# Chapter 558

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## Notice and Opportunity to Cure Act

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Florida Construction Certification Review Course
2019

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Trenam Law

TRENAM LAW

# Chapter 558

## Notice and Opportunity to Cure Act

- Purpose of 558
- Application of 558
- Compliance with 558
- Proper 558 Notice
- Procedures of 558
- Tolling the SOL by 558
- Limitations of 558
- Limitation of Liability for Design Professionals

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# Purpose of 558

- Dispute resolution "mechanism"
- 558 not a civil proceeding
- "Confidential settlement negotiations"

"Chapter 558 encourages settlement by providing a procedure to lead the parties to the waters of compromise; it does not make them drink."

"The statute does not forfeit substantive rights as a penalty for noncompliance…"

*-- Hebden v. Roy Kunnerman Constr.*

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# Application of 558

- When does 558 apply?
  - **C**ontract for construction
  - **C**onstruction defect
  - **C**ompletion of the improvement

558 does not apply to alleged personal injuries arising out of alleged construction defects

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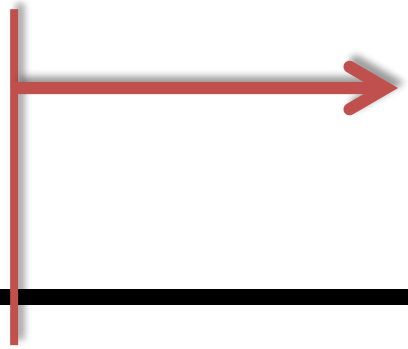
# Application of 558

## Contract for Construction

All contracts
unless parties
OPT OUT



Sept. 30,
2009

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# Application of 558

## Contract for Construction

- After Oct. 1, 2009:
  - Written opt out agreement
  - Note use of "potential defendant"

**All contracts for improvements made after Oct. 1, 2009, <u>unless</u> the claimant and *potential defendant* have agreed in writing to opt out of the requirements of Chapter 558**

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# Application of 558

## Contract for Construction

- After Oct. 1, 2009:
  - Requirement for contractual statutory notice
  - No penalty for failure to include notice

**ANY CLAIMS FOR CONSTRUCTION DEFECTS ARE SUBJECT TO THE NOTICE AND CURE PROVISIONS OF CHAPTER 558, FLORIDA STATUTES**

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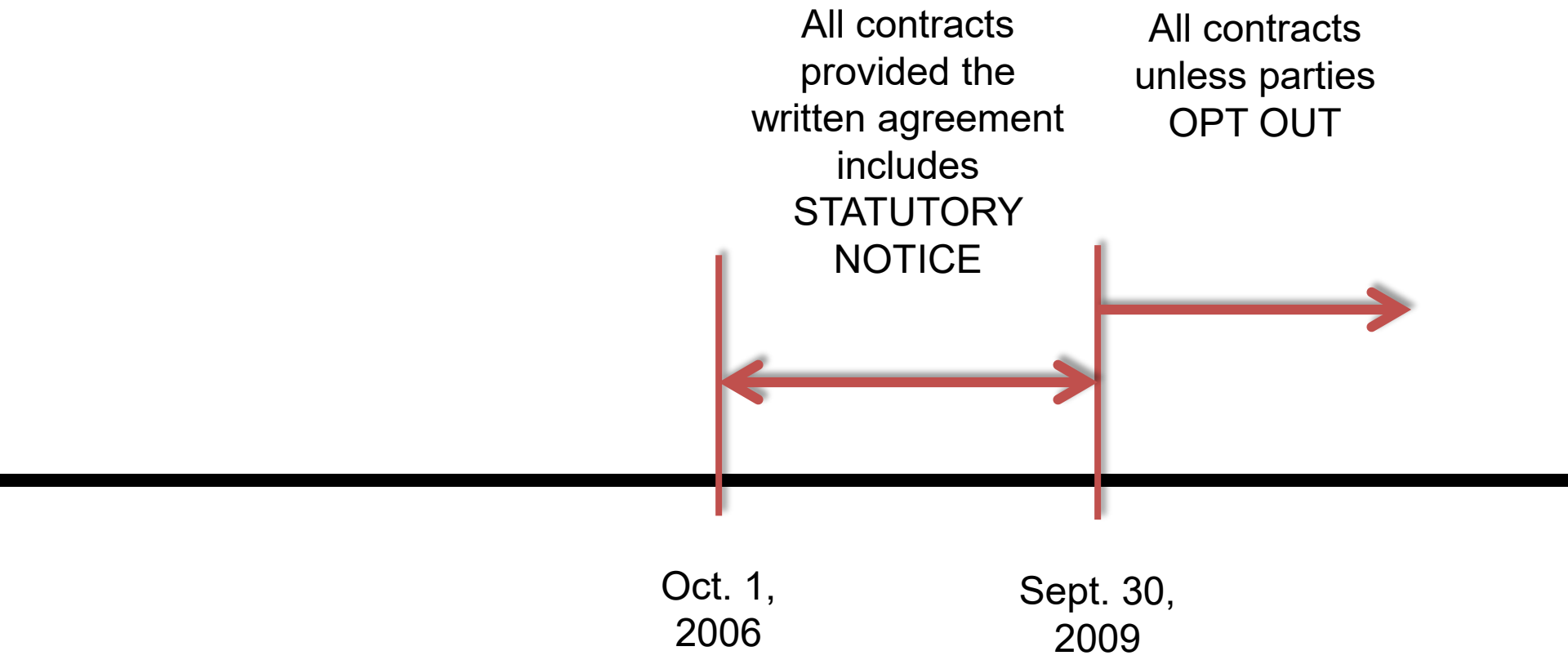
# Application of 558

