Inside Florida’s regulations on damages & defective conditions
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Most Florida construction professionals and any property owners who have lived in new condominium buildings are likely familiar with what attorneys in Florida refer to as the “558 process,” a legal process in which a property owner — whether an individual owner or a community association — facilitates an investigation of its building and, depending on the results, alleges claims against the developer, general contractor and those that constructed and/or designed the building (the “construction parties”) for construction defects.

As a part of the 558 process, the property owner typically will hire engineers to determine what repairs are necessary to fix the defects as well as a cost estimation expert to estimate how much it will cost to repair the defective conditions.

However, the expert’s estimate for how much it will actually cost to perform the repairs may not necessarily equate to the owner’s damages in a potential lawsuit against the construction parties.

This legal reality creates a series of practical difficulties for all sides. How can the property owner accurately evaluate what recovery it can expect in a construction defect lawsuit? Similarly, how can the construction parties (and their insurance companies) reasonably evaluate their potential exposure in a construction defect case?

The Impact of Grossman Holdings Ltd. v. Hourihan

The seminal case in Florida concerning construction defect damages is Grossman Holdings Ltd. v. Hourihan, 414 So. 2d 1037, 1040 (Fla. 1982). However, this case

was in a very specific context and involved an alleged breach of a construction contract. Grossman established that “damages for breach of contract are measured as of the date of the breach,” and “fluctuations in value after the breach do not affect the nonbreaching party’s recovery.” In Grossman Holdings Ltd., the breach occurred when a contractor built a home facing the wrong direction.

While the Grossman analysis applies under Florida law in cases where the plaintiff and defendant were both parties to a construction contract, a key distinction separates Grossman from the “typical” case of a condominium association’s construction defect lawsuit where there is no contract between the association and the construction parties. The absence of a contract means there is no specific “date of a breach”, which the Florida Supreme Court in Grossman relied upon for determining the proper measurement of damages. Nonetheless, many construction defect practitioners have taken the position that the Grossman holding should be applied to condominium associations’ third-party construction defect claims and argue that the “date of breach” in that context is the date that the unit-owner controlled condominium association took control of the building from the developer (often referred to as “turnover”).

However, applying Grossman in the context of an association’s third-party construction defect claim ignores crucial practicalities of the 558 process. First, the association never had the opportunity to contract with any of the construction parties and did not control any portion of the underlying construction. In addition, it often takes several years from turnover before a condominium association is in a position to perform construction defect repairs. Using the Grossman damages measurement would limit condominium associations to historical labor and material costs as of the date of turnover, which do not reflect what amounts the association will actually spend at the time of the repairs. This could result in a damages calculation that severely undercompensates the association and its members, failing to account for fluctuations in the cost of labor and materials from the date of turnover to the time of the repairs. Typically, to make up for these price changes, construction defect plaintiffs seek to recover prejudgment interest on any “date of turnover” damages calculation. However, while prejudgment interest rates are generally meant to address market changes like inflation, they are not designed to accurately reflect labor and material price variations in the construction industry.

Don't Overlook Tort Law

Rather than looking to contract law, many construction defect practitioners suggest that the courts look to tort law to determine the proper measure of damages in this context. Florida law provides that “recoverable damages occasioned by a tort include all damages which are a natural, proximate, probable or direct consequence of the act” because “the defendant is held to notice of the natural and ordinary result of its

negligent acts" (Taylor Imported Motors, Inc. v. Smiley, 143 So. 2d 66 [Fla. 2d DCA 1962]; Mansfield v. Brigham, 91 Fla. 109, 107 [1926]).

Considering that an association's legal claims against construction parties typically include claims of negligence (along with claims of statutory warranties or statutory breaches where available), tort damages arguably offer a more accurate reflection of the nature of the damages by including both immediate and foreseeable costs. It is arguably more practical to apply this measurement of damages because the association's actual damages would be based on the cost to repair and to remediate the building as of the date the repairs are being performed, not a historical "date of breach" that has no relationship to the actual damages. In addition, the Grossman court's logic in limiting a contracting party to damages resulting from a contractual breach is entirely inapplicable in a situation where there is no contract. In that situation, the "breach" at issue is of a duty owed to foreseeable third parties rather than to another party under a contract.

Opponents of this tort-based damages measurement argue that it would put the association in a better position than if the construction parties had performed their work and/or services without committing any violation or breach of a duty. Appellate courts in Florida have yet to provide any clear guidance on how construction defect damages should be measured where a construction defect plaintiff did not contract for the underlying construction project, and until that clarification is provided, we expect that construction defect practitioners will continue to advocate for one of the two above-referenced methodologies depending on what is more beneficial to their client in a particular case. For example, depending on the prejudgment interest rates and the amount of time between turnover and the final judgment, applying the Grossman measurement could potentially result in a larger monetary final judgment than using a tort-based damages measurements reflecting a more accurate and up-to-date cost estimate.

Final Thoughts

In sum, the facts of each case could determine what position each side might take rather than the practical and equitable considerations in calculating the most accurate measurement of damages possible. We expect that the courts will continue to evaluate this issue in the coming months and years until a case like Grossman, but outside of the construction contract context, is addressed.

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