

# THEORIES OF RECOVERY & CAUSES OF ACTION

## CONSTRUCTION LAW CERTIFICATION REVIEW COURSE

*Presented by :*

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EST. 1952

JACKSONVILLE | COCONUT CREEK | SAVANNAH

# ACCOUNT STATED

- *Elements:*
  - Parties had a series of transactions between them;
  - Statement of Account was given to Debtor;
  - No objection was made to Statement within reasonable time; and
  - Resulting balance is due.

# ACCOUNT STATED

- *A copy of the account must be attached showing:*
  - Items
  - Time of accrual of each
  - Amount of each
- *There is a presumption of correctness of the account*
  - May be overcome by proof of:
    - Fraud
    - Mistake
    - Error
    - Duress

# BREACH OF CONTRACT (EXPRESS OR IMPLIED)

- *Elements:*

- Valid Contract;
- Material Breach of Contract; and
- Resulting damages.

# BREACH OF CONTRACT (EXPRESS OR IMPLIED)

- *Contractor liability is cut off after the owner has accepted the work performed if the alleged defect is “patent”:*
  - **Test for patent defect:**
    - Whether the dangerousness of the condition was obvious had the owner exercised reasonable care.
      - *Florida Dept. of Transportation v. Capelettie Bros., Inc.*, 743 So.2d 150, 152 (Fla. 3d DCA 1999), *rev. denied*, 760 So.2d 945 (Fla. 2000).
- *Anticipatory Repudiation*
  - Relieves non-breaching party of its duty to perform and creates an immediate cause of action for breach of contract.
    - *Twenty-Four Collection, Inc. v. M. Weinbaum Construction, Inc.*, 427 So.2d 1110, 1111 (Fla. 3d DCA 1983).

# BREACH OF CONTRACT (EXPRESS OR IMPLIED)

- *Construction Contracts are usually not appropriate for Specific Performance.*
  - Levene v. Enchanted Lake Homes, Inc., 115 So.2d 89 (Fla. 3d DCA 1959).
  - Connell v. Mittendorf, 147 So.2d 169 (Fla. 2d DCA 1962).
- *However, Specific Performance may be ordered, if appropriate.*
  - Home America, Inc. v. Atkinson, 392 So.2d 268 (Fla. 2d DCA 1980).

Specific performance properly ordered on home construction contract following a finding contractor (although having substantially completed the home) had breached the contract by construction defects.

# BREACH OF FIDUCIARY DUTY

- *Elements:*

- Creation of Fiduciary Duty on part of wrongdoer;
- Breach of duty; and
- Resulting damages.

# BREACH OF FIDUCIARY DUTY

- *To establish a fiduciary relationship, you must allege:*

- Some degree of **dependency** on one side....

Some degree of undertaking on the other side to:

- **Advise,**
- **Counsel,** and
- **Protect**  
the weaker party.



# BREACH OF IMPLIED IN LAW CONTRACT / QUANTUM MERUIT / UNJUST ENRICHMENT (COMMON LAW *ASSUMPSIT*)

- *Elements:*

- Requested performance of labor, materials, or services;
- Reasonable value of labor, materials or services; and
- Nonpayment of the reasonable value.

# BREACH OF IMPLIED IN LAW CONTRACT / QUANTUM MERUIT / UNJUST ENRICHMENT (COMMON LAW *ASSUMPSIT*)

- ***Note:***

- This is an equitable cause of action.
- Implied in Law Contract may be shown where an express contract can't be proven.
- Defense:
  - An express contract.

# BREACH OF THIRD PARTY BENEFICIARY CONTRACT

- *Elements:*

- Existence of Contract;
- Clear or manifest intent of contracting parties that contract primarily and directly benefit third party;
- Breach of Contract by a contracting party; and
- Damage to the third party resulting from the breach.

# BREACH OF THIRD PARTY BENEFICIARY CONTRACT

- In Florida, it is necessary to show both parties to the contract intended the third party to benefit from the agreement:
- Insufficient to show only one party unilaterally intended to benefit the third party.
- *Caretta Trucking, Inc. v. Cheoy Lee Shipyards, Ltd.*, 647 So.2d 1028, 1031 (Fla. 4<sup>th</sup> DCA 1994).

# BREACH OF WARRANTY

- Express Warranties:

- Contractual Warranty

- Statutory Warranty

- **Ex:** §718.203, *Florida Statutes*--Warranty of Fitness of Construction of a Condominium

# BREACH OF WARRANTY

- **Implied Warranties**

- *Fitness of Plans and Specifications*
- *Merchantable or Fit for Particular Purpose*
- *Compliance with a condominium's restrictive covenants*
- *Habitability of a residence*

# BUILDING CODE VIOLATION FLA. STAT. §553.84

- Any person, individually or on behalf of a class, damaged as a result of a violation of §553.84 (the Florida Building Code) has a cause of action in any Court of competent jurisdiction against the person who committed the violation.