## Contract for Construction

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# Application of 558

## Contract for Construction

- Notice Between Oct. 1, 2006 and Sept. 30 2009:

CHAPTER 558, FLORIDA STATUTES, CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY BRING ANY LEGAL ACTION FOR AN ALLEGED CONSTRUCTION DEFECT. SIXTY DAYS BEFORE YOU BRING ANY LEGAL ACTION, YOU MUST DELIVER TO THE OTHER PARTY TO THIS CONTRACT A WRITTEN NOTICE, REFERRING TO CHAPTER 558, OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE SUCH PERSON THE OPPORTUNITY TO INSPECT THE ALLEGED CONSTRUCTION DEFECTS AND TO CONSIDER MAKING AN OFFER TO REPAIR OR PAY FOR THE ALLEGED CONSTRUCTION DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER WHICH MAY BE MADE. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER THIS FLORIDA LAW WHICH MUST BE MET AND FOLLOWED TO PROTECT YOUR INTERESTS.

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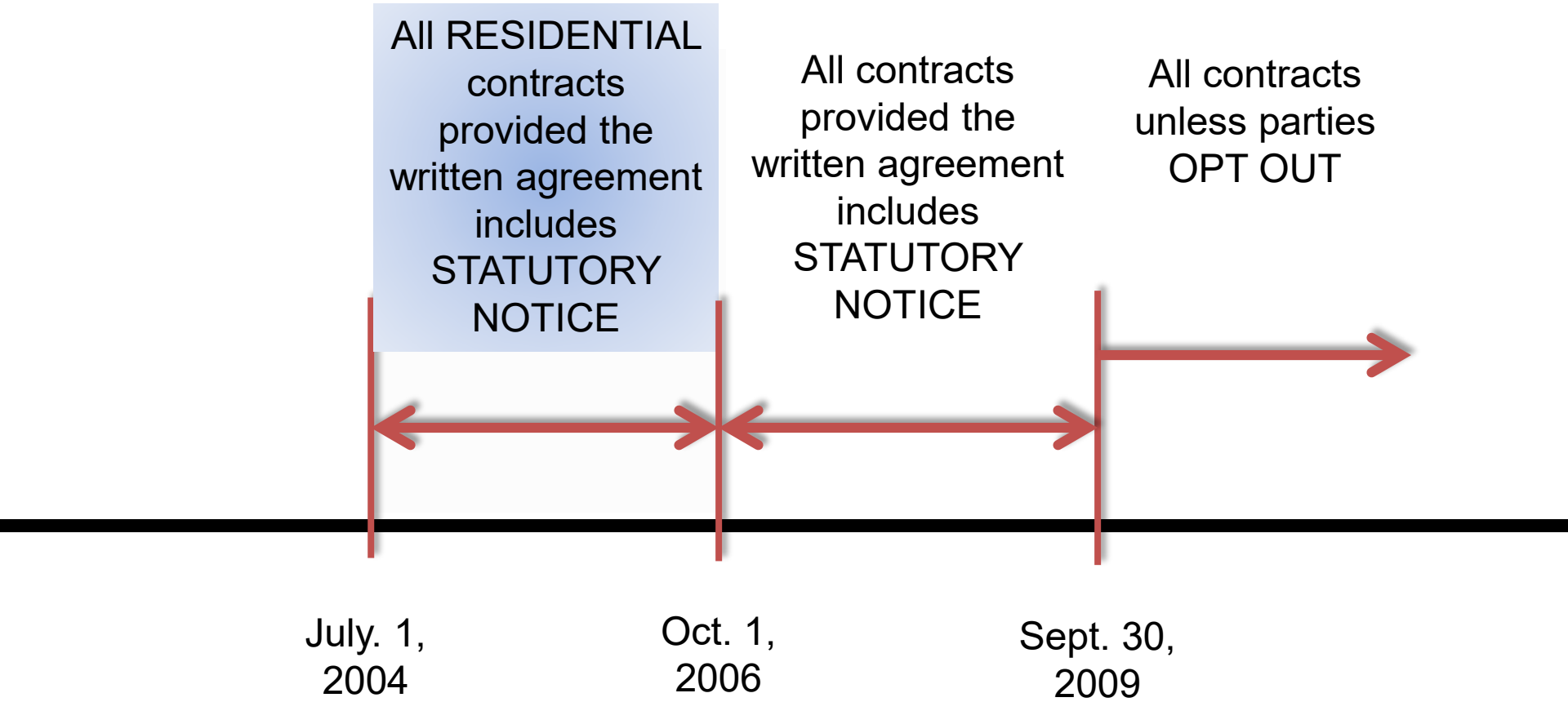
# Application of 558

