Practical Considerations to Recovery for Damages Caused by Latent Construction Defects – Part I

Purchasers/Owners of Real Property, Architects, Contractors and Developers are Impacted

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This is the first in a three-part series of alerts about latent construction defects.

Definition of Latent Defects

In the typical construction contract, such as AIA Document 201, there are specific notice and default procedures that an owner must comply with in order to bring an action against the contractor and its surety for known problems that arise from construction. Parties can limit their liability by requiring mandatory notice and default provisions. Additionally, states across the country have statutes that require different types of compliance. Likewise, sureties can plan notice requirements that must be complied with for actions on their bonds.

However, construction defects are not always immediately apparent and frequently the damage from a negligent act that occurs during construction does not manifest until years after construction is completed and the project is turned over to the owner. For example, water intrusion causing rot in a wall cavity. This alert highlights some of the practical considerations which come into play when litigating latent defects.

In the field of construction litigation, it is imperative for all participants – owners, architects, contractors and their counsel – to have a good working knowledge of latent defect claims. From an owner or developer's perspective, it is crucial to have an understanding of when a latent defect becomes patent in order to avoid sitting idle through the statute of limitations period. On the other hand, a contractor defending against a construction defect claim needs to know how to factually determine when the latent defect manifested itself to the owner. This is when the problem evolves from a latent defect to a patent defect. Although this determination is always based upon a fact-by-fact analysis, there are guidelines that courts have adopted to make this analysis more consistent, such as those in Florida.[1]

Kelley v. School Bd. of Seminole County, 435 So. 2d 804 (Fla. 1983); Performing Arts Center Authority v. Clark Const. Group, Inc., 789 So. 2d 392 (Fla. 4th DCA 2001).[1]

"Latent defects are generally considered to be hidden or concealed defects which are not discoverable by reasonable and customary inspection, and of which the owner has no knowledge."[2] A latent defect is one not apparent by use of one's ordinary senses from a casual observation of the premises.[3] However, knowledge can be inferred when the defect should have been discovered by due diligence of conducting a reasonable inspection.[4] In other words, an owner can't just assert ignorance of a visibly manifest construction defect. A state of blissful ignorance alone can't avoid having imputed the requisite knowledge of what is not a patent defect.

Latent Versus Patent Construction Defects

At some point in time, a distinct evolution takes place and a latent defect, as a matter of fact and law, transforms into a patent defect. It is at this point that the statute of limitations period begins to run.[5] This evolutionary process is triggered by the obvious manifestation of the defect, regardless of whether the owner has actual knowledge of the exact nature of the defect.[6] For instance, does the fee simple owner of an apartment complex have the requisite knowledge of unknown wall rot when the onsite apartment managers get numerous requests to fix a leaking window? How many service calls give notice? What if just caulking makes the intrusion stay in the wall cavity? When the manifestation is not obvious but could be due to causes other than an actionable defect, constructive knowledge as a matter of law may not be inferred.[7]

Whether a Defect Is Patent Depends on the Reasonableness of the Inspection

The test for patency is whether the defective nature of the object was obvious upon a visual and customary inspection with the exercise of reasonable care.[8] Those construction deficiencies that are noticeable during a reasonable inspection are legally deemed not to be latent. Moreover, what may be a latent defect to the average person may become a patent defect in the eyes of a person possessing superior knowledge.[9]

Rhetorically, what is the degree of detail required in an inspection to merit being reasonable and customary? Is it realistic when inspecting a house to be less intrusive than an inspection for a 500-unit apartment complex? Is a routine maintenance inspection sufficient? Should there be cores taken around balconies under windows?

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[2] Alexander v. Suncoast Builders, Inc., 837 So. 2d 1056, 1058 (Fla. 3d DCA 2003); Lakes of the Meadow Village Homes Condominium Nos. One, Two, Three, Four, Five, Six, Seven, Eight, and Nine Maintenance Ass'ns, Inc. v. Arvida/JMB Partners, L.P., 714 So. 2d 1120, 1122 (Fla. 3d DCA 1998) (quoting Henson v. James M. Barker Co., 555 So. 2d 901, 909 (Fla. 1st DCA 1990)).

[3] Holsworth v. Florida Power & Light Company, 700 So. 2d 705, 708 (Fla. 4th DCA 1997) (citing Kagan v. Eisenstadt, 98 So. 2d 370, 371 (Fla. 3d DCA 1957).

[4] Id. and Fla. Stat. Section 95.11(3)(c) 2010.

[5] Fla. Stat. Section 95.11(3)(c) 2010.

[6] Kelley, 435 So. 2d at 806; Performing Arts Center, 789 So. 2d at 394.

[7] Snyder v. Wernecke, 813 So. 2d 213, 217 (Fla. 4th DCA 2002); Performing Arts Center, 789 So. 2d at 394.

[8] Holsworth, 700 So. 2d at 708; Mastor v. David Nelson Construction Co., 600 So.2d 555, 557 (Fla. 2d DCA 1992).

[9] Mastor, 600 So.2d at 557; U.S. Home Corporation, Rutenberg Homes Division v. Metropolitan Property and Liability Ins. Co., 516 So. 2d 3, 4 (Fla. 2d DCA 1987).

The reasonableness of each inspection will hinge on the structural complexity of the residence(s) or commercial building(s) being inspected and the skills of the person performing the inspection, but there are certain factors that can be relied on as a baseline.

