

By Senator Altman

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1 A bill to be entitled
2 An act relating to construction defects; amending s.
3 558.002, F.S.; providing and revising definitions;
4 amending s. 558.003, F.S.; limiting application of
5 certain notices; amending s. 558.004, F.S.; revising
6 requirements and procedures for notice and opportunity
7 to repair certain defects; specifying that there are
8 no construction lien rights under certain provisions
9 of law for certain testing; providing an exception;
10 revising requirements for parties to exchange certain
11 materials; providing penalties; amending s. 558.005,
12 F.S.; revising requirements for application to certain
13 claims for legal relief; specifying certain notices
14 required for certain contracts; authorizing parties to
15 agree to mediation; revising application of notice
16 requirements to certain earlier contracts; specifying
17 a required notice for certain contracts; providing
18 construction of the requirement; providing an
19 effective date.

20
21 Be It Enacted by the Legislature of the State of Florida:

22
23 Section 1. Subsections (4) through (10) of section 558.002,
24 Florida Statutes, are renumbered as subsections (5) through
25 (11), respectively, a new subsection (4) is added to that
26 section, and present subsection (8) of that section is amended,
27 to read:

28 558.002 Definitions.—As used in this chapter, the term:
29 (4) "Completion of a building or improvement" means

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30 issuance of a certificate of occupancy for the entire building
31 or improvement, or the equivalent authorization to occupy or use
32 the improvement, issued by the governmental body having
33 jurisdiction and, in jurisdictions where no certificate of
34 occupancy or the equivalent authorization is issued, means
35 substantial completion of construction, finishing, and equipping
36 of the building or improvement according to the plans and
37 specifications.

38 (9) ~~(8)~~ "Service" means delivery by certified mail with a
39 United States Postal Service record of evidence of delivery or
40 attempted delivery, ~~return receipt requested,~~ to the last known
41 address of the addressee, by hand delivery, or by delivery by
42 any courier with written evidence of delivery.

43 Section 2. Section 558.003, Florida Statutes, is amended to
44 read:

45 558.003 Action; compliance.—A claimant may not file an
46 action subject to this chapter without first complying with the
47 requirements of this chapter. If a claimant files an action
48 alleging a construction defect without first complying with the
49 requirements of this chapter, on timely motion by a party to the
50 action the court shall stay ~~abate~~ the action, without prejudice,
51 and the action may not proceed until the claimant has complied
52 with such requirements. The notice requirement is not intended
53 to interfere with an owner's ability to complete a project that
54 has not been substantially completed. The notice is not required
55 for a project that has not reached the stage of completion of
56 the building or improvement.

57 Section 3. Section 558.004, Florida Statutes, is amended to
58 read:

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59 558.004 Notice and opportunity to repair.-

60 (1) In actions brought alleging a construction defect, the
61 claimant shall, at least 60 days before filing any action, or at
62 least 120 days before filing an action involving an association
63 representing more than 20 parcels, serve written notice of claim
64 on the contractor, subcontractor, supplier, or design
65 professional, as applicable, which notice shall refer to this
66 chapter. If the construction defect claim arises from work
67 performed under a contract, the written notice of claim must be
68 served on the person with whom the claimant contracted. The
69 notice of claim must describe the claim in reasonable detail
70 sufficient to determine the general nature of each alleged
71 construction defect and a description of the damage or loss
72 resulting from the defect, if known. The claimant shall endeavor
73 to serve the notice of claim within 15 days after discovery of
74 an alleged defect, but the failure to serve notice of claim
75 within 15 days does not bar the filing of an action, subject to
76 s. 558.003. This subsection does not preclude a claimant from
77 filing an action sooner than 60 days, or 120 days as applicable,
78 after service of written notice as expressly provided in
79 subsection (6), subsection (7), or subsection (8).

80 (2) Within 30 days after service ~~receipt~~ of the notice of
81 claim, or within 50 days after service ~~receipt~~ of the notice of
82 claim involving an association representing more than 20
83 parcels, the person served with ~~receiving~~ the notice of claim
84 under subsection (1) is entitled to perform a reasonable
85 inspection of the property or of each unit subject to the claim
86 to assess each alleged construction defect. An association's
87 right to access property for either maintenance or repair

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88 includes the authority to grant access for the inspection. The
89 claimant shall provide the person served with ~~receiving the~~
90 notice under subsection (1) and such person's contractors or
91 agents reasonable access to the property during normal working
92 hours to inspect the property to determine the nature and cause
93 of each alleged construction defect and the nature and extent of
94 any repairs or replacements necessary to remedy each defect. The
95 person served with ~~receiving~~ notice under subsection (1) shall
96 reasonably coordinate the timing and manner of any and all
97 inspections with the claimant to minimize the number of
98 inspections. The inspection may include destructive testing by
99 mutual agreement under the following reasonable terms and
100 conditions:

101 (a) If the person served with ~~receiving~~ notice under
102 subsection (1) determines that destructive testing is necessary
103 to determine the nature and cause of the alleged defects, such
104 person shall notify the claimant in writing.

