law Section, Laird Andrew Lile, chair, and William P. Sklar and Richard R. Gans, editors.

Time Line

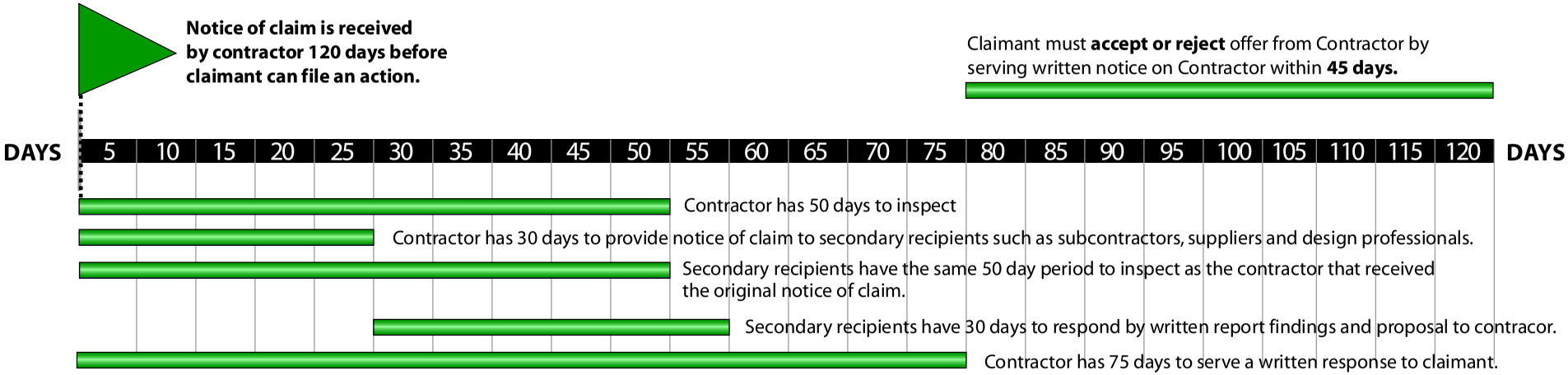
Chapter 558, Construction Defects §§558.001 - 558.005, Florida Statutes, July 1, 2004

Claimant **(Owner of a single family home, association representing 20 or fewer residential parcels, a manufactured or mobile home, a duplex, a triplex, a quadraplex)**



Contractor **(Also includes developer, subcontractor, supplier or design professional that receives a notice of claim from claimant)**

Claimant **(Association representing more than 20 residential parcel owners)**



Contractor **(Also includes developer, subcontractor, supplier or design professional that receives a notice of claim from claimant)**