



# **STATE OF FLORIDA CONSTRUCTION LAW COMPENDIUM**

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This outline includes a general overview of Florida's construction law. The discussion of any particular topic is not an exhaustive analysis of all the statutory or common law related to the particular topic but is intended to give a general understanding of the issues. Please consult one of the Florida based USLAW attorneys for assistance with any specific fact pattern and/or issue.

## **I. Breach of Contract Claims**

### **I-A: Choice of Law Clauses**

Florida recognizes a cause of action in the construction context for breach of contract claims. See Metrics Systems Corporation v. McDonald Douglas Corporation, 850 F. Supp. 1568 (N.D.Fla. 1994). The issue of liability is determined on a case by case basis dependent upon the language of the contract at issue. Typically, Florida law will apply to a Florida contract, especially when the terms of the contract itself dictate that Florida law will apply. However, under Florida law, "the law chosen by the contract applies so long as 'there is a reasonable relationship between the contract and the state whose law is selected and the selected law does not conflict with Florida law or confer an advantage on a non-resident party which a Florida resident does not have.'" Id. at 1578 (*quoting Forzley v. AVCO Corp. Elecs. Div.*, 826 F.2d 974, 979 (11th Cir. 1987)). Thus, there may be some instances in which a foreign state's laws would apply to a Florida contract. In Metrics, the court found a "reasonable relationship" existed between the contract and the other state because much of the operations were located in the other state. Id.

### **II-B: Impossibility of Performance**

Impossibility of performance is a viable defense under Florida law. See Metrics Systems Corporation v. McDonald Douglas Corporation, 850 F. Supp. 1568 (N.D. Fla. 1994); American Aviation v. Aero-Flight Serv., 712 So.2d 809 (Fla. 4<sup>th</sup> DCA 1998); Con--Dev of Vero Beach, Inc. v. Casano, 272 So2d 203, (Fla. 4th DCA 1973). The phrase "impossibility of performance," however, is a term of art that requires far more than a belief on the part of the performer that the contract is impossible to perform. Metrics, 850 F. Supp. at 1582. Often, a party seeking excuse of performance raises the related defense of 'commercial impracticality' in addition to that of impossibility. The court in Metrics stated that "because commercial impracticability standard is easily abused, [the] contractor must prove that it explored and exhausted all reasonable alternatives before concluding performance was senseless or impracticable." Id. (*citing Jennie-O Foods, Inc. v. United States*, 580 F.2d 400, 409 (Ct. Cl. 1978)). Therefore, Florida's legal position as to commercial impracticability reflects a traditional notion that performance is excused only when essentially impossible. See Valencia Center, Inc. v. Public Supermarkets, Inc., 464 So.2d 1267, 1268 (Fla. 3rd DCA 1985). (Explaining that courts are reluctant to excuse performance that is not impossible, but merely inconvenient, profitless, and expensive.)

Furthermore, the Florida courts have stated that "[w]here performance of a contract becomes impossible after it is executed, if knowledge of the facts making performance impossible was available to the promisor, he cannot invoke them as a defense to performance." American Aviation, 712 So.2d at 810 (Fla. 4<sup>th</sup> DCA 1998)(*citing Caidin v. Poley*, 313 So. 2d 88 (Fla. 4<sup>th</sup> DCA

1975 ). “If the risk of the event that has supervened to cause the alleged frustration was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed. Id. (citing City of Miami Beach v. Championship Sports, Inc., 200 So. 2d 583 (Fla. 3d DCA 1967).

Finally, the 11<sup>th</sup> Circuit has stated the following regarding the defense of impossibility:

In Florida, as the district court noted, the doctrine of impossibility refers to those factual situations, too numerous to catalog, where the purposes, for which the contract was made, have, on one side, become impossible to perform. However, where performance of a contract becomes impossible after it is executed, or if knowledge of the facts making performance impossible were available to the promisor [prior to the execution of the contract], the defense of impossibility is not available. Foreseeability is a critical determinant in assessing the availability of the defense. Under Florida law, the application of the defense of impossibility of performance is ultimately a fact-specific inquiry and is not confined to a rigid set of factual conditions.

Kamel v. Kenco/The Oaks at Boca Raton LP, 2008 U.S. App. LEXIS 21762, 7-8 (11th Cir. 2008) (citations omitted).

### II-C: Substantial Completion

Under Florida law, substantial completion pursuant to a contract can be the equivalent to the doctrine of substantial performance. J.M. Beason Company v. Sartori, 553 So. 2d 180, 182 (Fla. 4<sup>th</sup> DCA 1989). “Substantial performance is that performance of a contract which, while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny the promisee the full contract price subject to the promisor's right to recover whatever damages have been occasioned him by the promisee's failure to render full performance.” Id. See also Lazovitz, Inc. v. Saxon Constr., Inc., 911 F.2d 588, 592 (11th Cir.1990); Strategic Res. Group, Inc. v. Knight-Ridder, Inc., 870 So. 2d 846, 848 (Fla. 3d DCA 2003). Substantial completion, within the meaning of a construction contract, “means that the owner can use the property for the use for which it is intended.” Id. Furthermore, the court has laid out several “extremely important factors” in determining if substantial performance has occurred. Those factors include: the character of the performance that the plaintiff promised to render, the purposes and end that it was expected to serve in behalf of the defendant, and the extent to which the nonperformance by the plaintiff has defeated those purposes and ends, or would defeat them if the errors and omissions are corrected. Id.

If the breach of contract is willful, however, the doctrine of substantial performance does not apply. Rousselle v. B&H Const. Co., Inc. 358 So. 2d 614, 615 (Fla. 1st DCA 1978). Furthermore, under Florida law, abandonment is considered to be a willful breach. Bryan v. Owsley Lumber Co., 201 So. 2d 246, 248 (Fla. 1<sup>st</sup> DCA 1967). Additionally, Florida law dictates that it is the obligation of a general contractor to make assurances that subcontractors are performing their contracts in accordance with the owner’s requirements as contained in the plans and

specifications. Hawaiian Inn of Daytona Beach, Inc. v. Robert Myers Painting, Inc., 363 So. 2d 125, 126 (Fla. 1<sup>st</sup> DCA 1978) (also holding that when a property owner prevails in an action brought to enforce a mechanic's lien, the property owner is entitled to recover reasonable fees for the retention of attorney). Id.

## **II. Construction Negligence Claims**

### **II-A: General Negligence**

Under Florida law, to recover on a negligence claim in a construction cause of action, a Plaintiff needs to establish: (1) the defendant owed him a legal duty; (2) the defendant breached that duty, (3) the Plaintiff suffered injury as a result of the breach; and (4) the injury caused damage. Kayfetz v. A.M. Best Roofing, Inc., 832 So. 2d 784, 786 (Fla. 3d DCA 2002).

### **II-B: Negligence and Independent Contractors**

The Florida courts have specifically addressed negligence in the context of independent contractors. While an owner who hires an independent contractor is not generally liable for injuries sustained by that contractor's employees, an exception to this general rule exists when the owner "has been actively participating in the construction to the extent that he directly influences the manner in which the work is performed" or has engaged in "acts either negligently creating or negligently approving the dangerous condition resulting in the injury or death to the employee." Johnson v. Boca Raton Cmty. Hosp., Inc., 985 So. 2d 593, 595-96 (Fla. 4th DCA 2008), review denied, 1 So. 3d 172 (Fla. 2009); Thus, an owner who is also acting as a general contractor "has the ultimate duty to maintain a construction site in a reasonably safe condition." Worthington Cmty., Inc. v. Mejia, 28 So. 3d 79, 83 (Fla. 2d DCA. 2009) (*quoting* Griggs v. Ryder, 625 So. 2d 950, 951 (Fla. 1st DCA 1993)).

Where two or more independent contractors are working in or about a building and any one of them is doing work pursuant to his contract that he knows or should know to be dangerous to the employees of the other contractors lawfully engaged in other work in or about the building, the contractor engaged in such dangerous work should use due care to perform in such a manner as not to endanger persons in the employ of the other contractors so lawfully engaged in such work. Woodcock v. Wilcox, 122 So. 789 (Fla. 1929) (*See also* Simmons v. Roorda, 601 So. 2d 609 (Fla. 2d DCA 1992)).

### **II-C: Negligence, Trespassers, and the Attractive Nuisance Doctrine**

"In Florida, trespassers generally have few remedies for injuries received on another's land. The unwavering rule as to a trespasser is that property owner is under the duty only to avoid willful and wanton harm to him and upon discovery of his presence to warn him of known dangers not open to ordinary observation." Martinello v. B & P USA, Inc., 566 So. 2d 761, 763 (Fla. 1990) (*citations omitted*). The attractive nuisance doctrine, however, is an exception to this general rule. This doctrine, established to preserve the safety of children and also to protect the rights of

property owners, permits trespassing children to recover against landowners in certain instances. Id. In Martinello, the court held that construction contracts under Florida law cannot preclude a representative of a minor injured by falling from the roof of an uncompleted house from suing under an attractive nuisance theory by admitting negligence and claiming that the suit is therefore limited to ordinary negligence. Id. See also Coleman v. Associated Pipeline Contractors, Inc., 444 F.2d 737 (5th Cir. 1971) (holding that contractor's duty to the decedent was only to refrain from willfully or wantonly injuring the decedent because the site, at which the accident occurred, did not constitute an attractive nuisance) and Johnson v. Bathey, 376 So. 2d 848 (Fla. 1979) (holding that the attractive nuisance doctrine was inapplicable because there was no doubt that the plaintiffs were not allured onto the premises because of the existence of the pump, because the plaintiffs did not discover it until they had traveled some distance onto the property).

