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BALANCING THE NEED FOR EMERGENCY REPAIRS AGAINST THE RISK OF DESTROYING EVIDENCE

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What do you do when the need for emergency repairs arises when commencing or complying with Chapter 558 pre-suit requirements? For example, say you are a residential property owner and have water coming through your roof and/or skylights, along with other roof construction defects. Meanwhile, you have engaged an expert consultant or engineer and decided to begin the Chapter 558 process against the general contractor and/or roofer that performed the work. However, the water issues are continuing, you are suffering damage, and are now concerned about mold growth. Section 558.004(9), Fla. Stat. (2018) provides for the "claimant" (typically, the owner) to make "any necessary emergency repairs to the property as are required to protect the health, safety, and welfare of the claimant," notwithstanding all other requirements of Section 558.004, Fla. Stat. – such as notice and the right to offer to remedy the defects.

However, when taking advantage of Section 558.004(9), Fla. Stat., and making such emergency repairs, one must be careful to avoid any future claims of spoliation of evidence. "Spoliation" is "[t]he intention destruction, mutilation, alteration, or concealment of evidence…" Black's Law Dictionary (10th ed. 2014). Thus, if the repairs are made, the owner and their attorney must be cautious to preserve all evidence of the defect and repair. Florida courts may impose sanctions for spoliation of evidence, such as an adverse inference against the party that destroyed the evidence or striking of pleadings. See, e.g., League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 391 (Fla. 2015); Martino v. Wal-Mart Stores, Inc., 908 So. 2d 342, 347-8 (Fla. 2005). When the need for emergency repairs arises, one must take advantage of all opportunities to allow the opposing party and any experts to inspect the property – both pre- and post-repairs – and to document the repair process with photographs and, where possible, video.

Thus, in addition to the required notice to be sent to any responsible parties under Section 558.004(1), Fla. Stat. – as well as the inspection and destructive testing that can be performed by the person served with the notice under Section 558.004(2) – the claimant should also serve written notice on all persons involved for emergency repairs. Such notice should include a reasonable explanation and description of the repair, as well as opportunities to inspect and observe the repairs (to the extent possible, given any safety concerns). Cooperation with any opposing parties or counsel during this process is paramount to avoid claims of spoliation in any potential future litigation.

For more information on this topic, please contact Stephanie M. Chaissan on the firm's Dispute Resolution Team.

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