105 (b) The notice shall describe the destructive testing to be
106 performed, the person selected to do the testing, the estimated
107 anticipated damage and repairs to or restoration of the property
108 resulting from the testing, the estimated amount of time
109 necessary for the testing and to complete the repairs or
110 restoration, and the financial responsibility offered for
111 covering the costs of repairs or restoration.

112 (c) If the claimant promptly objects to the person selected
113 to perform the destructive testing, the person served with
114 ~~receiving~~ notice under subsection (1) shall provide the claimant
115 with a list of three qualified persons from which the claimant
116 may select one such person to perform the testing. The person

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117 selected to perform the testing shall operate as an agent or
118 subcontractor of the person served with ~~receiving~~ notice under
119 subsection (1) and shall communicate with, submit any reports
120 to, and be solely responsible to the person served with
121 ~~receiving~~ notice.

122 (d) The testing shall be done at a mutually agreeable time.

123 (e) The claimant or a representative of the claimant may be
124 present to observe the destructive testing.

125 (f) The destructive testing shall not render the property
126 uninhabitable.

127 (g) There shall be no construction lien rights under part I
128 of chapter 713 for the destructive testing caused by a person
129 served with notice under subsection (1) or for restoring the
130 area destructively tested to the condition existing prior to
131 testing, except to the extent the owner contracts for the
132 destructive testing or restoration.

133
134 ~~If in the event~~ the claimant ~~fails or~~ refuses to agree and
135 thereafter permit reasonable ~~to~~ destructive testing, the
136 claimant shall have no claim for damages which could have been
137 avoided or mitigated had destructive testing been allowed when
138 requested and had a feasible remedy been promptly implemented.

139 (3) Within 10 days after service ~~receipt~~ of the notice of
140 claim, or within 30 days after service ~~receipt~~ of the notice of
141 claim involving an association representing more than 20
142 parcels, the person served with ~~receiving the~~ notice under
143 subsection (1) may serve ~~forward~~ a copy of the notice of claim
144 to each contractor, subcontractor, supplier, or design
145 professional whom it reasonably believes is responsible for each

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146 defect specified in the notice of claim and shall note the
147 specific defect for which it believes the particular contractor,
148 subcontractor, supplier, or design professional is responsible.
149 The notice described in this subsection may not be construed as
150 an admission of any kind. Each such contractor, subcontractor,
151 supplier, and design professional may inspect the property as
152 provided in subsection (2).

153 (4) Within 15 days after service of ~~receiving~~ a copy of the
154 notice of claim pursuant to subsection (3), or within 30 days
155 after service ~~receipt~~ of the copy of the notice of claim
156 involving an association representing more than 20 parcels, the
157 contractor, subcontractor, supplier, or design professional must
158 serve a written response to the person who served ~~forwarded~~ a
159 copy of the notice of claim. The written response shall include
160 a report, if any, of the scope of any inspection of the
161 property, the findings and results of the inspection, a
162 statement of whether the contractor, subcontractor, supplier, or
163 design professional is willing to make repairs to the property
164 or whether such claim is disputed, a description of any repairs
165 they are willing to make to remedy the alleged construction
166 defect, and a timetable for the completion of such repairs. This
167 response may also be served on the initial claimant by the
168 contractor.

169 (5) Within 45 days after service of ~~receiving~~ the notice of
170 claim, or within 75 days after service ~~receipt~~ of a copy of the
171 notice of claim involving an association representing more than
172 20 parcels, the person who was served the ~~received~~ notice under
173 subsection (1) must serve a written response to the claimant.
174 The response shall be served to the attention of the person who

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175 signed the notice of claim, unless otherwise designated in the
176 notice of claim. The written response must provide:

177 (a) A written offer to remedy the alleged construction
178 defect at no cost to the claimant, a detailed description of the
179 proposed repairs necessary to remedy the defect, and a timetable
180 for the completion of such repairs;

181 (b) A written offer to compromise and settle the claim by
182 monetary payment, that will not obligate the person's insurer,
183 and a timetable for making payment;

