



CONSTRUCTive Talk

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CONSTRUCTION LAW COMMITTEE NEWSLETTER, A COMMITTEE OF THE
FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION



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How Do We Define the Chapter 558 Process?

Mixed Messages from the Florida Courts

By Brett J. Moritz, Esq., Peckar & Abramson, P.C., Miami, FL

A Florida court has again had to wrestle with the problem of defining the Chapter 558 process for construction disputes. The Fourth District Court of Appeal recently ruled that a Chapter 558 Notice of Claim constitutes an “action” under Florida’s Statute of Repose. The purpose of this article is to analyze the Court’s recent ruling in *Gindel v. Centex Homes* and the implications of said decision moving forward.

Gindel, brought by a group of homeowners, relates to the original

construction of a number of townhomes. The undisputed date of closure and possession for said townhomes was March 31, 2004.



Thereafter, the homeowners discovered a number of construction

defects and sent a Chapter 558 Notice of Claim on February 6, 2014. The parties were not able to resolve the matter through this process, and suit was filed on May 2, 2014.

The dates in this case were extraordinarily important because Florida has a strict Statute of Repose as it concerns actions relating to the improvement of real property, e.g. construction defect actions. Florida’s Statute of Repose, found in Florida Statute Section 95.11(3)(c), provides that an “action” founded upon the

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Articles and Submissions:

Here at CONSTRUCTive Talk, we are always looking for timely articles, news and announcements relevant to Construction Law and the Construction Law Committee. If you have an article, an idea for an article, news or other information that you think would be of interest to Construction Law Committee members, please contact: tderr@rumberger.com or lkeown@rumberger.com



"In summation, the Fourth District Court of Appeal ruled the Chapter 558 process falls under the general definition of "proceeding", such that the homeowners had timely commenced their action."

How Do We Define the Chapter 558 Process?

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design or construction of an improvement to real property "must be commenced within 10 years after the date of actual possession by the owner."¹ The term "action" is defined in Florida Statute Section 95.011 as a "civil action or proceeding." The other pertinent statute in this case, Chapter 558, includes a definition of an "action" as well. Chapter 558 provides that an "action" means "any civil action or arbitration proceeding."² The two statutes have similar but distinct differences in their definitions of an "action." The specific definitions are important because the homeowners filed suit roughly 10 years and 1 month after they took possession. If the homeowners could not demonstrate that the Chapter 558 Notice of Claim was an "action," then their claims would have been time-barred.

The Fourth District Court of Appeal ultimately ruled in favor of the homeowners, finding that the claims were not time-barred. The "or" included in the definition of an "action" under Chapter 95 proved to be the deciding factor. The Court found that an "action" is more broadly defined under Chapter 95 than Chapter 558 because Chapter 95 includes the term "proceeding." The Court relied on the Florida Supreme Court's definition of "proceeding" in the *Raymond James* case. "Proceeding" is defined in *Raymond James* as "[a]ny procedural means for seeking redress from a tribunal or agency" involving a "particular step or series of steps in the enforcement, adjudication, or administration of rights, remedies, laws, or regulations."³ The *Gindel* Court therefore reasoned that the Chapter 558 process is a series of mandatory steps before judicial action can be taken. Furthermore, the Court reasoned that because Chapter 95 does not rely or reference Chapter 558, then Chapter 95 may have a distinct meaning of an "action." In summation, the Fourth District Court of Appeal ruled the Chapter 558 process falls under the general definition of a "proceeding," such that the homeowners had timely commenced their action.

The *Gindel* ruling is in stark contrast to the ruling of the Florida Supreme Court in *Altman Contractors, Inc. v. Crum & Forster Specialty Insurance Company*. While the Fourth District Court of Appeal considered a Chapter 558 Notice of Claim to be a "proceeding," the Florida Supreme Court certainly did not in *Altman*. Specifically, the *Altman* Court ruled "the chapter 558 notice and repair process cannot be considered a civil proceeding...because the recipient's participation in the chapter 558 settlement process is not mandatory or adjudicative."⁴ It is interesting to note that both the Florida Supreme Court and the Fourth District Court of Appeal relied on the same case: *Raymond James Financial Services, Inc. v. Phillips*. It is not known at this time whether the Supreme Court has decided to review the *Gindel* case.

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"In total, the *Gindel* decision has provided plaintiff with more time in which to bring suit, while allowing defendants to be sued more than 10 years after construction was completed.

How Do We Define the Chapter 558 Process? Mixed Messages from the Florida Courts

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The *Gindel* case has thrown a wrench into how Florida courts continue to define the Chapter 558 process. The Florida Supreme Court has stated that the process is not a proceeding. On the other hand, the Fourth District Court of Appeal ruled that it does indeed fit within the definition of a proceeding found in *Raymond James*. It appears that the Chapter 558 process continues to be difficult to categorize under the law. Furthermore, the *Gindel* decision has weakened Florida's otherwise strict Statute of Repose for construction defects by allowing potential Plaintiffs to extend the time within which to file a lawsuit. The Statute of Repose, which was enacted to assist contractors and design professionals in putting projects to bed, has been chipped away. In total, the *Gindel* decision has provided plaintiffs with more time in which to bring suit, while allowing defendants to be sued more than 10 years after construction was completed. 🌀

1 There are three (3) additional criteria under the statute. However, these three (3) criteria do not apply to these circumstances and as such have been omitted.

2 Fla. Stat. § 558.002(1).

3 *Raymond James Financial Services, Inc. v. Phillips*, 126 So. 3d 186, 190 (Fla. 2013).

4 *Altman Contractors, Inc. v. Crum & Forster Specialty Insurance Company*, 232 So. 3d 273 (Fla. 2017).

Schedule of Upcoming Events

Thursday, March 7, 2019 — Saturday, March 9, 2019

Construction Law Institute

JW Marriott Grande Lakes Hotel

Orlando, Florida 32837

(407) 206-2300

<https://member.floridabar.org/s/lt-event?id=aIRIR00000527wqUAA>

Interested in joining the Construction Law Committee?

It's as easy as 1, 2, 3:

1. Become a member of the Florida Bar.
2. Join the Real Property Probate and Trust Law Section.
3. Email Scott Pence at spence@carltonfields.com advising you would like to join the CLC and provide your contact information.

Submissions:

Do you have an article, case update, or topic you would like to see in *CONSTRUCTive Talk*? Submit your article, note, or idea to:

tderr@rumberger.com or lkeown@rumberger.com

Editor's Corner:



Tyler J. Derr
Editor—Tampa



Lindy K. Keown
Assistant Editor—Orlando

Info & Upcoming Events

Subcommittee Practice-Get On Board!

Interested in getting involved? Contact one of the persons listed below.

ABA Forum Liaison - Cary Wright (cwright@carltonfields.com)

ADR - Deborah Mastin (deborahmastin@gmail.com)

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Construction Law Committee Meetings

Join us for our upcoming Construction Law Committee meetings. Benefits of the meetings include 1 hour of CLE each meeting, a timely update on developing case law, statutes and administrative rulings, and informative reports from our subcommittees.

The CLC meetings occur the second Monday of every month beginning promptly at 11:30 a.m. EST. To join, call: (888) 376-5050. Enter PIN number 7542148521 when prompted.