Some states, such as Florida, do not provide a definitive answer over what constitutes a reasonable inspection other than to provide that reasonableness is a factual determination. Federal cases have recognized several factors that should be considered when determining whether an inspection was performed with reasonable care: (i) inspection procedures required by the contract, if any; (ii) quantity of items to be inspected; (iii) cost and complexity of inspection; and (iv) certifications of the inspector or maintenance man and other assurances of compliance.

Should You Have Known of the Defect?

Inspection Procedures Required by Contract Help Define Reasonableness

Many current construction contracts have in-depth specifications that require tests and inspection procedures to be performed to establish whether the installation and/or product meets quality standards. Should the inspection follow the contractually required procedures, this acts as affirmative proof the inspection was performed with reasonable care.

The owner or contractor's failure to perform the specified tests on potentially deficient work does not automatically make a defect latent. If the deficiency is one that would have been discovered by the contractually specified test, then it may still be a patent defect. The failure of the party to perform the requisite contractual test or inspection is potentially liable for breach of the contract.

The contract may fail to specify a test that would reveal the presence of a serious construction defect. In other words, if the specified test does not identify the defect, but a more rigorous test would have done so, then arguably the onus falls on the owner to show the specified test was reasonable. In this instance, it will be necessary to inquire as to whether the more demanding inspection and/or test was reasonable under the circumstances and should have been implemented, rendering the defect to be patent.

Quantity of Items to Be Inspected Affects Whether a Reasonable Person Should Have Known

The specific number of items in the inspection is another factor to be considered in determining whether the inspection will be reasonable.[10] How does one examine the interior of walls inexpensively? A maintenance inspection that merely addresses a couple of items and fails to address major components is arguably unreasonable.[11] For instance, a routine overall maintenance inspection that fails to look at exterior sealants

[10] Mastor, 600 So.2d at 557.
[11] Solid State Elecs. Corp., ASBCA No. 23041, 80-2 BCA ¶ 14,702 at 73,503-04; Dale Ingram, Inc., ASBCA No. 12152, 74-1 BCA ¶ 10,436, at 49,331.

is questionable. The more items addressed in the inspection, the more likely it will be seen as reasonable.

Cost and Complexity of Inspection Affect Whether You Should Have Known

Other factors to be considered in evaluating the reasonableness of an inspection are its cost and complexity. The background of the inspector and the purchase price is important because, like all things in life, you get what you pay for. A $50 home inspection is not bringing a very close look. A $500 residential inspection is probably more robust. Price, scope of work and skill is indicative of the quality of the inspection.

The complexity of the inspection, or lack thereof, is a good barometer as well.[12] If an inspection includes complex procedures and tests, then it will be perceived as being more reasonable.[13]

Certification of Inspector and Assurances of Compliance

The more qualified the inspector, the more likely the inspection and/or test will be deemed reasonable.[14] More credibility and reliance will be given to an experienced inspector holding a license than the average owner or maintenance man.[15]

Typically, a licensed inspector will issue a report with assurances of compliance or non-compliance, whichever the case may be. The owner should be able to rely upon a report of this nature. Such assurances from a licensed inspector substantially increase the likelihood the inspection will be deemed reasonable, so any defects not discovered in the inspection could be legally concluded as latent.

The Slavin Doctrine – The Completed and Accepted Rule

One area in which the latent nature of a construction defect is critical is where a defect causes personal injury to a third party. The determination of whether the owner or contractor is liable to the injured party is set forth in the analysis of*Slavin v. Kay*, 108 So. 2d 462 (Fla. 1959). This landmark case created the “completed and accepted rule,” otherwise known as the *Slavin* doctrine.[16]

Under *Slavin*, a contractor is not liable in negligence for injuries to third parties after the owner has accepted the deficient work, unless the defect at issue was latent and could not have been discovered by the owner, or unless the contractor was dealing with inherently dangerous elements.[17] The distinguishing factors for *Slavin* to apply are that a third person, the claimant, has been personally injured on the property, the

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[12] Ahern Painting Contractors, Inc., GSBCA Nos. 7912 et al., 90-1 BCA ¶ 22,291.
[13] Id.
[14] Id.
[15] Id.
[16] Id.
[17] Id. at 466-67. See also Foreline Security Corp. v. Scott, 871 So. 2d 906, 909 (Fla. 5th DCA 2004).

construction defect is patent, or the owner has knowledge of the defect and accepted it.[18]

The *Slavin* doctrine only applies to claims for personal injuries brought by third parties.[19] The public policy behind *Slavin* is "that it would be unfair to continue to hold the contractor responsible for patent defects after the owner had accepted the improvements and undertaken its maintenance and repair."[20] It does not apply to breach of contract claims for property damage brought by an owner against a contractor.[21] In those circumstances, which will be described in more detail in the next alert in this series, one primary issue between a claimant owner and a contractor is whether the statute of limitations bars the claim.

[18] Id.
[19] Latite Roofing Company, Inc. v. Urbanek, 528 So. 2d 1381 (Fla. 4th DCA 1988) (recognizing that Slavin only applied to "an injured third party suing a contractor ... [and not] an owner suing the contractor."). See also Orr v. D'Andrea, 412 So. 2d 933, 934 (Fla. 1st DCA 1982) ("Because no third party is involved in this case, the inapplicability of the Slavin rule is easily discernible.")
[20] Easterday v. Masiello, 518 So.2d 260, 261 (Fla. 1998).
[21] Slavin v. Kay, 108 So. 2d 462 (Fla. 1959).