

# CONSTRUCTION NOTES

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STEVEN B. LESSER, CHAIR

## Recent Developments in Construction Law



## LETTERS OF INTENT: THE AGREEMENTS TO AGREE, MAYBE



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Letters of Intent (“LOI”) are agreements to enter into a contract which, unlike most agreements, are often unenforceable. Nevertheless, they can be a useful tool for construction projects, if they are used strategically and with an understanding of their legal limitations.

Many times a LOI is written with disclaimer language that says, for example: “No contract for the project is to be formed by this letter...” Under Florida law, courts will generally not conclude that a binding and enforceable contract was created by a LOI that states that it is not intended to be a contract. However, courts may find the requisite intent to form a binding contract by

examining other language in the LOI, as well as the surrounding circumstances and the context of negotiations.

So, what can be done at the drafting stage to make the terms of a LOI enforceable? Use specific language to identify the terms that the parties intend to agree to under the LOI. Then, state that the agreed “terms” are intended to be enforceable, regardless of whether the parties ever finalize any other formal written agreement for the project. For example, in a LOI for preliminary project work, after clearly describing the work to be performed and the price for it, the parties could include a clause similar to the following:

This letter is not a contract and is not binding, with the exception of contractor’s agreement to perform the work outlined in this letter for the stated amounts which are to be paid by the owner in accordance with the terms set forth herein. It is understood that this

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## LETTERS OF INTENT: THE AGREEMENTS TO AGREE, MAYBE

*continued*

letter is not considered to be a final or complete agreement to perform all work at the project without a subsequent writing executed by the owner and contractor. Therefore, this letter is not a comprehensive statement of the owner's or contractor's respective rights, duties and obligations with respect to the work at the project.

With careful drafting, a LOI could be very useful in the early stages of a project. For example, before working out the details for a new construction project, an owner and contractor might know of discrete work, such as tree relocations or other miscellaneous site work, that could be performed early for a set price. Getting that work performed before the main project work, pursuant to a

LOI, could be very helpful in keeping the project on track to be completed by its intended completion date. Other times, a LOI could be used for ordering specially-fabricated items early that have long lead times or to avoid some expected material price increase. Whatever the circumstances, a LOI should be drafted carefully with legal guidance.

In conclusion, if you have time to finalize a formal contract with all of the details necessary for the entire project, do not bother with a LOI. However, if you need to get something accomplished before the full contract is finalized, a LOI could be the means you need, as long as it is properly drafted. ■

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## CHAPTER 558: WHAT YOU NEED TO KNOW



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Chapter 558, Florida Statutes, known as the construction defect and notice statute, was originally enacted by the legislature in 2003. The statute was originally applicable only to residential structures, but is now applicable to both residential and commercial projects. The statute has been amended almost every year. This year was no different.

This year's changes took effect on October 1, 2009. Below is a brief discussion of some of this year's changes.

First, the statute now provides a definition of the term "completion of a building or improvement" to include the issuance of a Certificate of Occupancy (or equivalent), or substantial completion.

Second, a party initiating the Chapter 558 process does so by serving the "Notice of Claim" on the parties believed to be responsible for the alleged defects. The statute previously did not define how the Notice of Claim would be served, but it is now required to be

served by certified mail, hand delivery or courier with evidence of delivery.

Third, the Notice of Claim is not required for a project that has not been completed. This is important for contractors to know. This change means that if a project is ongoing and disputes arise between the Owner and the Contractor as to alleged defects, the statute does not apply. The parties are allowed to proceed with the dispute resolution process in the contract existing between them. Typically, this will be through the Architect, Independent Decision Maker, arbitration or pre-suit mediation.

Fourth, the trigger for the dates of compliance with the statute is now the date of service rather than receipt of the notice. This allows an Owner to begin counting the 75 day response time with more confidence, as he will know what date it was served, but may not know what date it was received. However, this poses a danger to contractors as the date of mailing needs to be carefully noted. It is that date, not the receipt date, which triggers the contractor's deadlines.

Fifth, there are changes to the destructive testing allowed under Chapter 558. A recipient of the Notice of Claim can hire someone to undertake destructive testing.

## CHAPTER 558: WHAT YOU NEED TO KNOW, *continued*

Previously, it was unclear whether the person actually doing the testing had any lien rights. The statute now makes it clear that no construction lien rights accrue for the party doing destructive testing, unless the owner contracts for the work.

Sixth, the statute allows for the exchange of discoverable information upon demand by the parties. However, no time frame was previously provided for the exchange. The statute now defines discoverable information to

include specifications, as-built plans, photographs and expert reports and requires such information to be exchanged within 30 days.