184 (c) A written offer to compromise and settle the claim by a
185 combination of repairs and monetary payment, that will not
186 obligate the person's insurer, that includes a detailed
187 description of the proposed repairs and a timetable for the
188 completion of such repairs and making payment;

189 (d) A written statement that the person disputes the claim
190 and will not remedy the defect or compromise and settle the
191 claim; or

192 (e) A written statement that a monetary payment, including
193 insurance proceeds, if any, will be determined by the person's
194 insurer within 30 days after notification to the insurer by
195 means of servicing ~~forwarding~~ the claim, which service
196 ~~notification~~ shall occur at the same time the claimant is
197 notified of this settlement option, which the claimant may ~~can~~
198 accept or reject. A written statement under this paragraph may
199 also include an offer under paragraph (c), but such offer shall
200 be contingent upon the claimant also accepting the determination
201 of the insurer whether to make any monetary payment in addition
202 thereto. If the insurer for the person served with ~~receiving~~ the
203 claim makes no response within the 30 days following service

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204 ~~notification~~, then the claimant shall be deemed to have met all
205 conditions precedent to commencing an action.

206 (6) If the person served with ~~receiving~~ a notice of claim
207 pursuant to subsection (1) disputes the claim and will neither
208 remedy the defect nor compromise and settle the claim, or does
209 not respond to the claimant's notice of claim within the time
210 provided in subsection (5), the claimant may, without further
211 notice, proceed with an action against that person for the claim
212 described in the notice of claim. Nothing in this chapter shall
213 be construed to preclude a partial settlement or compromise of
214 the claim as agreed to by the parties and, in that event, the
215 claimant may, without further notice, proceed with an action on
216 the unresolved portions of the claim.

217 (7) A claimant who receives a timely settlement offer must
218 accept or reject the offer by serving written notice of such
219 acceptance or rejection on the person making the offer within 45
220 days after receiving the settlement offer. If a claimant
221 initiates an action without first accepting or rejecting the
222 offer, the court shall stay ~~abate~~ the action upon timely motion
223 until the claimant complies with this subsection.

224 (8) If the claimant timely and properly accepts the offer
225 to repair an alleged construction defect, the claimant shall
226 provide the offeror and the offeror's agents reasonable access
227 to the claimant's property during normal working hours to
228 perform the repair by the agreed-upon timetable as stated in the
229 offer. If the offeror does not make the payment or repair the
230 defect within the agreed time and in the agreed manner, except
231 for reasonable delays beyond the control of the offeror,
232 including, but not limited to, weather conditions, delivery of

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233 materials, claimant's actions, or issuance of any required
234 permits, the claimant may, without further notice, proceed with
235 an action against the offeror based upon the claim in the notice
236 of claim. If the offeror makes payment or repairs the defect
237 within the agreed time and in the agreed manner, the claimant is
238 barred from proceeding with an action for the claim described in
239 the notice of claim or as otherwise provided in the accepted
240 settlement offer.

241 (9) This section does not prohibit or limit the claimant
242 from making any necessary emergency repairs to the property as
243 are required to protect the health, safety, and welfare of the
244 claimant. In addition, any offer or failure to offer pursuant to
245 subsection (5) to remedy an alleged construction defect or to
246 compromise and settle the claim by monetary payment does not
247 constitute an admission of liability with respect to the defect
248 and is not admissible in an action brought under this chapter.

249 (10) A claimant's service ~~mailing~~ of the written notice of
250 claim under subsection (1) tolls the applicable statute of
251 limitations relating to any person covered by this chapter and
252 any bond surety until the later of:

253 (a) Ninety days, or 120 days, as applicable, after service
254 ~~receipt~~ of the notice of claim pursuant to subsection (1); or

255 (b) Thirty days after the end of the repair period or
256 payment period stated in the offer, if the claimant has accepted
257 the offer. By stipulation of the parties, the period may be
258 extended and the statute of limitations is tolled during the
259 extension.

260 (11) The procedures in this chapter apply to each alleged
261 construction defect. However, a claimant may include multiple

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262 defects in one notice of claim. The initial list of construction
263 defects may be amended by the claimant to identify additional or
264 new construction defects as they become known to the claimant.
265 The court shall allow the action to proceed to trial only as to
266 alleged construction defects that were noticed and for which the
267 claimant has complied with this chapter and as to construction
268 defects reasonably related to, or caused by, the construction
269 defects previously noticed. Nothing in this subsection shall
270 preclude subsequent or further actions.

