



CONSTRUCTive Talk

VOLUME II ISSUE 4 CONSTRUCTION LAW COMMITTEE NEWSLETTER, A COMMITTEE OF THE
2016 - 2017 FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION



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Florida Homeowners' Construction Recovery Fund

By: Christopher M. Cobb, Esq., Jimmerson & Cobb, P.A., Jacksonville, FL

Contrary to popular belief, the Florida Homeowners Recovery Fund (the "Recovery Fund") is not "broke". The Recovery Fund was created under Chapter 489.140, Florida Statutes, and its purpose is to provide relief for Florida homeowners who have been financially harmed by Florida licensed contractors. With residential construction activities increasing throughout the state, it is important for construction lawyers to know and understand the role of the Recovery Fund.

Any homeowner or "claimant" is eligible to seek redress from the Recovery Fund, but there are conditions. The first require-

ment for payment from the fund appears in the statutory definitions. "Homeowner" is defined as the "owner of an owner-

occupied residence". From there, "Residence" is defined as "single-family residence....in which the owner contracting for the improvement is residing or will reside 6 months or more each calendar year...". In other words, payment from the Recovery Fund is limited to residential owner-occupied homesteaded property.

Assuming the property characteristics satisfy the statutory require-

ment, the Claimant then must have received either a final judgment, arbitration award or CILB final order against a license holder directing the license holder to pay restitution. The final judgment, arbitration award or CILB final order must be based upon consumer harm caused by financial mismanagement, abandonment, unapproved contract overages, executing a false affidavit, or making false statements. See Fla. Stat. §§ 489.129(1)(g), (j), or (k) and 713.35. Additionally, the homeowner/claimant will need to make some diligent effort to collect on the final judgment or arbitration award.

If no collection or execution is possible, then

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Editor's Corner:

Merry Christmas and Happy Holidays!

As our first full year of publication comes to a close, we wanted to give a shout out to all who have contributed time and content over the last year. If you have any ideas for future improvement of our CONSTRUCTive Talk newsletter, please let your editorial team know as feedback is always welcome. Wishing you and your family a wonderful holiday season!



Florida Homeowners Construction Recovery Fund

By: Christopher M. Cobb, Jimerson & Cobb, P.A., Jacksonville, FL (continued from page 1)

"An important consideration to keep in mind when making a claim on the Recovery Fund is that a homeowner/claimant has one year from the conclusion of any civil, criminal, or administrative action or award in arbitration to file the claim."

the homeowner/claimant can file the claim with the Recovery Fund. An important consideration to keep in mind when making a claim on the Recovery Fund is that a homeowner/claimant has one year from the conclusion of any civil, criminal, or administrative action or award in arbitration to file the claim. Further, the claim will be limited to actual damages and, until recently, claims were limited to \$50,000 per claim and applied only to Division I contractors (i.e. Certified General, Certified Building, and Certified Residential). That is not the case today, and the expansion of the Recovery Fund is further discussed below.

Any payment to the homeowner/claimant of any amount from Recovery Fund places the contractor's license on automatic suspension without further administrative action. The contractor's license will not be reinstated until he/she has repaid in full, plus interest, the amount paid to the homeowner/claimant.

Recently, there have been some significant changes to the Recovery Fund. Governor Rick Scott signed House Bill 535, which permits payments to injured homeowner/claimants from the Recovery Fund for Division II license holders. This effectively added Sheet Metal, Roofing, Class A Air-Conditioning, Class B Air-Conditioning, Class C Air-Conditioning, Mechanical, all Pool/Spa contractors, Plumb-

ing, Underground Utility and Excavation, Solar, and Pollutant Storage Systems to the Recovery Fund. The maximum recovery against Division II contractors is \$15,000 per claim and must be based on contracts entered after July 1, 2016. Division II claims may be considered by the CILB beginning January 1, 2017. There is an aggregate cap for Division II claims in the amount of \$150,000.00 per licensee (there is an aggregate cap of \$500,000 for Division I licensees).

This change also establishes new noticing requirements for all Division II contracts. Effective July 1, 2016, all licensed contractors, both Division I and Division II, must ensure that the Florida Homeowner Construction Recovery Fund Notice is contained in their residential construction contracts. All Division II contractors should immediately change their residential construction agreements to include the statutorily required language. The language is below:

FLORIDA HOMEOWNER'S CONSTRUCTION RECOVERY FUND

PAYMENT, UP TO A LIMITED AMOUNT, MAY BE AVAILABLE FROM THE FLORIDA HOMEOWNERS' CONSTRUCTION RECOVERY FUND IF YOU LOSE MONEY ON A PROJECT PERFORMED UNDER CONTRACT, WHERE THE LOSS RESULTS FROM SPECIFIED

VIOLATIONS OF FLORIDA LAW BY A LICENSED CONTRACTOR. FOR INFORMATION ABOUT THE RECOVERY FUND AND FILING A CLAIM, CONTACT THE FLORIDA CONSTRUCTION INDUSTRY LICENSING BOARD AT THE FOLLOWING TELEPHONE NUMBER AND ADDRESS:

Construction Industry Licensing Board
2601 Blairstone Road
Tallahassee, Florida 32399-1039
(850)487-1395

Note that the DBPR address has recently changed as well, so all old contract forms should be amended to reflect the new address. Failure of license holders to include the required warning language can result in discipline. On the first violation of failure to include this language, the CILB may fine the contractor up to \$500, and the moneys will be deposited into the Recovery Fund. On a second or subsequent violation, the CILB shall fine the contractor \$1,000 per violation, and the moneys will be also deposited into the Recovery Fund. § 489.1425(2), Fla. Stat. (2016).

