

Ruling Clarifies the Use of Pre-Suit Notice in Construction Defect Lawsuits

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The application of the 10-year statute of repose for construction defect lawsuits in Florida became a bit clearer recently after one of the state's district courts of appeal found that the requisite pre-suit notice qualified as the commencement of an action under the state's limitation period. Because the claimant began the mandatory pre-suit procedure under the state's Chapter 558 statute by delivering the pre-suit notice to the defendant before the 10-year period lapsed, the court ruled that the claim meets the standard for having commenced an action under the statute of repose for defect litigation.

Florida law provides a four-year statute of limitations for lawsuits founded on construction defects, but in cases of latent defects, the four-year period runs from the time the defect is discovered or should have been discovered. Florida law also provides for a 10-year statute of repose, which requires that any action founded on the design, planning or construction of an improvement to real property must be commenced within 10 years, regardless of whether the construction defect was latent. Florida's Chapter 558 requires pre-suit notice and compliance with other pre-suit procedural requirements before filing a lawsuit alleging construction defects.

The case of *Gindel v. Centex Homes* involved allegations of latent defects in townhomes that were discovered by the homeowners only a few months prior to the expiration of the 10-year

statute of repose. The owners subsequently provided the requisite pre-suit notice pursuant to Chapter 558 of the Florida Statutes to Centex approximately two months prior to the expiration of the 10-year repose period.

At the completion of the mandatory pre-suit procedure, which was more than one month after the expiration of the 10-year period, the builder declined to provide a remedy for the alleged defects and the homeowners filed suit.

The trial court granted summary judgment in favor of Centex. It disagreed with the homeowners' argument that the action commenced upon the filing of the requisite pre-suit notice as prescribed under Chapter 558. The trial court concluded that the action commenced upon the filing of the suit, so it originated after the expiration of the 10-year period.

In the homeowners' appeal, the Florida Fourth District Court of Appeal considered the language limiting and defining actions based on the improvement of real property under Florida law. It found that there are separate and distinct definitions for the term "action" provided in Chapter 95 and Chapter 558.

In Chapter 558, the appellate panel ruled that term "action" does not include the mandatory pre-suit procedure set forth in the chapter, as is apparent in its instructions that a written notice of claim shall be served on the contractor before an action is brought.

However, in the Chapter 95 statute of repose law, the court found that the term is defined more broadly and without much context to limit its meaning. Given the obvious differences, the court concluded that the interpretation of the term "action" in Chapter 95 is "distinct from and without reliance on the term as it is defined and used in Chapter 558."

The appellate panel agreed with the homeowners that Chapter 558 lays out a series of mandatory steps before judicial action is to be taken, so therefore the pre-suit notice constitutes an action for purposes of the statute of repose. It noted that prior to this decision, Florida courts had not directly addressed the issue of whether the mandatory pre-suit notice of Chapter 558 qualifies as an action pursuant to the Chapter 95 statute of repose for construction defect lawsuits.

The court found that while the homeowners could have taken advantage of the Chapter 558 stay provision to file their suit in advance of the expiration of the 10-year period, this provision has no bearing on whether an action was commenced before the period lapsed. The Fourth DCA cited relevant precedents in Florida Supreme Court decisions involving the application of statutes of repose in cases that did not entail construction defects, and the appellate panel concluded that compliance with the pre-suit notice requirement of Chapter 558 constitutes an "action" for purposes of the statute of repose, noting: "Chapter 558 was not intended as a stalling device in order to bar claims."

This decision has brought an added measure of clarity in the Fourth District to the application of the statute of repose for construction defect cases in the context of the Chapter 558 pre-suit process. However, until the Florida Supreme Court settles this issue, the safest approach for litigants facing an imminent statute of limitations or statute of repose deadline is still to file suit

before the deadline and stay the case pending compliance with the pre-suit procedural requirements of Florida's Chapter 558.

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