OA 12-8-88

IN THE SUPREME COURT OF FLORIDA

TRANSAMERICA INSURANCE COMPANY,

Petitioner,

vs. CASE NO. 72,531

BARNETT BANK OF MARION COUNTY, N.A.,

Respondent.
_____/

On Appeal From the Fifth District Court of Appeals

AMICUS CURIAES' INITIAL BRIEF ON MERITS

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PRELIMINARY STATEMENT

In this brief, Petitioner, Transamerica Insurance Co., will be referred to as "Transamerica" and Respondent, Barnett Bank of Marion County, N.A., will be referred to as "Barnett Bank".

STATEMENT OF THE CASE AND FACTS

Amicus Curiae adopt the statement of the case and facts set forth in the initial brief of Transamerica.

ISSUES ON APPEAL

I. WHETHER THE DISTRICT COURT'S DECISION IS CONTRARY TO ALMOST A CENTURY OF DECISIONS WHICH HAVE UNIFORMLY RECOGNIZED THAT A SURETY HAS PRIORITY OVER A LENDER TO EARNED BUT UNPAID CONSTRUCTION FUNDS BASED ON EQUITABLE SUBROGATION, AND THIS RIGHT DOES NOT CONSTITUTE A SECURITY INTEREST SUBJECT TO PERFECTION AND FILING UNDER THE UCC.

II. WHETHER THE DISTRICT COURT'S DECISION SHOULD BE APPLIED RETROACTIVELY SINCE IT REPRESENTS A GROSS DEPARTURE FROM PAST PRECEDENT ON WHICH SURETIES AND BANKS HAVE RELIED IN STRUCTURING THEIR COMMERCIAL DEALINGS.

SUMMARY OF ARGUMENT

The surety's rights of equitable subrogation have become so deeply imbedded in our commercial transactions that the United States Supreme Court, the Florida Supreme Court and most all of the state courts have uniformly recognized that a surety has priority over a lender to earned but unpaid construction proceeds. The surety's equitable right of subrogation has enjoyed remarkable stability over the past century, and it has withstood countless attacks by assignee banks on a multitude of legal grounds. Most recently, the courts of this nation have rejected the argument that Article 9 of the Uniform Commercial Code (UCC) supplants the equitable doctrine of subrogation. Instead, the courts have overwhelmingly and enthusiastically endorsed the view that the UCC is not applicable to the performing surety's entitlement to earned but unpaid contract funds, and the rights of equitable subrogation need not be perfected under the UCC.

The decision of the lower court eviscerates this long line of precedent by holding that the surety's rights of subrogation fall within the ambit of Article 9 of the UCC and must be perfected to enjoy priority over a lender. The lower court's decision defies logic, reason and the laudable goal of maintaining uniformity of Code interpretation. It is particularly inequitable when one considers that the bank in this case, as is true with most projects, was well aware of the surety's involvement and that a performance and payment

bond was required by state law. The decision's dramatic break with the past precedent of this Court, as well as most every other court in the nation, is totally unwarranted and should be reversed.

In the alternative, and at a minimum, because the decision of the lower court represents such a radical departure from well settled law on which sureties have relied for nearly a century, it should not be applied retroactively. To do so would deprive the surety of its only source of security -- the contract funds -- when all of the parties knew and understood from the beginning of this transactions that the surety had an equitable right of subrogation. Such a substantial inequity should not be contenanced at all, and certainly not in an after the fact fashion.

ARGUMENT

Suretyship is one of the oldest societal and commercial relationships. In the construction setting and in the development of commercial practices in this country, it has been the corporate surety that has assumed the role of guarantor for the contractor and indispensably facilitated the successful and timely completion of public work and private projects. Contrary to widespread impression, suretyship is not insurance; rather, the risk assumed by the surety is premised to a considerable extent on the surety's equitable rights to the contract funds, and any loss or dimunition of this security would have a serious impact on the continued viability of this very valuable commercial relationship. As recognized by the court in United Pacific Insurance v. First National Bank of Oregon, 222 F. Supp. 243, 250 (D. Or. 1963):

> It occurs to me that the existence of this equitable lien in the law of suretyship is an absolute necessity in this day and age of municipal corporations and others requiring the posting of bonds on public and other construction work. If no such a right or lien existed it would be difficult, if not impossible to entice another to act as surety.

In recognition of these factors, the courts across the nation have been remarkably uniform in holding that the surety has priority to earned but unpaid contract funds, in relation to the opposing claims of assignee banks which have loaned money to the contractor.