# BUILDING CODE VIOLATION FLA. STAT. §553.84

- Does not apply if:
  - The person obtains the required building permits;
  - Plans approved by proper entity;
  - Project passes all required inspections under the code; and
  - No personal injury or damage to property other than property that is the subject of the permits, plans, and inspections

**\*\*Unless: the party knew, or should have known, that the violation existed.\*\***



# BUILDING CODE VIOLATION FLA. STAT. §553.84

- Requires notice and opportunity to cure defects before legal action can be filed.
- Can you show a specific damage as a result of the a specific building code violation?

# CIVIL CONSPIRACY

- ***Elements:***

- An agreement between two (2) or more parties;
- To do an unlawful act or to do a lawful act by unlawful means;
- The doing of some overt act in pursuance of the conspiracy; and
- Damage to Plaintiff as a result of the acts done under the conspiracy.

# CIVIL CONSPIRACY

- There must be two types of intent:
  - Intent to enter into the agreement
  - Intent to achieve the objective of the agreement
- Plus an overt act

# CIVIL THEFT –

## §812.014, *FLORIDA STATUTES*

- ***Elements:***
  - **Knowingly;**
  - **Obtaining or using, or endeavoring to obtain or use, Plaintiff's property;**
  - **With felonious intent;**
  - **To temporarily or permanently**
    - **Deprive Plaintiff of right to, or a benefit from, property or**
    - **Appropriate the property to Defendant's own use or the use of a person not entitled to the property.**

# CIVIL THEFT –

## §812.014, *FLORIDA STATUTES*

- Before seeking treble damages, must make a written demand for return.
  - Return within thirty (30) days of the demand absolves the claim for treble damages.
- **Existence of a contractual relationship does not preclude an action for civil theft:**
  - Where the property at issue is also the subject of a contract between the parties, a civil theft claim requires additional proof of an **intricate, sophisticated scheme of deceit and theft**.
    - *Gersh v. Cofman*, 769 So.2d 407, 409 (Fla. 4<sup>th</sup> DCA 2000); *Seymour v. Adams*, 638 So.2d 1044, 1049 (Fla. 5<sup>th</sup> DCA 1994).

# CONSTRUCTION LIEN ENFORCEMENT – CHOICE OF REMEDIES

- §713.28, *Florida Statutes*:
  - If a Lienor shall fail, for any reason, to establish a Lien for the full amount to be due him or her in an action to enforce the same under the provisions of this part, he or she may, in addition to the Lien decreed in his or her favor, recover a judgment or decree in such action against any party liable therefor for such sums in excess of the Lien as are due him or her or which the Lienor might recover in an action on a Contract against any party to the action from which such sums are due him or her.

# LIEN FORECLOSURE (IN CHANCERY)

- Privity - §85.011(2), *Florida Statutes*
- Non-Privity - §85.021, *Florida Statutes*

# LIEN FORECLOSURE (IN CHANCERY)

- *Elements:*
  - Agreement/Contract to improve property;
  - Notice of Commencement, if Lien is within the effective period to establish relation back date;
  - Timely service of Notice to Owner or Contractor's Affidavit, as applicable;
  - Timely recording of Claim of Lien within 90 days of last work or delivery;
  - Performance of Contract;
  - Unpaid balance; and
  - List of Defendant(s) with liens, or interests that are inferior, seeking to foreclose those interests.



# LIEN FORECLOSURE (IN CHANCERY)

- **Request Court:**

- Recognize Lien in amount found to be due, from date Lien attached to title of the property
- Enter judgment in that amount and Judgment against Lienor's customer;
- Order sale of Owner's interest in property;
  - Deficiency judgment - §713.28(3), *Florida Statutes*
- Attorneys' fees and interest, from date debt was due; and

- **Record a Notice of *Lis Pendens***

- *Written notice a lawsuit has been filed concerning real estate.*

# ORDINARY ACTION AT LAW

- Privity - §85.011(3), *Florida Statutes*
- Non-Privity - §85.021, *Florida Statutes*

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# ORDINARY ACTION AT LAW

- **Request Court:**
  - Recognize Lien in amount found to be due, from date Lien attached to title of the property
  - Enter judgment in that amount and Judgment against Lienor's customer;
  - Order sale of Owner's interest in property;
    - Deficiency judgment - §713.28(3), *Florida Statutes*
  - Attorneys' fees and interest, from date debt was due; and
  - Request levy of execution on the lien property.
- **May be appropriate where Lien has been transferred to Bond.**

# SPECIAL ACTION AT LAW

- Privity - §85.011(4), *Florida Statutes*
- Non-Privity - §85.021, *Florida Statutes*
  - Particularly good for Lien on Leasehold Interest

# SPECIAL ACTION AT LAW

- *Elements:*

- Manner in which Lien arose;
- Amount of Lien;
- Description of property; and
- Demand that property be sold to satisfy Lien.

