

ETHICAL CONSTRUCTION DEFECT LITIGATION

Florida Statutes, Chapter 558: The Florida Construction Defect Statute

(THIS IS AN INTERMEDIATE SEMINAR, HANDOUTS WILL BE PROVIDED AT THE TIME OF THE SEMINAR SESSION)

- I. Background:** AThe Legislature finds that it is beneficial to have an alternative method to resolve construction disputes that would reduce the need for legislation.@ See Fla. Stat. 558.001.

Florida Statutes, Chapter 558 is a method of alternative dispute resolution.

However, due to precise time limits and penalties for violating them, it is advisable to have counsel involved from the earliest stages of the process in order to ensure you fulfill you **Ethical** and **Legal** duties.

A. Definitions:

- 1. Action** B any civil action or arbitration proceeding, for damages or indemnity, asserting a claim for damage to, or loss of, real property, caused by an alleged construction defect
- 2. Construction Defect** B a deficiency in, or a deficiency arising out of, the design, specifications, surveying, planning, supervision, observation of construction, or construction, repair, alteration, or remodeling of real property, resulting from:
 - a.** Defective material, products, or components used in the construction;
 - b.** A violation of the applicable building codes.
 - c.** A failure to construct according to applicable professional standards of care.
 - d.** A failure to construct according to accepted trade standards.
- 3. Contractor** B any person who is legally engaged in the business of designing, developing, constructing, manufacturing, repairing, or remodeling real property.

4. **Subcontractor** B a person who is a contractor who performs labor and supplies material on behalf of another contractor in the construction or remodeling of real property

B. Penalty for Noncompliance: A claimant may not file an action subject to this chapter, without first complying with the requirements of this chapter. If a claimant does file an action without first complying, any party to the action may file a motion with the court to stay the proceedings, until the procedures are followed.

This topic will last approximately 30 minutes; 25 minutes of instruction and 5 minute break.

II. Ethical and Legal Requirements: The most important feature of Florida Statutes, Chapter 558 is the notice and inspection timeline. This timeline mandates that an owner who wants to file a lawsuit arising out of defective construction, must first give timely notice, and an opportunity to repair, to all contractors who were involved in the construction.

At that point, after notice is given, each contractor has an opportunity to inspect the property, and then either repair the defect, settle with the claimant, or dispute either that the defect exists, or that it is the responsibility of the contractor.

All of the notice and inspection procedures, outlined below, take place before a lawsuit is ever filed. Therefore, it is particularly important for the contractor to avoid waiving any rights during this pre-suit stage of the process, that could later prejudice the contractor during litigation.

At least one trial court has held that a notice of defect, sent by a developer to a contractor, was an admission of liability. Developers, contractors, subcontractors, and all parties involved in this process, should take care to preserve all of their rights during the pre-suit notice and inspection stage.

A. Notice: The statute is first triggered when the claimant discovers a defect.

Within **15 days** of discovering the defect, the claimant must serve a **Notice of Claim** on the contractor.

*Note: failure to do so does not bar the later filing of a lawsuit.

The Notice of Claim must describe the claim in **reasonable detail**, sufficient to determine the general nature of each alleged defect, and a description of the

damage, if known.

The claimant must serve the Notice of Claim at least **60 days** (if there are less than 20 parcels involved) or **120 days** (more than 20 parcels) before filing a lawsuit.

Within **10 days** (less than 20 parcels involved) or **30 days** (more than 20 parcels) after receiving a Notice of Claim, the person who received the Notice, must serve **Chapter 558 Ethical Considerations:**

a **copy of the Notice** to Adownstream@ subcontractors, suppliers, or design professionals, whom he believes are responsible for each the defect.

*This notice may not be construed as an admission of any kind.

Within **15 days** (less than 20 parcels) or **30 days** (more than 20 parcels) of serving a **copy of the Notice**, the downstream subcontractor, suppliers, and design professionals must serve a written response to the person who served the copy.

Within **45 days** (less than 20 parcels) or **75 days** (more than 20 parcels) of serving the Notice of Claim, the contractor who received the Notice must serve a written response to the claimant.

To fulfill your **Ethical** and **Legal** duties the **written response** must provide:

1. An offer to remedy the alleged defect;
2. An offer to settle the claim by monetary payment that will not obligate the persons=s insurer;
3. An offer to settle by a combination of repairs and monetary payment;
4. A statement that the person disputes the claim; or
5. A statement that a monetary payment, including **insurance proceeds**, will be determined by the persons=s insurer within **30 days** after notification to the insurer by serving the claim.*

*The **insurer** should be notified of the claim at the same time the claimant is offered this settlement option. Note, the claimant may either accept or reject the offer. If the claimant accepts, the insurer has **30 days** to respond.

A claimant who receives an offer to settle, must accept or reject the offer by serving written notice on the person who made the offer within **45 days**.