## Contract for Construction

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# Application of 558

## Contract for Construction

- Notice Between Oct. 1, 2006 and Sept. 30 2009:

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- Notice Between July 1, 2004 and Sept. 30, 2006:

CHAPTER 558, FLORIDA STATUTES, CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY BRING ANY LEGAL ACTION FOR AN ALLEGED CONSTRUCTION DEFECT **IN YOUR HOME**. SIXTY DAYS BEFORE YOU BRING ANY LEGAL ACTION, YOU MUST DELIVER TO THE OTHER PARTY TO THIS CONTRACT A WRITTEN NOTICE, REFERRING TO CHAPTER 558, OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE SUCH PERSON THE OPPORTUNITY TO INSPECT THE ALLEGED CONSTRUCTION DEFECTS AND TO CONSIDER MAKING AN OFFER TO REPAIR OR PAY FOR THE ALLEGED CONSTRUCTION DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER WHICH MAY BE MADE. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER THIS FLORIDA LAW WHICH MUST BE MET AND FOLLOWED TO PROTECT YOUR INTERESTS.

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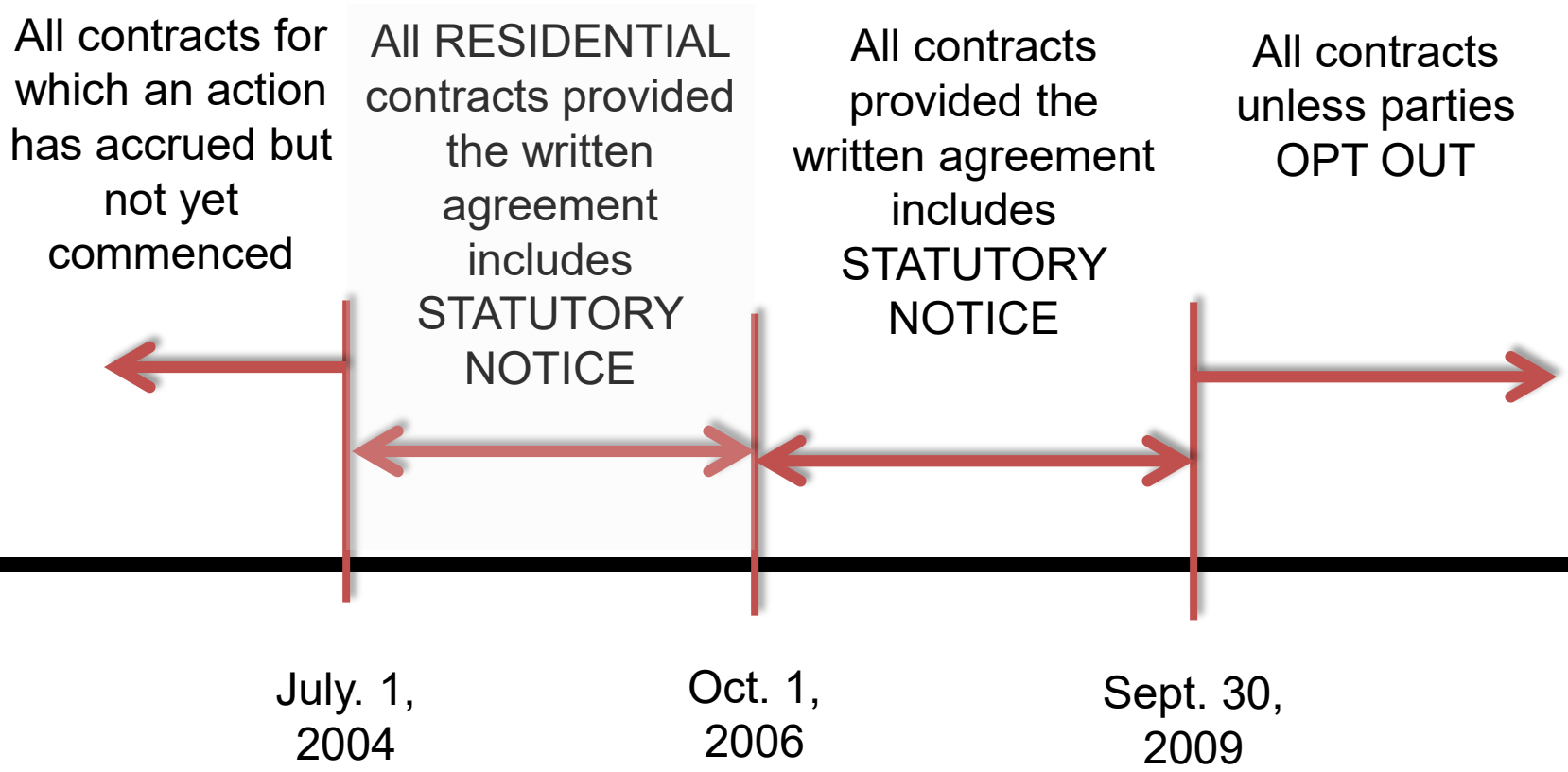
# Application of 558