# SPECIAL ACTION AT LAW

- **Judgment for Plaintiff is a personal judgment against Defendant, as well as a Lien on property.**
- **If non-privity Lien, also request Judgment against Contractor.**

# LABORER'S SUMMARY ACTION

- Privity - §85.011(5), *Florida Statutes*
- Non-Privity - §85.021, *Florida Statutes*
- ***Elements:***
  - Description of property; and
  - Facts which authorize or create Lien.



# REPOSSESSION / REPLEVIN – §713.15 & § 78.01 *FLORIDA STATUTES*

- Peaceable Repossession
  - No action filed
- Replevin
  - Right of repossession and removal.
  - Extends only to materials whose purchase price does not exceed amount remaining due to the person repossessing.
  - Where materials have been partly paid for, person delivering them may repossess them if they refund the part of the purchase price which has been paid.
- Materials retaken must be credited against any Lien at the original sales price (no restocking charges or reduced price).

# REPOSSESSION / REPLEVIN – §713.15 & § 78.01 *FLORIDA STATUTES*

- ***Elements:***

- Improvement is abandoned or completed and materials not used;
- Claimant is a Lienor (within definition of §713.01, *Florida Statutes*);
- Claimant furnished the materials, and is the Owner of the materials;
  - Must describe the source of the title to the materials;
  - Attach a copy of any documents reflecting ownership.
- Claimant delivered materials to the project and the materials are uninstalled;
  - Describe the materials.
  - Attach a statement as to the value of the materials .

# REPOSSESSION / REPLEVIN – §713.15 & § 78.01 *FLORIDA STATUTES*

- *Elements (Continued):*
  - Statement that materials are wrongfully detained by Defendant and how Defendant came into possession of the materials;
  - Statement that materials have not been taken for a tax, assessment or fine, pursuant to law;
  - Statement that materials have not been taken under an execution or attachment against the property of Plaintiff; and
- Request Writ of Replevin.

# REPOSSESSION / REPLEVIN – §713.15 & § 78.01 *FLORIDA STATUTES*

- **Objective of Replevin:**

- Plaintiff who prevails on the merits is entitled to:
  - Final judgment for recovery of the materials or their value, or the value of Plaintiff's lien or special interest, and damages sustained as a result of the wrongful taking/detention;
- Plaintiff may elect to seek a writ of replevin prior to the entry of final judgment in order to obtain possession of the property during the pendency of the replevin action and until the parties' claims are finally adjudicated
  - Pursuant to **§78.068**, *Florida Statutes*, the prejudgment writ may be issued without notice and a hearing, but the Plaintiff must post a bond.

# REPOSSESSION / REPLEVIN –

## §713.15 & § 78.01 *FLORIDA STATUTES*

- **§78.065(2), *Florida Statutes*:**

- If Complaint makes requisite allegations, Court will enter an Order to Show Cause why materials should not be returned.

- **§713.15, *Florida Statutes*:**

- “This right to repossess and remove or replevy the materials shall not be affected by their sale, encumbrance, attachment, or transfer from the site of improvement, except that if the materials have been so transferred, the right to repossess or replevy them shall not be effective as against a purchaser or encumbrancer thereof in good faith whose interest therein is acquired after such transfer from the site of the improvement or as against a creditor attaching after such transfer.”

# FRAUDULENT LIEN – §713.31(2)(C), *FLORIDA STATUTES*

- Claim may be made as a defense to Lien enforcement or as an affirmative claim by Owner, Contractor, Subcontractor, or Sub-subcontractor who has been damaged as a result of Fraudulent Lien.

# FRAUDULENT LIEN – §713.31(2)(C), *FLORIDA STATUTES*

- *Elements:*

- Lien has been recorded by Defendant;
- Plaintiff is Owner, Contractor, Subcontractor, or Sub-subcontractor who has been damaged by Lien;
- Lienor has willfully included a claim for work not performed or materials not furnished or Lienor has compiled claim with such willful and gross negligence as to amount to a willful exaggeration;
- Describe damages; and
- Attorneys' fees.

