

## Florida Legislature Proposes Significant Revisions to Construction Defect Statute

### Proposed Amendment to Statute of Limitations Eliminating The 10-Year Statute of Repose

A new bill has recently been submitted to the Florida Senate (SB 2022-736) that proposes to amend Fla. Stat. § 95.11(3)(c) by eliminating the current statute of repose for latent claims, which requires an action be commenced within 10 years after the date of actual possession by the owner, the date of issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion of the contract or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever is latest. The proposed amendment eliminates the 10-year repose period, which would effectively allow latent defect claims to be brought beyond the 10-year period in the event of fraudulent concealment or facts supporting the tolling of the four-year statute of limitations applying to such claims.

### PROPOSED CHANGES TO CONSTRUCTION DEFECT STATUTE REQUIRING WRITTEN NOTICE OF REJECTION OF SETTLEMENT OFFER AS TO WHY THE OFFER IS UNREASONABLE, ALLOWING SUPPLEMENTAL OFFER, AND REQUIRING THE COURT TO APPOINT AN EXPERT TO EXAMINE ALLEGED DEFECTS

The bill also proposes to amend Fla. Stat. § 558.004 by adding the following provision:

Requiring a claimant who rejects a timely settlement offer to provide a written notice rejecting the offer including the reasons for rejecting the offer within the notice serving to reject the offer. If the claimant believes the settlement offer omitted reference to any portion of the claim or was unreasonable in any manner, the claimant must identify the items that the claimant believes were omitted and state in detail all known reasons why the claimant believes the settlement offer is unreasonable.

### The Proposed Revisions Provide for a Supplemental Offer to the Claimant Triggering the Obligation by Claimant To Respond to the Supplemental Offer

Allowing the person served with a notice of rejection of settlement offer to make a supplemental offer of repair or monetary payment, or both, to the claimant within 15 days of receiving the notice of rejection. If the claimant rejects the supplemental offer, the claimant must serve a written notice of the claimant's rejection on the person making the supplemental offer. The notice must include all known reasons for the claimant's rejection of the supplemental settlement offer.

Requiring the court to stay an action upon filing of a timely motion if the action is initiated by claimant without first accepting or rejecting the offer or supplemental offer.

Limiting the claimant's rights to recover attorneys' fees in the event a claimant rejects a timely settlement offer or supplemental offer to remedy the alleged construction defect at no cost to the claimant, in any action brought for that defect, unless the claimant proves by a preponderance of the evidence that, at the time of the offer, additional repairs beyond those offered were necessary to remedy the defect. The attorneys' fee limitation does not apply to any claim for attorneys' fees based on a contract between the claimant and the offeror.



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#### Related Practice Areas

- Construction Law

Requiring a claimant who accepts the offer or supplemental offer to enter into a contract with one or more appropriately licensed contractors to correct the construction defect(s) within 90 days after acceptance. The offeror or insurer shall pay the contractor directly for the repairs and the repairs must be completed within 12 months after the claimant enters into a contract for the repairs, unless the offeror or insurer and the claimant agree otherwise.

### **New Requirement for Court To Appoint an Expert**

Creating a new § 558.0045, Fla. Stat., which requires the court, in a civil action alleging a construction defect, to appoint an expert with experience in the type of construction that is the basis of the claimant's claim to examine the alleged defect. The court may not appoint an expert if all the parties object, or if the court finds that the costs of the expert outweighs any potential benefits to resolution of the action. If an expert is appointed, the expert must coordinate and communicate with the parties as directed by the court. Within 15 days after conducting the examination, or as otherwise determined by the court, the expert shall submit a written report to the court and the parties that contains the expert's findings. The report must include the following:

- A description of how the expert conducted the examination of the alleged defect.
- Information identifying the persons present at the site of the improvement while the expert conducted the examination.
- Photographs or other documentation of the alleged defect including any relevant test results.
- A statement of whether the damages claimed by a claimant are more likely than not the result of a construction defect, another identified cause, or a construction defect and another identified cause.
- Information on other matters related to the alleged defect as directed by the court.

If the expert concludes that the damages are wholly or partially the result of a construction defect, the report must state the actions necessary to repair the defect and any repairs related to the defect, provide an estimate of the reasonable cost of repairs, and state the anticipated time needed for the repairs under the current market conditions for construction services and materials.

The parties shall compensate the expert, but the prevailing party is entitled to reimbursement from the non-prevailing party. The expert appointed by the court may not be employed to repair the alleged defect or recommend contractors to repair the defect.

### **Duty to Repair Construction Defect**

Creating Fla. Stat. § 558.0046, establishes the duty to repair a construction defect if the claimant receives compensation for the repair. If a claimant receives compensation and fails to fully repair the defect, the claimant is liable to a purchaser of the property for any damages resulting from the failure to disclose the defect.

### **Notice to Mortgagee or Assignee of Claim Alleging Construction Defect**

Creating Fla. Stat. §558.006, requires a claimant to provide notice to a mortgagee or assignee if a notice of claim alleging a construction defect is made with respect to real property to which a mortgagee or an assignee has a security interest. The claimant must, within 30 days after service of the notice of claim on the contractor, subcontractor, supplier, or design professional, provide the mortgagee or assignee with a copy of the notice of claim by certified mail, return receipt requested. If repairs relating to the defect are completed after notice to a mortgagee or assignee is provided, or if any settlement, partial settlement, arbitration award, or judgment is obtained by the claimant, the claimant must provide an additional notice to the mortgagee or assignee, by certified mail, return receipt requested, within 60 days after completion of the repairs or any settlement, partial settlement, arbitration award, or judgement, whichever is later.

### **Amendments if Enacted into Law Are Effective July 1, 2022**

The amendments to 95.11(3)(c) if enacted as law will apply to any action commenced on or after July 1, 2022, regardless of when the cause of action accrued. However, any action that would not have been barred under the statute before the amendments may be commenced before July 1, 2023. If such action is not commenced by July 1, 2023, and is barred by the amendments to the

statute, the action is barred.

The amendments to 558.004, 558.0045, 558.0046, and 558.006 if enacted into law take effect on July 1, 2022 and apply to civil actions and proceedings for a construction defect that are initiated on or after July 1, 2022.

### **Summary of Impacts to Florida Law By the Proposed Amendments**

The proposed amendments if enacted into law will significantly impact future construction defect claims, including eliminating the 10-year statute of repose. As a result, a latent construction defect claim could theoretically be filed well after 10 years under facts allowing for the tolling of the four-year statute of limitations applying to such claims. This change will obviously create additional exposure to contractors and their insurance carriers. The amendments also provide for a supplemental offer to be made in response to a claim, which if rejected by the claimant, could result in the claimant losing the right to recover attorneys' fees associated with litigating the defect claims unless the claimant can prove by a preponderance of evidence that additional repairs were necessary beyond those contained in the offer or supplemental offer.

Finally, the amendments also require the court to appoint an expert to examine the alleged defects and prepare a report. The costs of retaining an expert will be paid by the parties but the prevailing party in litigation is entitled to recover these costs from the non-prevailing party. The changes are intended to help the parties settle and resolve construction defect claims without having to engage in protracted litigation.

Cozen O'Connor's attorneys will continue to monitor these proposed amendments and provide an update if these legislative changes are enacted into law.

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