

When is the Contract Complete? Court Rules that
Statute of Repose Commences Upon Final Payment.

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Recently, Florida's Fifth District Court of Appeal reviewed the statute of repose relative to improvements to real property, which states, in pertinent part, that "the action must be commenced within 10 years after...the date of completion...of the contract...."¹ In *Cypress Fairway v. Bergeron Construction*,² the Court clarified what constitutes the "date of completion" as cited in the statute. The opinion delineates that the "date of completion" from which the 10-year repose period runs refers to the date all obligations under the contract are completed, and not only the completion of the construction.

In *Cypress Fairway*, a condominium association filed suit against the contractors involved with the construction of the condominium. The non-settling defendant argued that the condominium's claim was barred by the 10-year statute of repose, which it alleged commenced on the date the contractor requested final payment on January 31, 2001. The defendant argued that this was the appropriate "date of completion," because the construction project was finished at that time. The association conversely argued that the statute did not commence until February 2, 2001, the date when it made the final payment to the contractor under the contract. Since the action was filed on February 2, 2011, the three day difference was significant. Based on the language of the statute's preamble, the trial court agreed with the defendant, and granted summary judgment in its favor, ruling that the association's claims were time barred.

On appeal, the 5th DCA reversed the trial court's decision based on the "plain and unambiguous language" cited *supra*. "Completion of the contract means completion of performance by both sides of the contract, not merely performance by the contractor," the court opined. "Had the legislature intended the statute to run from the time the contractor completed performance, it could have simply so stated." Accordingly, the Court found that the statute of repose commenced on the date of the completion of the contract, which, in this case, was the date the final payment was made to the contractor per the terms of the construction agreement.

Many construction contracts specifically set out a date by which the work described in the contract must be completed. The stated date, however, is not necessarily the date by which all obligations under the contract have been discharged. As highlighted in *Cypress Fairway*, the repose period does not automatically commence when the construction is completed or when the "certificate of occupancy" has been issued; but, in some cases, may begin to run at the time the property owner issues its final payment to the contractor. It is yet to be seen if the holding of this case will be applicable to other factual scenarios, such as when a property owner withholds final payment, which could arguably extend the repose period indefinitely.

¹ Section 95.11(3)(c), Florida Statutes (2010).

² *Cypress Fairway Condo. v. Bergeron Const. Co. Inc.*, 5D13-4102, 2015 WL 2129473 (Fla. 5th DCA 2015). At the time this synopsis was composed, the opinion was not final, and may be modified.