



How long is too long to bring a construction defect claim?

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Florida's Fourth District Court of Appeal on April 3 certified to the Florida Supreme Court as a question of great public importance the issue of what the cutoff date is for filing a construction defect action.

Under Chapter 558, Florida Statutes, at least 60 days before filing a construction defect action, a claimant must serve written notice of the claim on the contractor or design professional, which triggers a number of pre-litigation actions intended to offer an opportunity to cure the defect prior to suit being filed. In this case, a group of homeowners discovered a construction defect in their townhomes and served written notice of their claim within the 10-year statute of repose, but by the time they completed the mandatory pre-suit procedure, their suit for construction defects was filed after the 10 years had passed. The trial court granted summary judgment based on the statute of repose, but the Fourth District Court of Appeal reversed, holding that the date of the pre-suit notification is the date on which the "action" commences. The conclusion turned on the definition of "action" in the statute of repose.

Florida's statutes of limitation and repose apply to "a civil action or proceeding, called 'action' in this chapter." Section 95.11(3)(c), the applicable statute of repose here, states that "an action" founded on the design, planning or construction of an improvement to real property must be commenced within 10 years of the actual possession by the owner or other listed criteria, whichever is later. But Chapter 558, the construction defect statute, states that a claimant may not file "an action" without first complying with its pre-suit requirements, and it defines "action" as "any civil action or arbitration proceeding."

The court concluded the broader definition in the statute of repose took precedence, because it applied to construction claims in general but did not rely on Chapter 558. In addition, because Chapter 558 lays out a series of mandatory steps that must be complied with before *judicial* action is to be taken, the pre-suit notice constitutes a "proceeding," as defined by the statute of repose.

Florida courts have not addressed this particular issue before. In the analogous medical malpractice context, the Florida Supreme Court has held that compliance with the statutory pre-suit notice and investigation constitutes commencement of an "action." The Fourth District Court of Appeal has now certified to the Florida Supreme Court that when an action commences under the construction defect statute is a question of great public importance. As it is not unusual for construction defects to be discovered years after construction is completed, at some point we may see the Florida Supreme Court answer the question of whether an "action" is a "proceeding" for purposes of the statute of repose in the construction defect context.

[Gindel v. Centex Homes](#), 2018 WL 4362058 (Fla. 4th DCA September 12, 2018), *certification granted*, 44 Fla. L. Weekly D846a (Fla. 4th DCA April 3, 2019).



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