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Statute of Repose for Latent Construction Defects Extension Creates Increased Risk

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On March 23, Gov. Rick Scott approved House Bill 875, which amended Florida Statute Section 95.11(3)(c) by extending the Statute of Repose (the ultimate deadline to assert claims) for latent construction defect claims. Prior to the amended language, the Statute of Repose was 10 years following project completion, but the revised statutory language extends this period and states as follows: "However, counterclaims, cross-claims, and third-party claims that arise out of the conduct, transaction, or occurrence set out or attempted to be set out in a pleading may be commenced up to one year after the pleading to which such claims relate is served, even if such claims would otherwise be time barred." This extension presents significantly increased risk for the entire development, construction and real estate industries, and should result in significantly higher insurance premiums.

From an initial reading of the amended language, it is clear that the previous 10-year deadline to file suit for latent construction defects has now been extended by at least one year, in the event that a pleading to which claims for latent defects relate is served just prior to the expiration of the original period. But, if you consider the reality of most complex claims for construction defects, the amended language actually extends the period to file suit by a longer period of time. The following example illustrates how this could work.

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A condominium association files its lawsuit against the developer for latent defects just before the expiration of 10 years after the date of the issuance of the certificate of occupancy, and the previous 10-year Statute of Repose. The developer now has an additional one year to file suit against the potentially culpable contractor and design professionals, even though almost 11 years would have passed since the issuance of the certificate of occupancy. And, just before the expiration of an additional one-year period (almost 12 years after final completion), the contractor and design professionals can now sue potentially culpable subcontractors. Those newly joined subcontractors, then have an additional one-year period to assert claims against potentially

culpable sub-subcontractors, suppliers and design consultants, and so on, and so on, creating a scenario where claims for latent construction defects are first being asserted 13 years (and perhaps longer) after final completion. While this was likely not the intent of the drafters, the language makes this a potential, and perhaps likely, scenario.

The increase in time upon which claims can be asserted for latent construction defects is, in and of itself, a significant increased risk that must be addressed in all construction contracts, including prime contracts and subcontract agreements. In addition, many insurance policies will not provide coverage beyond the 10-year Statute of Repose, which creates a much bigger problem and potential industry crisis.

For those construction projects insured under traditional procurement programs (where the contractor and subcontractors each procure their own general liability policy and the subcontractors name the general contractor and developer, and perhaps others, as additional insureds), contractors must make sure the contractual obligation to maintain completed operations additional insured coverage extends through the 10-year Statute of Repose and any extension thereof as a result of the amended language. Contract documents (particularly subcontracts) should be reviewed and potentially amended to ensure the extended period is covered, and contractors must train their personnel to track their subcontractor's policies to confirm that completed operations additional insured coverage is provided beyond the previous 10-year Statute of Repose, but based on the above example it is not clear how long the coverage must be maintained. (The amendment creates similar uncertainty relative to the length of time to maintain project files as 10 years are no longer sufficient.)

The problem is even more significant for those projects insured under an owner controlled insurance program or contractor controlled insurance program, commonly known as wrap policies, where almost all project participants obtain general liability and other coverage under the same policy. These types of policies are generally not renewed annually, and the post-completion tail coverage (previously 10 years) is defined and purchased up front and before commencement of construction. While the language of wrap policies varies among the carriers issuing same and projects, many only provide completed operations coverage for "10 years, or the applicable statute of repose, *whichever is less.*" It is very rare (if not impossible) to find a Wrap Policy that provides completed operations coverage for "10 years, or the applicable statute of repose, *whichever is greater.*" Unless the insurance market begins to provide more expansive coverage, this could leave all contractors and subcontractors on any particular project uninsured after the expiration of 10 years following final completion.

The potential expiration in coverage requires owners (including condominium associations), as well as implicated contractors and subcontractors, to assert their claims and work to ensure that all potentially culpable parties are joined in the litigation as early as possible. Insurance coverage is obviously an important tool to resolve and settle construction defect claims, so everyone has an interest in making sure it is available.

Those potentially impacted by this statutory revision should consult their counsel to understand all impacts of the statutory amendment.

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