The Recovery Fund offers aggrieved homeowners some hope of redress and relief from contractor misconduct. An understanding of the Recovery Fund and its processes is imperative as we all know the easy part is obtaining a judgment, but the hard part is collecting on one.

Case Law Update

By: Fred Dudley, Esq. and Steve Sellers, Esq., Dudley, Sellers, & Heath, P.L., Tallahassee, FL

- ◆ **Stasinos v. Department of Business and Professional Regulation**, 41 Fla. L. Weekly D2317, 2016 WL 5940053 (Fla. 4th DCA 2016).

If you make a claim to the Homeowners' Construction Recovery Fund at the Department of Business and Professional Regulation, you should be aware that there is a one year statute of limitations. Section 489.141(1) (f), Florida Statutes, provides that a claim must be "made within 1 year after the conclusion of any civil, criminal, or administrative action or award in arbitration based on the act." In this case the claim to the Fund was made two years after entry of judgment but within one year after the conclusion of an intervening bankruptcy filing by the contractor. The appellate court found that the bankruptcy case was a "civil action" under the meaning of the statute.

Note: Prior to July 2004, the statute of limitations for a claim to the Fund was measured from the date the contractor violated the statute, even if the resulting civil claim was not concluded. See Free v. Construction Industries Recovery Fund, 729 So. 2d 980 (Fla. 2d DCA 1999).

- ◆ **Best Drywall Services, Inc. v. Blaszczyk**, 2016 WL 6246701 (Fla. 2d DCA October 26, 2016) .

The contractor testified at trial to five different dates that the work was finally completed, some within the 90 day window required for the lien law and some outside that window. The trial judge then took this issue away from the jury and granted a directed verdict on the contractor's claim of lien. The appellate court reversed on the grounds that the conflicts in the evidence created a factual issue that must be determined by the jury.

- ◆ **Gator Boring & Trenching, Inc., v. Westra Construction Corp.**, 2016 WL 5807805 (Fla. 2d DCA October 5, 2016)

Whether a claim of lien is fraudulent or not requires a finding of intent and is therefore a question of fact to be decided at trial. See e.g. J.V. Rolle Dev. Corp. v. Newman, 910 So. 2d 349, 350 (Fla. 4th DCA 2005). The instant case affirms this rule even when the claim of lien includes \$676,556.90 for additional costs for changed conditions that are found to be not recoverable under the contract. The trial court granted summary judgment against the subcontractor on the additional costs included in its claim of lien because the extra work was not legally recoverable under the contract, the amount was not a minor amount, and there was no evidence the subcontractor consulted with counsel. The appellate court reversed because of the lack of evidence of intent.

Note: This case was handled by two attorneys who are Board Certified in Construction Law. There is an interesting section in this decision on appellate jurisdiction.

Fred R. Dudley and Steve E. Sellers are partners at Dudley, Sellers, Healy & Heath, P.L. in Tallahassee, FL. Fred is Board Certified in Construction Law. Steve is Board Certified in Construction Law, Civil Trial, and Business Litigation.

Interested in joining the Construction Law Committee?

It's as easy as 1, 2, 3:

1. Become a member of the Florida Bar.
2. Join the Real Property Probate and Trust Law Section.
3. Email Scott Pence at spence@carltonfields.com advising you would like to join the CLC and provide your contact information.

Editor's Corner:

Do you have an article, case update, or topic you would like to see in Constructive Talk? Submit your article, note, or idea to jsmith@rumberger.com or tbench@rumberger.com.



Jared E. Smith
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Editor



Timothy N. Bench
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Assistant Editor

Upcoming Events

Subcommittee Practice-Get On Board!

Interested in getting involved? Contact one of the persons listed below.

ABA Forum Liaison - Cary Wright (cwright@cfjblaw.com)
ADR - Deborah Mastin (deborahmastin@gmail.com)
Certification Exam - Steve Sellers (steve@dshattorneys.com)
Certification Review Course - Deborah Mastin (deborahmastin@gmail.com) and Bryan Rendzio (brendzio@fi-law.com)
CLE Subcommittee - Randy Dow (rdow@boydjen.com)
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Construction Litigation - Neal Sivyier (nsivyier@sbwlegal.com)
Construction Regulation - Fred Dudley (dudley@mylicenselaw.com) and Steve Sellers (steve@dssattorneys.com)
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Website Subcommittee - Brent Zimmerman (bzimmerman@jimersoncobb.com)

Construction Law Committee Meetings

Join us for our upcoming Construction Law Committee meetings. Benefits of the meetings include .5 hours of CLE each meeting, a timely update on developing case law, statutes and administrative rulings, and informative reports from our subcommittees.

The CLC meetings occur the second Monday of every month beginning promptly at 11:30 a.m. EST. To join, call: (888) 376-5050. Enter PIN number 7542148521 when prompted.

Schedule of Upcoming RPPTL Events

March 16-18, 2017
Construction Law Institute
and Construction Law Certification Review Course
JW Marriot/Ritz Grande Lakes

January 17, 2017
Water Intrusion / Construction Defect Claims
Construction Litigation Subcommittee
Video Webcast Only
3.5 Construction Law Cert. / Real Estate Cert. Credits
To Register for Live Webcast Presentation, [click here](#).