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## MEMORANDUM

**TO:** RPPTL Construction Law Committee

**FROM:** Ty G. Thompson

**DATE:** August 8, 2011

**RE:** *Why Federal Insurance Got it Right (from a surety attorney's perspective)*

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According to the Florida Supreme Court, a performance bond claim must be filed within five years from the date of acceptance. *Federal Insurance v. Southwest Florida Retirement Center, Inc.*, 707 So. 2d 1119, 1121 (Fla. 1998).

Section 95.11(2)(b), Florida Statutes, provides, in pertinent part, that a legal or equitable action on a contract, obligation, or liability founded on a written instrument shall be commenced within five years. Fla. Stat. § 95.11(2)(b). An action against a common-law performance bond is an action “on a contract, obligation, or liability founded on a written instrument.” *Federal Insurance v. Southwest Florida Retirement Center, Inc.*, 707 So. 2d 1119, 1121 (Fla. 1998); *School Board of Volusia County v. Fidelity Company of Maryland*, 468 So. 2d 431,

432 (Fla. 5th DCA 1985); *The Clark Construction Group v. Wentworth Plastering of Boca Raton*, 840 So. 2d 357, 358 (Fla. 4th DCA 2003).

It is well settled in Florida that a cause of action on a performance bond begins to run on the date the owner accepts the project as having been completed according to terms and conditions set forth in the parties' construction contract. *Federal Insurance*, 707 So. 2d at 1121. As discussed below, this accrual date remains unchanged even if the alleged defects are latent. *Id.*; *Clark Construction*, 840 So. 2d at 358-59.

*Federal Insurance* is the benchmark case in Florida regarding statutes of limitations for actions on performance bonds. In *Federal Insurance*, the owner sued its general contractor and the general contractor's surety alleging that in 1993, nearly nine years after the contractor completed construction, the owner discovered latent defects in the work. *Id.* at 1120. The owner alleged that the defects constituted a breach of an express warranty provided in the construction contract. *Id.* Therefore, the owner reasoned, its claim against the performance bond surety was founded on an alleged contemporaneous breach of the performance bond for the surety's failure to cure the general contractor's contractual warranty obligations. *Id.*

The trial court granted the surety's motion for judgment on the pleadings, holding that section 95.11(2)(b) barred any claim arising under the performance bond. *Id.* at 1120. However, the Second District Court of Appeal reversed the trial

court's ruling, and held that the issue before it concerned the accrual date of the statute of limitations, and not the limitations period itself. *Id.* The Second District reasoned that because the performance bond incorporated the construction contract, the surety's liability was coextensive with that of the general contractor, and a contractual claim against the general contractor would result in a valid claim against the surety bond. *Id.* Therefore, the Second District reasoned the limitations period for an action against the performance bond surety did not accrue until the owner discovered the latent defects. *Id.*<sup>1</sup>

The Florida Supreme Court quashed the Second District's decision, and remanded with instructions to affirm the trial court's judgment on the pleadings in the surety's favor. *Id.* at 1122. The Florida Supreme Court held that the owner's action was barred because the owner failed to bring its action against the surety within the applicable limitations period. *Id.* In quashing the Second District's decision, the Florida Supreme Court referenced Judge Blue's dissent at the district court level, wherein he observed that:

The majority opinion makes the claim against the bonding company actionable more than 10 years after completion of the bonded

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<sup>1</sup> The trial court relied on *School Board of Volusia County v. Fidelity Co. of Maryland*, 468 So. 2d 431 (Fla. 5th DCA 1985), wherein Florida's Fifth District Court of Appeal relied on the lack of any tolling language in section 95.11(2)(b) to hold that the five-year limitation was an absolute bar against the surety. *Federal Insurance*, 707 So. 2d at 1120. However, the Court did not agree with the Second District's opinion, and found that unlike the four-year statute of limitations found in section 95.11(3)(c), Florida Statutes, which establishes the time limitations to bring suits for negligence and when a cause of action concerning latent defects accrues, there is no comparable deferral of accrual period for a cause of action under section 95.11(2)(b). *Id.* at 1121-22.

construction. It does this by explaining that the cause of action does not accrue until the latent defect is discovered and only then does the five-year statute of limitations begin to run. . . . To make the latent defects actionable against the bonding company requires imposing a tolling period . . . [which requires] a legislative determination. The majority opinion also extends the liability of the bond by implication beyond the terms of the bond contract.

*Id.* at 1120-21; *Southwest Florida Retirement Center v. Federal Insurance Company*, 682 So. 2d 1130, 1136 (Fla. 2d DCA 1996).

The Florida Supreme Court in *Federal Insurance* expressly held that section 95.11(2)(b), as it applies to actions on performance bonds, accrues on the date the owner accepts the project; even as to latent defects. *Id.* at 1121. Accordingly, because the owner filed its action more than five years after acceptance of the project, the Florida Supreme Court held that the trial court correctly had entered judgment on the pleadings in favor of the surety. *Id.*; *see also Clark Construction Group, Inc. v. Wentworth Plastering of Boca Raton, Inc.*, 840 So. 2d 357, 359 (Fla. 4th DCA 2003)(affirming summary judgment in surety's favor because the general contractor sued its subcontractor's surety nine years after owner accepted project); *BDI Construction Co. v. Hartford Fire Insurance Company*, 995 So. 2d 576, 578 (Fla. 3d DCA 1998).