#### II-D: Duties of Premises' Owners

"An independent contractor has the status of a business visitor, or invitee, upon the premises." Hall v. Holland, 47 So. 2d 889, 891 (Fla. 1950). "Whether [a plaintiff/independent contractor] [is] an employee-invitee or a business visitor-invitee, it was the duty of the [defendant/premises's owner] to use reasonable care in maintaining the premises in a reasonably safe condition and to have given the plaintiff timely notice and warning of latent and concealed perils, known to the defendant, or which by the exercise of due care should have been known to him, and which were not known by plaintiff or which, by the exercise of due care, could not have been known to him." Id. "While the invitee is entitled to expect that the owner will take reasonable care to discover the actual condition of the premises and either make them safe or warn him of dangerous conditions, such owner is entitled to assume that the invitee will perceive that which would be obvious to him upon the ordinary use of his own senses, and is not required to give to the invitee notice or warning of an obvious danger." Id. at 891-92 (citations omitted).

The independent contractor, however, is usually placed in charge of the work site and is responsible for all incidental contingencies and is aware or presumed to be aware of the usual hazards incident to the performance of the contract. See, Johnson v. Boca Raton Cmty. Hosp., Inc., 985 So. 2d 593, 596 (Fla. 4th DCA 2008) (holding that a hospital had no duty to warn an independent contractor regarding the inhalation of asbestos dust because such inhalation is a 'usual hazard' incident to the performance of asbestos installation).

#### II-E: The Slavin Rule

In Slavin v. Kay, 108 So. 2d 462 (Fla. 1959), the Florida Supreme Court held that once a purchaser accepts a building, the purchaser accepts any of the building's defects for purposes of liability – but only if the defects are patent. Latent defects are not covered, and a contractor may still be liable to third parties for injuries caused by latent defects. Later court opinions have held that latency is based not on whether the physical condition is open and obvious, but whether the *danger* it posed was open and obvious. For example, if an owner takes possession of a home with glass doors which are dangerous because they are not shatter resistant, the glass doors themselves may be patent, but the danger is not. Fitzgerald v. Cestari, 553 So. 2d

708 (Fla. 4<sup>th</sup> DCA 1989); *see also* Plaza v. Fisher Dev., Inc., 971 So. 2d 918 (Fla. 3d DCA 2007) (applying the *Slavin* rule and awarding summary judgment to a contractor in an action where plaintiff was injured after falling onto a conveyor system.).

### **III. Breach of Warranty – Express Warranty**

#### **III-A: Express Warranties and Loopholes**

Express warranties are recognized and enforceable under Florida law. However, there are various loopholes that exist in the application of express warranties. For example, in K/F Dev. & Inv. Corp. v. Williamson Crane & Dozer Corp., 367 So. 2d 1078 (Fla. 3d DCA 1979), the purchaser of a warehouse, who alleged that the vendor orally warned him that the warehouse had a ten-year roof, could not recover for breach of an express oral warranty when the roof subsequently failed. Id. at 1080. This was due to the fact that the oral warranty was made at the time of closing and not at the time of the agreement for purchase and sale. Id. at 1079. Thus, the express warranty could not have been an inducement for the purchaser to enter into the transaction. Id.

#### **III-B: Express Warranties and the UCC**

Additionally, one should be made aware that the Uniform Commercial Code requires express warranties to be in writing and conspicuous if it is to exclude or modify any implied warranty of merchantability. Fla. Stat. § 672.316(2).

### **IV. Breach of Warranty – Implied Warranty**

#### **IV-A: Contractor’s Implied Warranty of Fitness**

Florida recognizes various implied warranties. Under Florida law, privity of contract is required to maintain an action for breach of an implied warranty. Mann v. Island Resorts Dev., Inc., 2008 U.S. Dist. LEXIS 102725, 7-8 (N.D. Fla. 2008). One such implied warrant is the so-called “implied warranty of fitness.” To be in compliance with a contractor’s implied warranty of fitness, the contractor must provide work and materials which conform to generally accepted standards of workmanship of similar work and materials meeting the requirements specified in the contract. Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911, 914 (Fla. 1995). *See also* Fla. Stat. § 718.203(2).

#### **IV-B: Caveat Emptor**

Florida has rejected the concept of *caveat emptor* in the purchase of new homes or condominiums. Gable v. Silver, 258 So. 2d 11, 14 (Fla. 4<sup>th</sup> DCA 1972), *cert. discharged* 264 So. 2d 418 (Fla. 1972). “[W]here the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer.” M/I Schottenstein Homes v. Azam, 813 So. 2d 91, 93 (Fla.

2002). This duty is equally applicable to all forms of real property, new and used. Johnson v. Davis, 480 So. 2d 625, 629 (Fla. 1985). This duty imposed upon sellers does not require disclosure to third parties not in privity with the seller. Wallis v. South Florida Savings Bank, 574 So. 2d 1108, 1110 (Fla. 2d DCA 1990).

In a commercial real property transaction, Florida law distinguishes between the mere nondisclosure of a known defect, a non-actionable offense, and the active concealment of one, an actionable offense. The doctrine of caveat emptor (literally, "let the buyer beware") provides that, when parties deal at arm's length, buyers are expected "to fend for themselves, protected only by their own skepticism as to the value and condition of the subject of the transaction." Absent an express agreement, a material misrepresentation or active concealment of a material fact, the seller cannot be held liable for any harm sustained by the buyer or others as the result of a defect existing at the time of the sale. Hayim Real Estate Holdings, LLC v. Action Watercraft Int'l, Inc., 15 So. 3d 724, 727 (Fla. 3d DCA 2009)

#### IV-C: Warranty of Workmanlike Performance

Warranty of workmanlike performance extends to contracts for maritime repair work. Corrao v. M/V Act III, 359 F. Supp. 1160, 1166 (S.D. Fla. 1973). Florida recognizes an implied warranty of workmanlike performance, and in those cases, liability should fall upon the party best situated to adopt preventative measures to reduce the likelihood of injury. Groupe Chegray/V. De Chalus v. P & O Containers, 251 F. 3rd 1359, 1371 (11th Cir. 2001).

The warranty of workmanlike performance, however, is an admiralty doctrine which does not apply to a non-maritime contract for the construction and sale of a vessel. See Fed. Ins. Co. v. Lazzara Yachts of N. Am., Inc., 2010 U.S. Dist. LEXIS 28865 (M.D. Fla. Mar. 24, 2010).

#### IV-D: Warranty Disclaimers

Under Florida law, warranty disclaimers are enforceable. Leasetec Corp. v. Orient Systems, Inc., 85 F. Supp. 2d 1310, 1315 (S.D. Fla. 1999). Warranties made at the time of an initial bargain cannot be subsequently limited or modified by delivery of either printed or written documents unless agreed to by the party to whom the initial warranty was extended. Tropicana Pools, Inc. v. Boysen, 296 So. 2d 104, 108 (Fla. 1<sup>st</sup> DCA 1974). An express exclusion of implied warranties and other representations that pre-date a contract is enforceable under Florida law. Saunders Leasing System, Inc. v. Gulf Central Distribution Center, Inc., 513 So. 2d 1303, 1306 (Fla. 2d DCA 1987).

Parties can exclude items from an implied warranty of habitability through a disclaimer with clear and unambiguous language, which "clearly reflects both parties' expectations as to what items are not warranted." See McGuire v. Ryland Group, Inc., 497 F. Supp. 2d 1347, 1351 (M.D. Fla. 2007) (explaining that a general disclaimer of implied warranties was invalid); See also, McGuire v. Ryland Group, Inc., 497 F. Supp. 2d 1356, 1360 (M.D. Fla. 2007) (holding that a general disclaimer together with specific performance standards sufficient to disclaim implied warranties).

