

CONSTRUCTION DEFECT CLAIMS AND FLORIDA'S NEW STATUTE OF REPOSE

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WHAT IS A “DEFECT”?

- The failure of a building or any building component to be erected in a reasonable workman-like manner or to perform in a manner intended by the manufacturer or reasonably expected by the buyer, which is the proximate cause of damage to the building or the people using the building.
- Two types of defects: LATENT and PATENT
 - **Latent** defects are defects that are not detectable through reasonable inspection and manifest over a period of time.
 - **Patent** defects are defects that are detectable through reasonable inspection.
- Whether a defect is latent or patent affects the **statute of limitations** and **ultimate repose** time periods to bring a lawsuit.



WHAT/WHERE IS THE “DEFECT”?



WHAT/WHERE IS THE “DEFECT”?



SB – 360

(2023 Legislative Session)

- Became effective April 13, 2023.
- Amended Section 95.11(3)(c), *Fla. Stat.*
 - Limitations
 - Repose
- Was pushed through by developer, contractor, and insurance company interests and **shortens the time to bring construction defect claims from 10 years to 7 years.**



STATUTORY TIME LIMITATIONS

➤ Statute of Limitations (Section 95.11(3)(c), Florida Statutes)

- PATENT DEFECT: 4 years from the **EARLIEST** of:
 - the issuance of a temporary certificate of occupancy;
 - the issuance of a certificate of occupancy;
 - the issuance of a certificate of completion; or
 - abandonment of construction if not completed.
- LATENT DEFECT: 4 years from the time the defect is discovered or should have been discovered in the exercise of due diligence.
- SOL Tolling:
 - Condominiums – Section 718.124, Fla Stat – Does not begin to run until Turnover.
 - This does **NOT** apply to HOAs



STATUTORY TIME LIMITATIONS

➤ Statute of Repose (Section 95.11(3)(c), Florida Statutes)

- **ABSOLUTE BAR!**
- 7 years from the **EARLIEST** of:
 - the issuance of a temporary certificate of occupancy;
 - the issuance of a certificate of occupancy;
 - the issuance of a certificate of completion; or
 - abandonment of construction if not completed.
- Currently no tolling, even if the developer holds on to the property for years!
 - **NOTE:** Pending legislation.



STATUTORY TIME LIMITATIONS

➤ Statute of Repose

IMPORTANT! CLAIMS SUNSET DATE!

- The changes in the statute apply to any action commenced on or after April 14, 2023
- **HOWEVER**, any action that would have been timely under the old law, but not under the new law, can be filed up to **July 1, 2024**.
- ❖ **If the action is not commenced by July 1, 2024, then the action is forever barred.**



STATUTORY TIME LIMITATIONS

➤ Statutory Warranties

- **New Construction** – 3 years from turnover
- **Conversions** – 1 year from turnover
- **Warranty periods are not SOL or SOR.**



CONSTRUCTION DEFECTS: *What you Should Know*

➤ **Who is responsible?**

- Developers
- Successor Developers
- General Contractors
- Sub-Contractors
- Materialmen
- Vendors
- Design Professionals
- City Inspectors ???



Common Myths and Misconceptions

“My Developer/Contractor...*(fill in the blank)*”

...is “bankrupt”!

...warranty has expired.

...is out of business.

...said its maintenance, caulk it!

...has no money.



When/What is Turnover?

- Turnover is when the community developer gives majority control of the Association's Board of Directors to the Association's membership. Turnover typically occurs when one of the statutory triggers listed below happen in a community.

Condominium Associations

- Three years after 50% of the units are sold.
- Three months after 90% of the units are sold.
- When no units are being offered for sale.
- When Developer files for bankruptcy.
- When a receiver is appointed to take control of the Developer and said receiver is not discharged within 30-days of said appointment.
- Seven years after recording the surveyor certificate or the sale of the first unit to a non-developer assignee, whichever occurs first.

Homeowners Associations

- Three months after 90% of the units are sold.
- As determined within the Association's governing documents.
- Developer abandons the site.
- When Developer files for Chapter 7 bankruptcy.
- When a receiver is appointed to take control of the Developer and said receiver is not discharged within 30-days of said appointment.





RED Flags...



➤ Condominiums

- **Common and Limited Common Areas** (*electrical, plumbing, HVAC, windows, balconies/patios, railings, elevators, drainage, pavement, roof, painting, stucco system, structural issues, etc.*)

➤ Homeowner Associations

- **Community Infrastructure** (*private roads, irrigation, drainage, amenities, etc.*)

➤ Townhomes

- **Building Envelopes** (*roof, stucco system, structure, fenestrations, windows, exterior doors, etc.*)



Construction Defect Process: *Getting Started*

- **Hire qualified general contractor, engineer, and/or architect to fully investigate issues:**
 - Licensed General Contractor, Engineer, and/or Architect.
 - Experience performing property condition assessments.
 - Experience working for HOA/COAs.
 - Experience testifying in Court.

- **Hire qualified attorney to protect the HOA/COA's rights**
 - Experience representing HOA and COAs in construction defect litigation.
 - In depth knowledge of construction and insurance law.
 - Proven track record of actually recovering money.



Construction Defect Process: *Presuit*

➤ Destructive Testing

➤ 558 Notice of Claim

- Insurance Demand – *Section 627.4137, Florida Statutes*
- Right to reasonable inspection of property
- Potential Responses to 558 Notice of Claim
 - Repair offer.
 - Monetary offer.
 - A combination of repairs and money.
 - Dispute the Claim the claim.

➤ Tolling of SOL or SOR during 558 notice periods?



Construction Defect Process: *Lawsuit*

- Arbitration and contractual arbitration clauses?
- File Complaint
- Mediation
- Trial
 - Jury or Nonjury



Construction Defect Process: *Post-suit*

- Failure to construct according to the building code or the plans filed with the local governmental authority are entitled to
 - The cost of repairing the defects or completing the omissions.
 - **Attorney Fees...if**
 - ❖ Breach of Express or Statutory Warranty
 - ❖ Sales Misrepresentation
 - ❖ Breach of Fiduciary Duty
 - ❖ FDUTPA
 - Loss of Use/Profits
 - Diminution in Value
 - Prejudgment interest



TAKEAWAYS

Do not delay!

- ✓ The time to bring a construction defect claim is reduced from 10 years to 7 years.
- ✓ The new law does not care when you purchased your home or when associations turnover to the owners.
- ✓ The time to bring a claim for construction defects can start to run **BEFORE** you purchase your home and before an association has the legal ability to bring construction defect claims.
- ✓ Most defects and resulting damages are hidden and do not become apparent until years after construction. Therefore, you must be proactive in checking for construction defects.
- ✓ **Owners must act quickly** – the sunset date for claims that would have been viable under the old law is July 1, 2024.
- ✓ Bring in experts to conduct an **EARLY** investigation.





THANK YOU!

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