# FRAUD/COLLUSION IN DEPRIVING LIENOR OF RIGHTS/BENEFITS - §713.31(1), *FLORIDA STATUTES*

- ***Elements:***

- Defendant has by fraud or collusion;
- Deprived or attempted to deprive, Owner or Lienor of benefits or rights;
- By giving false affidavits, releases, invoices, worthless checks, statements, or written instruments permitted or required under Lien law;
- To detriment of Lienor.



# FRAUD/COLLUSION IN DEPRIVING LIENOR OF RIGHTS/BENEFITS - §713.31(1), *FLORIDA STATUTES*

- Circuit Court - Action in chancery.
- Upon request, Court can:
  - Issue temporary and permanent Injunctions;
  - Order Accounting;
  - Grant discovery;
  - Utilize all remedies available under creditors' bills and proceedings supplementary to execution;
  - Marshal assets; and
  - Exercise any other appropriate legal or equitable remedies or procedures without regard to the adequacy of a remedy at law or whether or not irreparable damage has or will be done.

# SHORTEN LIEN WITH SUMMONS TO SHOW CAUSE - §713.21(4), *FLORIDA STATUTES*

- Where Plaintiff has interest in Defendant's Lien that has been recorded, Plaintiff can issue a special Summons that says:
  - "Pursuant to §713.21(4), *Florida Statutes*, Defendant is directed to show cause within twenty (20) days why Lien should not be enforced by action or vacated and canceled of record."
- Allege any other facts that are critical of Lien.
- If Defendant then fails to counterclaim to enforce the Lien, show cause (sworn to or affirmed) why Lien should be enforced in the action, or file a separate action to enforce Lien, the Court is duty bound to discharge Lien by order.

# SHORTEN LIEN WITH SUMMONS TO SHOW CAUSE - §713.21(4), *FLORIDA STATUTES*

- Purpose is to bring Lien claim to a head, regardless of any lack of merit of Lien.
- May be filed by “any interested party.”

# UNDISPUTED FUNDS - §713.346, *FLORIDA STATUTES*

- *Elements:*

- Existence of a Contract with Plaintiff “Lienor” (as defined in §713.01, *Florida Statutes*), to improve real property;
- Description of labor, services, or materials provided;
- Allegation that labor, services, or materials were provided in accordance with the Contract;
- Amount of Contract;
- Amount, if any, paid pursuant to Contract;

# UNDISPUTED FUNDS - §713.346, *FLORIDA STATUTES*

- *Elements (Continued):*

- Amount that remains unpaid pursuant to Contract, and amount that is undisputed;
- Undisputed amount has remained due and payable pursuant to Contract for more than 30 days after date labor or services were accepted or materials were received;
- Or Defendant received payment for the labor, services, or materials described in the Complaint more than 30 days prior to date Complaint was filed and has not paid the laborer/material supplier; and
- Counsel has been retained, fees have been incurred, and fees are sought.

# UNDISPUTED FUNDS -

## §713.346, *FLORIDA STATUTES*

- Court shall conduct an evidentiary hearing on Complaint, upon not less than 15 days written notice. The person providing labor, services, or materials is entitled to the following remedies, to the extent of the undisputed amount due, and upon proof of each allegation in the Complaint:
  - ✦ Accounting of use of any payment received such payment.
  - ✦ Temporary Injunction against person who received payment, subject to Bond requirements specified in the Florida Rules of Civil Procedure.
  - ✦ Prejudgment attachment against person who received payment, in accordance with requirements of Chapter 76.
  - ✦ Such other legal or equitable remedies as may be appropriate in accordance with the requirements of the law.

# UNDISPUTED FUNDS - §713.346, *FLORIDA STATUTES*

- Remedies must be granted without regard to any other remedy at law and without regard to whether or not irreparable damage has occurred or will occur.
- Remedies do not apply:
  - To extent of *bona fide* dispute regarding any portion of Contract price.
  - In the event Plaintiff has committed a material breach of Contract which would relieve Defendant from the obligations under Contract.

# LENDER RESPONSIBIITY – §713.3471, *FLORIDA STATUTES*

**Failure to give notice of final decision to cease funding.**

- Claim by Contractor against Lender;
- For failure to provide notice to Contractor within five (5) business days of a final determination to cease funding under the Construction Loan;
- Prior to distribution of all funds available under the Construction Loan,



# LENDER RESPONSIBIITY – §713.3471, *FLORIDA STATUTES*

- Contractor may sue Lender for the:
  - Actual value of the materials and direct labor costs;
  - Plus 15 percent for overhead, profit, and all other costs;
  - From the date on which notice of the Lender's decision should have been served on the Contractor and the date on which notice of the Lender's decision is served on the Contractor.

