



“When, If Ever, Is It Too Late To Bring A Demand For Arbitration?”

(Part 1 of 2)

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Construction disputes generally are resolved three ways – the matter is litigated in court before a judge, the matter is arbitrated before a private arbitrator, or the matter is settled before or after the litigation or arbitration commences. Matters that are litigated are subject to fairly strict rules of procedure, rules of evidence and the judge is supposed to follow precedent, i.e. rule consistently with prior cases. Arbitration is an alternative to litigation and is intended to be more streamlined, more flexible, and more efficient and there can be more than one arbitrator deciding a case. The arbitrator(s) is not required to apply the rules of civil procedure or rules of evidence, and is not even required to follow precedent. Parties cannot be required to arbitrate unless they voluntarily agree to do so, which usually occurs via a clause in a contract signed prior to the dispute. Another significant distinction between litigation and arbitration concerns when the dispute becomes too stale to pursue, and that is the subject of this two-part article.

When drafting, negotiating and reviewing your contracts you should be aware that claims that are to be arbitrated may not be subject to the same “statute of limitations” that applies to claims which are to be litigated.

Florida has several statutes dictating that after a certain period of time

claims become too old, or too stale, to be litigated. For example, Florida Statutes, Section 95.11(2) provides that claims for breach of contract must be filed in court within 5 years after the contract was breached. F.S. 95.11(3) further provides that claims for breach of a construction contract must be brought within 4 years of the breach. Claims for negligence also must be brought within 4 years of the negligent act. Statutes of limitation such as these were created in recognition of the difficulty a defendant has defending against claims as time passes.

Florida Statutes, Section 95.03 further provides that any contract provision that seeks to shorten an applicable statutory time limit within which a suit may be filed is unenforceable. In other words, if a construction contract states that a lawsuit for breach of the contract must be filed within 1 year of any alleged breach, that limitation would be ineffective and a claimant would have 4 years to sue as allowed by Section 95.11(3).

Thus, claims that are to be decided in court via litigation have a specific limited shelf life. If the suit is not brought before the statutory limitation period expires, then the claim is barred. Of course, given the number of lawyers we have in Florida, there are numerous exceptions if you know where to look, and sometimes what

appears to be a dead claim can be resurrected. For example, while a claim for damages due to a construction defect would be subject to the 4 year limitations period governing construction contract suits, if the defect is deemed to be a latent defect, then FS 95.11(3) (c) states that the suit must be filed within 4 years of the defect being discovered or the date it reasonably should have been discovered. Under Section 95.11(3)(c) a claimant could have more than the standard 4 years within which to file a lawsuit for breach of the construction contract. And, the arguments regarding when a defect “reasonably should have been discovered” have paid for the expensive sneakers of many a lawyer’s kid.

The statutes of limitation provide some level of assurance that after the specified period of time a lawsuit cannot be successfully pursued. However, as of the date of this writing the same cannot be said if you have agreed to use arbitration instead of litigation to resolve your disputes.

What is not commonly recognized is that the Florida statutes of limitation do not apply to arbitrations. For example, if the subcontract you have with your paving subcontractor states that all claims by the subcontractor will be decided by arbitration, then the 4 year limitation period in F.S. 95.11(3) does





not apply and the subcontractor conceivably can file a demand for arbitration years after a law suit would have been stale under Section 95.11(3). Moreover, while Florida Statutes, Section 95.03 prohibits parties to a contract from agreeing to a shorter limitation period than that statutorily specified, Section 95.03 does not prevent parties from shortening the time within which an arbitration claim may be brought. Section 95.03, like Section 95.11, only applies to litigated claims, not to arbitrated claims.

The current law in Florida on this issue is summarized in *Raymond James Financial Services, Inc. v. Phillips*, 2011 WL 5555691 (Fla. 2nd DCA 2011). In that case, the Second District Court of Appeals ruled that the limitation periods contained in Section 95.11 only apply to “actions”, and arbitration is NOT an “action”. Thus, the statute of limitation time limits do not automatically apply to disputes that are to be arbitrated. The Second District Court of Appeals has asked the Florida Supreme Court to look at the issue and determine whether the Second District got it right, but until the Supreme Court issues a decision, the law is that arbitrations are not automatically subject to the statutory limitation periods specified by F.S. 95.11. Similarly, because arbitration is not subject to the statutory limitation periods, the prohibition in F.S. 95.03 against contractually shortening an applicable statutory limitation period also does not apply to arbitrations. Thus, parties to an arbitration agreement are free to specify whatever limitation period they deem appropriate because they are not shortening any limitation period specified by statute.

The fact that arbitration claims are not subject to Florida statutory limitation periods and are not subject to the prohibition against contractually shortening an applicable statutory limitation period

creates uncertainty regarding when an arbitrable claim expires, but it also provides an opportunity for strategic draftsmanship. Next month, we’ll address ways the reader can revise a contract to limit some of the uncertainty regarding the shelf life of arbitration claims, and we will discuss how a contractor can use the Raymond James decision to the contractor’s advantage.

