

2009 Legislative & Case Law Update - Construction

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**Recent Trends in
Construction & Real Estate**

Construction Law – Update

1. Lien Law – Attorneys’ Fees
2. Lien Law – Contract Validity
3. Chapter 558 – Construction Defect
4. Chapter 489 – Unlicensed Contracting
5. HB 425 – Other Statutory Changes
6. Damages – Limiting Contract Damages



Lien Law - General

Chapter 713, Fla. Stat.

- Construction liens are a statutory creation.
- Chapter 713 is strictly construed.
- Lienor must “perfect” its lien - meet certain procedural requirements such as:
 - Timely serve notice to owner if not in privity (45 days).
 - Timely record claim of lien (90 days).
 - Enforcement of lien within 1 year from date of recording.



Lien Law – Attorneys’ Fees

GENERAL BACKGROUND

- Prevailing party is entitled to award of attorneys’ fees (713.29, Fla. Stat.).
- Prior to 2009, if a lienor obtained even a nominal judgment it would be deemed the “prevailing party” – Net Judgment Rule.
- Placed burden on owner to resolve lien claims or risk paying lienor’s attorneys’ fees.



Lien Law – Attorneys’ Fees

Trytek v. Gale Indus., Inc.

- In Trytek v. Gale Indus., Inc., 3 So. 3d 1194 (Fla. 2009), the Florida Supreme Court altered the standard for “prevailing party” determination in lien foreclosure cases.
- New Standard: Courts must apply the “significant issues” test to determine prevailing party – not Net Judgment Rule.



Lien Law – Attorneys’ Fees

Trytek v. Gale Indus., Inc.

Facts:

- Contractor brought action against a homeowner to foreclose on a construction lien.
- The homeowner counterclaimed for costs to repair damage caused by contractor.
- Trial court awarded the contractor \$1,500 on lien claim, but determined the homeowner was the “prevailing party.”
- The contractor appealed.



Lien Law – Attorneys’ Fees

Trytek v. Gale Indus., Inc.

Holding:

- Contractor was not the “prevailing party” solely because received award of \$1500.
- “Significant issues test” is the proper method of determining prevailing party status.
- Additionally, was within the court’s discretion to determine neither party was “prevailing party” for purposes of awarding attorney’s fees.



Lien Law – Attorneys’ Fees

What this means to you?

- Purpose of 713.29 is to “encourage settlement of disputes before resorting to litigation”
- Changes methodology for determining prevailing party – gives trial court discretion to do equity.
- Unlikely lienor will prevail if recovery is “nominal.”
- Lienor loses leverage.
- Both parties are at risk for fees – should encourage settlement.
- Avoid scenario where “tail is wagging the dog.”



Lien Law – Attorneys’ Fees

Port-A-Weld v. Padula & Wadsworth Constr., Inc.,
984 So. 2d 564 (Fla. 4th DCA 2008)

- “Significant Issues Test” cannot be contractually modified.



Lien Law – Attorneys' Fees

Port-A-Weld v. Padula & Wadsworth Constr., Inc.

Facts:

- Subcontractor sued general contractor for unpaid monies due.
- GC sued sub for delay damages.
- Contract included a 76% threshold for prevailing party determination.



Lien Law – Attorneys’ Fees

Port-A-Weld v. Padula & Wadsworth Constr., Inc.

Holding:

- The “significant issues test” for prevailing party attorney’s fees cannot be contractually modified.
- The 76% threshold was not enforceable as a matter of public policy.



Lien Law – Attorneys’ Fees

What does this mean to you?

- The “significant issues test” will be applied on a case-by-case basis.
- There is no bright-line test for prevailing party (consistent with Trytek decision).
- Parties cannot contractually agree to a prevailing party threshold.



Lien Law - Contract Validity

GENERAL BACKGROUND

- Under Florida law, a construction lien is a product of “contract.”
- A construction lien can arise only when a valid contract exists between the parties.
 - Niehaus v. Big Ben’s Tree Serv., Inc., 982 So. 2d 1253 (Fla. 4th DCA 2008).



Lien Law - Contract Validity

Niehaus v. Big Ben's Tree Serv., Inc.

Facts:

- A homeowner contacted for “removal” of a tree from her property for \$4,800.
- Parties had different understanding of “remove.”
- The contractor referred to industry meaning – cutting it down but not removing.
- Homeowner assumed “remove” meant cutting the tree down and removing it from her property.



Lien Law - Contract Validity

Niehaus v. Big Ben's Tree Serv., Inc.

Holding:

- The court held that because the contractor never explained the industry meaning of “remove,” the homeowner’s understanding of the term was reasonable.
- Because there was a misunderstanding of a material term, there was no valid contract and, as a result, no lien rights.