# LENDER RESPONSIBIITY - §713.3471, *FLORIDA STATUTES*

## Failure to give notice of re-designated loan proceeds.

- If Lender and Borrower have designated a portion of construction loan proceeds;
- Borrower may not authorize Lender to disburse funds for any other purpose;
- Until Owner serves Contractor (and any other Lienor who has given the Owner a Notice to Owner) with written notice of that decision, including the amount of the loan proceeds to be disbursed.

# CONVERSION

- *Elements:*
  - Act of dominion
  - Wrongfully asserted
  - Over another's property

# CONVERSION

- Damages are fair market value of property when converted, plus legal interest, *not replacement value*.
- Where parties are engaged in a contractual dispute over the amount owed and no fraud is involved, no conversion (or civil theft) can occur.
- Making a demand is necessary for a claim for conversion to survive in Florida.

# FRAUD IN THE INDUCEMENT

- *Elements:*

- False statement concerning a material fact;
- Knowledge by the person making the statement that the statement is false;
- Intent by Defendant that statement will induce Plaintiff to act on it; and
- Reliance on the statement to the damage of the Plaintiff.

# FRAUD IN THE INDUCEMENT

- In Florida, a claim for fraud in the inducement must be alleged with particularity, including:
  - Who made the false statement;
  - The substance of the false statement;
  - The time frame in which the false statement was made; and
  - The context in which the false statement statement was made.

# FRAUDULENT MISREPRESENTATION

- *Elements:*

- False statement concerning a material fact;
- Knowledge by the person making the statement that the statement is false;
- Intent by Defendant that the statement will induce the Plaintiff to act on it;
- Reliance on the statement to the damage of the Plaintiff; and
- Resulting damages.

# FRAUDULENT MISREPRESENTATION

- An agent, even though acting for an acknowledged principal, is independently liable for fraudulent misrepresentation.
- The knowledge element of fraudulent misrepresentation is satisfied where a representation is made:
  - Without knowledge as to either truth or falsity or
  - Under circumstances in which the representor ought to have known, if he did not know, of the falsity of the representation



# FLORIDA DECEPTIVE UNFAIR TRADE PRACTICES ACT

## §501.201, *FLORIDA STATUTES*, ET SEQ.

- If consumer has been damaged by deceptive act or trade practice, consumer may maintain an action for actual damages, plus attorneys' fees and costs.
  - Attorneys' fees are discretionary with the Court. *See Fla. Stat. 501.2105.*
- If there is a defense the claim is frivolous, Court shall conduct a hearing and may require posting of a Bond to maintain the action.
  - Bond is to indemnify Defendant for damages, plus costs and fees.

# EQUITABLE LIEN

- **Stems from two possible sources:**
  - **Written Contract which shows an intent to charge some particular property with a debt or obligation;**
  - **Judgment by a Court of equity out of general consideration of right and justice, as applied to the relations of the parties and the circumstances of their dealings in the particular case.**
- **Arises at the time of the transaction from which it springs.**

# EQUITABLE LIEN

- Complaint must allege ultimate facts that show there is no adequate remedy at law.
  - Conclusion is not enough.
- Defendant must own property on which Lien is sought to be enforced.
- Recording a Notice of *Lis Pendens* is discretionary.
  - If *Lis Pendens* is filed, there must be a Bond since the Equitable Lien is not based on a recorded instrument or Claim of Lien.
- Appropriate for unpaid improvements to a Leasehold where Lease prohibits liens against landlord's interest and landlord has been unjustly enriched.
- May be appropriate against a designated but undisbursed construction fund.

# EQUITABLE SUBROGATION

- *Elements:*
  - Subrogee made payment to protect their own interest;
  - Subrogee did not act as a volunteer;
  - Subrogee was not primarily liable for the debt;
  - Subrogee paid off the entire debt;
  - Subrogation would not work any injustice to the rights of a third party; and
  - Amount of debt.

# EQUITABLE SUBROGATION

- The policy behind equitable subrogation is to prevent unjust enrichment by assuring that the person who in equity, and good conscience, is responsible for the debt is ultimately answerable for its discharge.
- A subrogation suit is a separate, independent action against a subsequent tortfeasor by the initial tortfeasor. This spares the injured party from the subrogation action.

# GOODS SOLD AND DELIVERED

- *Elements:*

- Goods were sold and delivered to Defendant;
  - Sale can be proven by delivery, from which sale is presumed or implied.
- Agreed price or reasonable value.