I. THE DISTRICT COURT'S DECISION IS CONTRARY TO ALMOST A CENTURY OF DECISIONS WHICH HAVE UNIFORMLY RECOGNIZED THAT A SURETY HAS PRIORITY OVER A LENDER TO EARNED BUT UNPAID CONSTRUCTION FUNDS BASED ON EQUITABLE SUBROGATION, AND THIS RIGHT DOES NOT CONSTITUTE A SECURITY INTEREST SUBJECT TO PERFECTION AND FILING UNDER THE UCC

The surety's superior right to a defaulting contractor's earned and unpaid contract balances has been addressed by almost every court in the nation. Most prominent, of course, are the decisions of the United States Supreme Court which have firmly established the surety's priority vis a vis the lender to the earned contract balances under the doctrine of equitable subrogation. The earliest decision on this issue was Prairie State National Bank v. United States, 164 U.S. 227 (1896) where the Supreme Court held that the performance bond surety was entitled to the contract balance owed on its bonded contract by right of equitable subrogation to the owner's position. In this same regard, the Supreme Court in Henningsen v. United States Fidelity & Guaranty Co., 208 U.S. 404 (1908) held that the surety, upon payment of the contractor's obligations to laborers and materialmen, became subrogated to whatever rights and remedies the laborers and materialmen had against the owner, on the basis that these persons had an equitable priority in funds retained by the owner.

These cases foreshadowed the landmark decision in Pearlman v. Reliance Insurance Co., 371 U.S. 132 (1962) where the Supreme Court emphatically dispelled any doubts

concerning the primacy of the surety's subrogation rights. Here, the Court squarely held that the surety has priority, even over a bankruptcy trustee, to earned contract balances based on the common law right of equitable subrogation. The Court concluded that the surety, having paid the labor and materialmen, was entitled to the benefit of (1) the owner's rights to pay the laborers and materialmen from the retained funds; (2) the rights of the laborers and materialmen to be paid from the fund, and (3) the rights that the bankrupt contractor would have had to the fund, had he completed the job and paid his labor and material claimants. Wearing any one of these three "hats" preserved inviolate the surety's superior rights to the contract funds.

Virtually all, if not all, of the lower court decisions have followed the lead of the United States Supreme Court and held that under the doctrine of equitable subrogation a surety fulfilling the obligations of a defaulting contractor has a priority claim to unpaid funds in the possession of the owner, and the claim relates back to the date of the suretyship agreement. E.g., Fidelity and Deposit Company of Maryland v. Scott Brothers Construction Co., 461 F.2d 640 (5th Cir. 1972); Aetna Casualty and Surety Co. v. U.S., 435 F.2d 1082 (5th Cir. 1970); American Fire & Casualty Co. v. First City National Bank of New York, 411 F.2d 755 (1st Cir. 1969); In the Matter of Dutcher Construction Corp., 378 F.2d 866 (2d Cir. 1967); Fidelity and Deposit Company of Maryland

v. United States, 393 F.2d 834 (Ct. Cl. 1968); Royal Indemnity Co. v. United States, 371 F.2d 462 (Ct. Cl. 1967); Western Casualty and Surety Co. v. Brooks, 362 F.2d 486 (4th Cir. 1966); The Travelers Indemnity Co. v. West Georgia National Bank, 387 F. Supp. 1090 (N.D. Ga. 1974); Deer Park Bank v. Aetna Insurance Co., 493 S.W.2d 305 (Tex. 1973); First State Bank v. Reorganized School Dist. R-3 Bunker, 495 S.W.2d 471 (Mo. App. 1973). And while the United States Supreme Court decision in Pearlman dealt with a trustee in bankruptcy and not a lender, the rationale of that case has consistently been applied to a priority dispute between a bank and a surety. E.g., Great American Insurance Company v. United States, 492 F.2d 821 (Ct. Cl. 1974); Industrial Bank of Washington v. United States, 424 F.2d 932 (D.C. Cir. 1970); United Pacific Insurance Co. v. First National Bank of Oregon, 222 F. Supp. 243 (D. Ore. 1963); Indemnity Insurance Company of North America v. Lane Contracting Corp., 227 F. Supp. 143 (D. Neb. 1964); Aetna Casualty & Surety Co. v. Eastern Trust & Banking Co., 161 A.2d 843 (Me. 1960).