## Contract for Construction

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# Application of 558

## Construction Defect

**Construction Defect**

- Design
- Specification
- Surveying
- Planning
- Supervision
- Observation
- Construction
- Repair
- Alteration
- Remodeling

**On Real Property**

- Improved land
- Improvements on the land
- Fixtures in the improvements
- Manufactured housing
- Mobile homes

Real property does <u>not</u> include public transportation projects

**Resulting From**

- Defective products
- Violation of code
- Design falling below S.O.C.
- Construction falling below accepted trade standards

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# Application of 558

## Completion of Building or Improvement

- Defined to mean:

The governmental body having jurisdiction over the project issues a certificate that allows for occupancy or use of the entire building

**OR**

There is substantial completion of the building or improvement according to the plans and specifications, if the governmental body having jurisdiction over the project does not issue certificates of occupancy

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# Application of 558

## Completion of Building or Improvement

- Where a certificate is issued:
  - Definition includes a temporary certificate of occupancy or use…
  - …of the "entire building"
  - Note that temporary use is a 2015 change

What about a temporary certificate that allows partial use of a building in a phased project?

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# Compliance with 558

- Compliance not required if there is no completion of the building or improvement
- Claimant's action stayed until compliance
- Compliance not required to those unlicensed
- Compliance required for each and all defects

Notice not intended to interfere with owner's ability to complete a project that has not been substantially completed

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# Compliance with 558

- Multiple Claims
- Subsequent Claims
  - Initial list may be amended as defects become known

The court shall allow the action to proceed to trial only as to alleged defects that were noticed and for which the claimant has complied with 558 and as to defects reasonably related to, or caused by, the defects previously noticed

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# Proper 558 Notice

## Form and Content

Oct. 1, 2016

- Previous Requirements
  - Describe claim in reasonable detail sufficient to determine the general nature of each defect
  - Describe damage or loss resulting from the defect, if known

Current Requirements

- Based on visual inspection
- Describe nature of each defect in reasonable detail
- Identify location of each defect sufficiently to locate it without undue burden

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# Proper 558 Notice

## Form and Content

- <u>Service Requirements</u>
  - Certified mail
  - Hand delivery
  - Courier

Evidence of delivery is key

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# Procedures of 558

- 558 Notices
  - Initial Notice
  - Downstream Notice
- Inspection
  - Destructive Testing
- 558 Responses
- 558 Discovery

Note: 558 controls to the extent an arbitration clause in a contract for the sale, design, construction, or remodeling of real property conflicts with it

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# Procedures of 558

## 558 Notice of Claim

**Claimant**

- Property owner
- Subsequent purchaser
- Association

**Initial Notice** →

- Service **60/120 days** prior to action
- Endeavor to serve notice w/in **15 days** of discovery
- No obligation to perform destructive testing; only visual inspection required
- Notice to party in privity required