#### IV-E: Implied Warranty of Habitability

A developer may be held liable for damages for breach of implied warranties and the failure to construct according to plans or in a workmanlike or acceptable manner, or for the failure to provide a unit or building which is reasonably habitable. Schmeck v. Sea Oats Condo. Ass'n., Inc., 441 So. 2d 1092, 1097 (Fla. 5<sup>th</sup> DCA 1983). The test for a breach of the implied warranty of habitability is an objective standard of whether the premises meet ordinary, normal standards reasonably to be expected of living quarters of comparable kind and quality. Putnam v. Roudebush, 352 So. 2d 908, 910 (Fla. 2d DCA 1977). There is an implied warranty of habitability in the package sale of a new house and lot by a builder/vendor to an original purchaser. Hesson v. Walmsley Construction Company, 422 So. 2d 943, 945 (Fla. 2d DCA 1982). The implied warranty of habitability extends only to the conditions in existence at the time of sale, as it is unfair to hold a builder/vendor liable for defects caused by conditions occurring subsequent to the sale, e.g., natural catastrophes, such as earth tremors and sink holes. Id. The implied warranty of habitability does not extend to lots owned by a purchaser on which the builder subsequently constructs a house, or to the sale of used homes. Burger v. Hector, 278 So. 2d 636 (Fla. 1<sup>st</sup> DCA 1973); Strathmore Riverside Villas Condominium Association v. Pave Development Corp., 369 So. 2d 971, 972 (Fla. 2d DCA 1979).

#### **V. Misrepresentation and Fraud Claims**

##### V-A: Promissory Estoppel

Under Florida law, to state a cause of action for promissory estoppel, a plaintiff must show: (1) that the plaintiff detrimentally relied on a promise made by the defendant; (2) that the defendant should have expected the promise to induce reliance in the form action or forbearance on the part of the plaintiff or a third person; and (3) that injustice can be avoided only by enforcement of the promise against the defendant. W.R. Townsend Contracting, Inc. v. Jensen Civil Constr., Inc., 728 So. 2d 297, 302 (Fla. 1<sup>st</sup> DCA 1999).

##### V-B: Unjust Enrichment

To state a cause of action for unjust enrichment, a plaintiff must allege: that a benefit was conferred upon the defendant; (2) that the defendant either requested the benefit or knowingly and voluntarily accepted it; (3) that a benefit flowed to the defendant; and (4) that under the circumstances, it would be inequitable for the defendant to retain the benefit without paying the value thereof. Id. at 303.

##### V-C: Fraud in the Inducement

Florida law defines fraudulent inducement as a false representation of a material fact, made with knowledge of its falsity, to a person ignorant thereof, with intention that it shall be acted upon, followed by reliance upon and by action thereon amounting to substantial change of position. In



order to prevail on a fraudulent inducement claim, therefore, a plaintiff must prove the following elements: (1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and, (4) consequent injury by the party acting in reliance on the representation. Johnson Enters. of Jacksonville v. Fpl Group, 162 F.3d 1290, 1315 (11th Cir. 1998).

#### V-D: Negligent Misrepresentation

In H&S Corp. v. U.S. Fidelity & Guarantee Co., 667 So. 2d 393 (Fla. 1<sup>st</sup> DCA 1995), the contractor argued that the project engineer misrepresented details concerning the construction site and the nature of the work to be performed. Id. at 396. Specifically, the extent of latent defect work that needed to be completed. Id. However, the court found that the contractor viewed the job-site before bidding and was told by the project engineer that the earlier tests completed should not be relied on. Id. Furthermore, the court stated that “[b]y contract definition, latent defect work was ‘not discoverable in the exercise of reasonable diligence by persons possessing customary knowledge in the type of construction which is the subject of this Agreement.’” Id. at 397. Thus, the extent of the latent defect work which needed to be done to remedy the shortcomings in the original contractor’s work was a matter of opinion rather than a misrepresentation. Id. Therefore, there is no cause of action for negligent misrepresentation under Florida law in the context of the contract to perform latent defect work required to remedy shortcomings in an initial contractor’s work, where the extent of the latent defect work required is a matter of opinion, and by contract definition, latent defect work is not discoverable in the exercise of reasonable diligence by the persons possessing customary knowledge in the type of construction which was the subject of the agreement. Id.

#### V-E: Seller’s Duty to Disclose

The seller of a home is under a duty to disclose facts of which he is aware which materially affect the value of the property, and where the builder of a home knows of material defects existing in the home prior to closing, and further where those defects are concealed from the home purchasers by nondisclosure, a plaintiff homebuyer can recover for fraud. U.S. Home Corp., Rutenberg Homes Division v. Metro. Prop. and Liab. Ins. Co., 516 So. 2d 3, 4 (Fla. 2d DCA 1987). *See also* M/I Schottenstein Homes v. Azam, 813 So. 2d 91, 93 (Fla. 2002).

#### V-F: Liens

Where a contractor willfully exaggerates a lien claim by including amounts that were not recoverable under the contract, the entire lien is rendered fraudulent and unenforceable. Fla. Stat. § 713.31. *See also* Skidmore, Owings and Merrill v. Volpe Const. Co., Inc., 511 So. 2d 642, 644 (Fla. 3d DCA 1987). In Skidmore, the claimant included in his claims “amounts which [were] not recoverable under the contract, [were] not authorized, or [were] arbitrary.” Id. The court thus ordered the lien unenforceable. Id. The contractor is also not entitled to an award of attorney’s fees on its mechanic’s lien claim. Fla. Stat. § 713.31(2)(a,b).

### V-G: Fraud and Breach of Contract Actions

Where fraud is asserted as a defense to a contract claim, all of the essential elements of a claim for fraudulent conduct must be in place, including some injury. George Hunt, Inc. v. Wash-Bowl, Inc., 348 So. 2d 910, 912 (Fla. 2d DCA 1977). To establish the defense of fraud in a breach of contract action, the injuries sustained must cause the party to suffer some loss, either pecuniary or otherwise; however, the showing of injury arising out of misrepresentation or concealment need not amount to actionable fraud to justify its use as an affirmative defense. Id. All that is required is that the defensive pleadings set forth the essential elements of injury or damage. Id.

## **VI. Strict Liability Claims**

### VI-A: Florida Building Code and Strict Liability

Fla. Statute § 553.84 (2015) states that [n]otwithstanding any other remedies available, any person or party, in an individual capacity or on behalf of a class of persons or parties, damaged as a result of a violation of this part or the Florida Building Code, has a cause of action in any court of competent jurisdiction against the person or party who committed the violation; however, if the person or party obtains the required building permits and any local government or public agency with authority to enforce the Florida Building Code approves the plans, if the construction project passes all required inspections under the code, and if there is no personal injury or damage to property other than the property that is the subject of the permits, plans, and inspections, this section does not apply unless the person or party knew or should have known that the violation existed.

In Sierra v. Allied Stores Corp., 538 So. 2d 943 (Fla. 3d DCA 1989), the court refused to hold that the statute created “strict liability against the owner whose property, although the source of a harmful agent, is not in violation of the building code.” Id. at 944. Furthermore, the Florida building code does not impose a duty on a land owner to supervise the construction undertaken by an independent contractor, especially where the independent contractor is hired by a third party to perform services which benefit only the third party. Id. See also, Mann v. Island Resorts Dev., Inc., 2008 U.S. Dist. LEXIS 102725 (N.D. Fla. 2008).

### VI-B: Military Contractor’s Defense

“The military contractor defense is available in certain situations not because a contractor is appropriately held to a reduced standard of care, nor because it is cloaked with sovereign immunity, but because traditional separation of powers doctrine compels the defense.” Dorse v. Armstrong World Industries, Inc., 513 So. 2d 1265, 1268 (Fla. 1987). Under the “military contractor’s defense,” a contractor must show compliance with specifications material to dispute at bar that were precisely prescribed and required by contract between it and the government; if the specifications are not precise and leave the contractor with substantial discretion, then the contractor is strictly liable to the extent that its exercise of that discretion caused the injury. Id.

at 1269. *See also*, Brinson v. Raytheon Co., 571 F.3d 1348 (11th Cir. 2009) (applying the three-part *Boyle* test for determining whether state law is displaced by federal procurement law in establishing the military contractor defense).

#### VI-C: Strict Liability and Structural Improvements

Principals of strict liability do not apply to structural improvements to real property except for injuries arising from a product manufactured by a defendant and incorporated into an improvement to that real property. Craft v. Wet 'N Wild, Inc., 489 So. 2d 1221, 1222 (Fla. 5<sup>th</sup> DCA 1986).

#### VI-D: Strict Liability and Improvements to Real Property

The concept of strict liability does not apply to improvements to real property, except where the injuries result not from the real property as improved by the allegedly defective product, but directly from the defective product which may have itself been incorporated into the improvement of realty before the injury from the product occurred. Plaza v. Fisher Dev., Inc., 971 So. 2d 918 (Fla. 3d DCA 2007); Jackson v. L.A.W. Contracting Corp., 481 So. 2d 1290, 1291-92 (Fla. 5<sup>th</sup> DCA 1986).