271 (12) This chapter does not:

272 (a) Bar or limit any rights, including the right of
273 specific performance to the extent such right would be available
274 in the absence of this chapter, any causes of action, or any
275 theories on which liability may be based, except as specifically
276 provided in this chapter;

277 (b) Bar or limit any defense, or create any new defense,
278 except as specifically provided in this chapter; or

279 (c) Create any new rights, causes of action, or theories on
280 which liability may be based.

281 (13) ~~Nothing in~~ This section does not shall relieve the
282 person who is served a ~~receiving~~ notice of claim under
283 subsection (1) from complying with all contractual provisions of
284 any liability insurance policy as a condition precedent to
285 coverage for any claim under this section. However,
286 notwithstanding the foregoing or any contractual provision, the
287 providing of a copy of such notice to the person's insurer, if
288 applicable, shall not constitute a claim for insurance purposes.
289 Nothing in this section shall be construed to impair technical
290 notice provisions or requirements of the liability policy or

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291 alter, amend, or change existing Florida law relating to rights
292 between insureds and insurers except as otherwise specifically
293 provided herein.

294 (14) To the extent that an arbitration clause in a contract
295 for the sale, design, construction, or remodeling of real
296 property conflicts with this section, this section shall
297 control.

298 (15) Upon request, the claimant and any ~~the~~ person served
299 with receiving notice pursuant to subsection (1) shall ~~have a~~
300 ~~mutual duty to~~ exchange, within 30 days after service of a
301 written request, which request must cite this subsection and
302 include an offer to pay the reasonable costs of reproduction,
303 any design plans, specifications, and as-built plans; any
304 documents detailing the design drawings or specifications;
305 photographs, videos, and expert reports that describe any defect
306 upon which the claim is made; subcontracts; and purchase orders
307 for the work that is claimed defective or any part of such
308 materials ~~all available discoverable evidence relating to the~~
309 ~~construction defects, including, but not limited to, expert~~
310 ~~reports, photographs, information received pursuant to~~
311 ~~subsection (4), and videotapes, if any.~~ In the event of
312 subsequent litigation, any party who failed to provide the
313 requested materials ~~such evidence~~ shall be subject to such
314 sanctions as the court may impose for a discovery violation.
315 Expert reports exchanged between the parties may not be used in
316 any subsequent litigation for any purpose, unless the expert, or
317 a person affiliated with the expert, testifies as a witness or
318 the report is used or relied upon by an expert who testifies on
319 behalf of the party for whom the report was prepared.

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320 Section 4. Section 558.005, Florida Statutes, is amended to
 321 read:

322 558.005 Contract provisions; application.—

323 (1) Unless a claimant and a potential defendant have agreed
 324 in writing to opt out of the requirements of this section,
 325 ~~Except as otherwise provided in subsections (3) and (4), the~~
 326 provisions of this chapter shall apply to any claim for legal
 327 relief for which the agreement to make the improvement was made
 328 after October 1, 2009, and for which the basis of the claim is a
 329 construction defect that has arisen after completion of a
 330 building or improvement. ~~every contract for the design,~~
 331 ~~construction, or remodeling of real property entered into:~~

332 (2) For a claim of a construction defect pursuant to
 333 contracts for improvement entered into as described in this
 334 subsection, the following applicable notices are required:

335 (a) Between July 1, 2004, and September 30, 2006, which
 336 contract contains the notice as set forth in paragraph (3)-(2)(a)
 337 and is conspicuously set forth in capitalized letters.

338 (b) Between ~~On or after~~ October 1, 2006, and September 30,
 339 2009, which contract contains the notice set forth in paragraph
 340 (3)-(2)(b) and is conspicuously set forth in capitalized letters.

341 (3)-(2)(a) The notice required by paragraph (2)-(1)(a) must
 342 be in substantially the following form:

343
 344 CHAPTER 558 NOTICE OF CLAIM

345
 346 CHAPTER 558, FLORIDA STATUTES, CONTAINS IMPORTANT REQUIREMENTS
 347 YOU MUST FOLLOW BEFORE YOU MAY BRING ANY LEGAL ACTION FOR AN
 348 ALLEGED CONSTRUCTION DEFECT IN YOUR HOME. SIXTY DAYS BEFORE YOU

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349 BRING ANY LEGAL ACTION, YOU MUST DELIVER TO THE OTHER PARTY TO
350 THIS CONTRACT A WRITTEN NOTICE, REFERRING TO CHAPTER 558, OF ANY
351 CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE
352 SUCH PERSON THE OPPORTUNITY TO INSPECT THE ALLEGED CONSTRUCTION
353 DEFECTS AND TO CONSIDER MAKING AN OFFER TO REPAIR OR PAY FOR THE
354 ALLEGED CONSTRUCTION DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT
355 ANY OFFER WHICH MAY BE MADE. THERE ARE STRICT DEADLINES AND
356 PROCEDURES UNDER THIS FLORIDA LAW WHICH MUST BE MET AND FOLLOWED
357 TO PROTECT YOUR INTERESTS.

