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

19
20 Be It Enacted by the Legislature of the State of Florida:

21
22 Section 1. Subsections (4) through (10) of section
23 558.002, Florida Statutes, are renumbered as subsections (5)
24 through (11), respectively, a new subsection (4) is added to
25 that section, and present subsection (8) of that section is
26 amended, to read:

27 558.002 Definitions.--As used in this chapter, the term:

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

37 (9)(8) "Service" means delivery by certified mail with a
 38 United States Postal Service record of evidence of delivery or
 39 attempted delivery, return receipt requested, to the last known
 40 address of the addressee, by hand delivery, or by delivery by
 41 any courier with written evidence of delivery.

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

44 558.003 Action; compliance.--A claimant may not file an
 45 action subject to this chapter without first complying with the
 46 requirements of this chapter. If a claimant files an action
 47 alleging a construction defect without first complying with the
 48 requirements of this chapter, on timely motion by a party to the
 49 action the court shall stay ~~abate~~ the action, without prejudice,
 50 and the action may not proceed until the claimant has complied
 51 with such requirements. The notice requirement is not intended
 52 to interfere with an owner's ability to complete a project that
 53 has not been substantially completed. The notice is not required
 54 for a project that has not reached the stage of completion of
 55 the building or improvement.

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

58 558.004 Notice and opportunity to repair.--

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

79 (2) Within 30 days after service ~~receipt~~ of the notice of
80 claim, or within 50 days after service ~~receipt~~ of the notice of
81 claim involving an association representing more than 20
82 parcels, the person served with ~~receiving~~ the notice of claim
83 under subsection (1) is entitled to perform a reasonable

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

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

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

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111 (c) If the claimant promptly objects to the person
112 selected to perform the destructive testing, the person served
113 with ~~receiving~~ notice under subsection (1) shall provide the
114 claimant with a list of three qualified persons from which the
115 claimant may select one such person to perform the testing. The
116 person selected to perform the testing shall operate as an agent
117 or subcontractor of the person served with ~~receiving~~ notice
118 under subsection (1) and shall communicate with, submit any
119 reports to, and be solely responsible to the person served with
120 receiving notice.

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

123 (e) The claimant or a representative of the claimant may
124 be 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
128 I 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
 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
 154 the notice of claim pursuant to subsection (3), or within 30
 155 days 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

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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
170 of claim, or within 75 days after service ~~receipt~~ of a copy of
171 the notice of claim involving an association representing more
172 than 20 parcels, the person who was served the ~~received~~ notice
173 under subsection (1) must serve a written response to the
174 claimant. The response shall be served to the attention of the
175 person who signed the notice of claim, unless otherwise
176 designated in the notice of claim. The written response must
177 provide:

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

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

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

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

193 (e) A written statement that a monetary payment, including
194 insurance proceeds, if any, will be determined by the person's

195 insurer within 30 days after notification to the insurer by
 196 means of servicing ~~forwarding~~ the claim, which service
 197 ~~notification~~ shall occur at the same time the claimant is
 198 notified of this settlement option, which the claimant may ~~can~~
 199 accept or reject. A written statement under this paragraph may
 200 also include an offer under paragraph (c), but such offer shall
 201 be contingent upon the claimant also accepting the determination
 202 of the insurer whether to make any monetary payment in addition
 203 thereto. If the insurer for the person served with ~~receiving~~ the
 204 claim makes no response within the 30 days following service
 205 ~~notification~~, then the claimant shall be deemed to have met all
 206 conditions precedent to commencing an action.

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

218 (7) A claimant who receives a timely settlement offer must
 219 accept or reject the offer by serving written notice of such
 220 acceptance or rejection on the person making the offer within 45
 221 days after receiving the settlement offer. If a claimant
 222 initiates an action without first accepting or rejecting the

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223 offer, the court shall stay ~~abate~~ the action upon timely motion
224 until the claimant complies with this subsection.

225 (8) If the claimant timely and properly accepts the offer
226 to repair an alleged construction defect, the claimant shall
227 provide the offeror and the offeror's agents reasonable access
228 to the claimant's property during normal working hours to
229 perform the repair by the agreed-upon timetable as stated in the
230 offer. If the offeror does not make the payment or repair the
231 defect within the agreed time and in the agreed manner, except
232 for reasonable delays beyond the control of the offeror,
233 including, but not limited to, weather conditions, delivery of
234 materials, claimant's actions, or issuance of any required
235 permits, the claimant may, without further notice, proceed with
236 an action against the offeror based upon the claim in the notice
237 of claim. If the offeror makes payment or repairs the defect
238 within the agreed time and in the agreed manner, the claimant is
239 barred from proceeding with an action for the claim described in
240 the notice of claim or as otherwise provided in the accepted
241 settlement offer.

