



# Insurance Matters!

VOLUME 7 ISSUE 2

2018-2019

A Newsletter of the **Insurance and Surety Committee**  
of the Real Property Probate and Trust Law Section of The Florida Bar



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## Effects of Amendment to Florida's Statute of Repose on the Products Completed Operations Hazard

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Recent amendments to Florida's Statute of Repose<sup>1</sup> have resulted in concerns as to the scope of risk Florida homebuilders face as a result, and the availability of insurance coverage for such exposures. Previously, the statute provided for a strict, yet straightforward 10-year limitation for latent construction defect claims. Under that language, issues arose when suits were filed near expiration of the statute, because parties seeking to defend claims were given little time to effectively assert related claims.



The amendment to the statute serves to lengthen the statute of repose to 11 years for certain cross-claims, compulsory counter-claims, and third-party claims, and in limited circumstances, potentially even longer. Most policies in the Florida marketplace serve to limit coverage under the products-completed operations hazard ("PCO") to 10 years, and thus, in very limited circumstances, an insured contractor may be exposed to third-party claims under the revised statute. It is important to note, however, that coverage under most CGL policies is occurrence-based,

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## Catastrophe Claims: Insurance Coverage for Natural and Man-Made Disasters

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The one *must-have* insurance treatise for your law library this year is - Catastrophe Claims: Insurance Coverage for Natural and Man-Made Disasters.<sup>1</sup> This essential volume is co-authored by Dennis J. Wall, a respected member of The Florida Bar, who is well known for his expertise in insurance matters. Mr. Wall with his co-authors, John K. DiMugno and Steven Plitt, brings us an up-to-date analysis of well researched insurance law and practice arising from contemporary events. The three main authors and the other chapter authors generously share their scholarship and experience to bring us depth and breadth of coverage for catastrophic events.



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### What is new?

Cases are taken straight from our recent national headlines include those arising from Hurricane Katrina, the cyberhacking of the Target Corporation, terrorism at the World Trade Center, floods and fires, the Northridge Earthquake, and subprime mortgage litigation to name only a few. The authors also address trends in conditions which could lead to more catastrophic events. For example, the authors discuss trending conditions that impact insured claims such as climate change, irrespective of the cause of such changes that cause catastrophic losses, and changes in the regulatory scheme in the wake of current administration Executive Orders. Risks are not likely to abate but whether the claims arise under federal or state law will be important to know.

The most significant 2018 additions are the two new chapters devoted to our 83-year-old Social Security Old-Age Insurance and Disability Insurance Programs with the reminder that Social Security is insurance. One chapter lays out the basis and status of the Act and one addresses Social Security Disability Insurance. In the author's words, "These are the twin premises behind both chapters: First, Social Security Old-Age Insurance and Social Security Disability Insurance are *insurance*. Second, these are insurance contracts between the federal government and the people of the United States, governed by principles written in the *Constitution* of the United States."

Senior lawyers and lawyers who counsel the aged or disabled client recognize that even a modest return can ameliorate the catastrophic cost of living once an individual can no longer work. Here, the author reminds us of the constitutional underpinnings of this insurance legislation that once helped an economically defeated nation recover from the Great Depression after 1929. The initial chapter on the status of the Act is subtitled: "An outline, not an argument."

### What analysis should you expect?

The authors generously share their scholarship on a broad range of topics: fundamentals of insurance policies and risk management; fundamentals of claims handling, appraisals, and underwriting as well as litigation; agent and broker liability; causation in coverage determination; changes in homeowner property insurance; valuation and proof of business interruption losses post-catastrophe; insurance for disaster losses due to human activity; flood and earthquake insurance as well as disasters that are both natural and man-made; financial disasters, such as the subprime crisis, and director and officer liability insurance; social security and disability insurance; and insurance for cyberattacks.

### What is unexpected?

Who knew that an insurance law treatise could be readable for both the business major, the seasoned insurance professional, and the liberal arts graduate? Where, but here, will you find a citation to Dodd-Frank, legislation intended to protect us from financial institutions that are "too big to fail", in the same paragraph with a quotation from William Faulkner?<sup>2</sup> In other words, this tome is intellectually intriguing and entertaining on many levels as well as authoritative on the law.

