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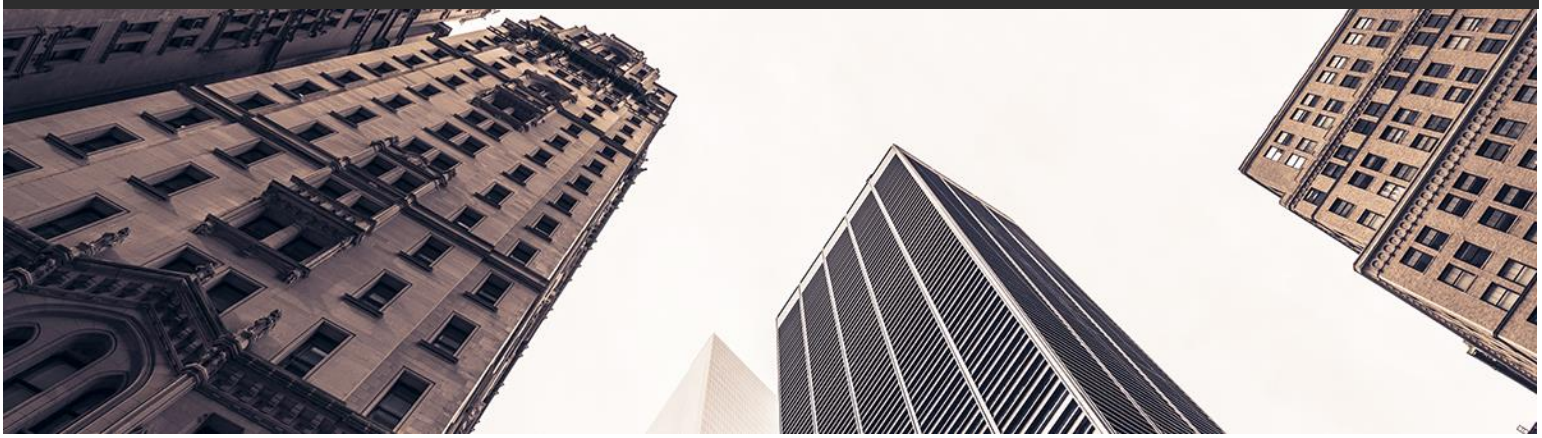

September 2018

Florida Appeals Court Expands Statute of Repose for Construction Defects

On Sept. 12, 2018, in *Robert Gindel, et al. v. Centex Homes, et al.* (43 Fla. L. Weekly D2112d), Florida's Fourth District Court of Appeal held that the service of a pre-suit construction defect notice pursuant to section 558.004, Florida Statutes, constitutes an "action" for purposes of initiating an action within the ten (10) year statute of repose for actions founded upon the improvement of real property under section 95.011(3)(c), Florida Statutes.

Based on this holding, the Fourth District Court reversed the trial court's finding that the 10-year statute of repose period had run on the plaintiffs' (collectively, the Homeowners) claims. The *Gindel* court instead found that the Homeowners' lawsuit was not time barred because the Homeowners' service of the mandatory pre-suit notice of a construction defect under section 558.004 – which was served during the 10-year repose period – qualified as an "action" for the purposes of the repose statute. Thus, the Homeowners' institution of the Chapter 558 process within the statute of repose period was sufficient to avoid the application of the statue of repose to bar the Homeowners' otherwise tardy lawsuit.

Per the opinion, the Homeowners took possession of Centex-built townhomes in Florida's Palm Beach County on March 31, 2004, starting the clock on the 10-year statute of repose under Chapter 95, Florida Statutes. After discovering alleged construction defects, the Homeowners, on Feb. 6, 2014, provided Centex the requisite pre-suit notice of defects in accordance with Chapter 558. Subsequently, Centex informed the Homeowners it would not cure the alleged defects, and the Homeowners filed a complaint for damages against Centex on May 2, 2014.

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The trial court granted summary judgment to Centex based upon the statute of repose, finding that the Homeowners failed to file suit within the 10-year repose period. On appeal, the Fourth District Court rejected the trial court's ruling, finding "the trial court conflated the separate and distinct definitions of the term 'action' provided in Chapter 95 and Chapter 558." Per the opinion, in Chapter 558, the term "action" does not include the mandatory pre-suit procedure; however, "in Chapter 95, 'action' is defined more broadly and without much context to limit the meaning of the term."

Ultimately, the appellate panel sided with the Homeowners' "logical and practical" argument that the mandatory pre-suit notice established by Chapter 558 should fall under the broad definition of "action," which is defined as a "civil action or proceeding" in Chapter 95. "The trial court's interpretation ignores the full definition of Chapter 95, rendering the rest of the definition, 'or proceeding,' as meaningless surplusage," the district court concluded. The district court further reasoned that "Chapter 558 was not intended as a stalling device in order to bar claims," and that construction defect claimants should not be penalized for "rightly complying with the mandates of the statute."

Notably, the Fourth District Court rejected the notion that the stay provision provided in Chapter 558, which allows a party who has already filed suit before complying with the pre-suit requirement to stay the suit until compliance with the statute, had or should have any bearing on the analysis of whether an action was commenced before the statute of repose period lapsed.

Gindel likely represents a sea change to the risk horizon of all construction industry participants. Historically, owners, builders, contractors, engineers, and architects could reliably look to section 95.011(3)(c), and know that if a lawsuit arising out of a particular project was not filed within the statute of repose period, their risk of litigation had ended. In a post-*Gindel* environment, litigation risk is likely to be of an indefinite duration so long as a timely Chapter 558 notice has been delivered.

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