



CONSTRUCTive Talk

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CONSTRUCTION LAW COMMITTEE NEWSLETTER, A COMMITTEE OF THE
FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION



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Timely Revisions For Florida's 10 Year Statute of Repose

Proposed Legislation to Lengthen Florida's Statute of Repose for Construction Defect Counter, Cross, and Third-Party Claims

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Pending legislation may relax Florida's statute of repose for latent construct defects. Senate Bill 536 and House Bill 875 — both up for



vote during the 2018 legislative session — propose new language to Florida's 10-year statute of repose to allow counterclaims, cross-claims, and third-party claims up

to one year after the statute of repose has otherwise expired.

To understand the positive effects of this proposed legislation, a quick primer on the statute of repose is necessary. A statute of repose, like a statute of limitation, cuts off the right to bring a lawsuit. However, unlike a typical statute of limitations, a statute of repose bars a suit after a fixed period of time, such as the delivery of a product or the completion of work, even if this period ends before the

plaintiff has suffered any injury. *Sabal Chase Homeowners Ass'n, Inc. v. Walt Disney World Co.*, 726 So. 2d 796, 798 (Fla. 3d DCA 1999) (quoting *Bauld v. J.A. Jones Const.*



Co., 357 So. 2d 401, 402 (Fla. 1978)).

Now imagine a general contractor ("GC") has

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Articles and Submissions:

Here at CONSTRUCTive Talk, we are always looking for timely articles, news and announcements relevant to Construction Law and the Construction Law Committee. If you have an article, an idea for an article, news or other information that you think would be of interest to Construction Law Committee members, please contact: tbench@rumberger.com or tderr@rumberger.com



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been served with a construction defect suit on the afternoon of the day the 10-year statute of repose expires. Of course, the GC wants to sue the involved subcontractors whose scopes of work are implicated by the alleged defects. However, the GC’s project files are inaccessible for immediate review. So unless a lawyer is prepared to obtain and review the files and file an immediate lawsuit, the GC’s potential third-party action will likely be time-barred because the statute of repose expired the day it was served. Without a remedy, the GC may be liable for the entirety of any construction defect damages.

Statutes of repose are designed to encourage diligence in the prosecution of claims, eliminate the potential of abuse from a stale claim, and foster certainty and finality in liability. While the statute of repose is purposefully unforgiving, Florida’s new legislation is a game changer for a time-pressed construction defect defendant. Practically, the pending legislation will allow a defendant, sued right before the statute of repose expires, to investigate and bring counterclaims, cross-claims, and third-party actions against potentially liable entities for an additional year after the expiration of the statute of repose. Without this revision, time-barred defendants are left without recourse against parties that should be on the hook.

Current State of the Law

For construction defect claims, section 95.11(3)(c) of the Florida Statutes sets forth time periods within which a party must bring suit for a deficiency in construction. If the party does not file a suit within the given time frame, any claims regarding the defect(s) will be barred. One legislative purpose for enacting this statute was to “limit the amount of time an architect, engineer or contractor could be exposed to potential liability for the design or construction of an improvement to real property.” *Long v. First Fed. Sav. & Loan Ass’n*, 497 So. 2d 964, 965–66 (Fla. 1st DCA 1986).

Under the statute’s guidelines, the statute of repose applicable to “[a]n action founded on the design, planning, or construction of an improvement to real property” must be commenced within 10 years after the latest of the following four events:

- 1) date of actual possession by the owner;
- 2) the date of the issuance of a certificate of occupancy;
- 3) the date of abandonment of construction if not completed; or
- 4) the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer.

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Fla. Stat. § 95.11(3)(c) (2017).

Proposed Legislation

The proposed legislation is simple but powerful, adding the following language to section 95.11(c)(3) of the Florida Statutes:

[C]ounterclaims, 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.

If passed, this legislation will undoubtedly benefit construction defect defendants, such as general contractors. For instance, our hypothetical GC, served with a lawsuit in the eleventh hour on the very day the statute of repose expired, will have a meaningful opportunity to investigate and pursue claims against the subcontractors whose scopes of work are implicated by the defect claims and may therefore be liable.

Florida’s legislative session began January 9, 2018. If passed, this new legislation will go into effect July 1, 2018. ☞

Editor’s Corner:



Congratulations to both Deborah Mastin and Jason Quintero in being recognized at this year’s Construction Law Institute!

Deborah received the Lifetime Achievement Award and Jason received the Rising Star Award! Thank you both for the contributions you have made, and continue to make, throughout the construction law community!

