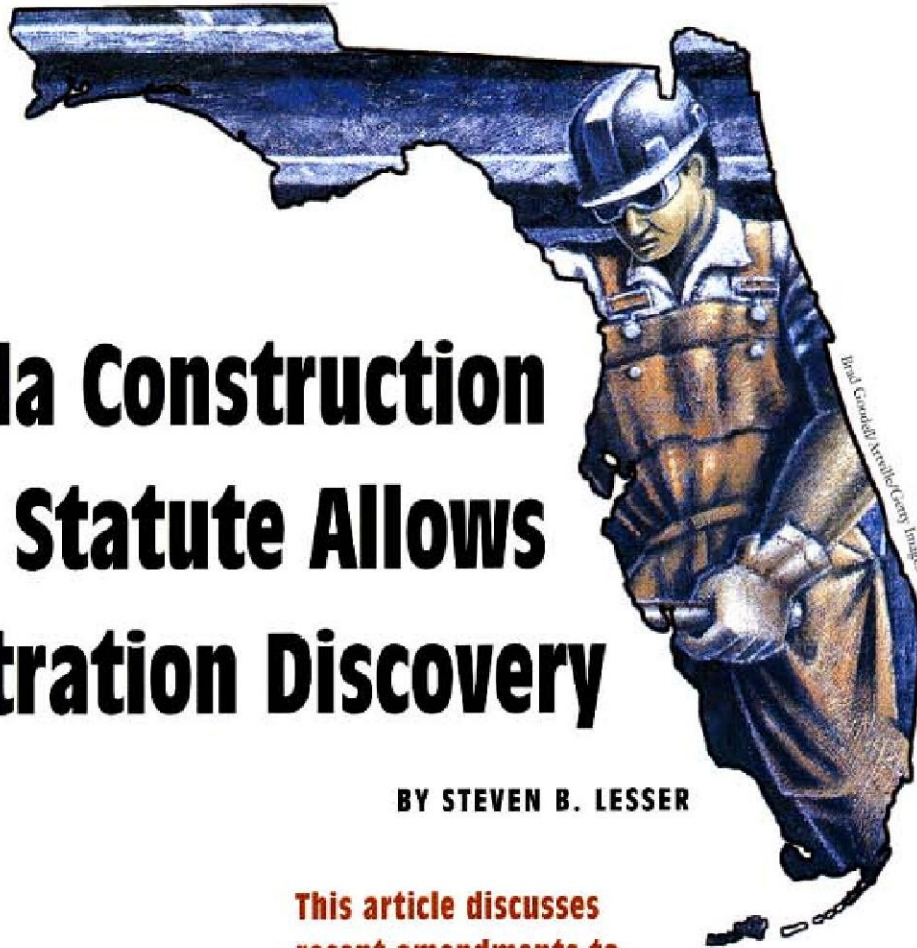


Florida Construction Defect Statute Allows Pre-Arbitration Discovery

BY STEVEN B. LESSER



This article discusses recent amendments to Florida's "notice" and "right-to-cure" statute which allow homeowners who wish to arbitrate construction defect disputes to discover documents from the opposing party prior to commencement of the proceeding. This is a significant development because parties engaged in arbitration are not entitled to discovery.

Parties to residential construction contracts in Florida can be required to exchange discoverable material prior to commencing an arbitration proceeding to resolve a homeowner's construction defect dispute. This is part of the innovative changes that were made by the 2004 amendment to Chapter 558 (Construction Defects) of the Florida Statutes.

Section 558.004, as amended last year, requires residential homeowners to provide contractors and other allegedly responsible parties with prior written notice and an opportunity to cure alleged defects

prior to filing a lawsuit or arbitration.¹ This is not a controversial change in the law. But what is new and likely to cause immense confusion is § 558.005(15), which requires a potential party to such a case, upon the written request of another party, to produce all "discoverable evidence," including expert reports, before arbitration is commenced.

Chapter 558, in which this new requirement is included, has been in force since July of last year.

Generally speaking, discovery as conducted in court is not permitted in arbitration proceedings. Discovery in arbitration is usually far more limited. In construction arbitration under the National Construction Industry Arbitration Rules of the American Arbitration Association (AAA), the parties' ability to obtain information from each other in an arbitration proceeding depends on whether they have reached an agreement on information exchanges, and whether the case proceeds under the AAA's "Fast Track" or "Regular Track" Procedures. In cases subject to the Fast Track Procedures (i.e., cases involving no more than \$75,000), the parties may only obtain copies of each other's exhibits for the hearing. Apart from this, Fast Track Rule F-7 provides that "there shall be no discovery, except as ordered by the arbitrator in extraordinary cases when the demands of justice require it."

