

Notify Builder 60 Days Before Suing

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Today is the twelfth (and final) part of our series regarding the 2003 Legislative Session and its effect on community associations. Past installments have looked at community association manager licensing, the new condo “flag law,” new disclosure obligations in homeowners associations (HOA’s), amendments to the HOA statute, amendments to the Florida Marketable Records Title Act, amendments to the condominium statute regarding mortgagee questionnaires, electronic notice of association meetings, insurance, and fire sprinkler retrofitting, and the effect of Florida’s new smoking ban on community associations.

Today’s column looks at a new law which requires individual homeowners and community associations to promptly notify builders and developers of any claims for residential construction defects prior to initiating a lawsuit for damages.

Under the new law, Section 558.001 of the Florida Statutes, a “claimant” (homeowner or community association) claiming damages due to a construction defect must provide the “contractor,” with written notification of the alleged defect at least 60 days before filing a lawsuit, setting forth the alleged construction defects in reasonable detail. Under the scope of the law “contractor” is defined as anyone engaged in the business of selling a dwelling and would therefore include a developer, builder, general contractor, or design professional. Within 5 business days after receiving notice of the claim, the contractor has the right to inspect the premises and (subject to mutual agreement) perform what is known as “destructive testing.” Any subcontractors that the contractor feels may be responsible must then be notified and they too have rights to inspect the premises.

Following this opportunity to inspect, and not later than 25 days after receiving the notice of a claim, the

contractor must serve a written response to the claimant. The contractor’s written response must either (a) include a written offer to repair the alleged defect at no cost to the claimant; (b) include a written offer to compromise the claim by monetary payment within 30 days; or (c) dispute the claim. An association is then given 45 days to accept or reject the offer. If an individual homeowner files a claim, they are provided with 15 days to accept or reject an offer. It is only after this process is exhausted that a party can initiate legal action against the contractor. If a claimant files an action without first complying with the statutory requirements, the statute requires the trial court to “abate” or stop the action, without prejudice. If this occurs, the lawsuit may not proceed until the claimant has complied with the requirements of the law.

It is also noteworthy that the statute encompasses not only original construction but also “remodeling,” which could mean repair work to association buildings and improvements such as concrete restoration, re-roofing and painting. There are no dollar thresholds on what work falls within the scope of the statute and, therefore, it appears that **any** residential construction work would be subject to the requirements of the statute.

As a result of the new law, every construction contract between an association and a developer, contractor, design professional, supplier and subcontractor must contain a disclosure statement explaining the law.

An association must be mindful of the time deadlines associated with the statute. Once a claim letter is served, the association must be prepared to arrange for access to enable the recipients of the claim letter to inspect the dwelling. Efforts should be undertaken to resist requests to perform destructive testing unless parameters for testing have been established such as

arrangements to repair the areas, arrangements for security to guard against theft and damage during the testing process, and requiring the testing party to carry necessary insurance. These issues must be agreed upon between the parties prior to testing.

Based upon the statutory time deadlines, it is likely that the recipients of the claim letter will be unable to conduct an inspection in 5 business days. Consequently, in many instances, the inspection will likely not take place. However, there is likely to be some response to the offer and care should be undertaken by an association or homeowner to timely accept or reject it. Accordingly, boards of directors should be prepared to meet on an immediate basis to timely decide on what action will be taken with respect to an offer. This is especially true during the summer months.

Someone recently asked me to sum up the 2003 legislative session as relates to community associations. Immediately, an old movie title came to mind. I hereby dub legislation from this session as “The Good, The Bad, and The Ugly.”

Now on to reader mail.

QUESTION: Can a homeowner’s association make a ruling that yellow ribbons are allowed at the club house entrance, but not allowed by homeowners in their yard? Can the Homeowner’s Association make decisions like this without a vote from the homeowners? **P.F. (via e-mail)**

ANSWER: You might have read my recent article, [Legislature Pledges Allegiance to Flag, 5/4/03](#). In it, I reported that the latest Florida Flag Bill expanded the list of items that neighborhood associations could not prohibit homeowners from displaying to include the U.S. Flag (in a respectful manner) and armed services flags (on certain holidays). Despite the legislature’s patriotic intent, they did not expand the law to include yellow ribbons. As long as your association’s governing documents give the Board the authority to regulate what residents display in their yards (as many do), then the Board’s actions are probably permissible. ⚖

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners’ associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm’s Naples and Ft. Myers offices.

Send questions to Joe Adams by e-mail to jadams@becker-poliakoff.com This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at www.becker-poliakoff.com.