Finally, these provisions of Chapter 558 apply to all contracts for improvements entered into after October 1, 2009. As always, when entering a contract for construction work, or evaluating claims relating to prior construction work, it is important to know your rights and remedies under Chapter 558. ■

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## CASES OF NOTE

### *Important legal decisions that impact owners and construction professionals*



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***Trial court's disagreement with arbitrator's finding that subcontracts were legal is not a legally sufficient ground to set aside an arbitration award***

In *Commercial Interiors Corp. of Boca Raton v. Pinkerton & Laws, Inc*, 19 So. 3d 1062 (Fla. 5th DCA 2009) an interior design company sued a subcontractor in state court for breach of certain subcontracts by failing to pay monies owed in regard to the construction of a hotel. The matter was transferred to arbitration, at which time the subcontractor moved to dismiss the arbitration proceedings; claiming the subcontracts were illegal. The arbitrator denied this motion.

The subcontractor then filed a motion in state court to vacate the arbitrator's ruling. The trial court granted this motion, however, the appellate court reversed. Although the trial court may have disagreed with the arbitrator's decision as to the illegality of the subcontracts, this disagreement [i.e. any error of law committed by the arbitrator] was not a statutorily specified ground under Florida Statute § 682.13 to vacate the arbitrator's award.

***Contractor's failure to file counterclaim cause of action to foreclose its lien after being served with a Complaint to cancel the lien and Order to Show Cause results in discharge of the lien***

*Unnerstall v. Designerick, Inc.* 17 So. 3d 900 (Fla. 2d DCA 2009) involved a situation where the project owners filed an action to cancel a contractor's construction lien and for an order to show cause (under Fla. Stat. § 713.21). Although the contractor timely responded and asserted a counterclaim for breach of an oral contract, open account, and unjust enrichment, the contractor's counterclaim did not include a count to foreclose its construction lien. Consequently, the owners moved to discharge the lien, but the trial court denied this motion.

The appellate court, however, granted the owners' petition for certiorari, which it treated as a petition for mandamus. Recognizing that the language of the lien discharge statute requires that an action for lien enforcement be filed within twenty days or that cause be shown within that period why enforcement should not be commenced, the appellate court viewed the contractor's counterclaim for money damages as insufficient to preserve its lien rights. Consequently, the trial court's order denying the motion to discharge the lien was reversed and the trial court was directed to discharge the lien.

## CASES OF NOTE, *continued*

### *Limitation of liability clause in contract between geologist's company and owner does not limit liability against geologist in his individual capacity*

In *Witt v. LaGorce Country Club*, 35 So. 3d 1033 (Fla. 3d DCA June 9, 2010), a country club entered into a contract with a geologist's company for consulting services in connection with the irrigation of a golf course. Many problems arose during the design and construction of the project. The country club sued, among others, the geologist in an individual capacity.

The geologist argued that his liability was capped by the limitation of liability provision in his company's contract with the country club. The court, however, rejected this argument. Recognizing that a cause of action in negligence exists against an individual professional irrespective and independent of a professional services agreement, the court found that the limitation of liability provision was invalid and unenforceable as to the geologist individually.

### *Any failure by a homeowners' association to obtain proper notice for a meeting to obtain member approval to bring an action against a developer was not an affirmative defense to association's action for construction defects against the developer*

In *Lake Forest Master Community Ass'n, Inc. v. Orlando Lake Forest Joint Venture*, 10 So. 3d 1187 (Fla. 5th DCA 2009), a homeowner's association sued a developer for construction defects. The developer moved for summary judgment on various grounds, including that the association did not obtain the approval of its membership before commencing litigation in excess of \$100,000. See Fla. Stat. § 720.303(1). The trial court granted the developer's motion.

In reversing the trial court's summary judgment in favor of the developer on this issue, the appellate court stated that the association's failure to obtain proper notice of any required meeting for membership approval to sue did not provide the developer with an affirmative defense to the suit against it for construction defects.

### *Jury's finding that subcontractor's performance bond surety settled claim in bad faith constitutes a defense to surety's claim against subcontractor for indemnification*

In *Auto-Owners Ins. Co. v. Southeast Floating Docks, Inc.* 571 F.3d 1143 (11th Cir. 2009) a surety issued a performance bond to secure a subcontractor's performance of certain work on a concrete floating dock system. Issues arose during the project, including but not limited to, the responsibility for certain punch list work.

The subcontractor sued the general contractor for failing to pay the balance of funds claimed to be owed. The general contractor, in turn, sued the subcontractor and its surety for defective work. Ultimately, the surety paid the full amount of the subcontract performance bond to the contractor. Thereafter, the surety brought an action against the subcontractor to recover this payment.