In cases subject to the Regular Track Procedures (i.e., cases involving more than \$75,000 and where the disclosed claim or counterclaim is less than \$500,000), more information can be exchanged. Regular Track Rule R-22 provides that, in addition to exchanging exhibits to be used at the hearing, the arbitrator may direct the parties to produce documents and other information, as well as the name of witnesses to be called. Document production may be ordered at a

party's request or at the arbitrator's discretion.

Special procedures apply when the dispute involves a homeowner with construction defect claims. Rule SR-7 of the AAA's Supplementary Procedures for Residential Construction Disputes provides that, at least five business days prior to the hearing, the parties to a case administered under the Fast Track Procedures shall exchange copies of all exhibits, affidavits and any other information they intend to submit at the hearing. These parties are also supposed to identify all witnesses they intend to call. Moreover, the Supplementary Procedures say that the arbitrator shall allow the parties and their experts to inspect, document and test the alleged deficiencies prior to the hearing.

In a residential construction dispute subject to the Regular Track or Large, Complex Case Procedures in which one or more issues directly relate to alleged defects in design, materials or construction, Rule SR-7(b) of the Supplementary Procedures calls for the same type of inspection, documentation and testing. In addition, these procedures say that the arbitrator "shall direct the production of relevant documents (including expert reports and information relied upon by the experts), the name and address of witnesses to be called, a brief summary of their proposed testimony, and copies of all exhibits, affidavits and other information [the parties] intend to submit at the hearing." This production is required to take place no later than 15 days after the answering statement but if no such statement is filed, then 20 days after the claim is filed. Both claimants and respondents have a continuing obligation under SR-7 to supplement their document production in the event new or additional relevant documents are created or identified during the arbitration. However, these rules do not apply until after arbitration is commenced and the arbitrator is appointed.

But as a result of § 558.005(15), Florida has become the only state in which a homeowner who plans to seek damages in arbitration for construction defects can obtain discovery from the adverse party even before a demand for arbitration is filed. What, then, can be discovered under the new Florida law?

What is Discoverable?

Section 558.005(15) calls for the production of "all available discoverable evidence" relating to construction defects, including, "but not limited to" expert reports, photographs, information received pursuant to subsection (4), and videotapes, if any. Florida law defines "discoverable" evidence to include any non-privileged matter relevant to

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the subject matter of the dispute or reasonably calculated to lead to the discovery of admissible evidence.² This broad definition gives homeowners the right to seek production of plans, shop drawings, contracts, and correspondence generated during construction of the project from a potential respondent to a construction defect dispute, as well as expert reports, photographs and videotapes stated in the statute.

Potential Problems

This new right will undoubtedly prompt many additional disputes. For example, disputes will likely arise about the timing of document production, the cost of reproducing the documents and who must pay, and claims of privilege. This is especially true since the statute is silent on these issues.

The mutual obligation to provide pre-arbitration discovery is problematic on a number of levels. Most documents generated during the design and construction of a project are not privileged. Thus, the contractor alleged to be responsible could be required to produce a voluminous amount of documents before arbitration is commenced. Thus, the new statutory right of discovery could eliminate the speedy, low-cost relief normally associated with arbitration.

In addition, exchanging documents outside the arbitration proceeding could defeat the privacy of arbitration, which is a primary benefit of arbitration, and a key reason parties elect to arbitrate as opposed to litigating publicly in court.

Another problem stems from the statute's failure to provide any pre-arbitration enforcement mechanism for resolving discovery disputes. The statute requires the court in a subsequently-filed litigation to address the issue of sanctions for a party's noncompliance with the discovery exchange requirement, but it says nothing about an arbitrator's authority to impose sanctions. Obviously, the AAA rules do not address this as they come into force only after the parties participate in the statutory process. The lack of statutory guidance means that it no doubt will fall to arbitrators, once appointed, to resolve all discovery-related disputes between the parties, as the AAA rules authorize the arbitrator to resolve such disputes.³ This view makes sense. Otherwise a party would have to petition a court to impose sanctions, which would delay resolution of the dispute. This is one glitch in the statute that

Provisions Allowing Homeowners to Conduct Pre-Arbitration Discovery

§ 558.004 Notice and opportunity to repair.

