

Take-Two: Legislature Amends Florida's Construction Statute Of Limitations And Repose Again In 2018

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Last year, in an attempt to clarify, if not tighten, the time within which actions founded on construction defects must be brought, the Florida Legislature amended Florida Statute Section 95.11(3)(c) to define "completion of the contract," one of the four triggers in Florida's statute of limitations ("SOR") and repose ("SOL").¹ A year later, the Legislature has amended Section 95.11(3)(c) again, this time to refine last year's amendment, and to also extend or incorporate a cushion into the SOR in certain circumstances. This article provides an overview of these amendments and explores how they might affect certain construction defect actions.

Florida's Statute of Limitations and Repose

Florida has a four-year SOL for actions founded on the design, planning, or construction of an improvement to real property (referred to herein as "construction defect actions"), with the time for commencing such actions running from the latest of the date of:

1. actual possession by the owner;
2. issuance of a certificate of occupancy;
3. abandonment of construction if not completed; or
4. completion of the contract or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer.²

The SOL includes a delayed discovery provision, which provides that when actions involve a latent defect, the time for commencing them does not begin to run until a defect is discovered or should have been discovered with the exercise of due diligence.³ However, the incorporated 10-year SOR provides, "[i]n any event, such actions must be commenced within ten years after" the latest of the four triggers set forth above.⁴

The 2017 Amendment: Completion of the Contract

Before 2017, "completion of the contract" was undefined in Section 95.11(3)(c). Not surprisingly, that trigger became the subject of disputes about the timeliness of construction defect actions.

In *Cypress Fairway Condominium v. Bergeron Const. Co. Inc.*,⁵ for example, condominium owners and their association filed a construction defect action against various entities involved in the condominium's original construction. One such entity moved to dismiss the action as time-barred by the SOR because it was not commenced within 10 years of completion of the contract, which it argued occurred upon final *payment application*.⁶ The plaintiffs countered that completion of the contract did not occur until final payment, which was made

three days after the final payment application.⁷

"Convinced that the Legislature intended that the date of completion of the contract had to do with the date of completion of the construction that would have been done under the contract, not the date of final payment," the trial court dismissed the action as untimely.⁸ The Fifth District reversed, and held that "completion of the contract means completion of performance by both sides of the contract, not merely performance by the contractor."⁹

A similar issue arose more recently in *Busch v. Lennar Homes, LLC*.¹⁰ There, a homeowner filed a construction defect action against Lennar more than 10 years after closing on the purchase of a home.¹¹ Lennar moved to dismiss the action as time-barred by the SOR, and argued the parties' contract was completed at the time of the closing.¹² The trial court agreed and dismissed the action.¹³

Relying in part on the *Cypress Fairway* court's "performance by both sides" interpretation, and in part on the terms of the purchase contract at issue, the Fifth District reversed.¹⁴ The court reasoned that the purchase contract expressly contemplated that closing could occur even if work required by the purchase contract remained incomplete, and the homeowner had not alleged in his complaint that no work was completed after closing; therefore, the homeowner's allegations did not conclusively establish the contract was completed upon closing.¹⁵

The 2017 Legislature attempted to address such disputes, and specifically the *Cypress Fairway* issue, by defining "completion of the contract" as "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 was made."¹⁶ It seemingly adopted the *Cypress Fairway* court's "performance by both sides" interpretation, and in doing so eliminated the possibility for one party to delay completion of the contract and thereby extend the SOR simply by nonpayment. However, the 2017 Legislature did not define "final performance."

The 2018 Amendment: Completion of the Contract Refined

The 2018 Legislature recently amended Section 95.11(3)(c), by adding the following provision:

With respect to actions founded on the design, planning, or construction of an improvement to real property, if such construction is performed pursuant to a duly issued building permit and if a local enforcement agency, state

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enforcement agency, or special inspector, as those terms are defined in s. 553.71, has issued a final certificate of occupancy or certificate of completion, then as to the construction which is within the scope of such building permit and certificate, the correction of defects to completed work or repair of completed work, whether performed under warranty or otherwise, does not extend the period of time within which an action must be commenced.¹⁷

The 2018 Legislature intended the amendment to address “an issue that arises regarding the definition of final performance, namely whether warranty work performed by the contractor has the effect of extending the time of final performance to the date that the warranty work is completed.”¹⁸ It noted that “the term warranty work refers to the common term in a construction contract that requires the contractor to warrant, or assure, that all work performed will be free from defects in materials and workmanship for some fixed period of time.”¹⁹

In analyzing the proposed amendment, the 2018 Legislature referenced *Busch v. Lennar Homes, LLC*, stating that “recent case law suggests . . . a contract is not complete, and thus the timeframes for bringing a lawsuit cannot begin to run, until all punch-list or other follow-up work is complete.”²⁰ It reported that “the bill substantially counters this case law by effectively providing that a construction contract performed pursuant to a building permit is complete when a final certificate of occupancy or certificate of completion is issued.”²¹ “After that point, the correction or repair of completed work that is within the scope of the building permit and final certificate does not delay the running of the timeframes in which a construction-defect action may be commenced.”²²

The 2018 Legislature essentially refined its earlier definition of “completion of the contract” in an attempt to clarify that repair or correction of completed work, including warranty work, performed after issuance of a certificate of occupancy or completion, does not delay the start of the running of the SOL or SOR or extend the time to commence a construction defect action. This amendment further clarifies the time within which actions founded on construction defects must be brought.