George Spofford is a shareholder in the Tampa office of the GrayRobinson law firm. Spofford has represented the construction industry since 1985 and serves as General Counsel to the UUCF. GrayRobinson, P.A. (gray-robinson.com) is a full-service business law firm with over 250 attorneys and 10 offices across Florida. If any member has specific questions relating to this topic or any topic they would like to see addressed in future editions, please feel free to contact George at (813) 273-5000 or george.spofford@gray-robinson.com.

NUCA Provides New Member Benefit

Have you heard about the great new NUCA member benefit? NUCA recently announced that members can now enjoy special pricing on a wide range of HP business products you use every day including printers, notebooks, desktops, tablets, servers, storage, networking and much more. As an NUCA member, you can enjoy these exclusive benefits: Discounts on reliable HP business products, FREE U.S. ground shipping, Flexible financing and

leasing options, Solutions specialists to assist you, and Award-winning service and support. Choosing HP can help boost your efficiency while cutting costs. Take advantage of this valuable new member benefit from NUCA today. Call Jessica at NUCA at (703) 358-9300 and get started today!

Florida House Sub-committee Renews Call for Input Through Your Voice Survey for Florida’s Businesses

After receiving more than two thousand submissions from Florida business stakeholders on excessive rules and regulations, members of the House Rulemaking and Regulation Subcommittee are once again asking those doing business in Florida to allow their voices to be heard. Floridians are encouraged to fill out the **YourVoice regulation reform survey online**. Since its

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introduction in October, more 2,500 people have participated in the YourVoice survey.

“The YourVoice survey provides Florida’s business stakeholders a platform to sound off on burdensome rules and regulations on businesses,” said House Rulemaking & Regulation Subcommittee Chairman Chris Dorworth (R-Lake Mary). “Identifying excessive or costly barriers to new business will go a long way in helping to create a favorable business climate across Florida.”

In 2011, the Florida Legislature enacted a bill increasing public scrutiny of agency rules that regulate the actions of Floridians and their businesses. The bill required all state agencies to review existing rules and identify which ones may impose significant economic impacts on Floridians. Additionally, the bill endorsed an effort by the Legislature to solicit public input on rules and regulations online.

Launched in 2011, “**YourVoice**” is an online tool for business owners and stakeholders to collect feedback on any potential burdensome rules and regulations for businesses as well as regulations that are making a positive impact. “**YourVoice**” is currently gathering important information from current and potential Florida business owners and stakeholders that can be used to enhance or revise existing rules and regulations. Those interested in completing the survey can **access it online**.

CILB Update

Re-activation of Inactive Licenses:

**Chapter No. 2012-61, CS/
HB 517**, passed during the 2012 Legislative Session and was approved by Governor Rick Scott on April 6, 2012. This bill reduces the number of continuing education credits an inactive or delinquent contractor licensee must complete prior to reactivating his or her license. Effective July 1, 2012, an inactive or delinquent licensee will only need to complete the continuing education requirements for the renewal cycle immediately preceding license reactivation.

Applications and Licensure – Streamlined Applications Released:

In an effort to assist applicants through the licensure process and to reduce the number of deficient applications, the Department of Business and Professional Regulation (DBPR) and the Construction Industry Licensing Board (CILB) conducted a complete review and revision of construction applications. The new application forms provide clearer instructions, reduce paperwork and provide clear criteria to establish financial stability/responsibility and work experience.

The CILB will begin accepting the Department’s new streamlined applications beginning April 13, 2012. There will be a ninety (90) day transition period during which the Department will continue to accept submission of the old applications; this period will end on July 16, 2012.

If you would like more information on the new bonding form or the required credit score, please visit the Department’s financial responsibility and stability website by clicking

the following link: ***Contractor Financial Responsibility and Stability***.

Examination and Re- examination: Board Increases Time Limit to Pass of All Examination Parts.

The CILB has amended Rule 61G4-16.009, Florida Administrative Code, to grant candidates more time to complete all portions of the initial licensure examination. Beginning November 1, 2011, examination candidates will be permitted four years from the date he or she initially sat for the initial licensure examination to pass all portions of the examination and will not be limited in the number of times they may re-take a test during the four year period. If you have any question regarding the Board’s change, you may visit ***www.myfloridalicense.com/dbpr/pro/cilb/index.html*** or call (850) 487-1395 for more information.

Florida Homeowners’ Construction Recovery Fund Experiencing Funding Shortfall

Due to a shortfall in funding, there are not sufficient funds available to pay claims received by the Florida Homeowners’ Construction Recovery Fund at this time. The Department will monitor revenues for the Recovery Fund and make payments as funds become available.

The Department will continue to process claims until the claims are complete and ready for review by the CILB. The Department will then present claims to the Board, in the order they are completed, as funds become available. The Department will notify claimants by mail when the claims are complete and when they are ready for Board review. For more information, please refer to the Frequently Asked Questions regarding the status of the Recovery Fund or contact the Department’s Customer Contact Center at (850) 487-1395.