### Who should be interested in this treatise?

Every legal practitioner will benefit. This comprehensive contemporary view is not just a work for transactional and insurance coverage lawyers. Litigators will want to know more about first party litigation or when expert testimony is required, or not, to establish the professional standard of care in a broker malpractice case. A coverage litigator will find discussions on federal and state court

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actions for declaratory judgment, removal from and to federal court, recovering the judgment against the insurer, and class actions such as the homeowner class action arising from Hurricane Katrina. If you are a construction lawyer working to recover under applicable insurance on the construction project or if you are a corporate lawyer seeking to understand insurance for cyber-hacking attacks, this book brings you current cases and analysis to approach your search with confidence. Every lawyer whose practice touches any insurable risk will find a wealth of information and analysis to guide the representation.

Get up to date with this important work open on your desk. You can learn more at: <https://legalsolutions.thomsonreuters.com/law-products/Treatises/Catastrophe-Claims-Insurance-Coverage-for-Natural-and-Man-Made-Disasters-May-2018-ed/p/105453948>

1. Thompson-Reuters, May 2018.

2. "The past is never dead. It's not even past." William Faulkner, *Requiem for a Nun* (New York, Vintage, 2011), p.73 IM

*"This article will analyze the anticipated effect of the amendments upon coverage under a 10-year PCO extension."*

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meaning that the policy is triggered by property damage that occurs during the policy period, and therefore, any subsequent claims permitted under the amended statute will necessarily relate to the original property damage that occurred during the 10-year period. As such, the property damage would be covered under the standard 10-year PCO extension. This article will analyze the anticipated effect of the amendments upon coverage under a 10-year PCO extension.

### Understanding the Relationship Between the Statute of Repose and Insurance Coverage

#### **A. Amendment to Florida Statute § 95.11(3)(c)**

On March 23, 2018, the Governor approved House Bill 875 which became effective on July 1, 2018. This bill amended Florida Statute § 95.11, which governs statutes of repose for construction defect claims and previously provided for a strict 10-year statute of repose. Pertinently, the amendment includes the following addition: "However, counterclaims, cross-claims, and third-party claims that arise out of the conduct, transaction, or occurrence set out or attempted to be set out in a pleading may be commenced up to 1 year after the pleading to which such claims relate is served, even if such claims would otherwise be time-barred." This language seeks to extend the time to file claims for latent construction defects for up to an additional year, or 11 years from the date of completion of the project. The new limitations period applies to any actions that commence on or after July 1, 2018.

#### **B. Effect of Amendment on Products-Completed Operations Coverage**

Currently, in the Florida market, most policies provide products-completed operations coverage for 10 years, or the statute of repose, whichever is less. This begs the question of whether the amendment to the statute has created any uninsured exposure outside of the scope of the PCO hazard.

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To evaluate the potential for uninsured exposure, we start with the fact that the set of circumstances in which this extended limitation period may come into play at all is limited. First, in order for the repose period to be expanded under the revised statute, a defect claim would need to be asserted in the 10th year after project completion, on the eve of the expiration of the limitations period.

*See Statute of Repose, continued on Page 4*

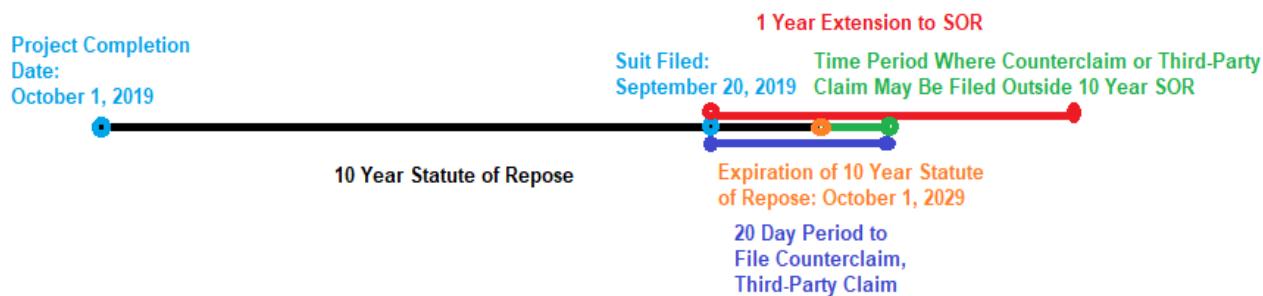
## Statute of Repose, continued from page 3

*“Therefore, most subsequent claims allowed by the amended statute will relate to the property damage that occurred during the policy period.”*

*“The statute further requires that any subsequent claims by or amongst the parties must arise out of the same occurrence set out in the original pleading.”*

