Building Better Outcomes

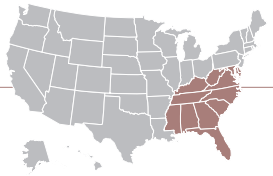
CONSTRUCTION CLAIMS

SPRING 2018
VOLUME 3
ISSUE 1

The ASCENT of a Woman

WHEN SUFFOLK CONSTRUCTION OFFERED KENNA PLANGEMANN THE OPPORTUNITY TO START A CLAIMS DEPARTMENT, SHE DUG IN, BROKE MOLDS AND BUILT BRIDGES.

A publication of
CLM
TheCLM.org



From the Bench

5th Circuit Undoes Davis Test

The 5th Circuit Court of Appeals in New Orleans put the Davis Test to the test and upended a lower court ruling and a finding by a panel of its own judges. The court ultimately ruled that an employee injury on a fixed oil and gas platform in Louisiana coastal waters was governed by state, rather than maritime, law, and stated: "After briefing and argument, the Court has decided to adopt a simpler, more straightforward test consistent with the Supreme Court's decision in *Norfolk Southern Railway Co. v. Kirby* for making this determination."

The original case, *Larry Doiron, Inc. v. Specialty Rental Tools & Supply LLP*, stemmed from an injury that occurred when a vessel-based crane knocked down a platform-based worker. The crane operator and his employer sought indemnity and defense from the injured employee's company (STS), but STS argued that their master services contract "must be construed under Louisiana law and that the indemnity provision contained therein is void and unenforceable under the Louisiana Oilfield Indemnity Act." The district court found for the worker and his employer, and the 5th Circuit panel affirmed.

The 5th Circuit, in an en banc review, concluded: "The use of the vessel to lift the equipment was an insubstantial part of the job and not work the parties expected to be performed. Therefore, the contract is nonmaritime and controlled by Louisiana law. The LOIA bars indemnity. Accordingly, we reverse the summary judgment in favor of LDI and grant summary judgment in favor of STS, render judgment in favor of STS, and dismiss LDI's third-party complaint against STS." The decision can be found at http://caselaw.findlaw.com/us-5th-circuit/1885307.html.

Time's Up! Or Is It?

Proposed legislation in Florida would lengthen the statute of repose for counter, cross and third-party claims in construction defect.

By Dara Jebrock and Lindy Keown

The time for bringing certain actions for latent construction defects in Florida may be relaxed, depending on the outcome of proposed legislation. 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.

Dara Jebrock

Lindy Keown

To understand the effect of this proposed legislation, a quick primer on the statute of repose is necessary. Unlike the statute of limitations, which establishes a time limit within which an action must be brought after a cause of action accrues, the statute of repose "cuts off the right of action after a specified time measured from the delivery of a product or the completion of work… regardless of the time of the accrual of the cause of action or of notice of the invasion of a legal right," according to *Sabal Chase Homeowners Ass'n, Inc. v. Walt Disney World Co.*, quoting *Bauld v. J.A. Jones Const. Co.*

Now imagine a general contractor—let's call it Better Builders—has been served with a construction defect suit on the afternoon of the day the 10-year statute of repose expires. Of course, Better Builders wants to sue the involved subcontractors whose scopes of work are implicated by the alleged defects. However, Better Build-

Florida Assignment of Benefits Reform Passes House

The Florida House of Representatives has passed a bill to change assignment of benefits in first-party property claims and lawsuits. H.B. 7015 defines an "assignment agreement" and requires an AOB to (1) be in writing; (2) include a seven-day period within which the insured may rescind the AOB; (3) include an estimate of services; (4) include a notice to the insurer upon execution of an AOB; and (5) include a notice to the insured regarding the legal implications of an AOB, according to a Butler Weihmuller Katz and Craig blog post. "The bill prohibits an AOB from containing any fee related to administering or rescinding the AOB, such as a rescission penalty fee, a mortgage-processing fee, a cancellation fee, or an administrative fee. Additionally, the bill prohibits an AOB from altering any term or defense in the insurance policy relating to a managed repair arrangement," the blog states. At press time, the bill was in the Senate's Banking and Insurance, Judiciary and Rules Committees. Other AOB bills have failed in the Senate over the years. See www.butler.legal/aob-reform-bill-passes-florida-house-senate-future-uncertain for further details. ■

ers' project files on this 10-year-old project are at an offsite storage unit—inaccessible for review. Sadly for Better Builders, its potential third-party action will likely be time-barred because the statute of repose expired the day it was served—that is, unless a lucky lawyer has immediate access to the project files and works against time to detect issues *and* file suit against the responsible subcontractors on the same day Better Builders was served. Without a remedy, Better Builders may be liable for the entirety of any construction defect damages.

While the statute of repose is purposefully unforgiving—recognizing that an aging building should not be the subject of construction defect litigation in perpetuity—the new, proposed legislative language 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.

For instance, our hypothetical Better Builders, which was served with a lawsuit in the 11th hour on the very day the statute of repose expired, would 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.

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 frames, 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," as found in *Long v. First Fed. Sav. & Loan Ass'n*.

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) Date of the issuance of a certificate of occupancy
3) Date of abandonment of construction if not completed
4) Date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his employer.

At least one Florida court has held the repose periods in Fla. Stat. § 95.11(3)(c) apply to "all claims," including claims for indemnity and contribution. See *Fla. Dep't of Transp. v. Echeverri*, 736 So. 2d 791, 792 (Fla. 3d DCA 1999), finding that the plain language of the statute indicates it applies to indemnity and contribution actions.

Proposed Legislation

The proposed legislation is simple but powerful. The legislation recommends the following language be added 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 Better Builders, which was served with a lawsuit in the 11th hour on the very day the statute of repose expired, would 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. Likewise, if Better Builders has a counterclaim or cross-claim, it can pursue those claims in the year that follows service of process.

Florida's legislative session began Jan. 9, 2018. As of press time, the bills were both being evaluated by legislative subcommittees. If passed, the new legislation will go into effect July 1, 2019. ■

Dara Jebrock is a partner in the Orlando office of Rumberger, Kirk and Caldwell. djebrock@rumberger.com

Lindy Keown is an attorney in Rumberger's Orlando office. lkeown@rumberger.com