The subcontractor contended that the surety settled the claim in bad faith and that this was a defense to the surety's claims against it. Among the issues considered in this respect were whether the surety (1) performed an unreasonable and inadequate investigation, (2) ignored the assessments of those who had been substantially involved with the case, (3) made demands for collateral upon the subcontractor that thwarted and undermined its ability to defend the case, (4) used an attorney that had a friendly relationship with and bias toward the contractor, (5) was more concerned with eliminating a bad faith claim against it, (6) engaged in secretive negotiations with the contractor, and (7) entered into a settlement with the contractor that released the surety but not the subcontractor.

At trial, the jury returned a defense verdict for the subcontractor. The trial court, however, granted the surety's motion for a new trial. On appeal, the court reversed the granting of a new trial and found that the trial court abused its discretion in doing so. The appellate court remanded the case for the trial court to enter judgment in accordance with the jury's verdict in favor of the subcontractor. ■

# NEWS & NOTES

## BECKER & POLIAKOFF ATTORNEYS IN THE NEWS

**Steven Lesser, Esq.** helped spearhead the statewide campaign in opposition to Senate Bill 1964 that would have created an exemption for design professionals from negligence suits filed by property owners. The bill was ultimately vetoed by Governor Crist.

**Steven Lesser, Esq., Lee Weintraub, Esq. and Herbert O. Brock, Jr., Esq.** received Florida “Super Lawyer” rankings, which is awarded to only five percent (5%) of the attorneys in Florida.

**William Strop, Esq. and Michelle Ammendola, Esq.** have been awarded board certification in construction law by the Florida Bar.

**Steven Lesser, Esq.** has been certified by the Florida Supreme Court as a Civil Circuit Mediator and has been appointed a Governing Committee member on the Forum on the Construction Industry.

**William Cea, Esq. and Mark Stempler, Esq.** authored “Fighting for Public Dollars: Procedures and Pitfalls for Protesting Government Bid Awards” which was published in the March 2010 edition of *The Florida Bar Journal*.

**Mark Stempler, Esq.** spoke to the Condominium and Homeowners Association of Indian River, Inc. (CHAIR) in Vero Beach, Florida on contracting for construction services.

**Lee Weintraub, Esq.** was recognized by the Florida Bar Real Property, Probate and Trust Law Committee for his role in creating and chairing the first three years of the statewide Construction Law Institute. Mr. Weintraub received the Committee’s annual service award.

**Lee Weintraub, Esq.** spoke about Florida’s lien law at the 2010 Construction Law Board Certification Review Seminar. Mr. Weintraub also spoke about the effects of the recession on construction defect claims at the MC Consultants Convention on Construction and Insurance.

**Herbert O. Brock, Jr., Esq. and Aaron J. Pruss, Esq.** spoke to the Grand Shores Management Group, Inc. on construction defect claims and Florida’s lien law.

**Sanjay Kurian, Esq. and John Cottle, Esq.** presented a webinar on the Gulf Oil Spill.

**Aaron J. Pruss, Esq.** spoke to the Sanibel-Captiva Chamber of Commerce on the Gulf Oil Spill and the British Petroleum claims process.

**Steven Lesser, Esq.** received the prestigious tier one ranking in the 2010 edition of Chambers USA; Americas Leading Lawyers for Business, in construction law. **Lee Weintraub, Esq.** and the Firm’s entire Construction Law practice group also received a tier two ranking in the 2010 edition of Chambers USA; Americas Leading Lawyers for Business.

**Herbert O. Brock, Jr., Esq.** was selected to speak at the fall 2010 ABA Forum on the Construction Industry. He spoke on lender liability for construction defects. ■

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Becker & Poliakoff's Construction Law Practice Group is well-known for its knowledge of the construction industry and its experience protecting the interests of its clients. Our construction attorneys represent clients in both transaction matters and legal disputes ranging from single and multi family dwellings to large commercial buildings, planned unit developments, retail, industrial and governmental projects.

*For more information, please contact Steven B. Lesser at [slesser@becker-poliakoff.com](mailto:slesser@becker-poliakoff.com).*



**We are pleased to announce the launch of our Construction Law Blog to help keep you informed, on a more regular basis, of news, cases and opinion impacting Florida's construction industry. We invite you to subscribe to this free service to stay up to date on the issues impacting your building, your project or your industry. We appreciate your interest and look forward to your feedback. Please visit [www.floridaconstructionlawauthority.com](http://www.floridaconstructionlawauthority.com) today!**

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