The basic rationale propounded by the courts and commentators for giving the surety priority over a lender or trustee is a refinement of the triparty explanation offered in Pearlman:

> Once we find that materialmen and laborers are vested with 'beneficial interest' as to sums in the hands of the owner owed to the contractor we must, a fortiori, find that the surety by subrogation would stand in the same legal right

> after having satisfied his contractual debt with respect to the contractor.
>
> * * *
>
> Aside from ... this approach, there is enough support for concluding that the surety, in his own right, is entitled to said funds. Besides stepping into the shoes of the laborers and materialmen in the above-described manner, the surety's rights of subrogation may also be viewed from the standpoint of filling the shoes of the contractor whose debts he has satisfied.
>
> * * *
>
> From still a third viewpoint, the surety may be seen as filling the shoes of the owner, whose benefits from the completion of the project, may be unjustly enriched if the surety who assumed completion of the project were precluded from seeking reimbursement.

Federal Insurance Co. v. Constructora Maza, Inc., 500 F. Supp. 246, 250 (D.P.R. 1979) aff'd, 628 F.2d 724 (1st Cir. 1980) (citations omitted). Accord, In Re Ram Construction Company, Inc., 32 B.R. 758 (W.D. Pa. 1983). Regardless of the rationale espoused, the underlying reason for success of the surety is grounded in the commercial realities of the situation and the protection the surety affords to the owner of the construction project, who ultimately pays the contract proceeds only upon assurance that the job is successfully completed.

Over the years, the banks have relentlessly continued to attack the surety's priority to the contract funds, but the surety's priority withstood the test of time. Against this backdrop of unwaivering precedent, sureties and lenders have

structured their business dealings with contractors, knowing the risks and benefits that accompanied the extension of performance and payment bonds and lines of credit. Because of the unbroken line of decision, sureties have not attempted to perfect a security interest by filing their indemnity agreements under the UCC, and instead, relied on their equitable right of subrogation to claim contract funds.

The enactment of the UCC by the various states of the nation in the 1950's and 1960's did not abrogate the surety's priority to earned but unpaid contract balances. The Pearlman decision itself was decided after the UCC was first promulgated in 1951. In addition, virtually every state court that has considered this issue since adoption of the UCC has confirmed the widely held view that the surety's equitable rights to the contract balances were superior to the secured creditor's rights, regardless of whether the source of the contract balance was a federal, state or private owner. See, e.g., Insurance Company of North America v. Northampton National Bank, 708 F.2d 13 (1st Cir. 1983); In the Matter of J.V. Gleason Co., 452 F.2d 1219 (8th Cir. 1971); Home Indemnity Co. v. United States, 433 F.2d 764 (Ct. Cl. 1970); Framingham Trust Co. v. Gould-National Batteries, Inc., 427 F.2d 856 (1st Cir. 1970); American Fire & Casualty Co. v. First National City Bank of New York, 411 F.2d 755 (1st Cir. 1969); National Shawmut Bank of Boston v. New Amsterdam Casualty Co., 290 F. Supp. 664 (D. Mass. 1968),

aff'd, 411 F.2d 843 (1st Cir. 1969); General Electric Supply Co. v. Epco Constructors, Inc., 332 F. Supp. 112 (S.D. Tex. 1971); Reliance Insurance Co. v. Alaska State Housing Authority, 323 F. Supp. 1370 (D. Alaska 1971); Pembroke State Bank v. Balboa Insurance Co., 241 S.E.2d 483 (Ga. App. 1978); United States Fidelity and Guaranty Co. v. First State Bank of Salina, 494 P.2d 1149 (Kan. 1972); National Surety Corporation v. The State National Bank of Frankfort, 454 S.W.2d 354 (Ky. 1970); Lambert v. Maryland Casualty Company, 403 So. 2d 739 (La. App. 1981); Canter v. Schlager, 267 N.E.2d 492 (Mass. 1971); Finance Company of America v. United States Fidelity and Guaranty Co., 353 A.2d 249 (Md. App. 1976); Aetna Casualty and Surety Co. v. Perrotta, 308 N.Y.S.2d 613 (N.Y. App. 1970); Mid-Continent Casualty Co. v. First National Bank & Trust Co., 531 P.2d 1370 (Ok. 1975); Jacobs v. Northeastern Corporation, 206 A.2d 49 (Pa. 1965).