**Receiving Contractor**

- Contractor
- Subcontractor
- Supplier
- Design professional

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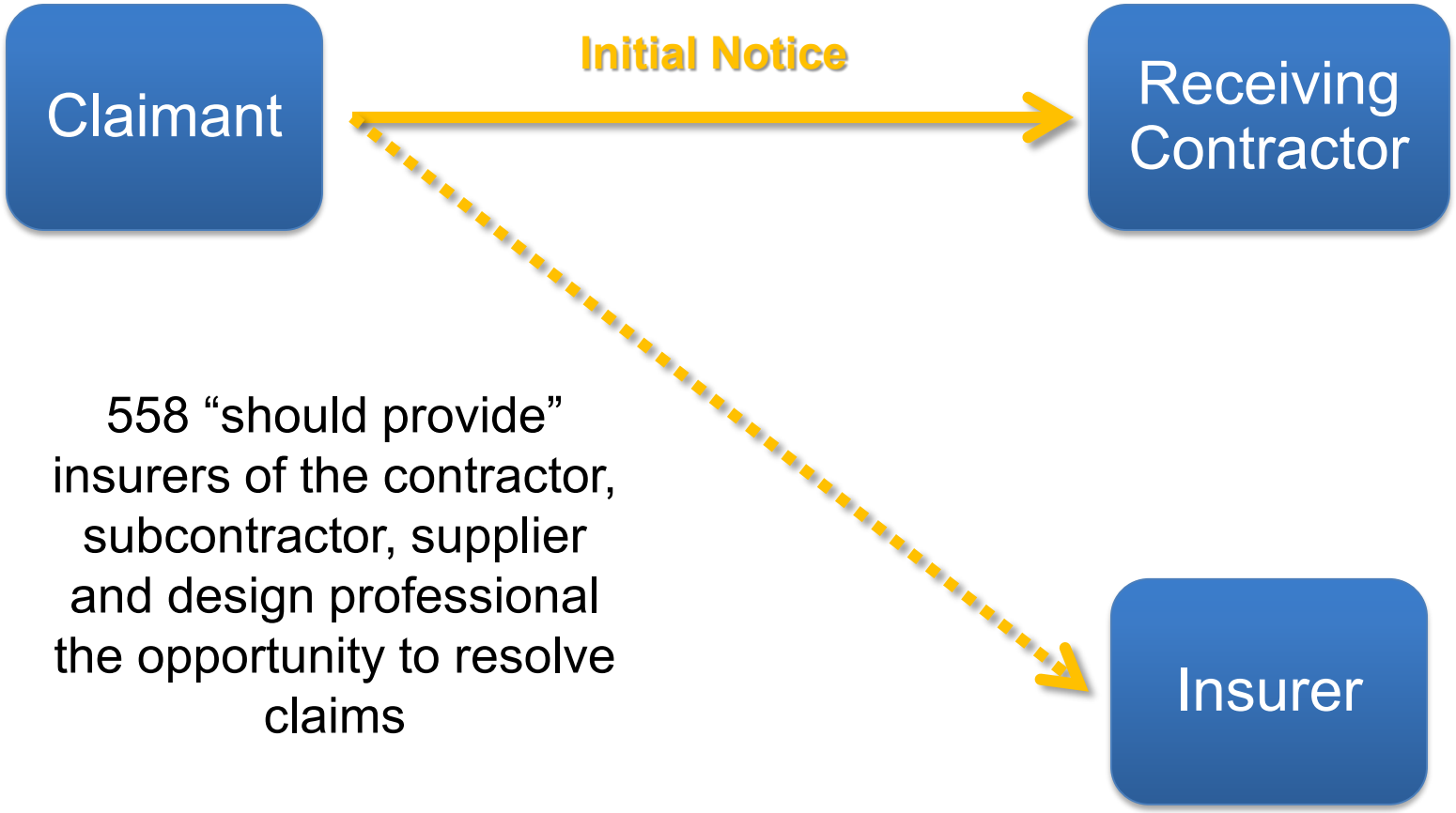
# Procedures of 558

## 558 Notice of Claim




558 "should provide" insurers of the contractor, subcontractor, supplier and design professional the opportunity to resolve claims

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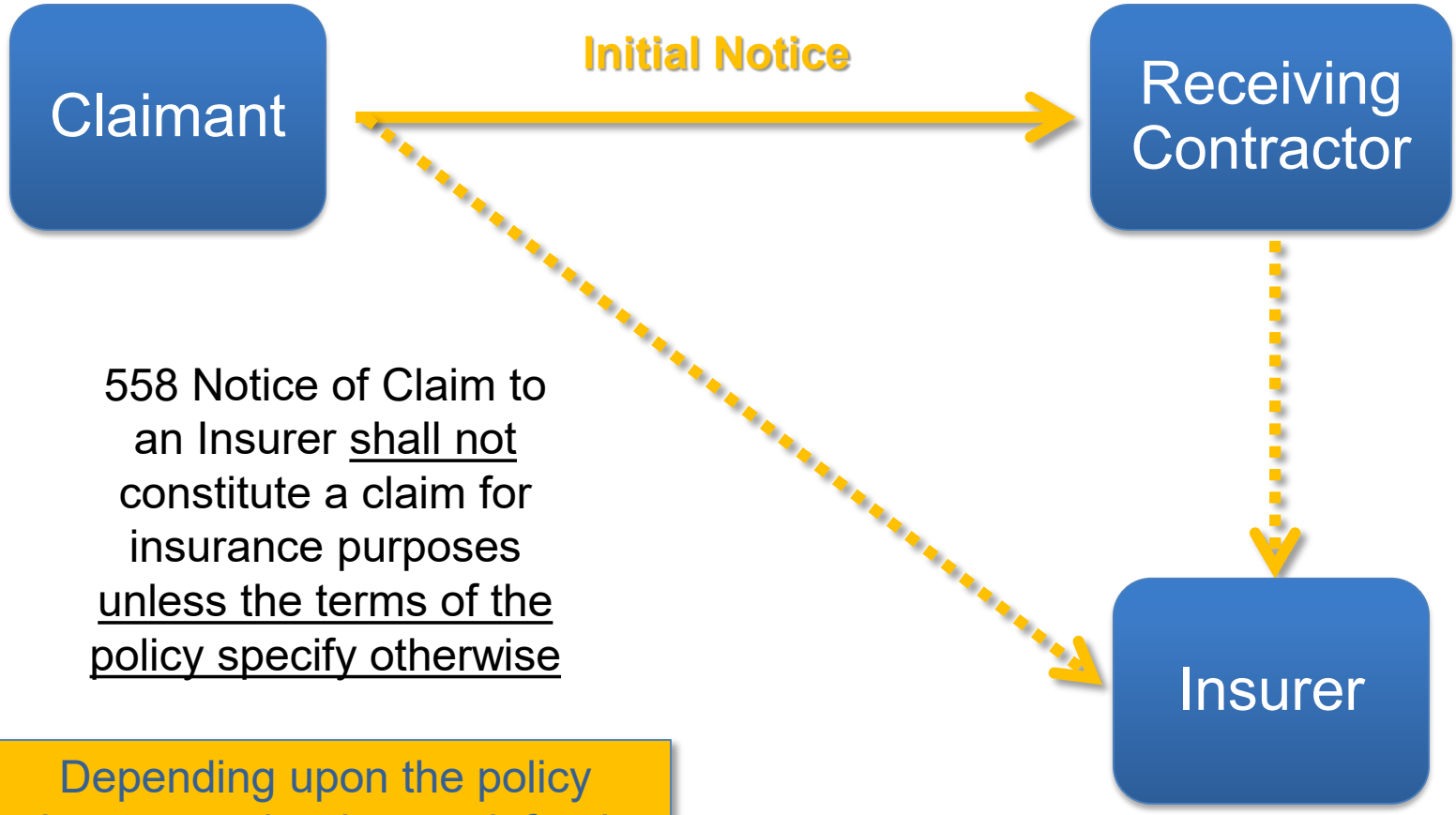
# Procedures of 558