### **VII. Indemnity Claims**

#### VII-A: Common Law Indemnity

Florida applies a two pronged test in order to recover on a theory of common law indemnity. An indemnity plaintiff must prove: (1) the plaintiff is wholly without fault and the party against whom indemnity is sought is guilty of negligence, and (2) the party who seeks indemnity must be obligated to pay another party or entity only because of some vicarious, constructive, derivative, or technical liability. Fid. & Guar. Ins. Co. v. Ford Motor Co., 707 F.Supp.2d 1300, 1313 (M.D. Fla. 2010); Gatelands Co. v. Old Ponte Verde Beach Condo., 715 So. 2d 1132, 1134 (Fla. 5th DCA 1988). For example, in Paul N. Howard Co. v. Affholder, Inc., 701 So. 2d 402 (Fla. 5th DCA 1997), the party seeking indemnification (“Howard”), according to the court, failed to satisfy the second factor of the test. Specifically, the relationship between the parties was one involving a “general contractor subcontracting with subcontractor/independent contractor.” Id. at 404. Thus, Howard’s attempt to characterize itself as principal and the opposing party (“Affholder”) as its Agent was unavailing. Id. As a result, Howard cannot be held vicariously, constructively, derivatively, or technically liable for Affholder's alleged negligence. Id.

#### VII-B: Common Law Indemnity and General Contractors

When a general contractor is liable to a property owner on account of a subcontractor's failure to use due care, the general contractor is entitled to indemnification by the subcontractor. This downhill flow continues, from special relationship to special relationship, until privity between

the downhill parties ends. CC-Aventura, Inc. v. Weitz Co., LLC, 2009 U.S. Dist. LEXIS 126843, 2009 WL 2136527 (S.D. Fla. 2009); *See also*, Spolski General Contractor, Inc. v. Jett-Aire Corp. Aviation Management of Cent. Florida, Inc., 637 So. 2d 968, 970 (Fla. 5th DCA 1994) (claim for indemnity should not have been dismissed when contractor in direct privity with supplier); In re Masonite Corp. Hardboard Siding Products Liability Litigation, 21 F. Supp. 2d 593, 605 (E.D. La. 1998) (applying Florida law) (liability could flow from contractor to defective component provider).

A general contractor cannot recover common law indemnity against a subcontractor for defects and material supplied by the contractor, under a contract requiring an architect to approve materials, if the architect, who was the owner's representative, had been made the general contractor's agent by estoppel, and if the defects could have been found during the inspection and approval by the architect. Federal Insurance Company v. Western Waterproofing Company of America, 500 So. 2d 162 (Fla. 1986). A general contractor will be considered to be actively negligent and therefore barred from indemnification from subcontractors if it was on actual notice of the defects attributed to the subcontractors, and which are alleged to be the proximate cause of resulting injuries to the original plaintiff. *Id.* The special relationship requirement between a primary defendant and a third party defendant in a claim for indemnification is only necessary under a common law theory of indemnification, and is not a condition precedent to seeking to recover under a contractual indemnity clause. Camp, Dresser & McKee, Inc. v. Paul N. Howard Company, 721 So. 2d 1254 (Fla. 5th DCA 1988).

#### VII-C: Section 725.06 limitation on indemnity

Fla. Stat. Sec. 725.06 (1) provides in part: In any construction contract "wherein any party referred to herein promises to indemnify or hold harmless the other party to the agreement, contract, or guarantee for liability for damages to person 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 contains a monetary limitation on the extent of the indemnification that bears a reasonable commercial relationship to the contract and is part of the project specifications or bid documents, if any." *See, e.g.*, Barton-Malow Co. v. Grunau Co., 835 So. 2d 1164 (Fla. 2d DCA 2002).

#### **VIII. Statute of Limitations**

##### VIII-A: Statute of Limitations, Indemnity and Contribution Claims

The statute of limitations does not begin to run on a claim for indemnity or contribution until the right to bring that claim is established, either when a judgment has been entered or when a defendant has paid the claim. Kala Investments, Inc. v. Sklar, 538 So. 2d 909, 915-16 (Fla. 3d DCA 1989). This is so despite the fact that the statute of limitations has run on an original cause of action at the time the contribution claim is filed and despite the fact that the statute of limitations had run on an original cause of action when it was filed. *Id.* at 916.

### VIII-B: Statute of Limitations and Surety Obligations

The statute of limitations on a surety's obligation to cure the defects and performance of a construction contract accrues on the date of acceptance of the project as having been completed according to the terms and conditions set out in the construction contract. Federal Ins. Co. v. Southwest Florida Retirement Center, Inc., 707 So. 2d 1119, 1121 (Fla. 1998). The statute of limitations does not begin to run in an indemnity case until the indemnitee has paid a judgment, or has made a voluntary payment of its legal liability to an injured party. Scott & Jobalia Const. Co., Inc. v. Halifax Paving, Inc., 538 So. 2d 76, 79 (Fla. 5th DCA 1989); *declined to extend by* BP Products N. America, Inc. v. Giant Oil, Inc., 545 F.Supp.2d 1257 (M.D. Fla. 2008).

### **IX. Recovery for Investigative Costs**

The Florida Supreme Court has held that "diminution in value or the cost of repairs is a proper measure of damages for breach of a construction contract, absent evidence of 'economic waste.'" Pearce & Pearce, Inc. v. Kroh Brothers Dev. Co., 474 So. 2d 369, 371 (Fla. 1st DCA 1985). In Pearce & Pearce, the court found that the proper measure of damages under Florida law resulting from the negligent design of a building which suffered water leakage was the cost of repairs, and not the diminution in value to the building caused by the leakage. Id. Florida courts have not passed on the issue of recovery of investigative costs, although the Pearce case, in dicta, does state that the trial court did not abuse its discretion in refusing to allow for recovery of investigative costs into the building's water leakage problem. Id. at 372.

### **X. Emotional Distress Claims**

Florida does not recognize any recovery for emotional distress claims in the context of negligence. Rivers v. Grinsley Oil Co., Inc., 842 So. 2d 975, 976 (Fla. 2d DCA 2003). Florida applies what is called the impact rule, which requires some sort of physical impact before a plaintiff will be allowed to recover for the negligent infliction of emotional distress. Id. In Champion v. Gray, 478 So. 2d 17, 20 (Fla.1985) (receded from on other grounds), the Florida Supreme Court recognized an exception to the requirement that plaintiffs sustain physical impact during the incident giving rise to the cause of action. To qualify for the exception, plaintiffs must satisfy the following elements:

- (1) the plaintiff must suffer a physical injury;
- (2) the plaintiff's physical injury must be caused by the psychological trauma;
- (3) the plaintiff must be involved in some way in the event causing the negligent injury to another; and
- (4) the plaintiff must have a close personal relationship to the directly injured person.

Zell v. Meek, 665 So. 2d 1048, 1054 (Fla.1995) (restating the Champion test). Zell also receded from Champion's requirement that the "causally connected clearly discernible physical impairment *must accompany or occur within a short time* of the psychic injury." "Temporal proximity, as opposed to being an absolute inflexible requirement, should be utilized simply as a relevant factor to be considered in a factfinder's determination of whether a person has

sustained a physical injury as a result of psychic trauma.” *Id.* at 1053. For example, in Rivers, the Second District Court of Appeals of Florida found that an employee could not maintain a cause of action for negligent infliction of emotional distress against an employer, based upon the employee's suffering psychological injuries after being robbed at work allegedly due to the employer's failure to install adequate security, because the claim of damages did not constitute a physical injury resulting from the robbery itself. *Id.* Under the impact rule, a plaintiff must suffer physical impact before recovering for emotional distress caused by the negligence of another; in essence, the rule stands for the proposition that before a plaintiff can recover damages for emotional distress caused by the negligence of another, the initial distress suffered must flow from physical injuries the plaintiff sustained in an impact. Reynolds v. State Farm Mut. Auto. Ins. Co., 611 So. 2d 1294, 1296 (Fla. 4th DCA 1992).

Under a limited exception to the impact rule, the existence of a familial relationship between the plaintiff and the injured person may allow the plaintiff to recover damages for any psychic trauma resulting from the negligent injury of that person by another; any recovery is further limited to those instances where the deceased or injured person is not only a close family member, but is one with whom the plaintiff has a relationship with a specially close emotional attachment. *Id.*

#### **XI. Emotional Distress and the “Impact Rule”**

The "impact rule" requires that a plaintiff seeking to recover emotional distress damages in a negligence action prove that "the emotional distress ... flow[s] from physical injuries the plaintiff sustained in an impact [upon his person]." R.J. v. Humana of Florida, Inc., 652 So. 2d 360, 362 (Fla. 1995). Florida's version of the impact rule has more aptly been described as having a "hybrid" nature, requiring either impact upon one's person or, in certain situations, at a minimum the manifestation of emotional distress in the form of a discernible physical injury or illness. See Kush v. Lloyd, 616 So. 2d 415, 422 (Fla. 1992). The Florida Supreme Court has been slowly moving away from the impact rule, as is evidenced by its opinion in Gracey v. Eaker, 837 So. 2d 348 (Fla. 2002). In Gracey, following the ruling in Kush v. Lloyd, 616 So. 2d 415, 422 (Fla. 1992), the Court held that the impact rule generally "is inapplicable to recognized torts in which damages often are predominately emotional." *Id.* at 422. Thus, the Supreme Court held that the impact rule requiring a plaintiff who seeks to recover emotional distress damages in a negligence action prove that emotional distress flowed from physical injuries the plaintiff sustained in an impact upon his or her person is inapplicable in cases in which a psychotherapist allegedly creates a fiduciary relationship with the patient and breaches that statutory duty of confidentiality to the patient. Gracey, 837 So. 2d at 356. According to the Supreme Court, the impact rule should not have been imposed to override clear legislative intent to protect a patient from unauthorized disclosure of confidences reposed in a psychotherapist, and the logical injuries flowing from the violation of such protections were emotional in nature. *Id.*

#### **XII. Economic Waste**

Under Florida law, economic waste is a doctrine that “applies to situations in which the cost of repairing the deficiencies in a building are grossly disproportionate to the value of the completed

structure.” Austin-Westshore Constr. Co., Inc. v. Federated Dep’t Stores, Inc., 934 F. 2d 1217, 1224 (11th Cir. 1991). “In such circumstances, damages can be measured by the difference in value of the structure contracted for and the structure received as opposed to the cost of correcting the deficiencies.” Id. The doctrine “contemplates that one of the contracting parties did not receive what was contracted for and to insist on such compliance under the circumstances would be unreasonable and economically wasteful.” Id.