Lien Law - Contract Validity

What this means to you?

- Liens are a creature of contract – if no contract, then no lien.
- Need both valid contract (written or oral) and perfected lien per Chapter 713, Fla. Stat.
- Case did not address other legal principles, e.g. contract implied in law (equitable claim / lien)



Chapter 558-Construction Defect

GENERAL BACKGROUND

- Chapter 558 is known as Florida's construction defect statute.
- Creates an alternative method for owners and contractors to resolve construction defect claims and avoid litigation.
- Must comply with statutory pre-suit written notice before you can sue the contractor.
- Allows contractor to inspect and offer to repair or settle claims to avoid litigation.



Chapter 558-Construction Defect

HISTORY OF STATUTE

- First enacted on May 27, 2003.
- Confusing statute – has gone through a series of significant revisions in its short lifetime.
- Recently amended in 2009 – effective date of amendment is **October 1, 2009**.



Chapter 558-Construction Defect

CHANGES IN THE LAW

1. Changed to an “opt out” statute.
2. Applies to only “completed” projects.
3. Expands definition of “service.”
4. No lien rights for destructive testing.
5. 558 notice not an admission of liability.
6. Right to “discovery” limited.



Chapter 558-Construction Defect

1. “Opt Out” Statute

- Current version is an “opt in” statute – must include specific “notice” language in your contract or Chapter 558 does not apply.
- Not retroactive – creates 3 time frames:
 - 7/1/04 thru 9/30/06: no notice required in contract.
 - 10/1/06 thru 9/30/09: notice required in contract.
 - 10/1/09: notice required, but failure to include does not bar application of Chapter 558
- Parties can contractually agree to “opt out.”



Chapter 558-Construction Defect

2. Applies Only to Completed Projects

- Chapter 558 not intended to interfere with an owner's ability to complete a project.
- States that “notice is not required for a project that has not reached ... completion.”
- “Completion of building improvement” means:
 1. Issuance of Certificate of Occupancy or its equivalent, or
 2. Substantial completion according to plans and specifications.



Chapter 558-Construction Defect

3. Expands Definition of “Service”

- Current statute required Chapter 558 notice be sent “certified mail, return receipt.”
- Now can serve via:
 - Certified mail, return receipt.
 - Hand delivery.
 - Other courier service that provides written confirmation of delivery (UPS or Fed Ex).



Chapter 558-Construction Defect

4. No Lien Rights for Destructive Testing

- No lien rights for destructive testing or for work restoring the area destructively tested.
- Exception: If “owner” contracts for the destructive testing or restoration, contractor can file a lien.



Chapter 558-Construction Defect

5. Notice Not an Admission of Liability

- “The notice described in this subsection shall not be construed as an admission of any kind.”
- Reason for the change:
 - Geller v. Aventura Land Holdings, Ltd., Case No. 06-09739-CA (fla. 17th Cir Ct. 2006).
 - Chapter 558 notice provided by a developer to its contractor and subs was deemed an admission against interest.



Chapter 558-Construction Defect

6. Right to “Discovery” Limited

- Although seldom used, parties have right to “all available discoverable evidence” under Chapter 558 process.
- Statute amended to limit discovery to only:
 1. Design plans and specifications.
 2. As-built plans and documents detailing design.
 3. Photographs and videos.
 4. Expert Reports.



Chapter 558-Construction Defect

What this means to you?

- Chapter 558 now applies to nearly all commercial and residential projects (except for public transportation projects), unless parties “opt out.”
- You can avoid Chapter 558 by including a specific “opt out” provision in your contract.
- Chapter 558 does not apply until project is complete.



Chapter 489

GENERAL BACKGROUND

- Chapter 489, Fla. Stat., regulates the construction industry.
- A “contractor” must be licensed to perform certain kinds of construction work in Florida.
 - General Contractor – Scope of services “unlimited”
 - Building Contractor – Commercial and residential
 - Residential Contractors – Limited to 2-story residential
 - Specialty Contractors – Limited to a particular phase of work



Chapter 489

Unlicensed Contracting

GENERAL BACKGROUND

- Penalties in Florida for unlicensed contractor are severe (489.128, Fla. Stat.)
 1. Contract is unenforceable in law or in equity.
 2. No lien rights.
- Prior to 2009, contractors had to fulfill both **state** and **local** licensing requirements to be considered licensed.



Chapter 489

Unlicensed Contracting

CHANGES IN THE LAW

- Effective date: June 16, 2009.
- Language changed to remove the words “or local” from the statute.
- Determination of “unlicensed” now includes only state licensing requirements (e.g. the “job scopes” defined in 489.105(3), Fla. Stat.).