Florida's Rules of Civil Procedure require a party to assert all counterclaims, cross-claims, and third-party claims within 20 days of the filing of the pleading triggering the claim.<sup>2</sup> Thus, taking into account any potential extensions of the time period to respond or motions for leave to later assert a third-party claim, if the statute of repose expires within that time frame, a compulsory counterclaim, a cross-claim, or third-party claim that arises from the same conduct will not be barred pursuant to the amended language. In other words, in the 11th year, either a compulsory counterclaim would need to be asserted against the party bringing the original action, a cross-claim asserted by one defendant against another, or a new party would be joined in the action by way of a third-party claim. In the latter scenario, where another party is joined in the 11th year, the language of the statute arguably allows that party an additional year to assert claims, resulting in potential exposure up to 12 years after project completion. This may not have been the legislative intent for the period to extend anywhere beyond 11 years,<sup>3</sup> however, the revised language permits such a result.

As seen in the following illustrated hypothetical where suit is filed September 20, 2019, assuming the 20-day period to file a counterclaim, cross-claim or third-party claim is not extended, there is only a brief period of time (highlighted in green) in which claims may fall outside the original 10-year statute of repose.



Even more limited are the situations where the extended repose period under revised Florida Statute Sec. 95.11(c) could result in a potentially uninsured exposure outside of the extended comp-ops period. Coverage under most CGL policies is occurrence-based, meaning that the policy is triggered by bodily injury or property damage that occurs during the policy period, including the 10-year PCO extension period.

As such, the original lawsuit will in most cases be brought by the owner of the property within the 10-year statute of repose. The statute further requires that any subsequent claims by or amongst the parties *must arise out of the same occurrence* set out in the original pleading. Thus, by the statute's plain terms, any additional claims will in most circumstances relate to the original occurrence and allege the same property damage that occurred during the policy period and was the subject of the initial pleading.

Therefore, most subsequent claims allowed by the amended statute (regardless of when they are asserted) will relate to the property damage that occurred during the policy period, and thus, be covered by the 10-year PCO extension.

Further, under general pleading principles, compulsory counterclaims and cross-claims filed by or against an insured, who is already party to the action, will necessarily relate back to the property damage that is the subject of the original filing, which occurred during the policy period, and therefore covered. This is because if the insured is part of the action from the beginning, any cross-claims or compulsory counterclaims filed will relate back to the initiation of suit, therefore falling within the 10-year statute of repose and be covered under standard PCO language. Moreover, alt-

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hough it does not appear that Florida courts have addressed the issue, the majority rule is that the duty to defend does not include the obligation to prosecute counterclaims.<sup>4</sup> Thus, to the extent the insured may seek to bring a counterclaim, it may not be covered regardless of the potential expiration of the PCO period. Therefore, if we assume a 10-year PCO extension that begins to run upon project completion, the only situation that could potentially result in exposure outside of the 10-year PCO period is where an insured is first brought into the defect action by way of a third-party claim asserted in the 11th or 12th year after project completion, which relates back to the property damage asserted in the original filing, but is considered a separate occurrence for purposes of coverage.

Although the circumstances are temporally and procedurally limited, the resulting consequences to an insured may be significant where a third-party claim is asserted, and coverage ultimately denied as a result of the 10-year PCO extension period having expired.

### C. The Marketplace

A review of carrier offerings shows that a majority of the PCO endorsements provide completed operations coverage for “10 years, or the applicable statute of repose, whichever is less.” In fact, most PCO extensions commercially available in the Florida marketplace are effectively limited to 10 years, and coverage for extension periods greater than 10 years generally not offered. This is likely the result of a majority of the project-specific insurance markets being London syndicate insurers or reinsured through London, which limits PCO extensions by treaty to 10 years.

### D. Recommendations

To ensure the revised legislation does not negatively impact coverage, it is recommended that any extended PCO endorsement utilized going forward not be restricted to a specific number of years alone (*i.e.*, 10 years), but instead state that the PCO Hazard is extended to the applicable statute of repose. In addition, endorsements that specifically state “10 years, or the applicable statute of repose, *whichever is less* . . .” should also be avoided to ensure there are no resulting uninsured exposures. Alternatively, language reading “10 years, or the applicable statute of repose, *whichever is greater* . . .” would be acceptable.