The supreme court, in Grossman Holdings Ltd. v. Hourihan, 414 So. 2d 1037 (Fla. 1982), adopted section 346(1)(a) of the Restatement (First) on Contracts (1932) as the measure of damages for a breach of a construction contract. This subsection provides, in part, as follows: “(a) For defective or unfinished construction [the contracting party] can get judgment [from the builder] for either (i) the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste; or (ii) the difference between the value that the product contracted for would have had and the value of the performance that has been received by the plaintiff, if construction and completion in accordance with the contract would involve unreasonable economic waste.” Hourihan, 414 So. 2d at 1039 (*quoting* Restatement (First) of Contracts § 346(1)(a) (1932)).

“In short, a party is entitled to recover the cost of repairing a defect so that it is in compliance with the contract or, if that would result in economic waste, the diminution of value between a house built in accordance with the contract and the one actually built.” Smith v. Mark Coleman Constr., Inc., 594 So. 2d 812, 814 (Fla. 2d DCA 1992). The Florida courts have further recognized that “stigma damages” are recognized under the rubric of the “diminution in value” concept. Orkin Exterminating Co., Inc. v. Delguidice, 790 So. 2d 1158, 1159 (Fla. 5th DCA 2001). Stigma damages have been defined as “the reduction in value caused by the contamination resulting from increased risk associated with contaminated property.” Finkelstein v. Tenneco Oil Co., 656 So. 2d 921 (Fla. 1995). Although it is true that the Florida courts have not specifically addressed stigma damages in relation to construction (it is usually applied in the environmental contamination paradigm), at least one court has indicated that stigma damages “can be awarded in Florida on a breach of contract theory [but] only in limited circumstances.” Orkin Exterminating Co., 790 So. 2d at 1159. However, stigma damages must likely be included in the contract in order to recover. Id.

“Where the performance on a contract is defective, the proper measure of damages is the reasonable cost of making the performed work conform to the contract. This maxim is subject to the exception that, where construction in accordance with the contract would involve unreasonable economic waste, the measure of damage for defective construction is the difference between the value of the item contracted for and the value of the performance received.” Aponte v. Exotic Pools, Inc., 699 So. 2d 796, 797 (Fla. 4 DCA 1997).

### **XIII. Delay or Liquidated Damages**

"It is well settled that in Florida the parties to a contract may stipulate in advance to an amount to be paid or retained as liquidated damages in the event of a breach. However, to be a valid

liquidated damages clause, the court must find, first, that the damages consequent upon a breach must not be readily ascertainable, and [second, that] the sum stipulated to be forfeited must not be so grossly disproportionate to any damages that might reasonably be expected to follow from a breach as to show that the parties could have intended only to induce full performance, rather than to liquidate their damages." Air Caledonie Int'l v. AAR Parts Trading, Inc., 315 F. Supp. 2d 1319, 1344 (S.D. Fla. 2004) (citations omitted). See also Resnick v. Uccello Immobilien BMBH, Inc., 227 F.3d 1347, 1350 (11th Cir. 2000). Liquidated damages can extend to those for delay, but the burden of proving damages will be on the party that asserts the delay. Fred Howland Inc. v. Gore, 13 So. 2d 303 (Fla. 1943).

For instance, a liquidated damages charge of \$1,000.00 per day for delay in substantial completion of a city arena project was not invalid as a penalty under the circumstances. In re: Florida Precast Concrete, Inc., 112 B.R. 451, 455 (M.D. Fla. 1990). The damages which the city would have suffered upon breach of the contract were not readily ascertainable at the time of entering into the contract, and \$1,000.00 per day charge was not unreasonable in relation to the damages that might have been expected in light of the size of the construction contract and the heavy schedule of use that was planned for the arena. Id.

"Clauses providing for 'no damages for delay,' except in the case of fraud, bad faith, or active interference by the owner, are legal and enforceable" under Florida law. Triple R Paving, Inc. v. Broward County, 774 So. 2d 50, 54 (Fla. 4th DCA 2000). However, these clauses will not be unreasonably enforced. Southern Gulf Util., Inc. v. Boca Ciega Sanitary Dist., 238 So. 2d 458 (Fla. 2d DCA 1970).

It should be noted that even in a contract which contains a "no damage for delay" clause, a contractor can still recover if the owner actively impedes, or willfully and knowingly delays, the contractor's ability to timely perform under the contract. Newbury Square Development Corporation v. Southern Landmark, Inc., 578 So. 2d 750, 752 (Fla. 1st DCA 1991).

#### **XIV. Economic Loss Rule and the Recent Changes to its Application in Florida**

Prior to March 7, 2013, Florida adopted the Economic Loss Rule, which "sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses." Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Companies, Inc., 110 So. 3d 399, 401 (Fla. 2013), citing Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc., 891 So. 2d 532, 536 (Fla.2004) (receded from on other grounds). The Economic Loss Rule previously applied in the product liability context and to circumstances where parties are in contractual privity and one party seeks to recover damages in tort for matters arising from the contract. Tiara, 110 So. 3d at 402.

The Florida Supreme Court's decision in Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Companies, Inc. has changed the Economic Loss Rule's application in Florida. Tiara, 110 So. 3d at



399. In *Tiara*, the initial issue was whether an insurance broker fell within the then professional service exception to the Economic Loss Rule, such that the Rule would not apply and a tort claim could be brought against the broker. *Id.* The Court broadened this question, spending much of the opinion analyzing the origins and history of the Economic Loss Rule and its expanded applications beyond the original intent of the Rule. After reviewing the origin and original purpose of the Economic Loss Rule, and what has been described as the “unprincipled extension of the rule,” the Court in *Tiara* held that the Rule should only apply in the products liability context. *Id.* at 407. With this holding, the Court recedes from all prior rulings to the extent that they have applied the Economic Loss Rule to cases other than product liability. *Id.*

The impact of the *Tiara* decision includes the prospect of every breach of contract claim being accompanied by a tort claim because the Court will no longer rely on the Economic Loss Rule to evaluate tort claims between two parties who have also entered into a contract where the contract involves the same subject matter as the tort claim. This impact will also likely extend to the drafting of construction contracts as companies will want to steer their commercial relationships closer to the contract realm by consistently ensuring that each party’s rights and duties are well documented in a clear and comprehensive contract. If this practice is strictly followed, Florida courts may be more inclined to recognize contract law, over tort law, as the better means of adjudicating a later dispute.

## **XV. Insurance Coverage for Construction Claims**

Typical Commercial General Liability (“CGL”) policies that contain an express exclusion for products/completed operations will serve to exclude coverage for defective workmanship under Florida law. However, it should be noted that the specific language of the policy in question as well as the complaint which alleges damages must be analyzed in conjunction with one another in order to determine whether coverage is afforded under the policy. The standard application of this policy provision under Florida law is that a CGL policy will only protect against personal injury or damages to personal property which might result from defective workmanship and the policies do not afford coverage for the repair of the defective workmanship itself. *Auto Owners Ins. Co. v. Travelers Casualty and Surety Co.*, 227 F.Supp.2d 1248 (M.D. Fla. 2002)(*quoting La Marche v. Shelby Mut. Ins. Co.*, 390 So. 2d 325, 326 (Fla. 1980)). In other words, “the purpose of a CGL policy is to provide protection for personal injury or for property damage caused by the completed product, but not for the replacement and repair of the product.” *Id.* at 1261. Florida law typically looks to the surety for the costs of replacement or repair of a defective product.

Similarly, in *Auto Owners Ins. Co. v. Marvin Dev. Corp.*, 805 So. 2d 888 (Fla. 2d DCA 2001), a development company contracted with a buyer to sell the buyer a lot and build a home on it. *Id.* at 890. After construction was completed, cracks formed in the home allegedly due to the home being constructed on pockets of underground debris. *Id.* Auto Owners insured the development company under commercial general liability policies. *Id.* Auto Owners argued that the damage was not covered under the CGL policy. *Id.* However, an exclusion in the policy, when read in the context of the entire policy, eliminated coverage for claims of bodily injury and property damage arising after Marvin Development completed its work. *Id.* at 891. The court found that the

“absence of allegations in the [the buyer’s] underlying complaint to bring the claim within the coverage of the policy results in Auto-Owners not having a duty to defend against the claim.” Id.