# INDEMNITY – COMMON LAW

- *Elements:*

- Indemnity between tortfeasors is allowable only where whole fault is in one against whom indemnity is sought.
  - Indemnity shifts entire loss from one who, without active negligence or fault, has been obligated to pay another because of some vicarious, constructive, derivative or technical liability.
- Indemnification can come only from a party who is wholly at fault.
- Special relationship between parties is required for common law indemnification to exist in Florida.

# INDEMNITY – CONTRACTUAL

- ***Elements:***

- Agreement by which the promisor agrees to protect the promisee against loss or damages by reason of liability to a third party.



# INDEMNITY – CONTRACTUAL

- Typically for personal injury or property damage, but may include economic losses.
- Agreement may allow party to indemnify others for negligence of others.
- In design and construction setting there are restrictions on contractual indemnity, Fla. Stat. 725.06:
  - Must be commercially reasonable limit of not less than \$1,000,000.00; and
  - Limit must be part of project specifications or bid documents, if any.
  - Without the limit, agreement to indemnify another's negligence is void and unenforceable.

# INDEMNITY – CONTRACTUAL

- Raises a duty to defend
- Express contract not required:
  - Contractual Indemnity may arise out of implied contractual relations or liability imposed by law.
- Special relationship not required

# INDEMNITY – IMPLIED COMMON LAW INDEMNITY

- Complaint must allege:

- Cause of action;
- Against Indemnatee;
- Based at least in part on imputed liability.

- Third Party Complaint must allege:

- Special relationship running from Indemnitor to Indemnatee;
- Indemnitor breached duty to Indemnatee;
- Plaintiff's injuries resulted from same actions that constitute breach of Indemnitor's duty to Indemnatee; and
- Indemnatee can be held liable to Plaintiff for injuries to Plaintiff resulting from Indemnitor's act.

# INJUNCTIONS

- *Elements:*

- Equitable grounds;
- Clear legal or equitable right in favor of party seeking Injunction; and
- Inadequate remedy at law.

# INJUNCTIONS

- There may be considerations of Public Interest.
- Court must specify reasons for entry of Injunction with findings of fact.
- Preliminary Injunction must provide for a Bond for damages.

# NEGLIGENCE

- *Elements:*

- Defendant owed legal duty to Plaintiff;
- Defendant breached that duty;
- Plaintiff was injured as a result of Defendant's breach of duty; and
- Resulting damage.

# OPEN ACCOUNT

- *Elements:*

- Sales Contract existed between Creditor and Debtor;
- Amount claimed by Creditor represents either agreed on sales price or reasonable value of services or goods delivered; and
- Services or goods were actually performed/delivered.

# PAYMENT BOND CLAIM

- ***Elements:***

- Bond issued by Defendant;
- Claimant falls within permitted class under Bond;
- Claimant is unpaid for covered labor, services, or materials;
- Claimant has complied with Bond conditions, and any applicable statutory conditions;
- Suit has been timely filed; and
- Reasonable attorneys' fees incurred.



# PERFORMANCE BOND CLAIM

- *Elements:*

- Defendant furnished Performance Bond;
- Claimant is an Obligee under the Bond;
- Bond Principal has breached the Contract or Bond obligations;
- Claimant has performed any conditions precedent to recovery under Bond, including any timely notices and/or filing of suit; and
- Claimant has suffered damages as a result of the breach.

# PROFESSIONAL NEGLIGENCE

- *Elements:*

- Breach by a professional of the standard of care of a like professional; and
- Resulting damage to any person who with reasonable certainty was intended to have been protected by the duty.

# PROMISSORY ESTOPPEL

- *Elements:*

- Promise;
- Which Promisor should reasonably expect to induce action or forbearance on the part of the Promisee or a third person;
- Which does induce such action or forbearance; and
- Injustice can be avoided only by enforcement of the promise.

# PROMPT PAYMENT ACT – FEDERAL: 31 U.S.C. §3901 THROUGH 3907

- **31 USCA 3903(a)(6):**
  - Interest on construction contracts begins to accrue 14 days after a progress payment request is received, unless Contract provides for a longer period of time;
  - Interest accrues on unpaid retainage by a date specified in the Contract or, in the absence of such a specified date, by the 30th day after final acceptance;
- **31 USCA 3903(7):**
  - Defective invoices may be returned within seven (7) days of receipt for correction;

# PROMPT PAYMENT ACT – FEDERAL: 31 U.S.C. §3901 THROUGH 3907

- 31 USCA 3905(a):
  - Contractor owes interest to Owner for amounts overbilled;
- 31 USCA 3905(b):
  - Contractor shall pay Subcontractors within seven (7) days of receipt of payment, and is liable for interest on late payments;
- 31 USCA 3907:
  - Claims for interest may be filed under 41 USCA 7103;
  - Interest accrues until claim is filed or for up to one (1) year

