



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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Amendment Adds Clarity to Florida's Construction Statutes of Limitations and Repose

By: Timothy Bench, Esq., Rumberger, Kirk & Caldwell, P.A., Orlando, FL

On June 14, 2017, Florida's Governor signed into law House Bill 377, which seeks to provide clarity regarding when Florida's construction statutes of limitations and repose begin to run. The prior version of the statute, § 95.11(3)(c), Florida Statutes, provided that both the limitations period and the repose period begin to run when the later of certain specified events occurs:

- Actual possession by the owner; or
- The date of issuance of a certificate of occupancy; or

• The abandon-



ment of construction if not completed; or

- The date of completion or termination of the contract between the professional engineer, registered architect or licensed contractor, and his or her employer, or

- Regarding the 4-year limitations period only, if the defect is latent, when the defect is discovered or should have been discovered with the exercise of due diligence.

The third option, "[t]he date of completion or termination of the contract between the professional engineer, registered architect or licensed contractor, and his or her employer," has been the source of confusion for courts and litigants alike. Unfortunately, this prior version of the statute did not provide a definition of "completion" of the con-

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Editor's Corner

Our own Scott Pence presented plaques at the 2017 Construction Law Institute to Arnie Tritt (pictured) for his service as Chair from 2011-2013, and to Hardy Roberts for his service as Chair from 2013-2016. Peter Brandt received the Lifetime Achievement Award, and the Rising Star award went to Bryan Rendzio. Congratulations to them all! Well deserved!



Amendment Adds Clarity to Florida's Construction Statutes of Limitations and Repose

By: Timothy Bench, Esq., Rumberger, Kirk & Caldwell, P.A., Orlando, FL (continued from page 1)

"By amending the statute, the Florida Legislature has sought to prevent the purpose of the statute from being circumvented..., by providing a definition for when a contract is 'completed.'"

tract, and in 2015, Florida's Fifth District Court of Appeal held in *Cypress Fairway Condo. v. Bergeron Const. Co. Inc.*, 116 So. 3d 706 (Fla. 5th DCA 2015), that a contract is completed within the meaning of the statute, not when the work is completed, but when the final payment due under the contract is made.

Thereafter, some owners began inserting language into contracts with the effect of extending the time for making final payment, and finding other ways to delay making final payment. The result was that limitations periods as well as repose periods could be unilaterally extended almost indefinitely. This defeats the purpose of the statute, to place limits on the duration of potential liability for construction defects. Uncertainty regarding when the statute of repose will expire also complicates a contractor's ability to effectively utilize risk management tools, such as determining how long completed operations coverage must remain in place.

By amending the statute, the Florida Legislature has sought to prevent the purpose of the statute from being circumvented in this way, by providing a definition for when a contract is "completed." The new version of the statute provides the same list of triggering events, but adds that:

"Completion of the contract means the later of the date of final performance of all the contracted services or the date that final payment for such services becomes due without regard to the date final payment is made."

While not a perfect solution, the amendment is certainly a significant improvement that should make it easier for litigants and their legal counsel to determine when a particular claim for construction defects is barred by the statute of limitations, or extinguished by the statute of repose.

The amendment became effective July 1, 2017, and applies to causes of action that accrue after that date. Therefore, the new definition will not apply to most existing causes of action. However, it seems likely that courts construing the prior version of the statute, in the absence of an express definition for "completion...of the contract" will look to this amendment as persuasive authority.

Case Law Update

- ♦ **Anderson v. Taylor Morrison of Florida, Inc.**, 2017 WL 436316 (Fla. 2d DCA May 31, 2017).

Taylor Morrison, a home builder, provided a limited warranty to home purchasers which limited the types of claims for defects available to the purchasers to those specified in the warranty, and which contained a mandatory arbitration clause. When the homeowners discovered defects in the stucco on their home and sued, Taylor Morrison moved to compel arbitration under the warranty, which the trial court granted. On appeal, the 2nd DCA reversed, holding that the arbitration provision was void as against public policy because it was limited to claims covered by the warranty, and the purported to eliminate statutory claims such as for breach of the Florida building code.

- ♦ **Trump Endeavor 12 LLC v. Fernich, Inc. d/b/a The Paint Spot**, 216 So. 2d 704 (Fla. 3rd DCA April 12, 2017).

Paint Spot recorded a lien against the Trump National Doral Miami, owned by Trump. When Trump failed to pay Paint Spot for materials, Paint Spot filed a complaint to foreclose its lien. Paint Spot's work on the project had spanned two parts, both of which had the same address, and for each of which Trump had hired a different general contractor. Trump inadvertently provided Paint Spot with the wrong Notice of Commencement, and as a result, Paint Spot's Claim of Lien listed the wrong general contractor. Trump asserted in the foreclosure suit that the COL was invalid because it listed the wrong GC. The trial court rejected this contention and entered a final judgment of foreclosure. On appeal, the 3rd DCA affirmed, finding that Paint Spot had substantially complied with § 713.06(2), Fla. Stat., and that Trump had not been adversely affected by the error.

- ♦ **International Fidelity Ins. Co. v. Americaribe-Moriarty JV**, unpublished opinion (11th Cir. February 28, 2017).

Americaribe, a general contractor, entered into a subcontract with Certified Pool Mechanics to perform pool work on a project. International fidelity issued a performance bond on the subcontract, which incorporated by reference the terms of the subcontract. Both the subcontract and the bond contained certain notice requirements for declaring the subcontractor in default, and to provide the surety an opportunity to choose from multiple options it had available under the bond for completion of the work. Americaribe properly terminated the subcontractor, with proper notice to the subcontractor and surety under the terms of the subcontract and the bond. However, Americaribe then engaged a replacement subcontractor without allowing the surety the time provided by the terms of the bond to elect its completion option. As a result, the Southern District of Florida granted summary judgment to the surety, finding that the surety had no obligations under the bond due to Americaribe's breach, and the 11th Circuit affirmed.

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 tbench@rumberger.com or tderr@rumberger.com.

Editor's Corner:



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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)

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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.

Schedule of Upcoming RPPTL Events

March 8-10, 2018

**Construction Law Institute and Construction Law Certification
Review Course**

JW Marriot Orlando Grande Lakes
Orlando, Florida