In U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871 (Fla. 2007), the Florida Supreme Court analyzed post-1986 standard CGL policies in connection with claims relating to defective construction. The Court concluded that because the CGL policy does not define 'accident', the term includes not only "accidental events," but also faulty workmanship that is "neither expected nor intended" from the standpoint of the insured. The Court also held that defective work damaging an otherwise non-defective part of the project has caused "physical injury to tangible property" and constitutes 'property damage' under the policy. Id. at 888.

The Court found that the post-1986 CGL policy exclusions do not preclude coverage for damage to a completed project caused by a subcontractor's faulty workmanship. The court noted that the “faulty workmanship exclusion” does not apply to property damage included in the “products-completed operations hazard,” and that the “your work” exclusion contains an express exception for subcontractor work. Id. at 890. For example, if a contractor is sued because a window is allegedly incorrectly installed, causing a leak, the policy would cover not only consequential damages but also repair and replacement of the window if the work was done by a subcontractor. Thereafter, the same Court, in Auto-Owners Insurance Co. v. Pozzi Window Company, 984 So. 2d 1241 (Fla. 2008), confirmed that “the mere inclusion of a defective component, such as a defective window or the defective installation of a window, does not constitute property damage unless that defective component results in physical injury to some other tangible property... Accordingly, if the claim in this case is for the repair or replacement of windows that were defective both prior to installation and as installed, then that is merely a claim to replace a “defective component” in the project...Because the Subcontractor's defective installation of the defective windows is not itself “physical injury to tangible property,” there would be no “property damage” under the terms of the CGL policies. Accordingly, there would be no coverage for the costs of repair or replacement of the defective windows.” Id. at 1248. However, “coverage would exist for the cost of repair or replacement of the windows because the Subcontractor's defective installation caused property damage.” Id. at 1249.

In the recent decision, Nationwide Mut. Fire Ins. Co. v. Advanced Cooling & Heating, Inc., 126 So. 3d 385, 387 (Fla. Dist. Ct. App. 2013), the 4th DCA relies on the Pozzi Window holding quoted above to find that Nationwide had no duty to defend a counterclaim alleging installation of a compressor in an unworkmanlike manner, resulting in a leak in the air conditioning system. Id. at 388. Specifically, the Advanced Cooling court found no duty to defend because the “customer’s faulty workmanship claim alleged that Advanced installed the compressor in an unworkmanlike manner, resulting in a leak in the air conditioning system causing a physical injury to tangible property—the compressor ... [but that the claim] did not allege property damage to some tangible property other than the air conditioning unit itself.” Id.

However, in Pozzi Window, the court held that “if the claim is for the repair or replacement of windows that were not initially defective but were damaged by the defective installation, then there is physical injury to tangible property ... because the windows ... were not themselves defective, and were damaged as a result of the faulty installation ... [and] thus, coverage would

exist for the cost of repair or replacement of the windows because the Subcontractor's defective installation caused property damage." Auto-Owners Ins. Co., 984 So. 2d at 1249. With this, it seems that under Pozzi Window law, the Advanced Cooling case would turn on whether the compressor was actually faulty prior to installation or if the installation caused the damage to the compressor. The Advanced Cooling court is not clear as to whether the compressor was defective prior to installation, but does state that the leak in the compressor after the installation does not constitute the property damage necessary for there to be a duty to defend. Advanced Cooling, 126 So. 3d at 389. If the compressor was not initially defective before installation, then the Advanced Cooling court may have misinterpreted the Pozzi Window decision. With this, Florida law on CGL coverage remains muddled and parties should be wary of the Advanced Cooling decision until the law in Florida becomes more settled.

## **XVI. Recoverable Damages**

### **XVI-A: Breach of Construction Contract**

In a case involving the breach of a construction contract, the recognized measure of damages is the reasonable cost of performing construction and repairs in conformance with the original contract's requirements. This figure will also include relocation and financing costs, engineering and architectural fees reasonably necessary to accomplish construction. The non-defaulting party bears the burden of showing actual expenditures occasioned by the breach, and the defaulting party then has the burden to show the unreasonableness of these expenditures. Centex-Rooney Constr. Co., Inc. v. Martin County, 706 So. 2d 20, 27 (Fla. 4<sup>th</sup> DCA 1997). In other words, "the rule in Florida is that when a contractor wrongfully breaches a construction contract, or abandons the construction, leaving it uncompleted, the owner is entitled to an award of the cost of completing the work in conformity with the contract and specifications, including the actual expenditures made in good faith as necessary to complete the job." Young v. Johnston, 475 So. 2d 1309, 1313 (Fla. 1<sup>st</sup> DCA 1985).

### **XVI-B: Builder's Claims**

In a builder's claim for breach of a construction contract, the damages are measured either by *quantum meruit* (the value of the actual work performed), or the builder's lost profits together with the reasonable cost of labor and materials incurred in good faith in the course of partial performance of the contract. Brooks v. Holsombach, 525 So. 2d 910, 911 (Fla. 4<sup>th</sup> DCA 1988). The percentage of completion of the project is not a proper method for calculating damages. Id. A contractor may establish quantum meruit damages by showing "those damages that would put him in the same position that he was [in] immediately prior to the making of the agreement, in which case the contractor's measure of damages is the reasonable value of the labor and services rendered, and materials furnished." Puya v. Superior Pools, Spas & Waterfalls, Inc., 902 So. 2d 973, 976 (Fla. 4<sup>th</sup> DCA. 2005) (quoting Ballard v. Krause, 248 So. 2d 233, 234 (Fla. 4<sup>th</sup> DCA 1971)). A contractor may prove lost profit damages "by showing the total cost and expenses of labor, services and materials necessary to perform the contract and then deducting that sum from the contract price." Ballard v. Krause, 248 So. 2d 233, 234 (Fla. 4<sup>th</sup> DCA 1971).

### XVI-C: Owner's Claims

When a contractor wrongfully breaches a construction contract for the construction of a home, or abandons construction, leaving it uncompleted, the owner is entitled to an award of the cost of completing the work in conformity with the contract and specifications, including actual expenditures deemed in good faith to be necessary to complete the job. Am. Structural Sys., Inc. v. R. B. Gay Constr. Co., 619 So. 2d 366, 366 (Fla. 1<sup>st</sup> DCA 1993); *See also* Mole v. First Fed. Sav. & Loan Ass'n, 674 So. 2d 144, 145 (Fla. 5<sup>th</sup> DCA 1996). The burden is upon the owner to show that the construction of the home was completed at a reasonable cost, or in good faith, in order for the owner to recover damages for loss of the bargain from the builder who breaches the contract. The amounts actually expended must be proven with a reasonable degree of certainty. Young v. Johnston, 475 So. 2d 1309, 1313 (Fla. 1<sup>st</sup> DCA 1985). The Florida Supreme Court has adopted Section 346 (1)(a) of the Restatement (First) of Contracts (1932) as the measure of damages for the breach of a construction contract. Roseman Holdings, Ltd. v. Hourihan, 414 So. 2d 1037, 1039 (Fla. 1982). That section states as follows:

- A. For defective or unfinished construction, the contracting party can obtain a judgment from the builder for either:
  - 1. The reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste; or
  - 2. The difference between the value that the product contracted for would have had and the value of the performance that has been received by the Plaintiff, if construction and completion in accordance with the contract would involve unreasonable economic waste.

In addressing breach of construction contracts, under Florida law, the measure of damages is the difference between what it would have cost to perform the contract, and the contract price had it been entirely executed. In estimating the cost of performance, the price of materials, labor, etc., at the time of the breach will govern, without regard to subsequent fluctuations. The elements of cost should be ascertained from reliable sources, from those having experience in the field, and not from speculative opinions. Pullum v. Regency Contractors, Inc., 473 So. 2d 824, 827 (Fla. 5<sup>th</sup> DCA 1985).

### **XVII. Statutory Warranties**

Florida Statute §718.203 creates statutory warranties applicable to condominiums. The statute grants the buyer an implied warranty of fitness and merchantability from the developer, and grants the developer an implied warranty of fitness from the contractor, subcontractors, and suppliers. The Supreme Court of Florida has stated that “the guarantee established in [§718.203]

applies to defects that occur during the lifetime of the warranty, i.e., within three years of the date of completion of construction of the condominium or improvement.” Charley Toppino & Sons v. Seawatch at Marathon Condominium Ass'n, 658 So. 2d 922, 924 (Fla. 1994). Furthermore, courts have also addressed the distinction between subsections (1) and (2) of the statute, stating “[t]he developer's implied warranty is a ‘warranty of fitness or merchantability for the purposes or uses intended’ whereas the contractor's implied warranty is a ‘warranty of fitness as to the work performed or material supplied.’” Leisure Resorts v. Frank J. Rooney, 654 So. 2d 911, 914 (Fla. 1995). The court in Leisure went on to state that “[t]o be in compliance with the section 718.203(2) implied warranty of fitness, the contractor must provide work and materials which conform with the generally accepted standards of workmanship and performance of similar work and materials meeting the requirements specified in the contract.” Id.