The rationale which persuaded virtually all of the courts of this nation to conclude that the UCC does not affect the surety's rights to equitable subrogation is sound. Because an equitable right of subrogation arises by operation of law, it escapes the jurisdictional definitions of the UCC which relate only to "security interests" which are "created by contract". §679.102(2), Fla. Stat.; National Shawmut Bank of Boston v. New Amsterdam Casualty Co., 411 F.2d 843 (1st Cir. 1969); Fidelity and Casualty Company of New York v. Central Bank of Birmingham, 409 So. 2d 788 (Ala. 1982); Alaska State

Bank v. General Insurance Company of America, 579 P.2d 1362 (Alaska 1978); United States Fidelity and Guaranty Co. v. First State Bank of Salina, 494 P.2d 1149 (Kan. 1972). Indeed, the UCC itself expressly provides that "unless displaced by the particular provisions of this Code, the principles of law and equity shall supplement its provisions". §672.103, Fla. Stat. Additionally, the Code excludes from its ambit "a transfer of a right to payment under a contract to an assignee who is also to do the performance under the contract." §679.104(6), Fla. Stat. Thus, while a surety's assignment or contract claims must be perfected and recorded to take priority over another secured creditor, the same has never been said of the surety's equitable right of subrogation. 1/

1/ In support of its argument that the UCC supplants the equitable doctrine of subrogation, the banks have relied upon the UCC Editorial Board's rejection of a proposed amendment to Article 9-312, which would have provided that a "security interest which secures an obligation to reimburse a surety . . . secondarily obligated" to a later lender which perfects its security interest. See Uniform Laws Annotated, U.C.C., Official Draft, Text and Comments, at 773, 777 (1952); Uniform Laws Annotated, U.C.C., Changes in Test and Comments, at 25-26 (1953). Although the surety representatives were responsible for the deletion of this proposed amendment, the banks have contended that the deletion of the proposed amendment signaled an admission by the surety companies that they had a security interest within the meaning of the Code. This position has also been rejected insofar as it relates to the equitable right of subrogation (as opposed to whatever additional rights the surety possesses by virtue of its contractual assignment rights) In the matter of J.V. Gleason Co., 452 F.2d 1219, 1221 (8th Cir. 1971); National Shawmut Bank of Boston v. New Amsterdam Casualty Co., 411 F.2d 843, 846 (1st Cir. 1969).

The survival of the surety's equitable right of subrogation subsequent to the adoption of the UCC has been exhaustively treated in numerous law review articles, and need not be reiterated herein. Suffice it to say that the commentators have acknowledged the courts' decisive confirmation of the surety's rights to priority. Shure, "The UCC Does Not Affect Adversely the Surety's Priority", 11 The Form 630 (1976); Withers, "Surety v. Lender: Priority of Claims to Contract Funds", 10 Washburn L.J. 356 (1971); Comment, "Jacobs v. Northeastern Corp." Surety's Dilemma-Subrogation Rights or Perfected Security Interests", 69 Dick L. Rev. 172 (1965); Note, "Suretyship: Subrogation Under the UCC", 65 Colum. L. Rev. 927 (1965). As aptly explained by one writer, equitable subrogation is "too hardy a plant to be uprooted by Article 9 of the UCC". Comment, "Equitable Subrogation - Too Hardy a Plant to Be Uprooted by Article 9 of the UCC", 32 U. Pitt. L. Rev. 580 (1970).

The Florida courts have likewise recognized the traditional priority rights of sureties to construction contract proceeds, especially to earned but unpaid contract funds. On no less than five occasions, this Court itself has recognized the performing surety's superior claim to contract funds owed on its bonded projects. E.g., Commercial Bank in Panama City v. Board of Public Instruction of Okaloosa County, 55 So.2d 552 (Fla. 1951); Union Indemnity Co. v. City