B. Inspection and Opportunity to Repair

Within **30 days** (less than 20 parcels involved) or **50 days** (more than 20 parcels) after service of the Notice of Claim, the person served with the notice, is entitled to perform a **reasonable inspection** of the property.

The claimant must provide **reasonable access** to the property during normal working hours, to inspect the property to determine the nature and cause of the defect(s) and the extent of repairs necessary.

The inspection may include **destructive testing**, subject to certain requirements. *If the claimant refuses to permit destructive testing, the claimant waives any claim for damages that could have been avoided or mitigated if destructive testing had been allowed and a remedy had been implemented.

This topic will last approximately 60 minutes; 50 minutes of instruction and 5 minute break.

Florida Construction Contracts: Ethical Limitations on Indemnification

I. Statute

Any portion of any [construction] agreement . . . wherein any party . . . promises to indemnify or hold harmless the other party to the agreement . . . for liability for damages to persons or property caused in whole or in part by any act, omission, or default of the indemnitee arising from the contract or its performance, shall be void and unenforceable, unless the contract:

- (1) contains a monetary limitation on the extent of the indemnification that bears a reasonable commercial relationship to the contract; and
- (2) is part of the project specifications or bid documents.

[T]he monetary limitation on the extent of indemnification provided to the owner . . . shall not be less than \$1 million per occurrence, unless otherwise agreed by the parties.®

See Fla. Stat. §726.05(1).

The statute provides that, in construction contracts, an indemnification provision is only enforceable, when certain conditions are met. First, the contract must contain a monetary limit on the amount of indemnification available, based on the contract. Second, the limit

must be at least \$1 million, if the owner of the project is a party to the contract.

However, Florida Statutes, section 725.06, raises interesting issues, because it only applies in situations when a contractor is seeking indemnity for the contractor=s own negligence.

This topic will last approximately 30 minutes; 25 minutes of instruction and 5 minute break.

II. Case Law; Ensure Compliance With Your Ethical and Legal Duties

A. Cuhaci & Peterson Architects, Inc. v. Huber Construction Company B In this case, Cuhaci contracted with the owner of a shopping center to prepare the construction plans for the shopping center. Huber contracted with the owner to construct the shopping center. When an employee of a subcontractor on the project was fatally injured, both Cuhaci and Huber were sued. Summary judgment was entered in favor of Cuhaci and Huber in that lawsuit. Subsequently, Cuhaci filed a separate lawsuit against Huber, seeking fees and costs pursuant to the indemnification provision of the construction contract between Huber and the owner of the construction project.

Huber moved for summary judgment, arguing that the indemnification provision did not comply with Florida Statutes, section 725.06. The trial court agreed, because the indemnity clause did not comply with the statute. However, the appeals court reversed, holding that section 725.06 **did not apply**, because Cuhaci was not seeking indemnity for its own negligence.

See Cuhaci & Peterson Architects, Inc. v. Huber Construction Co., 516 So. 2d 1096 (Fla. 5th DCA 1987) (We interpret [section 725.06] to apply only in circumstances wherein a party by contract seeks to obtain indemnification from another party for its *own* active *negligence*.@)

B. Federal Insurance Company v. Western Waterproofing Company of America B In a similar case, the trial court dismissed a contractor=s claim for contractual indemnity against three subcontractors, because the indemnity contract did not comply with the conditions set forth in section 725.06. The appellate court reversed, holding that section 725.06 Applies *only* to indemnification against one=s own negligence and thus does not have any application to the specific facts at bar.@

See Fed. Ins. Co. v. Western Waterproofing Co. of Am., 500 So. 2d 162 (Fla. 1st DCA 1986).

This topic will last approximately 30 minutes; 25 minutes of instruction and 5 minute break.

III. Ethical and Legal Requirements Over the Years.

What year is it? Depending on the year the contract was entered into, the requirements of the statute are different.

- A. 1972B2000** B the prior version of the current law provided that indemnification from a person=s own negligence could only be enforced, if:
 - 1.** The contract had a monetary limit on the indemnity and was part of the project specifications or bid documents; or
 - 2.** The persons indemnified gave the indemnitor specific consideration for the indemnification Athat shall be provided for in his or her contract and section of the project specifications or bid documents, if any.@
- B. 2000B2001** B contracts seeking to indemnify a party against its own negligence were not enforceable.
- C. 2001BPresent** B the current law states that construction contracts in which a party seeks indemnity for its own wrongful acts, are enforceable, so long as the contract contains a monetary limit on the extent of the indemnity, that bears a reasonable relationship to the contract, and is part of the specifications or bid documents, if any. Further, when the owner of the project is a party, the indemnity limit shall not be less than \$1 million per occurrence, unless otherwise agreed by the parties.

This topic will last approximately 30 minutes; 25 minutes of instruction and 5 minute break.