# PROMPT PAYMENT ACT – STATE: §255.072, *FLORIDA STATUTES*

- §§255.073 and 215.422, *Florida Statutes*:
  - Owner must pay undisputed amounts timely
  - Interest of 1% per month due on late payments
- If payment of an invoice is not issued within forty (40) days after receipt of the invoice and receipt, inspection, and approval of the goods and services, the agency or judicial branch shall pay the vendor, in addition to amount of invoice, interest at legal rate on the unpaid (undisputed) balance from the expiration of the 40-day period until such time as payment is issued to the vendor;
- Subcontractors must be paid within ten (10) days of receipt of payment by Contractor;

# PROMPT PAYMENT ACT – STATE: §255.072, *FLORIDA STATUTES*

- §255.075, *Florida Statutes*:

- Contract may not waive interest on late payments; and
- In an action to recover amounts due for construction services purchased by a public entity;
- Court shall award court costs and reasonable attorneys' fees, including fees incurred through any appeal, to prevailing party;
- If the Court finds the nonprevailing party withheld any portion of payment without any reasonable basis in law or fact.

# PROMPT PAYMENT ACT –FLORIDA LOCAL GOVERNMENT §§218.70 - 218.80, *FLORIDA STATUTES*

- Payment for construction services is due twenty (20) business days (25 days if an agent needs to approve) after delivery of invoice, unless rejected within ten (10) days after receipt of invoice.
  - Rejection must specify reasons, and undisputed portions of invoice must be paid.
- Subcontractors must be paid within ten (10) days after payment to prime.



# PROMPT PAYMENT ACT – FLORIDA LOCAL GOVERNMENT §§218.70 - 218.80, *FLORIDA STATUTES*

- Local governments are required to have an informal dispute resolution procedure to resolve billing disputes within sixty (60) days after payment request was properly received.
- Interest of 1% per month is due on late payments, unless contractual rate is higher.
  - Contract may not waive interest on late payments.
- Attorneys' fees and costs to be awarded to prevailing party for violation of this Act (Part).

# PROMPT PAYMENT ACT – PRIVATE WORK: §715.12, *FLORIDA STATUTES*

- Interest is due on payments that are late, as defined in §715.12(4), and bear interest at no less than the legal rate, computed beginning on the 14th day after the payment is due. Obligor has fourteen (14) days to return incomplete payment requests.
- Unless Contract provides otherwise, dispute is not grounds to withhold payment for work not affected by the dispute.
- Retainage is due within fourteen (14) days of the earlier of:
  - substantial completion
  - beneficial occupancy or
  - issuance of a certificate of occupancy.
- Contractor may substitute specified security for a portion of retainage withheld.
- This is not a separate cause of action.

# QUIA TIMET

- Agreement where Surety is entitled to demand from Indemnitors an amount sufficient to discharge any claim made against the Bond;
- There must be a rational basis for the Surety's fear that the Bond is in jeopardy; and
- Surety must establish the nature and approximate amount of possible claims and liabilities it reasonably anticipates under the Bond.

# QUI TAM – FEDERAL 31 U.S.C. §3729

Any person who does the following is liable to the U.S. Government for a civil penalty of not less than \$5,000.00 and not more than \$10,000.00, plus three (3) times the amount of damages which the Government sustains because of the act:

- Knowingly presents, or causes to be presented, to an officer or employee of the U.S. Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
- Knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
- Conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

# QUI TAM – FEDERAL 31 U.S.C. §3729

- **Cont.**

- Has possession, custody, or control of property or money used, or to be used, by the U.S. Government and, intending to defraud the U.S. Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;
- Is authorized to make or deliver a document certifying receipt of property used, or to be used, by the U.S. Government and, intending to defraud the U.S. Government, makes or delivers the receipt without completely knowing that the information on the receipt is true; and
- Knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the U.S. Government.