### Conclusion

Although the amendments to the statute have yet to be interpreted by courts, the recommended best practice is to be proactive and review PCO extensions on a going forward basis to identify language that explicitly limits the coverage afforded to 10 years. The potential uninsured exposure a Florida homebuilder may face, while low in probability, can often be curtailed by modifying the PCO extension period to apply through the applicable statute of repose.

<sup>1</sup> See Fla. Stat. § 95.11 (2018), titled *Limitations other than for the recovery of real property*.

<sup>2</sup> See Fla. R. Civ. P. 1.140(a)(1); Fla. R. Civ. P. 1.180(a).

<sup>3</sup> The House of Representatives Final Bill Analysis suggests that the limit is intended to be no more than one additional year, stating that the statute is amended “to extend the time to file counterclaims, cross-claims, or third-party claims *up to one year beyond the current statutes of limitations or repose* in an action based on the design, planning, or construction of an improvement to real property. This bill allows such claims to be filed *up to one year after the filing of the triggering pleading* in actions based on the design, planning, or construction of an improvement to real property, even if those claims would otherwise be time-barred.” (emphasis added.)

<sup>4</sup> See, e.g., *Spada v. Unigard Ins. Co.*, 80 Fed. Appx. 27, 29 (9th Cir. 2003) (duty to defend does not extend to the insured’s affirmative claims); *Vansteen Marine Supply, Inc. v. Twin City Fire Ins. Co.*, 2008 WL 599850 (Tex. App. Mar. 6, 2008) (insurer’s duty to defend did not obligate it to pay for policyholder’s purely offensive counterclaims); *James 3 Corp. v. Truck Ins. Exchange*, 91 Cal. App. 4th 1093, 1104 (Cal. Ct. App. 2001); *Goldberg v. Am. Home Assur. Co.*, 80 A.D.2d 409, 410 (N.Y. App. Div. 1981).

“A review of carrier offerings shows that a majority of the PCO endorsements provide completed operations coverage for ‘10 years, or the applicable statute of repose, whichever is less.’”

## Committee Mission Statement

The purpose of the Insurance and Surety Committee is to educate the RPPTL Section of the Florida Bar on insurance, surety and risk management issues. The ultimate goal is to grow the Committee to the point it can seek Board Certification in Insurance and Risk Management. IM



Mariela Malfeld  
Co-Vice Chair & Co-Editor

## Leadership & Subcommittees

Interested in getting involved? Contact one of the persons below:

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 Co-Vice-Chair - Frederick R. ("Fred") Dudley (dudley@mylicenselaw.com)  
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Cynthia Beissel  
Co-Editor

## Schedule of Upcoming Committee Meetings

- Do you know the difference between the various forms of additional insured endorsements?
- Do you understand your ethical obligations when representing sureties and their principals?
- Do you know what a "your work" exclusion is?
- Can you describe the difference between an additional insured and a loss payee?
- Do you understand the risks to your clients if they fail to obtain a waiver of subrogation?
- Do you know the difference between "claims made" and "occurrence" based insurance policies?

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When: Noon - 1:00 P.M. ET on the third Monday of every month, excluding government holidays.

Where: Via Teleconference

How: Dial-in number: **888-376-5050**

Participate Code: **7854216320#**

The first part of each teleconference is devoted to Committee business, followed by an insurance/surety-related CLE presentation that lasts approximately 45-50 minutes.

If you, or someone you know, might be interested in presenting at an upcoming meeting, please let us know.

If you, or someone you know, would like to submit an article for possible inclusion in a future issue of **Insurance Matters!**, please contact Mariela Malfeld at mmalfeld@wattieder.com or Cindi Beissel at cindi@coquinalawgroup.com

### We Need You!

We are in need of persons to assist in leading various subcommittees. Please contact us if you would like to become more involved.

### Did you know?

You can access previous issues of **Insurance Matters!**, as well as agendas, meeting minutes, presentation materials & CLE posting information from past committee meetings at our Committee Page once you've logged in to the RPPTL website located at <http://www.rpptl.org>.

## Schedule of Upcoming RPPTL Section Meetings

March 13-19, 2019  
 Executive Council Meeting  
 Omni Resorts  
 Amelia Island Plantation

May 29-June 2, 2019  
 Executive Council Meeting &  
 Convention  
 Opal Sands Resort  
 Clearwater Beach, Florida

July 24-27, 2019  
 Executive Council Meeting &  
 Legislative Update  
 The Breakers  
 Palm Beach, Florida