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DailyBusinessReview.com
An ALM Publication JANUARY 10, 2019
DAILY BUSINESS REVIEW

PRACTICE FOCUS / REAL ESTATE

Decision Further Erodes Fla.'s Statute of Repose for Latent Construction Defects

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Recent changes to Florida's Statute of Repose set forth in Florida Statute Section 95.11 have made it possible for developers and contractors to be sued for latent construction defects more than ten years after the completion of a project, which was previously recognized as a hard deadline. The change in the statute increased the risk of uninsured claims because insurance policies providing coverage for construction defect claims (both those written before and after the statutory change) equated a ten-year policy term with the outside date for expiration of the insured's exposure—and this may no longer be the case. Further, a recent Florida court decision exacerbated the problem by holding that a homeowner was not required to file an actual lawsuit prior to expiration of the Statute of Repose, and that a simple pre-suit notice of claim under Chapter 558, Florida Statutes was sufficient to preserve rights and commence an "action" under Florida Statute Section 95.11.

On March 23, 2018, Florida's 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 1 year after the pleading to which such claims relate is served, even if such claims would otherwise be time barred." The extended period is actually much greater than the one-year period set forth in the amended statutory language, since most complex claims for latent construction defects implicate many lower-tier subcontractors and suppliers, potentially with multiple layers of third-party claims.

Florida's Fourth District Court of Appeals' holding in *Gindel v. Centex Homes* will cause increased confusion and further extend the date by which a lawsuit may be filed. In that case, purchasers of townhomes discovered latent

construction defects shortly before the expiration of the Statute of Repose, see 43 Fla. L. Weekly D2112 (4th DCA Sept. 12, 2018). But, rather than file a lawsuit before the deadline, the homeowners served a pre-suit notice of claim, and only filed their lawsuit after the completion of the mandatory pre-suit procedure, which was more than ten years after the homeowners closed and took possession. The court ruled that "compliance with the pre-suit notice requirement of Chapter 558 constitutes an action for purposes of the statute of repose in the context of the improvement of real property. Chapter 558 was not intended as a stalling device in order to bar claims." The Fourth District Court of Appeals permitted the homeowners' lawsuit to proceed.

So now, in addition to the ability to be sued for latent construction defects beyond ten years due to the revisions to Florida Statute §95.11, it is possible for claimants to preserve rights without actually filing a lawsuit in the first instance. The requirement of Florida Statute §95.11 to commence an "action" prior to the expiration of the Statute of Repose no longer requires filing a lawsuit or demanding arbitration, as serving a Notice of Claim per Chapter 558, Florida Statutes, is sufficient and the lawsuit/arbitration can wait until completion of the "pre-suit procedure" defined therein.

This "pre-suit procedure" for complex defect claims under Chapter 558 can continue for years following service of the initial notice of claim as the parties often agree to extend the deadlines while investigation, remedial work and negotiations continue. And, while Chapter 558 sets the minimum period of time for the procedure ("at least 60 days before filing any action, or at least 120 days before filing an action involving an association representing more than 20 parcels"), nothing prevents the parties from agreeing to extend these deadlines as is typical on complex matters or projects. This creates even more uncertainty and the potential for lawsuits and arbitrations to be initiated long after the expiration of 10 years, with potential third-party claims first commencing even later in time.

As such, the holding in *Centex Homes* represents significantly increases risk to developers and contractors and exacerbates the problem already created by recent amendments to Florida Statute Section 95.11. This erosion of Florida's Statute of Repose, and the lack of certainty that now exists with respect to the deadline to assert claims, must be carefully considered in the context of insurance coverage and other risk mitigation policies and procedures.

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