

## CONSTRUCTION ALERT

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### **Statute of limitations changes: Florida clarifies the “date of completion” of a contract for purposes of design, planning and construction defect actions**



On June 14, 2017, Gov. Rick Scott approved House Bill 377 relating to limitations on actions other than for the recovery of real property, specifying the date of completion for specified contracts for limitation of action purposes. The bill's approval makes changes to § 95.11(3)(c), Florida Statutes.

#### **What was the issue with Section 95.11(3)(c) as previously drafted and interpreted?**

Section 95.11(3)(c) specifies when lawsuits founded on the design, planning or construction of an improvement to real property must be commenced. This statute has been interpreted by the courts in a problematic manner. For example, in *Cypress Fairway Condo. v. Bergeron Constr. Co.*, the court sought to interpret whether the ten year statute of repose of § 95.11(3)(c) commenced to run when construction was completed or when the contract was completed, which, in *Cypress*, was

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the date on which final payment was made. The court concluded that the statute of repose commenced to run on the date of completion of the contract (*i.e.*, the date on which final payment was made). In the ruling, the court wrote:

Completion of the contract means completion of performance by both sides of the contract, not merely performance by the contractor. Had the legislature intended the statute to run from the time the contractor completed performance, it could have simply so stated. It is not our function to alter plain and unambiguous language under the guise of interpreting a statute.

The problem with this interpretation of § 95.11(3)(c) is that it inadvertently extended a contractor's susceptibility to a lawsuit, being that delays in payments by a customer could extend the time to sue on a contractor's liability for construction defects.

### **What is the wording of the statute moving forward?**

The Florida legislature now seeks to correct this problem by amending § 95.11(3)(c) to specify that "[c]ompletion 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**" [*emphasis added*]. The bill specifies that the amendment applies to causes of action that accrue on or after July 1, 2017.

To further take advantage of this positive development, those who provide design, planning or construction services should consider actions that make the statute of repose deadline start running as early as possible. This may include defining the date of final performance in contracts, identifying the date final payment becomes due when possible, and documenting the date when final performance has been made by notifying all parties that final performance has occurred. Please contact us to discuss how this change in the law affects you and what steps or changes in your processes may be feasible for you in light of this change in the law.

For more information please contact [Javier Pacheco](#), [Josh Bialek](#), [Ted Walters](#) or any member of Porter Wright's [Construction Practice Group](#).