



CONSTRUCTION LAW ALERT

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Statutes of Limitations and Repose in Construction Cases

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There are two separate statutes that limit the time within which a contractor, subcontractor, developer, supplier or design professional may be sued for deficient work, work pursuant to a written or oral contract, or misrepresentations or fraud in connection with a construction project. One is the “statute of limitations”, which places a time limit on filing a lawsuit for wrongful conduct. There are different time limits depending upon the kind of claim asserted (e.g., breach of contract, negligence, fraud), and when the breach or injury occurred or was reasonably discoverable. After the expiration of the applicable statutory period, unless a legal exception applies, the injured person loses the right to file a lawsuit.

The other statute is the “statute of repose”, which applies to claims for negligent design or construction. A statute of repose establishes a time frame after which a lawsuit is absolutely barred even if the damage occurs after that time.

Claimants should be aware of the applicable statutes of limitations and repose and when the statutes begin to run so they are not barred from recovering from the party or parties responsible for the construction defects or breach of construction duties. Likewise, developers, contractors, subcontractors, suppliers, and design professionals should be vigilant in handling construction claims because the period of limitations may not begin to run until after the defects are discovered or reasonably should have been discovered. Therefore, the potential liability can continue for extended periods of time.

Accrual of Cause of Action

A statute of limitations starts running at the time a claim accrues. Ordinarily, that is the time which an injury is suffered or damages are sustained. For breach

of contract claims, the statute of limitations generally begins to run when the breach occurs. For tort claims, the statute of limitations generally commences when the redressable harm or injury occurs. However, there are exceptions to these general rules.

The Discovery Rule

One exception to the general rule of when the statute of limitations begins to run is known as the “discovery rule.” Sometimes it is not possible for a person to discover the cause of an injury or even to know that an injury has occurred until considerably after the act which causes the injury. The discovery rule allows a lawsuit to be filed within a certain period of time after the injury is discovered or reasonably should have been discovered. The discovery rule applies to latent defects, which are defects generally considered to be hidden or concealed defects which are not discoverable by reasonable and customary inspection and which the owner has no knowledge. Examples of latent defects are faulty plumbing, damaged foundations, faulty electric, and leaks in a roof.

Tolling of The Statute of Limitations

Another exception to the general rule of when the statute of limitations begins to run is where the statute of limitations has been equitably “tolled.” This means that an event or occurrence has stopped or paused the statute from running for a period of time. For example, a contractor could be precluded from relying on a statute of limitations defense if he, through his conduct or representations, induced a plaintiff not to file suit. An owner could assert that the statute of limitations was tolled during the time a contractor was making repairs if the contractor

made statements to the owner that induced or told the owner not to file a lawsuit.

Specific Statutes of Limitations

Actions Based on Design, Planning, or Construction of an Improvement to Real Property

In Florida, there is a 4 year statute of limitations for actions founded on the design, planning, or construction of an improvement to real property. The statute of limitations begins to run with the from the latest of the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer.

For latent defects (hidden or dormant defects), the 4 year statute of limitations does not start to run until the defect is discovered or should have been discovered by the owner.

Breach of Written Contract/Breach of Express Warranty

Florida recognizes a cause of action in the construction context for breach of contract. There is a 5 year statute of limitations for a legal or equitable action on a contract, obligation, or liability founded on a written instrument. The discovery rule discussed above does not apply to breach of contract actions.

Breach of Oral Agreement

For actions alleging the breach of an oral agreement, such as the breach of an oral agreement to repair defects or an oral agreement to provide architectural plans for the owner to receive the necessary

building permits to complete construction of a building, the statute of limitations is 4 years.

Implied Contract Claims

Where a plaintiff is not certain about the viability of a breach of contract claim, the theories of *quantum meruit* and unjust enrichment are sometimes plead as alternate counts by a plaintiff.

Quantum meruit is appropriate where the parties, by their conduct, have formed a relationship which is contractual in nature, even though an enforceable contract may never have been created. To recover under quantum meruit the plaintiff must show that the recipient acquiesced in the provision of services, was aware that the provider expected to be compensated, and was unjustly enriched as a result.

Unjust enrichment is based upon the public interest in preventing the injustice of a person's retaining a benefit for which no payment has been made.

To recover under an unjust enrichment theory, the plaintiff must show a lack of an adequate remedy at law; a benefit conferred upon the defendant by the plaintiff coupled with the defendant's appreciation of the benefit; and the acceptance and retention of the benefit under circumstances that make it inequitable for him to do so without paying the value of the benefit.

The statute of limitations for *quantum meruit* and unjust enrichment claims is 4 years.

Negligence/Professional Malpractice

Under Florida law, to recover on a claim for negligence or professional malpractice (engineer, architect, surveyor), a plaintiff must allege and prove that the defendant owed him a legal duty, that the defendant breached that duty, and that the plaintiff suffered damage as a proximate result of the breach. There is a 4 year statute of limitations for negligence and professional malpractice claims.

Fraud and Misrepresentation

Claims for fraud and misrepresentation must be brought within 4 years from when fraud or mistake is discovered or should have been discovered.

Breach of Implied Warranties

The statute of limitations for claims for the breach of the implied warranty of habitability for new homes and the breach of the implied warranty of workmanlike performance for repair work is 4 years.

Indemnity Claims

Construction participants may seek indemnification from one another based upon a contract or a special relationship between one another.

Under Florida law, an indemnity plaintiff must prove that the plaintiff is wholly without fault and the party against whom indemnity is sought is guilty of negligence, and the party who seeks indemnity must be obligated to pay another party or entity only because of some vicarious, constructive, derivative or technical liability.

If the indemnity claim is based upon a contract, the statute of limitations is 5 years. If the claim is one of common law indemnity, the statute of limitations is 4 years.

The statute of limitations does not begin to run on a claim for indemnity until the right to bring that claim is established – either when a judgment has been entered or when a defendant has paid the claim.

Statute of Repose

As discussed above, a statute of repose is an absolute bar which prevents a cause of action from arising after a certain period. It is not related to the accrual of any cause of action, and the injury need not have occurred, much less have been discovered.

Florida has a 10 year statute of repose for an action founded on the design, planning, or construction of an improvement to real property. The action must be commenced within 10 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest.

Conclusion

Owners, contractors, developers, suppliers, and design professionals, among others, should be aware of the deadlines for filing a lawsuit for construction defects and construction claims and the conduct that may extend those deadlines.

Owners should determine when the defect was discovered or should have been discovered and the date of substantial completion for the defective work and the project, provide prompt written notice to the parties who may have responsibility for the defect, and consider whether to enter into tolling agreements with the parties who may have responsibility for the defective work to toll the applicable statute of limitations and statute of repose.

Contractors, developers, suppliers, and design professionals should determine when the defect was discovered or should have been discovered and the date of substantial completion for the defective work and the project. In addition, these construction parties should consider providing written notice to the owner reserving their rights and stating that nothing they say or do should be construed to extend or otherwise affect the applicable statute of limitations and the statute of repose. ■



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