## 558 Notice of Claim




558 Notice of Claim to an Insurer <u>shall not</u> constitute a claim for insurance purposes <u>unless the terms of the policy specify otherwise</u>

Depending upon the policy language, the duty to defend may not arise with a 558 Notice

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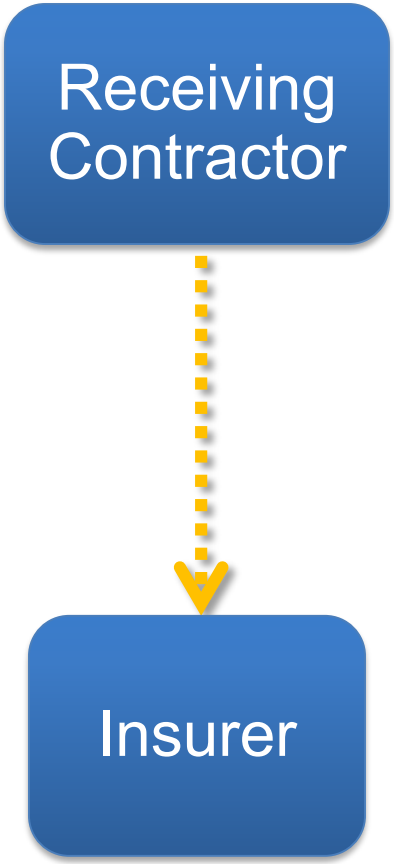
# Procedures of 558

## 558 Notice of Claim

*Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.,* No. 15-12816 (11th Cir. Jan. 26, 2018)

"Is the notice and repair process set forth in Chapter 558 of the Florida Statutes a 'suit' within the meaning of the CGL polices issued by C&F to ACI?"

"Although the Chapter 558 process does not constitute a 'civil proceeding,' it is included in the policy's definition of 'suit' as an alternative dispute resolution proceeding' to which the insurer's consent is required to invoked the insurer's duty to defend the insured."

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# Procedures of 558

## Downstream Notice

Receiving Contractor

**Downstream Notice**

Sub-Contractor

- May be served **10/30 days** after receipt of claimant's notice…

- On party reasonably believed to be responsible for alleged defect

- Provider of labor and materials
- Provider of supplies only
- Design professional

