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Top Ten Living Space Trends for 2017

CHAPTER 558
Notice of Construction Defects

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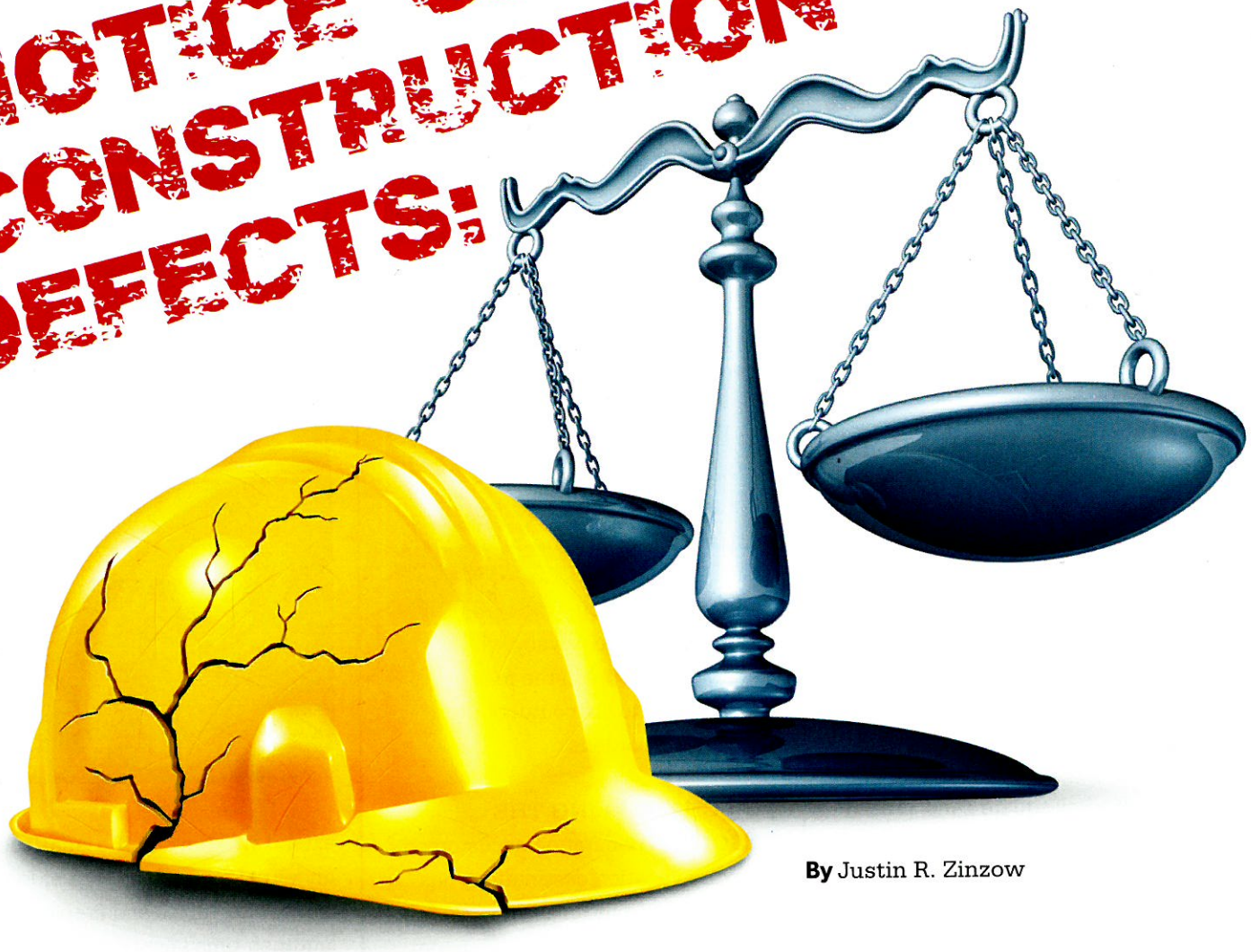

By Justin R. Zinzow

FIRST STEPS, MISSTEPS, AND STEPS TO PROTECT YOURSELF

If you build it he will come. For some, this phrase triggers iconic images of a baseball field being built on an Iowa corn farm in the movie *Field of Dreams*. For others, it is a sales or business growth mantra, with the "he" being the customer, and the "it" being the structure or the business culture or vision. Sadly, for still others, the "he" is the plaintiff's lawyer, and that lawyer is coming for you on behalf of a property owner client. You may be a developer, a general contractor, subcontractor, design professional or material supplier; in any case, you are or may be a target.

If you have built or participated in the building of a community or a structure and have received the dreaded Chapter 558 Notice of Construction Defects, your first instinct is to contact your insurance agent and insurer immediately. You provide them the Notice to trigger insurance coverage and gain assistance from your insurer. Your insurer should assign an adjuster and one or more construction consultants to investigate the claims on your behalf in the hopes of resolving them without litigation. However, winds of change are once again upon the construction industry, and this time those winds strike at the very essence of the insurance policy you purchased to protect yourself.

