



June 2015

Changes to Florida's Construction Defect Notice Statute

Florida Governor Rick Scott signed a new bill that changes Florida's construction defect notice statute, effective October 1, 2015. Changes to the Florida statute include: (I) an amendment to section 558.001, revising legislative intent; (II) an amendment to section 558.002, revising the definition of the term "completion of a building or improvement"; (III) an amendment to section 558.004, providing additional requirements for a notice of claim; (IV) a revision of the requirements for a response; and (V) a revision of provisions relating to the production of certain records. Refer below for additional analysis.

I. Legislative Intent

Section 558.001, Florida Statutes, now includes language that adds insurers to the list of people who receive notice and an opportunity to resolve the claim. In relevant part, the statute states that "the claimant filing a notice of claim . . . should provide the contractor, subcontractor, supplier, or design professional, and the insurer of the contractor, subcontractor, supplier, or design professional, with an opportunity to resolve the claim."¹

Additionally, the statute now explicitly states that these claims can be resolved "through confidential settlement negotiations" without resorting to further legal process.² This language emphasizes the statutory goal to "reduce the need for litigation as well as protect the rights of property owners."³

II. Definition of the term "completion of a building or improvement"

Section 558.002, Florida Statutes, includes new language clarifying that temporary certificates of occupancy qualify under the definition of "completion of a building or improvement". The statute now defines this term as the "issuance of a certification of occupancy, whether temporary or otherwise, that allows for occupancy or use of for the entire building or improvement, or the equivalent authorization to occupy or use the improvement, issued by the governmental body having jurisdiction".⁴ Note, however, there is no change in jurisdictions where no certificate of occupancy or equivalent authorization is issued. "Completion of a building or improvement" is still defined as the "substantial completion of construction, finishing, and equipping of the building or improvement according to the plans and specifications."⁵

¹ Note: additions underlined; deletions ~~stricken~~.

² Fla. Stat. § 558.001.

³ *Id.*

⁴ Fla. Stat. § 558.002(4).

⁵ *Id.*

III. Additional Requirements for a Notice of Claim

The amendment to section 558.004, Florida Statutes, sets forth additional requirements for a notice of claim. It states that, at a minimum, the claimant must visually inspect the defect, describe it in reasonable detail as well as identify its location in the notice of claim. Additionally, if the damage or loss resulting from the defect is known, the claimant must describe it, however, there is no requirement to perform destructive or other testing for the notice.

In relevant part, the statute now provides that the claimant "must describe the claim in reasonable detail sufficient to determine the general nature of each alleged construction defect" but need only describe the damage or loss resulting from the defect "if known."⁶ Further, the amendment adds that "[b]ased upon at least a visual inspection by the claimant or its agents, the notice of claim must identify the location of each alleged construction defect sufficiently to enable the responding parties to locate the alleged defect without undue burden. The claimant has no obligation to perform destructive or other testing for purposes of this notice."⁷

IV. Revision of the Requirements for a Response

The amendment also includes additional requirements for the contractor, subcontractor, supplier, or design professional for their response after servicing a claim. They must now serve a written report of the scope of any inspection of the property, the findings and results of the inspection, and one or more of the offers or statements specified in paragraphs (5)(a)-(e), as chosen by the responding contractor, subcontractor, supplier, or design professional, with all of the information required for that offer or statement.⁸ Previously, in place of this requirement, the statute stated that the servicer must provide "a statement of whether the contractor, subcontractor, supplier, or design professional is willing to make repairs to the property or whether such claim is disputed, a description of any repairs they are willing to make to remedy the alleged construction defect, and a timetable for the completion of such repairs. This response may also be served on the initial claimant by the contractor."

Additionally, the amendment explicitly states that the language in the insurance policy still controls whether or not the statutory §558 defect notice constitutes an insurance claim under the policy. The statute states "[t]he person who is served a notice of claim [must comply] with all contractual provisions of any liability insurance policy as a condition precedent to coverage for a claim. However, notwithstanding the foregoing or any contractual provision, the providing of a copy of such notice to the person's insurer, if applicable, shall not constitute a claim for insurance purposes unless the terms of the policy specify otherwise."⁹ This amendment appears to be in line with the recent case *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 13-80831-CIV, 2015 WL 3539755 (S.D. Fla. 2015), holding that the obligations of the parties are determined based on the terms of the insurance policy.

⁶ Fla. Stat. § 558.004(1)(b).

⁷ *Id.*

⁸ Fla. Stat. § 558.004(4).

⁹ Fla. Stat. § 558.004(13).

V. Revision of Provisions Relating to the Production of Certain Records

The bill includes a revision to section 558.004, Florida Statutes, of the requirements for a response. Upon request, the claimant and any person served with notice has to exchange information detailing the defect. Previously, this information included "any documents detailing the design drawings or specifications". Instead of this language, the bill now elaborates on the types of photograph and video evidence that may be requested. In addition to other types of information listed in the statute, it now states that the servicer may request "photographs and, videos of the alleged construction defect identified in the notice of the claim."¹⁰

Additionally, requested information may now include "maintenance records and other documents related to the discovery, investigation, causation, and extent of the alleged defect identified in the notice of claim and any resulting damages. A party may assert any claim of privilege recognized under the laws of this state with respect to any of the disclosure obligations specified in this chapter."¹¹

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¹⁰ Fla. Stat. § 558.004(15).

¹¹ *Id.*