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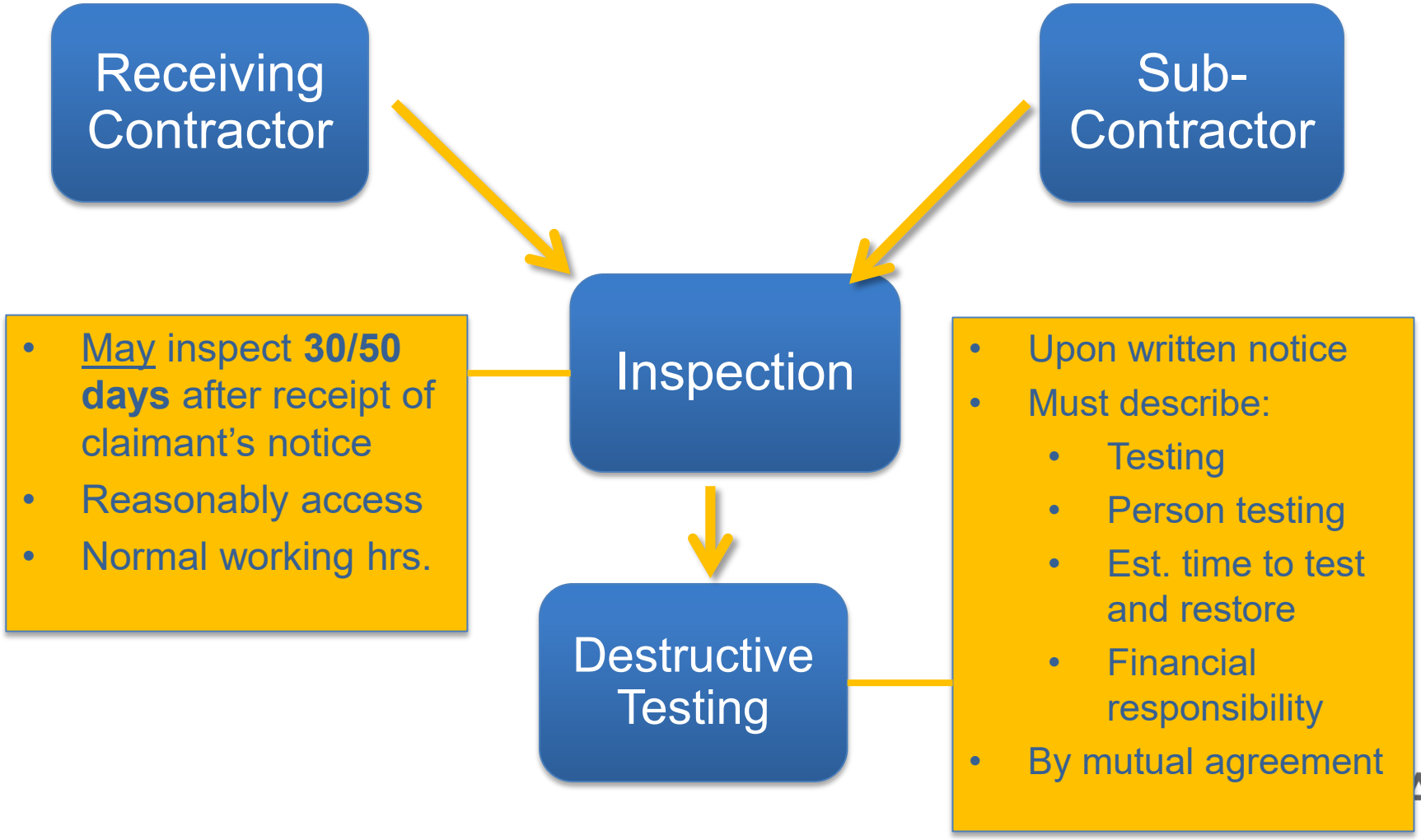
# Procedures of 558

## Inspection and Testing



# Procedures of 558

## Inspection and Testing

- Destructive Testing
  - Shall not render property uninhabitable
  - Not subject to lien rights <u>unless</u> the owner contracts for testing or restoration
  - No damages to the extent destructive testing and remedy could have avoided or mitigated them

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# Procedures of 558

## Downstream Response

Sub-Contractor → **Response** → Receiving Contractor

- If served, Subcontractor must serve a response to Receiving Contractor within **15/30 days** of receipt of downstream notice

- Response must include:
  - A written report, if any;
  - An offer or statement per **558.004(5)**

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# Procedures of 558

## Downstream Response

Sub-Contractor → **558.004(5) Response** → Receiving Contractor

(a) A written offer to remedy the alleged construction defect at no cost to the claimant, a detailed description of the proposed repairs necessary to remedy the defect, and a timetable for the completion of such repairs;

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# Procedures of 558

## Downstream Response

Sub-Contractor → **558.004(5) Response** → Receiving Contractor

(b) A written offer to compromise and settle the claim by monetary payment, that will not obligate the person's insurer, and a timetable for making payment;

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# Procedures of 558

## Downstream Response

Sub-Contractor → **558.004(5) Response** → Receiving Contractor

| | |
|---|---|
| (c) | A written offer to compromise and settle the claim by a combination of repairs and monetary payment, that will not obligate the person's insurer |
| (d) | A written statement that the person disputes the claim and will not remedy the defect or compromise and settle the claim; or |

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# Procedures of 558

## Downstream Response

Sub-Contractor → **558.004(5) Response** → Receiving Contractor

(e) A written statement that a monetary payment, including insurance proceeds, if any, will be determined by the person's insurer within 30 days after notification to the insurer…

A written statement under this paragraph may also include an offer under paragraph (c)…

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# Procedures of 558

## 558 Response

Receiving Contractor → **Response** → Claimant

- Within **45/75 days** after service of the 558 Notice of Claim, the Receiving Contractor must serve its written response