Chapter 558, Florida Statutes, was designed as an alternative dispute resolution mechanism. It was implemented because construction defect lawsuits were sharply on the rise, and trade associations believed that many such lawsuits were frivolous, or that valid claims could be resolved before lawsuit filing if only there were some mandatory alternative dispute resolution mechanism available. Out of this great idea Chapter 558 was born. If a property owner believes it has suffered from design, construction, or material defects, it cannot file a lawsuit or claim in arbitration until it has first attempted to resolve the problem under Chapter 558. This Chapter requires the owner to provide notice of the defects and an opportunity to inspect and cure. In 2015 the legislature enhanced the Chapter, improving protections for those in the construction industry. For example, a vague notice is no longer sufficient. The defects described must be based upon at least a visual inspection of the affected area, and the notice must identify the location of each defect in sufficient detail such that the contractor or others can locate the defect without undue burden. The process is now confidential. Owner maintenance failure discussions can now take center stage. The owner must provide, upon request, a copy of all maintenance records, which can then be used to facilitate an open and honest discussion concerning the real cause of the damage. Perhaps most ironic in light of this article, the property owner must now allow insurers to participate in the process.

Despite the improved reference to insurers in the Chapter, a federal court has recently determined that a notice of construction defects under Chapter 558 did not trigger a Crum & Forster Specialty insurance policy or the insurer's duty to assign counsel, investigate, or defend. This left, in that case, the general contractor for a high rise condominium no choice but to hire its-own counsel at its-own expense. The court's decision rested primarily upon the policy's language. Lest you stop reading here because you are not insured by Crum & Forster, you should know that American Insurance Association and the Florida Insurance Council agree with Crum & Forster's legal position and have filed a supporting legal brief. The implications of this decision therefore reach far beyond a single insurer.

Insurance policies are written on one of a number of industry standard forms. Each form has important differences. The Crum & Forster form did not require the insurer to step in until a "suit" arose. The policy defined suit to mean "a civil proceeding [such as arbitration or litigation or] . . . [a]ny other alternative dispute resolution proceeding in which such damages are claimed." The court determined that the Chapter 558 notice and process is not a civil proceeding even though its express purpose is to either prepare the parties for litigation or resolve matters before litigation or arbitration. The court also determined that Chapter 558 is not an alternative dispute resolution proceeding even though the Chapter contains express legislative intent indicating that the law was created because "it is beneficial to have an alternative ➤

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method to resolve construction disputes that would reduce the need for litigation." The court's decision turned on an archaic interpretation of the word "proceeding." The contractor appealed the decision to a federal appellate court, and the federal appellate court asked the Florida Supreme Court to issue an opinion clarifying Florida Law. It is unclear whether the Florida Supreme Court will weigh in, and if it does, how the federal appellate court will ultimately decide the issue.

The net result is that the contractor is left to fend for itself, likely to lose the best and most time and cost effective means of resolving a claim: before a lawsuit or arbitration proceeding is commenced. The insurance associations referenced above have taken the very opposite position. They claim that it is not in the contractor's best interest for the insurer to assist in dispute resolution, and that an insurer's participation in pre-suit dispute resolution will "fuel an insurance crisis in the state by dramatically increasing the cost of insurance . . . and limiting its availability." This author, for one, says "nonsense!" The costs an insurer will incur to defend a lawsuit will almost always exceed the cost of resolving a claim before a lawsuit is ever filed. Requiring an insurer to participate in the pre-suit dispute resolution is far more likely to decrease insurance premiums by reducing overall litigation exposure than to raise them.

While the winds of change are blowing there are certain precautions you should take:

- Evaluate your insurance policy now with a Board Certified Construction law attorney. Not all insurance policies are alike. Whether you have dispute resolution coverage or not will turn on the language of your policy. There may be other policies available to you which can provide better coverage without increased premiums.
- If you receive a notice of construction defects under Chapter 558 or otherwise:
  - Immediately send it to your insurance agent and the insurer. Failure to timely notify an insurer can void your coverage for that claim.
  - Immediately send it to your construction law attorney to evaluate for coverage or coverage traps.
- If your carrier denies coverage or refuses to participate in the dispute resolution process, keep your construction law attorney on speed dial. There are many missteps you can make during that process, from failure to preserve evidence, to prejudicing the carrier, both of which can void your coverage once a lawsuit is filed.

If you do not have a relationship with a Board Certified Construction Law attorney you should get to know one or more. You should not rely solely on the attorney your insurance carrier may assign to you. Carrier-assigned attorneys almost never specialize in construction law, but rather, handle the gamut of issues ranging from slip and fall to auto accident claims. Carrier-assigned lawyers also do not owe you the same duties a privately-retained attorney does. For example, carrier assigned counsel may only provide advice about defending a covered claim (avoiding advice on how to prosecute your lien foreclosure claims), and cannot advocate on your behalf against your insurer if coverage is limited or denied, or if the carrier wishes to take certain action with which you disagree.

As you build your field of dreams be mindful that we live in a litigious society. By seeking appropriate counsel from experienced professionals you can be prepared to minimize risk when "he comes" knocking.

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