### **XIII. Chapter 558 Prelitigation Notice and Right to Cure Statute**

#### *XIII-A: Florida Statute § 558.004 [Notice and Opportunity to Repair]*

§ 558.004 requires a claimant bringing a construction defect action to, at least 60 days before filing any action, serve written notice of the claim on the contractor, subcontractor, supplier, or design professional. The notice must describe the claim in “reasonable detail sufficient to determine the general nature of each alleged construction defect and a description of the damage or loss resulting from the defect.” Once notice is served, the person receiving the notice has 30 days to inspect the property (or 50 days after service of the notice of claim involving an association representing more than 20 parcels). If destructive testing is necessary, the person must notify the claimant in writing.

Within 10 days after service of the notice of claim, or within 30 days after service of the notice of claim involving an association representing more than 20 parcels, the person initially served with a section 558.004 notice of claim may serve a copy of the notice of claim to each contractor, subcontractor, supplier, or design professional whom it reasonably believes is responsible for each defect specified in the notice of claim and shall note the specific defect for which it believes the particular contractor, subcontractor, supplier, or design professional is responsible. The notice described in this subsection may not be construed as an admission of any kind.

Furthermore, within 45 days after receiving the notice of claim, or within 75 days after service of a copy of the notice of claim involving an association representing more than 20 parcels, the person who received notice must serve a written response to the claimant. The written response must provide:

- (a) a written offer to remedy the alleged construction defect at no cost to the claimant, a detailed description of the proposed repairs necessary to remedy the defect, and a timetable for the completion of such repairs;
- (b) a written offer to compromise and settle the claim by monetary payment, that will not obligate the person’s insurer, and a timetable for making payment;
- (c) a written offer to compromise and settle the claim by a combination of repairs and monetary payment, that will not obligate the person’s insurer, that includes a detailed

description of the proposed repairs and a timetable for the completion of such repairs and making payment;

(d) a written statement that the person disputes the claim and will not remedy the defect or compromise and settle the claim; or

(e) a written statement that a monetary payment, including insurance proceeds, if any, will be determined by the person's insurer within 30 days after notification to the insurer by means of forwarding the claim, which notification shall occur at the same time the claimant is notified of this settlement option, which the claimant can accept or reject.

If the person receiving the notice fails to engage one of the aforementioned responses, the claimant may proceed with the action. Lastly, under section 558.004(10), the mailing of the written notice tolls the applicable statute of limitations for time periods which are specified in the statute. *See also* Saltponds Condo. Ass'n v. McCoy, 972 So. 2d 230, 233 (Fla. 3d DCA 2007).

It is important to note that this is only an overview of the statute and does not contain all details of the statute.

#### XIII-B: Case Law Interpreting § 558.04

The court in J.S.L. Constr. Co. v. Levy, 994 So. 2d 394 (Fla. 3d DCA 2008) discussed § 558.04 in some detail. In the case, the Plaintiffs gave the contractor notice "expressing their intent to make a claim that lightweight concrete was missing from the roof of their home." The Levys also advised J.S.L. that their investigation was continuing. On the eve of trial, however, the Levys attempted to amend their complaint to allege the defendant was liable for the cost to replace the entire roof. The court looked to the statutory notice provided to J.S.L. regarding the missing lightweight concrete and found that it did not state that the Levys were seeking replacement of their roof as a consequence of the missing lightweight concrete. Consequently, the court stated, the plaintiffs "should not have been allowed to testify about defects other than the missing lightweight concrete, and [the plaintiff's] \$42,387 contract for replacement of the roof should not have been admitted into evidence."

In Hebden v. Roy A. Kunnemann Constr., Inc., 3 So. 3d 417 (Fla. 4th DCA 2009), a contractor sued homeowners for breach of contract after the homeowners withheld their final draw payment. The homeowners gave the contractor the written notice required by section 558.004 in connection with a counterclaim alleging that the contractor's work was defective. In response, the contractor indicated it would make certain repairs to the home. The trial court found that the homeowners improperly denied the contractor access to the interior of the residence to cure the defects. The appellate court held that the homeowners' failure to allow access was tantamount to a rejection of the contractor's settlement offer. The contractor did not move to abate the action to require the homeowners to comply with the 'written notice requirement' in §

558.004(7) by rejecting the offer in writing. The court held that the homeowners' failure to strictly comply with the notice statute did not forfeit their right to offset damages.

### **XIX. Chapter 558 Design Professionals' Contractual Limitation on Liability**

§558.0035 limits the liability of design professionals employed by a business entity or agent of the business for claims relating to errors and omissions of his/her work product. A design professional employed by a business entity or agent of the business is not individually liable for damages resulting from negligence occurring within the course and scope of a professional services contract if: (1) there is a contract between the business entity and the claimant; (2) the individual design professional is not named as a party to the contract; (3) the contract includes a clause in over-sized font stating that "pursuant to this section, an individual employee or agent may not be held individually liable for negligence; (4) the business entity has professional liability insurance required under the contract; and (5) all of the claimant's damages are purely economic and do not extend to personal injuries or property not subject to the contract. Fla. Stat. §558.0035 (2013).

§558.0035 defines "business entity" as any corporation, limited liability company, partnership, limited partnership, proprietorship, firm, enterprise, franchise, association, self-employed individual or trust, doing business in Florida.

Although susceptible to constitutional challenge, this new law will supersede existing case law such as Witt v. La Gorce Country Club, Inc., 35 So. 3d 1033 (Fla. 3d DCA 2010), where the Third DCA ruled that an individual design professional was not protected by the contractual limitation of liability in the contract between an owner and a business entity.

It is not yet known how the courts will interpret the provisions of §558.0035.

### **XX. Florida Lien Law**

Note that this is a broad outline of Florida's Lien Statute and corresponding case law. Florida's lien law is very detailed and complex. In the words of one jurist, "[t]here can be no more confusing statute in Florida than the one on liens under Chapter 713. The frequent impracticality of its application in the field, coupled with ill conceived, confusing, patchwork amendments, all topped off by conflicting appellate decisions, have all combined to make life miserable for judges, lawyers, legislators and the vitally affected construction and lending industries." (Judge Gavin Letts, American Fire & Casualty Company v. Davis Water and Waste Industries, Inc., 358 So. 2d 225 (Fla. 4<sup>th</sup> DCA 1978))

Given the detailed and complex nature of Florida's law, consultation should be made with counsel on the specifics of any lien issue.

### What is the purpose of the lien laws?

- Lien laws provide a procedure by which claimants may perfect security rights in the property they have improved.
- The Florida Statutory Code provides specific procedures which the improver must follow in order to have a valid lien. In order to obtain a construction lien upon an owner's property, a claimant must strictly comply with the law.

### Who is entitled to claim a lien?

1. Contractors: means a person other than a materialman or laborer who enters into a contract with the owner of real property for improving it, or who takes over from a contractor as so defined the entire remaining work under such contract. The term "contractor" includes an architect, landscape architect, or engineer who improves real property pursuant to a design-build contract authorized by § 489.103(16). Fla. Stat. § 713.01.
2. Liens for Professional Services: Architects, Landscape Architects, Interior Designers, Surveyors, Mappers, and Engineers are entitled to a lien for the money owing to him or her for his or her professional services if the professional has a direct contract and, in the practice of his or her profession shall perform services, by himself or herself or others, in connection with a specific parcel of real property. Fla. Stat. § 713.03.
3. Subcontractors: Note that a subcontractor is deemed a contractor for lien law purposes if they contract directly with the owner.
4. Suppliers: Nurseries furnishing trees, shrubs, bushes or plants to a specified parcel of real property are afforded lien rights under §713.01(13). However, a supplier cannot perform any labor or installation of the materials. Otherwise, they constitute a subcontractor.
5. Assignees: Pursuant to Fla. Statute § 713.01(17), lien rights are freely assignable, as the definition of "lienor" includes successors in interest. Furthermore, the right to enforce construction liens survives the death of a lienor and may be pursued by the lienors personal representatives. Hiers v. Thomas, 458 So. 2d 322 (Fla. 2d DCA 1984).

### The Lien Process

#### Notice of Commencement

- §713.13 – Notice of Commencement
  - §713.13 requires an owner or the owner's authorized agent, before actually commencing to improve any real property, to record a notice of commencement in the clerk's office and to post a copy at the worksite. The statute also provides the information the notice must include and a form the owner may use.