358 (b) The notice required by paragraph (2)~~(1)~~(b) must
359 expressly cite this chapter and be in substantially the
360 following form:

361
362 CHAPTER 558 NOTICE OF CLAIM

363
364 CHAPTER 558, FLORIDA STATUTES, CONTAINS IMPORTANT REQUIREMENTS
365 YOU MUST FOLLOW BEFORE YOU MAY BRING ANY LEGAL ACTION FOR AN
366 ALLEGED CONSTRUCTION DEFECT. SIXTY DAYS BEFORE YOU BRING ANY
367 LEGAL ACTION, YOU MUST DELIVER TO THE OTHER PARTY TO THIS
368 CONTRACT A WRITTEN NOTICE, REFERRING TO CHAPTER 558, OF ANY
369 CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE
370 SUCH PERSON THE OPPORTUNITY TO INSPECT THE ALLEGED CONSTRUCTION
371 DEFECTS AND TO CONSIDER MAKING AN OFFER TO REPAIR OR PAY FOR THE
372 ALLEGED CONSTRUCTION DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT
373 ANY OFFER WHICH MAY BE MADE. THERE ARE STRICT DEADLINES AND
374 PROCEDURES UNDER THIS FLORIDA LAW WHICH MUST BE MET AND FOLLOWED
375 TO PROTECT YOUR INTERESTS.

376 (4)~~(3)~~ At any time After receipt of the initial notice of
377 claim, a claimant and the person to whom notice is served or

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378 otherwise must be served receiving notice under s. 558.004(1)
379 may agree in writing to pre-action mediation or otherwise, ~~by~~
380 ~~written mutual agreement,~~ alter the procedure for the notice of
381 claim process described in this chapter.

382 (5) ~~(4)~~ Notwithstanding the notice requirements of this
383 section for contracts entered into on or after October 1, 2006,
384 this chapter applies to all actions accruing before July 1,
385 2004, but not yet commenced as of July 1, 2004, and failure to
386 include such notice requirements in a contract entered into
387 before July 1, 2004, does not operate to bar the procedures of
388 this chapter from applying to all such actions. ~~This chapter~~
389 ~~applies to all actions accruing on or after July 1, 2004, and~~
390 ~~all actions commenced on or after such date, regardless of the~~
391 ~~date of sale, issuance of a certificate of occupancy or its~~
392 ~~equivalent, or substantial completion of the construction.~~
393 ~~Notwithstanding the notice requirements of this section for~~
394 ~~contracts entered into between July 1, 2004, and September 30,~~
395 ~~2006, this chapter applies to all actions accruing before July~~
396 ~~1, 2004, but not yet commenced as of July 1, 2004, and failure~~
397 ~~to include such notice requirements in a contract entered into~~
398 ~~prior to July 1, 2004, does not operate to bar the procedures of~~
399 ~~this chapter from applying to all such actions. Notwithstanding~~
400 ~~the notice requirements of this section for contracts entered~~
401 ~~into on or after October 1, 2006, this chapter applies to all~~
402 ~~actions accruing before July 1, 2004, but not yet commenced as~~
403 ~~of July 1, 2004, and failure to include such notice requirements~~
404 ~~in a contract entered into before July 1, 2004, does not operate~~
405 ~~to bar the procedures of this chapter from applying to all such~~
406 ~~actions.~~

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407 (6) Notwithstanding s. 558.003, unless the parties agree
408 that this chapter does not apply, after October 1, 2009, any
409 written contract for improvement of real property entered into
410 between an owner and a contractor, or between an owner and a
411 design professional, must contain substantially the following
412 notice: "ANY CLAIMS FOR CONSTRUCTION DEFECTS ARE SUBJECT TO THE
413 NOTICE AND CURE PROVISIONS OF CHAPTER 558, FLORIDA STATUTES."
414 The failure to include in the contract the notice provided in
415 this subsection does not subject the contracting owner,
416 contractor, or design professional to any penalty. The purpose
417 of the contractual notice is to promote awareness of the
418 procedure, not to be a penalty.

419 Section 5. This act shall take effect October 1, 2009.