New Law Requires More Specifics in Construction Defect Pre-Suit Process

By Phillip J. Harris, Esq.
Daily Business Review
September 29, 2015

In Florida, pre-suit handling of residential and commercial construction and design defect claims is covered under Chapter 558 of the Florida Statutes.

Chapter 558 was enacted in 2003 to provide the construction industry with a mandatory pre-suit method for resolving conflicts with the idea that costly and time-consuming litigation may be avoided in many cases.

Typically, construction defect lawsuits involve several parties, ranging from the property owner to the homeowner association to each and every company that performed work on or even supplied a single piece of material to the project.

When this type of litigation is filed, it is typically not long before dozens of attorneys become involved, which often results in increased litigation costs and lengthy delays in a lawsuit's resolution.

While Chapter 558 has been somewhat successful in helping construction litigants avoid drawn-out lawsuits, on June 16 Gov. Rick Scott endorsed slight revisions to the statute in an effort to encourage more settlement and less litigation.

The overall theme of these changes can be summarized as requiring claimants to provide more specificity of the alleged defects from the outset and include the insurers in the pre-suit settlement process. These changes will take effect Thursday. For construction professionals and attorneys who are involved with construction and design defect cases, there are some important changes to Chapter 558 to note.

Section 558.001

This section sets forth the statute's general purpose. Following the amendment, the term "confidential settlement negotiations" will be used to refer to the pre-suit and opportunity to cure process.

The revisions also now appear to require the claimant to provide not only the contractor, subcontractor, supplier or design professional with an opportunity to resolve the claim early, but the insurer of those individuals or entities as well.

The party responsible for delivering the notice to the insurer is not specified within the Statute. Also missing are possible consequences when an insurer is not properly included in the process.

Section 558.002

The revision to this section is minor but important. After Thursday, the definition of the phrase "completion of a building or improvement" will now include issuance of a temporary certificate of occupancy.

Prior to this revision, a Chapter 558 notice was not required until issuance of a certificate of occupancy or substantial completion. By requiring only a temporary certificate of occupancy, Chapter 558 requirements become applicable to more projects since it will apply to projects in earlier stages of construction.

Section 558.004(1)(b)

This may be the most important and interesting revision. The amendment to this section requires that the claimant identify in the notice of claim the location of each alleged defect in order to allow the responding parties to locate the defect "without undue burden."

Consistent with the purposes behind Chapter 558, this revision is designed to encourage early disclosure of defects and may further motivate early

settlement. It is important to note, however, that the claimant is not required to perform any destructive testing to identify the defects, but must at least perform a "visual inspection" to identify the location of the defects.

This begs the question, then, if destructive testing is not required, how are all defects supposed to be identified for the responding party with a fair opportunity to respond?

On a positive note, we may see courts becoming reluctant to allow claimants to rely on the often-cited argument that it is "too burdensome" or "too expensive" during litigation for them to identify each and every defect in the project if Chapter 558 requires a higher level of investigation and disclosure in pre-suit.

Section 558.004(15)

Consistent with the theme of requiring more specificity in pre-suit notices, this section is amended to require that any photographs and videos exchanged must show the defects identified in the Chapter 558 notice, and that additional records must be exchanged upon request, including "the 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."

This is in addition to what the statute already requires the parties to exchange within 30 days of a written request: design plans, specifications, as-built plans; documents that describe the design drawings or specifications; photographs, videos and expert reports that describe the defect; subcontracts; and purchase orders pertaining to the claimed defects.

This section was further amended to allow for a party to assert a claim of privilege as to any of the disclosure obligations set out in the chapter.

By requiring that the pictures and videos show each defect identified in the Chapter 558 notice, a higher burden is placed on the claimant to ensure that if a defect is listed on the notice, there is documented support that the defect in fact exists.

Overall, the amendments are directed toward requiring claimants to provide more specificity in the pre-suit process related to construction and design defect claims. It will be interesting to see whether these revisions will lead to more transparent claims with a higher number of pre-suit settlements early on in the process.

In any sense, requiring claimants to provide more detail in the pre-suit stage should make litigating the issues of a construction defect claim more clear at the outset. Additionally, it should decrease the number of common claimant arguments being entertained by courts that it is too burdensome and expensive for courts to require them to identify each and every defect upon which the lawsuit is based.

Phillip J. Harris is a member of the professional liability department at civil defense litigation law firm, Marshall Dennehey Warner Coleman & Goggin in the Tampa office. He devotes his practice to commercial, employment and contractor disputes in federal and state courts. He may be reached at pjharris@mdwcg.com.

Reprinted with permission from the September 29, 2015 edition of the Daily Business Review© 2015 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 - reprints@alm.com or visit www.almreprints.com.