#### Notice to Owner

- When is a "Notice to Owner" required?
  - §713.05 allows for the creation of a lien where the lienor is in privity with the owner. See Thompson v. Jared Kane Co., 872 So. 2d 356, 358 (Fla. 2d DCA 2004).
  - §713.06 allows for the creation of a lien where the lienor is not in privity with the owner of the property. However, the statute requires the lienor give notice to the owner setting



forth certain information, which is listed in the statute. *See also V L Orlando Bldg. Corp. v. Skilled Servs. Corp.*, 769 So. 2d 526, 527 (Fla. 5th DCA 2000). The statute also provides a form the lienor may use.

- Note that if there is privity of contract between the owner and the lienor, the notice requirements do not apply. However, if there is no contract between the owner and the lienor, then the failure to comply with certain notice requirements under the statutes would be fatal to the lienor's lien foreclosure action. *See Thompson v. Jared Kane Co., Inc.*, 872 So. 2d 356, 359-60 (Fla. 3d DCA 2004).
- If a "Notice to Owner" is required, what are the time limits?
  - A Notice to Owner is generally considered to be "timely" when the claimant serves it:
    1. before commencing to supply services or materials, or
    2. after commencing to supply services or materials, but before one of the following events occurs:
      - a. 45 days elapse from the first furnishing of services or materials; or
      - b. The contractor presents the owner with a final affidavit and the owner disburses the final payment.
- How does a lienor properly serve a "Notice to Owner?"
  - The Notice to Owner shall be served on the owner.
  - Note that §713.18 provides that proper service is obtained through personal delivery or certified mail. However, if neither of those methods can be accomplished, the Notice to Owner may be posted on the premises.

### Claims of Lien

- §713.08 states that, as a prerequisite to perfecting a lien, a lienor must record a claim of lien. The statute lists the information which must be included in the claim. The statute also provides a standard form that may be used by the lienor.
- Who can draft a claim of lien?
  - The claim of lien acts as an encumbrance on the property until it is satisfied. Because of the substantial rights which are determined by these documents, the drafting of them must be completed with the assistance of a licensed attorney. For the same reason, we agree with the Standing Committee that the drafting of a notice of commencement form constitutes the practice of law.  
Fla. Bar Re Advisory Opinion-Activities of Cmty. Ass'n Managers, 681 So. 2d 1119, 1123 (Fla. 1996).
- Where does the Claim of Lien have to be recorded?
  - A claim of lien must be recorded in the clerk's office in the county in which the property is located.
- How should a lienor serve the Owner with the Claim of Lien?
  - The claim of lien shall be served on the owner. Failure to serve any claim of lien in the manner provided in §713.18 before recording or within 15 days after recording shall render the claim of lien voidable to the extent that the failure or delay is shown to have been prejudicial to any person entitled to rely on the service.

- Note that §713.18 provides that proper service is obtained through personal delivery or certified mail. However, if neither of those methods can be accomplished, the Claim of Lien may be posted on the premises.
- When must the Claim of Lien be recorded?
  - The claim of lien may be recorded at any time during the progress of the work or thereafter but not later than 90 days after the final furnishing of the labor or services or materials by the lienor.
  - Note that there is an exception which is only applicable when the original contractor either abandons the improvement or has his or her contract terminated.

*Bringing an Action to Enforce a Lien*

- What are the time limits for bringing an action?
  - According to §713.22, after a claim of lien against an owner is recorded pursuant to §713.08, the lien is valid for one year, unless within that time an action to enforce the lien is commenced in a court of competent jurisdiction.
  - An owner may “shorten” the one-year time period if the owner files a notice of contest of lien pursuant to §713.22(2). Such a notice shortens the statute of limitations to “60 days after service of such notice.” See Pierson Constr., Inc., v. Yudell, 863 So. 2d 413, 415 (Fla. 4th DCA 2003).
  - The lien of any lienor upon whom such notice is served and who fails to institute a suit to enforce his or her lien within 60 days after service of such notice shall be extinguished automatically. See Id. at 415-16.
  - An owner may also file a complaint for an Order to Show Cause pursuant to §713.21(4) – Upon filing a complaint . . . the clerk shall issue a summons to the lienor to show cause within 20 days why his or her lien should not be enforced by action or vacated and canceled of record. Upon failure of the lienor to show cause why his or her lien should not be enforced or the lienor's failure to commence such action before the return date of the summons the court shall forthwith order cancellation of the lien.
  - An amended complaint foreclosing on a lien after the lien would otherwise expire is still timely if it arises from the same transaction as the timely filed original complaint for lien foreclosure. Wen-Dic Const. Co., Inc. v. Mainlands Const. Co., 463 So. 2d 1187 (Fla. 2d DCA 1985), reversed on other grounds.

**Summary:** Once a claim of lien is recorded, the lienor has one year to enforce the lien. However, an owner may elect to shorten the one-year time-limit by filing a notice of contest of lien. At that point, the lienor has 60 days after service of such notice to institute a suit to enforce the lien, or the lien will be extinguished automatically.

- How does a contractor’s final affidavit affect the time limits?
  - §713.06(3)(d)(1) provides that in order for a contractor in privity with the owner to be paid, he must submit to the owner an affidavit stating that all lienors under his direct contract have been paid in full or, if not yet paid, showing the name of each lienor who has not been paid in full and the amount due or to become due each for labor, services,

or materials furnished. The sub-section also contains a sample form the contractor may use.

- Further, the statute appears to make the delivery of the affidavit a condition precedent to filing a suit – “The contractor shall execute the affidavit and deliver it to the owner at least 5 days before instituting an action as a prerequisite to the institution of any action to enforce his or her lien under this chapter, . . .” Pierson Constr., 863 So. 2d at 416 (quoting Fla. Stat. §713.06).
- Case law excuses the failure to file a contractor’s affidavit prior to filing suit to enforce the lien; however, if the 60-day time-period from §713.22(2) is applicable, the filing of the affidavit must have been accomplished within the 60-day limitation period of §713.22(2). See Pierson Constr., 863 So. 2d at 416 (citing Holding Elec., Inc. v. Roberts, 530 So. 2d 301, 303 (Fla. 1988) (stating that if a contractor’s affidavit is not served on the owner five days before commencing an action, it must still be served within the applicable “statutory limitation period”).

### Fraudulent Liens

- What are the effects of a fraudulent lien?
  - §713.21 specifically states that “[i]t is a complete defense to any action to enforce a lien under this part, or against any lien in any action in which the validity of the lien is an issue, that the lien is a fraudulent lien; and the court so finding is empowered to and shall declare the lien unenforceable, and the lienor thereupon forfeits his or her right to any lien on the property upon which he or she sought to impress such fraudulent lien.”
  - The section also states, however, that minor mistakes, errors, or a good faith dispute as to the amount due does not constitute a willful exaggeration.
- What constitutes “fraud” in this context?
  - §713.31(2)(a) states that fraud exists when one of the following is shown:
    - 1) The lienor has willfully exaggerated the amount for which such lien is claimed;
    - 2) The lienor has willfully included a claim for work not performed upon or materials not furnished for the property upon which he or she seeks to impress such lien; or
    - 3) The lienor has compiled his or her claim with such willful and gross negligence as to amount to a willful exaggeration.
      - A lienor's consultation with counsel prior to filing a claim of lien tends to establish that the lienor acted in good faith. Therefore, in determining whether a lienor has willfully exaggerated the amount stated to be due in a claim of lien, the lienor's consultation with independent counsel prior to filing the claim of lien is a factor to be considered along with other pertinent factors.  
Sharrard v. Ligon, 892 So. 2d 1092, 1097 (Fla. 2d DCA 2004).
- What are the owner’s/other damaged party’s options when a fraudulent lien has been filed?
  - §713.31(2)(c) states that “[a]n owner against whose interest in real property a fraudulent lien is filed, or any contractor, subcontractor, or sub-subcontractor who suffers damages as a result of the filing of the fraudulent lien, shall have a right of action for damages occasioned thereby.”
  - The statute also allows the “prevailing party” to recover reasonable attorney’s fees and costs.

- Note that “prevailing party” is a legal term of art and does not necessarily mean the party who obtains a ‘net-positive’ judgment. See Trytek v. Gale Indus., 3 So. 3d 1194 (Fla. 2009).
- As to damages, the statute provides that the lienor shall be liable to the owner or other defrauded party who prevails in an action under this subsection in damages. Such damages “shall” include:
  - court costs;
  - clerk's fees;
  - a reasonable attorney's fee;
  - costs for services in securing the discharge of the lien;
  - the amount of any premium for a bond given to obtain the discharge of the lien;
  - interest on any money deposited for the purpose of discharging the lien; and
  - punitive damages in an amount not exceeding the difference between the amount claimed by the lienor to be due or to become due and the amount actually due or to become due.
- Are there criminal charges for filing a fraudulent lien?
  - Yes – per §713.31(3), any person who willfully files a fraudulent lien commits a third degree felony, punishable by up to five years imprisonment and up to a \$5,000 fine.
  - Also, whenever an indictment is filed against a contractor, a subcontractor, or a sub-subcontractor which charges that person with a violation of §713.31, the state attorney is required to notify the Department of Business and Professional Regulation, who will perform their own investigation.

**This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.**