# FALSE CLAIMS ACT –

## §68.082, *FLORIDA STATUTES*

- ***Elements:***

**Any person who does the following is liable to the state for a civil penalty of not less than \$5,500.00 and not more than \$11,000.00 and for treble the amount of damages the agency sustains because of the act or omission of that person:**

- Knowingly presents or causes to be presented to an officer or employee of an agency a false or fraudulent claim for payment or approval;
- Knowingly makes, uses, or causes to be made or used a false record or statement in order to get a false or fraudulent claim paid or approved by an agency;
- Conspires to submit a false or fraudulent claim to an agency or to deceive an agency for the purpose of getting a false or fraudulent claim allowed or paid;

# FALSE CLAIMS ACT –

## §68.082, *FLORIDA STATUTES*

- Has possession, custody, or control of property or money used or to be used by an agency and, intending to deceive the agency or knowingly conceal the property, delivers or causes to be delivered less property than the amount for which the person receives a certificate or receipt;
- Is authorized to make or deliver a document certifying receipt of property used or to be used by an agency and, intending to deceive the agency, makes or delivers the receipt without knowing that the information on the receipt is true; or
- Knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to an agency.

# FALSE CLAIMS ACT - §68.082, *FLORIDA* *STATUTES*

- A person may bring a civil action for a violation of §68.082 for the person and/or for the affected agency.
  - Civil actions instituted under this act shall be governed by the Florida Rules of Civil Procedure and shall be brought in the name of the State of Florida.
  - Prior to the Court unsealing the Complaint under subsection (3), the action may be voluntarily dismissed by the person bringing the action only if the department gives written consent to the dismissal and its reasons for such consent.
- The Complaint shall be identified on its face as a Qui Tam action and shall be filed in the Circuit Court of the Second Judicial Circuit, in and for Leon County.
  - Immediately upon the filing of the Complaint, a copy of the Complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Attorney General and the Chief Financial Officer, by registered mail, return receipt requested.
  - They may elect to intervene and proceed with the action, on behalf of the state, within 60 days after receiving the Complaint and the material evidence and information.



# FALSE CLAIMS ORDINANCES – LOCAL GOVERNMENT

- A municipality may have a false claims ordinance, e.g. Article XV, §§ 21-255 to 21-266, Metropolitan Dade County Code of Ordinances.
- Check for such an ordinance and then be mindful of its terms.

# STRICT LIABILITY

- *Elements:*

- The wrongdoer's relationship to the product or dangerous activity in question;
- The product or activity has a defective and unreasonably dangerous condition when used as intended;
- There is proximate cause between the condition of the produce or dangerous activity and Plaintiff's injuries or damages; and
- Resulting damages.

# UNAUTHORIZED USE OF PLANS - COPYRIGHT

## – 17 U.S.C. §§101-810

- *Elements:*

- Plaintiff is Owner of copyright;
- Defendant has published plans or built a building, which was copyrighted;
- Plan or building of Defendant is substantially similar to that of Plaintiff; and
- Plaintiff seeks damages and/or Injunction.

# UNLICENSED CONTRACTOR

- **Statutory Action for Damages - §768.0425, *Florida Statutes*:**
  - “In any action against a Contractor for injuries sustained resulting from the Contractor’s negligence, malfeasance, or misfeasance, the consumer (person who contracts for the performance of any construction or building service which is regulated by any state or local law), shall be entitled to three times the actual compensatory damages sustained in addition to costs and attorneys’ fees if the Contractor is neither certified as a Contractor by the state nor licensed as a Contractor pursuant to the laws of the municipality or county within which she or he is conducting business.”

# UNLICENSED CONTRACTOR

- **Contracts Entered Into by Unlicensed Contractors Are Unenforceable - §489.128, *Florida Statutes*:**
  - “As a matter of public policy, contracts entered into on or after October 1, 1990, by an unlicensed Contractor shall be unenforceable in law or in equity by the unlicensed Contractor.”
  - “[...]a Contractor shall be considered unlicensed only if the Contractor was unlicensed on the effective date of the original contract for the work, if stated therein, or, if not stated, the date the last party to the contract executed it, if stated therein. If the contract does not establish such a date, the Contractor shall be considered unlicensed only if the Contractor was unlicensed on the first date upon which the Contractor provided labor, services, or materials under the contract.”

# WORTHLESS CHECKS – §68.065, *FLORIDA STATUTES*

## Elements:

- Check is given for materials or services furnished;
  - With intent to defraud;
  - Payee gave written notice (specified in the statute) of a worthless check; and
  - 30 days have gone by without payment.
- 
- Holder of the check may sue the maker for the amount of the check, plus treble damages, and attorneys' fees and costs.

# INTENTIONAL INTERFERENCE WITH CONTRACT OR BUSINESS RELATIONSHIP

- *Elements:*

- The existence of a business relationship, not necessarily evidenced by an enforceable Contract;
- Knowledge of relationship by Defendant;
- Intentional and unjustified interference with relationship by Defendant; and
- Damage to the Plaintiff as a result of breach of the relationship.

# QUESTIONS FROM THE AUDIENCE?

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EST. 1952

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