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

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

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

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

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

272 (12) This chapter does not:

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

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

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

282 (13) ~~Nothing in~~ This section does not shall relieve the
 283 person who is served a receiving notice of claim under
 284 subsection (1) from complying with all contractual provisions of
 285 any liability insurance policy as a condition precedent to
 286 coverage for any claim under this section. However,
 287 notwithstanding the foregoing or any contractual provision, the
 288 providing of a copy of such notice to the person's insurer, if
 289 applicable, shall not constitute a claim for insurance purposes.
 290 Nothing in this section shall be construed to impair technical
 291 notice provisions or requirements of the liability policy or
 292 alter, amend, or change existing Florida law relating to rights
 293 between insureds and insurers except as otherwise specifically
 294 provided herein.

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

299 (15) Upon request, the claimant and any the person served
 300 with receiving notice pursuant to subsection (1) shall ~~have a~~
 301 mutual duty to exchange, within 30 days after service of a
 302 written request, which request must cite this subsection and
 303 include an offer to pay the reasonable costs of reproduction,
 304 any design plans, specifications, and as-built plans; any
 305 documents detailing the design drawings or specifications;

306 photographs, videos, and expert reports that describe any defect
 307 upon which the claim is made; subcontracts; and purchase orders
 308 for the work that is claimed defective or any part of such
 309 materials ~~all available discoverable evidence relating to the~~
 310 ~~construction defects, including, but not limited to, expert~~
 311 ~~reports, photographs, information received pursuant to~~
 312 ~~subsection (4), and videotapes, if any.~~ In the event of
 313 subsequent litigation, any party who failed to provide the
 314 requested materials ~~such evidence~~ shall be subject to such
 315 sanctions as the court may impose for a discovery violation.
 316 Expert reports exchanged between the parties may not be used in
 317 any subsequent litigation for any purpose, unless the expert, or
 318 a person affiliated with the expert, testifies as a witness or
 319 the report is used or relied upon by an expert who testifies on
 320 behalf of the party for whom the report was prepared.

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

323 558.005 Contract provisions; application.--

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

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

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

339 (b) Between ~~On or after~~ October 1, 2006, and September 30,
 340 2009, which contract contains the notice set forth in paragraph
 341 ~~(3)(2)~~(b) and is conspicuously set forth in capitalized letters.

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

344
 345 CHAPTER 558 NOTICE OF CLAIM

346
 347 CHAPTER 558, FLORIDA STATUTES, CONTAINS IMPORTANT REQUIREMENTS
 348 YOU MUST FOLLOW BEFORE YOU MAY BRING ANY LEGAL ACTION FOR AN
 349 ALLEGED CONSTRUCTION DEFECT IN YOUR HOME. SIXTY DAYS BEFORE YOU
 350 BRING ANY LEGAL ACTION, YOU MUST DELIVER TO THE OTHER PARTY TO
 351 THIS CONTRACT A WRITTEN NOTICE, REFERRING TO CHAPTER 558, OF ANY
 352 CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE
 353 SUCH PERSON THE OPPORTUNITY TO INSPECT THE ALLEGED CONSTRUCTION
 354 DEFECTS AND TO CONSIDER MAKING AN OFFER TO REPAIR OR PAY FOR THE
 355 ALLEGED CONSTRUCTION DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT
 356 ANY OFFER WHICH MAY BE MADE. THERE ARE STRICT DEADLINES AND
 357 PROCEDURES UNDER THIS FLORIDA LAW WHICH MUST BE MET AND FOLLOWED
 358 TO PROTECT YOUR INTERESTS.

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

362
 363 CHAPTER 558 NOTICE OF CLAIM

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

377 (4)~~(3)~~ At any time After receipt of the initial notice of
 378 claim, a claimant and the person to whom notice is served or
 379 otherwise must be served receiving notice under s. 558.004(1)
 380 may agree in writing to pre-action mediation or otherwise, by
 381 ~~written mutual agreement,~~ alter the procedure for the notice of
 382 claim process described in this chapter.

383 (5)~~(4)~~ Notwithstanding the notice requirements of this
 384 section for contracts entered into on or after October 1, 2006,
 385 this chapter applies to all actions accruing before July 1,
 386 2004, but not yet commenced as of July 1, 2004, and failure to

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

408 (6) Notwithstanding s. 558.003, unless the parties agree
409 that this chapter does not apply, after October 1, 2009, any
410 written contract for improvement of real property entered into
411 between an owner and a contractor, or between an owner and a
412 design professional, must contain substantially the following
413 notice: "ANY CLAIMS FOR CONSTRUCTION DEFECTS ARE SUBJECT TO THE
414 NOTICE AND CURE PROVISIONS OF CHAPTER 558, FLORIDA STATUTES."

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415 The failure to include in the contract the notice provided in
416 this subsection does not subject the contracting owner,
417 contractor, or design professional to any penalty. The purpose
418 of the contractual notice is to promote awareness of the
419 procedure, not to be a penalty.

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