Chapter 489

Unlicensed Contracting

What this means to you?

- If a license is not required by the state, then contractors will not be deemed “unlicensed” and can enforce contracts and perfected lien rights.
- Amendment is retroactive.
- Contractors no longer need to fulfill varying local licensing requirements in order to enforce a contract.



Chapter 489

Worker's Compensation Immunity

GENERAL BACKGROUND

- Statutory Scheme (Chapter 440) – All employers must provide worker's compensation insurance.
- Provides certain medical and disability benefits for injured workers.
- By providing this coverage, an employer is insulated from further tort liability.



Chapter 489

Worker's Compensation Immunity

Central Florida Lumber Unltd., Inc. v. Qaqish,
12 So. 3d 766 (Fla. 2d DCA 2009).

Holding:

- “Unlicensed contractors” do not lose worker’s compensation immunity if they otherwise qualify as an “employer.”



Chapter 489 / 255

HB 425

OTHER CHANGES

1. “Certificate of Authority” deleted.
2. Reporting crimes (§455.227, Fla. Stat.).
3. Specialty Contractors expanded by “board rule.”
4. Deny application if past disciplinary action.



Chapter 489 / 255

HB 425

OTHER CHANGES

“Certificate of Authority” (Chapter 489)

- Current a business organization must obtain a “Certificate of Authority”
 - Often referred to as a “qualifying business number.”
- Completely removed from the statute.
- Business must still have a qualifying agent, but does not need to obtain a separate “certificate.”
 - Individual qualifying business “must apply for registration or certification as the qualifying agent” for the business.



Chapter 489 / 255

HB 425

OTHER CHANGES

Reporting Crimes (§455.227, Fla. Stat.).

- Report criminal record – convicted or found guilty of, or entered a plea of nolo contendere or guilty, to a crime in any jurisdiction.
- A licensee must report within 30 days after the effective date – by November 1, 2009.
- Grounds for disciplinary actions by CILB.



Chapter 489 / 255

HB 425

OTHER CHANGES

Specialty Contractors – Definition Expanded

- Determination of “unlicensed” includes the “job scopes” defined in 489.105(3), Fla. Stat.
- 489.105(3)(q) defined specialty contractors as a “subset” of the categories already defined.
- Now “specialty contractor” is defined as:
 - Scope of work limited to a particular phase of construction “established in a category adopted by board rule”
 - whose scope is a subset of one of the categories defined in the statute.



Damages

GENERAL BACKGROUND

- Generally, a party cannot receive double recovery for the same breach of contract.
- However, a party can recover both damages for delay in construction and alternative living arrangements.
 - Fisher Island Holdings, LLC v. Cohen, 983 So. 2d 1203 (Fla. 3d DCA 2008).



Damages

Fisher Island Holdings, LLC v. Cohen

Facts:

- Homeowners sued their contractor for breach of contract—delayed construction of their house.
- Jury awarded homeowners damages for:
 1. Delay – 2 years (Dec. 2004 thru Dec. 2006).
 2. Living Expenses – 9 month lease (Jan. thru Sept. 2007)



Damages

Fisher Island Holdings, LLC v. Cohen

Holding:

- Damages for the delay and alternative living arrangements were not impermissibly duplicative.
- So long as the timeframe for each award does not overlap, a party can recover such damages.



Damages

Economic Waste Doctrine

GENERAL BACKGROUND

- Generally, when there is a breach of a construction contract, the measure of damages is:
 1. The cost of proper completion; or
 2. The difference in value if the cost of proper completion would constitute “unreasonable economic waste.”
- Courts will not permit damages that are deemed “economic waste.”



Damages

Economic Waste Doctrine

Heine v. Parent Const., Inc.

Facts:

- Suit between homeowner and contractor.
- House built at 7.5 foot elevation, as opposed to 8.5 foot elevation as specified.
- Cost to tear down house and build according to contract was close to a \$1 million vs. \$25,000 for diminution of value.



Damages

Economic Waste Doctrine

Heine v. Parent Const., Inc.

Holding:

- Contract included a provision that “contractor shall bear cost of correcting,” thus owner argued that contractor had to correct even if such damages were “economic waste.”
- Florida Supreme Court held that economic waste doctrine still applied.



Damages

Economic Waste Doctrine

What this means to you?

- Most contractual provisions will not bar application of the doctrine of economic waste.
- However, parties used a standard form contract.
- Court indicated that a more explicit, specific provision could bar the application of the economic waste doctrine.



Construction Law – Update

QUESTIONS?



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Recent Trends in
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