Case Law Update



2018 CASE SUMMARIES AND PROPOSED LITIGATION

- ◆ ***Block Builders, LLC v. Mastec North America, Inc., et al.***, 43 Fla. L. Weekly D253b (Fla. 4th DCA Jan. 31, 2018).

Bell South contracted with Mastec for access to underground utility lines and Mastec subsequently contracted with Blok Builders for related excavation work. Following personal injury due to the driveway collapsing, Block was sued. In turn, Block sued Bell South and Mastec, who responded with contractual indemnity claims against Blok. The trial court found the indemnification provision to be unenforceable under 725.06 because a utility line is not a “building, structure, appurtenance, or appliance...” under the statute. On appeal, the Fourth DCA also found Blok had not duty to indemnify or defend; however, that finding was based upon the indemnity provision within the prime contract, which was incorporated into the contract at issue, and only required Mastec to indemnify Bell South, not its subcontractor.

- ◆ ***Inlet Marina of Palm Beach, Ltd. v. Sean Diversified, Inc.***, 4D17-1406, 2018 WL 636210 (Fla. 4th DCA Jan. 21, 2018).

The marina brought an action regarding the design of a concrete slab by the boat launch area due to cracking, spalling, and other deterioration. The engineer responded by filing a motion for summary judgment arguing the statute of limitations had run, which the trial court granted. On appeal, the issue was whether a genuine dispute of material fact existed regarding the marina’s ability to discover the defect upon inspection and due diligence. The Fourth DCA found that while a when a defect is patent and obvious, legal notice will be inferred at manifestation, when a defect is not obvious and could be caused by another defect, The Court concluded that a material fact existed as to whether the fact sufficiently put the marina on notice of the defect before the four-year statute of limitation had run under Section 95.11(3)(c), Florida Statutes.

SB 680 / HB 759 – Amending Section 558.004 to claims or authorized representative sign construction defect claims; require claimant and retained consultants be present to identify the location of the construction defects; require an explanation by claimant as to why offer made is inadequate; and require mediation prior to filing lawsuit. (*Indefinitely postponed and withdrawn from consideration*).

SB 536 / HB 875 – Amending Section 95.11(3)(c) to clarify the required timeline for completion of the contract regarding statute of repose purposes, and to require that counterclaims, cross-claims, and third party claims may be brought within 1 year after service of process of a party asserting a claim, despite consideration as to whether such claims are time barred.

SB 908 / HB 723 – Under Ch. 713, attempting to require a verified notice of nonpayment of a construction bond, provide for the required content of such verified notice, and allows sanctions for fraudulently filing a notice of nonpayment.

SB 604 / HB 89 – Allow personal liability of a contractor that fails to maintain the required insurance coverage relating to public liability and property damage, notwithstanding the organizational form of the contractor’s business.

Interested in joining the Construction Law Committee?

It's as easy as 1, 2, 3:

1. Become a member of the Florida Bar.
2. Join the Real Property Probate and Trust Law Section.
3. Email Scott Pence at spence@carltonfields.com advising you would like to join the CLC and provide your contact information.

Submissions:

Do you have an article, case update, or topic you would like to see in **CONSTRUCTIVE TALK**? Submit your article, note, or idea to:

tbench@rumberger.com or tderr@rumberger.com

Editor's Corner:



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Upcoming Events

Subcommittee Practice-Get On Board!

Interested in getting involved? Contact one of the persons listed below.

- ABA Forum Liaison** - Cary Wright (cwright@carltonfields.com)
- ADR** - Deborah Mastin (deboarhmastin@gmail.com)
- Certification Exam** - Alex Espino (aespino@tevtlaw.com)
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- Website Subcommittee** - Brent Zimmerman (bzimmerman@jimersoncobb.com)

Construction Law Committee Meetings

Join us for our upcoming Construction Law Committee meetings. Benefits of the meetings include 1 hour of CLE each meeting, a timely update on developing case law, statutes and administrative rulings, and informative reports from our subcommittees.

The CLC meetings occur the second Monday of every month beginning promptly at 11:30 a.m. EST. To join, call: (888) 376-5050. Enter PIN number 7542148521 when prompted.

Schedule of Upcoming Events

April 11-13, 2018

ABA Forum on Construction Law
Annual Meeting

Taking Care of Business: A Mini-ABA Program for the Construction Lawyer
The Roosevelt New Orleans
New Orleans, Louisiana

May 10, 2018

Construction Law Board Certification Exam
Tampa Hilton Westshore
Tampa, Florida