(1) In actions brought alleging a construction defect, the claimant shall, at least 60 days before filing an action involving a single-family home, an association representing 20 or fewer residential parcels, a manufactured or modular home, a duplex, a triplex, or a quadruplex, or at least 120 days before filing an action involving an association representing more than 20 residential parcel owners, serve written notice of claim on the contractor, subcontractor, supplier, or design professional, as applicable, which notice shall refer to this chapter. If the construction defect claim arises from work performed under a contract, the written notice of claim must be served on the person with whom the claimant contracted....

* * *

(15) Upon request, the claimant and the person receiving notice pursuant to subsection (1) shall have a mutual duty to exchange all available discoverable evidence relating to the construction defects, including, but not limited to, expert reports, photographs, information received pursuant to subsection (4), and videotapes, if any. In the event of subsequent litigation, any party who failed to provide such evidence shall be subject to such sanctions as the court may impose for a discovery violation. Expert reports exchanged between the parties may not be used in any subsequent litigation for any purpose, unless the expert, or a person affiliated with the expert, testifies as a witness or the report is used or relied upon by an expert who testifies on behalf of the party for whom the report was prepared.

could create confusion for parties to arbitration in Florida.

These consequences could make the process of construction defect arbitration more expensive for parties and thus have an adverse affect on the use of arbitration to resolve these kinds of disputes.

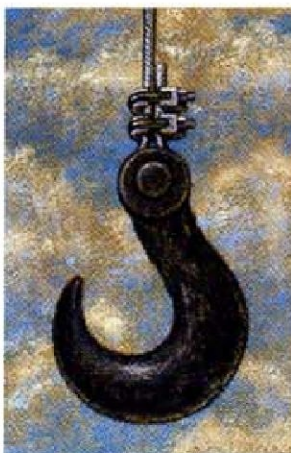
Use of Waivers?

Since arbitration rules do not provide for open-ended discovery (indeed this is one of the distinguishing characteristics between arbitration and litigation), potential respondents served with a pre-arbitration demand for discovery will likely resist complying with the demand. Florida's statute does not address this situation. Potential respondents could try to evade the statute's requirements by including a waiver in their residential construction contracts providing that, in the event of a conflict between § 558.004 of the Florida Statutes and the applicable AAA rules and procedures, the latter rules and procedures shall apply. However, arbitrators may not accept this attempt to circumvent a statute plainly intended to benefit residential homeowners.⁴ In that case, the failure to produce materials requested under § 558 could lead to sanctions imposed by the arbitrator.⁵

Conclusion

Residential homeowners in Florida who have construction defect claims can be expected to serve a pre-arbitration discovery demand on the contractor, subcontractor, supplier, or design professional allegedly responsible for the defective work, requesting production of a wide array of documents. Likewise, potential respondents who receive a demand for pre-arbitration production can be expected to respond in kind with discovery requests asking the claimant to produce expert reports and other discoverable materials that support the construction defect claim.

Never before could these documents be obtained except by an arbitral subpoena or order issued during a pending arbitration. The mutual pre-arbitration obligation to produce documents provides potential arbitration litigants with a unique opportunity to see information that they otherwise might not be entitled to have. However, this comes at great cost. As a result, it may be difficult to obtain a cost-effective, quick resolution of a construction defect arbitration in Florida. The parties might be able to address these issues in their contracts, but if they can't, the legislature should reconsider its actions. ■



Brad Goodell/Artville/Getty Images

ENDNOTES

¹ Fla. Stat. §§ 558.001-558.005 (2004).

² Fla. R. Civ. P. 1.280(b)(1) (describing scope of discovery). *Allstate Ins. Co. v. Boecher*, 733 So. 2d 993, 995 (Fla. 1999).

³ See, e.g., Rule SR-7(b) of the AAA Supplementary Procedures for Residential Construction Disputes. It provides, in part, with respect to Regular Track and large, complex cases: "The arbitrator is authorized to resolve any disputes concerning the exchange of information or objections to such information." A similar provision appears in Rule F-6 of the Fast Track Procedures, in Rule R-22 of the Regular Track Procedures and in Rule L-4(g) of the procedures for Large, Complex Construction Cases.

⁴ See Fla. Stat. § 558.001, which contains the following "legislative findings and declaration":

The Legislature finds that it is beneficial to have an alternative method to resolve construction disputes that would reduce the need for litigation as well as protect the rights of homeowners. An effective alternative dispute resolution mechanism in certain construction defect matters should involve the claimant filing a notice of claim with the contractor, subcontractor, supplier, or design professional that the claimant asserts is responsible for the defect, and should provide the contractor, subcontractor, supplier, or design professional with an opportunity to resolve the claim without resort to further legal process.