- Response <u>must</u> include an offer or statement from **558.004(5)**

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# Procedures of 558

## Notice of Acceptance or Rejection of Offer

- Service within **45 days** of receipt of a timely offer
- Court shall stay action until claimant complies
- At any time may agree in writing to alter 558 procedures or to "preaction" mediation

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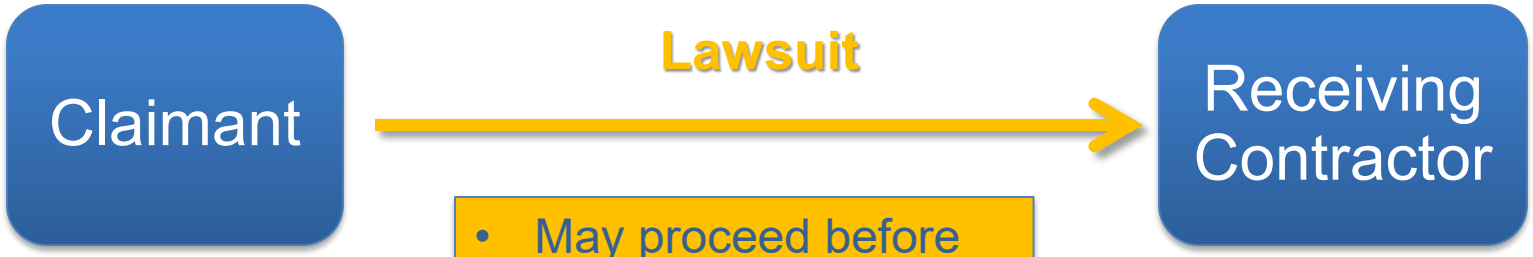
# Procedures of 558

## Filing Suit




- May proceed before **60/120 days** if Receiving Contractor disputes claim

- Partial settlement or compromise with action on unresolved claims only

- May proceed without notice for failure to comply with offer to compromise

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# Procedures of 558

## "Discovery"

Claimant

**Document Exchange**

Receiving Contractor

- Mandatory upon request - **30 days**
- Disclosure subject to claim of privilege
- Failure to disclose subject to sanctions
- Request must cite 558.004(15) and offer to pay for copies of:

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# Procedures of 558

## "Discovery"

Claimant

**Document Exchange**

Receiving Contractor

- Design plans
- Specs
- As-builts
- Photos and videos
- Expert reports
- Subcontracts
- P.O.'s
- Maintenance records
- Other documents related to discovery, investigation, causation and extent of alleged defects

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# Tolling of Statute of Limitations

- Claimant's service of notice tolls applicable statutes of limitation until the later of:
  - 90 or 120 days from service; or
  - 30 days after end of repair or payment period; or
  - By stipulation of the parties

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# Limitations of 558

- Admissibility of 558 in Litigation
- Emergency Repairs
- Legal Rights and Defenses

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# Limitations of 558

## Admissibility of 558 in Litigation

- Opportunity to resolve claims through confidential settlement negotiations
  (558.001)
- Downstream notices are not admissions of liability
  (558.004(3))
- Offers to remedy or pay to settle are not admissions and not admissible in an action brought under this chapter
  (558.004(9))

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# Limitations of 558

## Emergency Repairs

- 558 procedures do not prohibit or limit the claimant from making any necessary emergency repairs to the property required to protect the health safety and welfare of the claimant.

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# Limitations of 558

## Legal Rights and Defenses

- 558 does not bar or limit:
  - Rights,
  - Causes of action, or
  - Theories of liability
- 558 does not:
  - Bar or limit defenses; or
  - Create new defenses except as provided in 558

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# Limitations of 558

## Legal Rights and Defenses

- 558 does not:
  - Create any new rights
  - Causes of action, or
  - Theories on which liability may be based

*But what about*… Offers to remedy or pay to settle are not admissions and not admissible in an action "*brought under this chapter.*" *See* 558.004(9)

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# Limitation of Liability for Design Professionals

- Avoid individual liability for negligence
- Applies to employee or agent of the professional

**IF**

There is a contract between the professional business entity and the claimant or subconsultant;

The contract does not name the employee or agent as a party;

The contract includes the requisite statutory form and content; **AND**

The professional business entity maintains professional liability insurance required under the contract

# Limitation of Liability for Design Professionals

- Avoid individual liability for negligence
- Applies to employee or agent of the professional

**IF**

The damages are solely economic in nature and the damages do not extend to personal injuries or property not subject to the contract.

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# Limitation of Liability for Design Professionals

- Requisite statutory form and content:
  - A prominent statement
  - All uppercase font
  - 5 pt. sizes larger than other text
  - State that pursuant to 558.035 the employee or agent cannot be held individual liable for negligence

Form is as important as substance.

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*Good Luck!*

# Chapter 558

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## Questions or Comments?

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