The 2018 Amendment: Limited Extension of the Statute of Repose

The 2018 Legislature also amended Section 95.11(3)(c), by adding the following bold language, thereby extending the SOL:

In any event, the action must be commenced within 10 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion of the contract or termination

of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest. **However, counterclaims, crossclaims, 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.**²³

This amendment has the opposite effect of the amendment regarding contract completion. It actually extends the statute of repose, though only for “counterclaims, crossclaims, and third-party claims” that arise out of the “conduct, transaction, or occurrence” set out in a pleading to which they relate, and only for one year. However,

because the extension runs from the time the underlying pleading is served, as opposed to filed, the repose deadline could extend well beyond one year given Florida’s 120-day service of process rule.²⁴

This amendment effectively provides a cushion for defendants in construction defect actions, upon being served, to investigate, identify and commence an action (specifically a counterclaim, crossclaim or third-party claim) against other responsible persons or entities. It squarely addresses an issue that arises when, for example, a homeowner sues his or her general contractor on the eve of the expiration of the SOL, thereby leaving the general contractor limited time, or no time depending on the date of service of process, to investigate, identify and commence an action against responsible subcontractors. The extension could minimize, if not eliminate, disputes about the timeliness of counterclaims, crossclaims or third-party claims in such circumstances.

The concept of a cushion, or a limited extension of time to commence actions against others, is not unique to Florida. Other states, such as Texas and Oklahoma, for example, have codified a similar cushion or extension of time to commence crossclaims and counterclaims, though theirs are separate from their SOL and SOR.²⁵

Implications of the 2018 Amendments

The 2018 amendments should decrease litigation over the timeliness of construction defect actions under both the SOL and the SOR. The refined definition of “completion of the contract” addresses the issues raised in *Cypress Fairway* and *Busch* and thereby draws a clearer line with respect to the time within which construction defect actions must be commenced, while the limited extension of the SOR clears up timeliness issues for counterclaims, crossclaims and third-party claims that arise from even the most late-filed construction defect actions.

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Effective Date

The 2018 amendments to Fla. Stat. §95.11(3)(c) apply to any action commenced on or after July 1, 2018, regardless of when the cause of action accrued, except that any action that would not have been barred under Section 95.11(3)(c) prior to the 2018 amendments may be commenced before July 1, 2019, and if it is not commenced by that date and is barred by the 2018 amendments, it shall be barred.²⁶



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Endnotes

- 1 See Fla. Stat. §95.11(3)(c) (2017); see also Bret M. Feldman, *A Practical Guide to Florida's Construction Statute of Repose After 2017 Legislative Changes*, Vol. XXXIX, No. 1, *ActionLine*, 20 (Winter 2017-18).
- 2 See Fla. Stat. §95.11(3)(c) (2017).
- 3 *Id.*
- 4 *Id.*
- 5 *Cypress Fairway Condominium v. Bergeron Const. Co. Inc.*, 164 So. 3d 706 (Fla. 5th DCA 2015) (decided under Fla. Stat. §95.11(3)(c) (2010)).
- 6 *Id.* at 707.
- 7 *Id.*
- 8 *Id.* at 708 (emphasis added).
- 9 *Id.*
- 10 *Busch v. Lennar Homes, LLC*, 219 So. 3d 93 (Fla. 5th DCA 2017) (decided under Fla. Stat. §95.11(3)(c) (2015), and before the Legislature's 2017 amendment).
- 11 *Id.* at 94.
- 12 *Id.* at 95.
- 13 *Id.*
- 14 *Id.* at 95-96.
- 15 *Id.*
- 16 See Fla. Stat. §95.11(3)(c) (2017).
- 17 Ch. 18-97, §1, 2018 Fla. Laws 1 (amending Fla. Stat. §95.11 (2017)) (effective July 1, 2018).
- 18 Fla. H.R. Comm. on Judiciary, HB 875 (2018) Final Bill Analysis 4 (Mar. 27, 2018).
- 19 *Id.*
- 20 Fla. S. Comm. on Cmty. Aff., SB 536 (2018) Bill Analysis and Fiscal Impact Statement 1 (Feb. 28, 2018).
- 21 *Id.*
- 22 *Id.*
- 23 Ch. 18-97, §1, 2018 Fla. Laws 1 (amending Fla. Stat. §95.11 (2017)) (effective July 1, 2018).
- 24 See Rule 1.070(j), Fla. R. Civ. P.
- 25 See Tex. Civ. Prac. & Rem. Code Ann. §16.069 (West 2017), which provides: "(a) If a counterclaim or cross claim arises out of the same transaction or occurrence that is the basis of an action, a party to the action may file the counterclaim or crossclaim even though as a separate action it would be barred by limitation on the date the party's answer is required. (b) The counterclaim or cross claim must be filed not later than the 30th day after the date on which the party's answer is required." See also Okla. Stat. Ann. Title 12 §2013(C) (West 2018), which provides: "...Where a counterclaim and the claim of the opposing party arise out of the same transaction or occurrence, the counterclaim shall not be barred by a statute of limitation notwithstanding that it was barred at the time the petition was filed, and the counterclaimant shall not be precluded from recovering an affirmative judgment. Where a counterclaim and the claim of the opposing party: 1. Do not arise out of the same transaction or occurrence; 2. Both claims are for money judgments; 3. Both claims had accrued before either was barred by a statute of limitation; and 4. The counterclaim is barred by a statute of limitation at the time that it is asserted, whether in an answer or an amended answer, the counterclaim may be asserted only to reduce the opposing party's claim. Where a counterclaim was barred by a statute of limitation before the claim of the opposing party arose, the barred counterclaim cannot be used for any purpose."
- 26 Ch. 18-97, §2, 2018 Fla. Laws 2 (amending Fla. Stat. §95.11 (2017)) (effective July 1, 2018).