of New Smyrna, 100 Fla. 980, 130 So. 453 (1930); Florida East Coast Railway Co. v. Eno, 99 Fla. 887, 128 So. 622 (1930); Phifer State Bank v. Detroit Fidelity & Surety Co., 97 Fla. 538, 121 So. 571 (1929). The federal courts, applying Florida law, have likewise acknowledged the "clear" and "settled" rule that the surety steps into the shoes of the owner under the doctrine of equitable subrogation and acquires a priority right to earned, but unpaid contract funds. E.g., Midtown Bank of Miami v. Travelers Indemnity Co., 366 F.2d 459 (5th Cir. 1966); In re Bush Painting Co., _____ B.R. _____ (Case No. 88-04002 N.D. Fla. 1988); In re Ward Land Clearing & Drainage, Inc., 73 B.R. 313 (N.D. Fla. 1987); McAtee v. United States Fidelity and Guaranty Co., 401 F. Supp. 11 (N.D. Fla. 1975); Aetna Insurance Co. v. Poole and Kent Co., 303 F. Supp. 963 (S.D. Fla. 1969); Broward County, Florida Commission v. Continental Casualty Co., 243 F. Supp. 118 (S.D. Fla. 1965). Moreover, in McAtee, the court expressly found that "all the still viable decisions to date hold that the doctrine of equitable subrogation in suretyship cases does not create a security interest under the Code and has not been displaced or controlled by Article 9". 401 F. Supp. at 14.

In a dramatic and unexpected break with precedent, the lower court in the present case obliterated the surety's consistent record of success in obtaining contract balances

owed on its bonded contracts. Rejecting the scores of precedent on this issue, the Fifth District Court of Appeals held that Transamerica's assignment rights constituted a security interest that was governed and controlled by the perfection and recording requirements of Article 9 of the UCC, embodied in Chapter 679 of the Florida Statutes. Because Barnett Bank had perfected a security interest under the UCC in the contractor's accounts receivable prior to Transamerica, the court held that Barnett Bank had priority to the earned but unpaid contract funds due as of the moment of default by the contractor.

While the Fifth District's opinion did address the interplay between the UCC and the surety's contract assignment rights, it eschewed the confrontation presented by the surety's equitable rights of subrogation. According to the court, the surety's priority right under equitable subrogation "just does not seem to describe the situation of modern day payment or performance bond surety". Transamerica Insurance Co. v. Barnett Bank of Marion County, N.A., 524 So.2d 439, 445 (Fla. 5th DCA 1988). Not only is the opinion devoid of any explanation for this unsupportable conclusion, the statement contradicts the commercial realities and practices that have governed sureties and lenders for nearly a century. Judge Sharp, now Chief Judge, properly criticized the majority opinion in a stinging and well reasoned dissent:

> In my view, the doctrine of equitable subrogation entitles the surety, to the extent of its performance and loss under its bond pertaining to the contract, to the unpaid contract funds held by the owner which had been earned by the contractor prior to its default. Furthermore, the surety's equitable right of subrogation is not a security interest which requires perfection by filing a financing statement to obtain priority under the U.C.C. ... (T)he overwhelming and essentially unanimous post-U.C.C. decisions in this country, federal as well as state courts, have held that (1) the surety's equitable right of subrogation is not a consensual security interest, (2) no U.C.C. filing is necessary to perfect the surety's interest, and (3) the surety's interest continues to be, as it was under pre-Code law, superior to the claim of a contract assignee, such as a bank.

Id. at 447-450.

The foundational premise for the lower court's decision rests upon the conclusion that the contractor had earned the right to receive the unpaid contract funds by performance and payment of labor and materials before default. This conclusion crumbles upon cursory inspection, however, because once the contractor fails to complete the contract, the owner has the right to retain the funds to remedy the contractor's default. At this point, the contractor has no right to disbursement of the unpaid balances, even though accrued, and where the surety completes the contract and satisfies the claims of all laborers and materialmen, the surety accedes to the owner's rights to the unpaid balances. It has never even been suggested that the owner's right to use these contract funds is a security interest under the UCC, and the fact that

the surety or even some unrelated third party completes performance and earns entitlement to the contract funds should in no way alter this conclusion. E.g., In re Pacific Marine Dredging and Construction, 79 B.R. 924, 928-29 (D. Or. 1987).

The decision of the lower court flies in the face of logic, equity and the strong admonition in the UCC to interpret the Code in a uniform manner. §671.102(2)(c), Fla. Stat. In defiance of this mandate, the Fifth District curiously states that the "surety in this case relies on federal decisions", and "it is in the best interest of the law of the state of Florida to not follow federal precedent". Id. at 443-44. Notably deficient in the lower court's analysis is any valid explanation of why it is inappropriate to follow federal precedent, including that of the United States Supreme Court, and how one can cavalierly discount the scores of state court opinions on this issue. As noted above, every state court that has considered the effect of the UCC on the surety's rights of equitable subrogation, has rejected the position advanced by the Fifth District. See also The Uniform Commercial Code Law Letter, Vol. 22, No. 7 (Sept. 1988).

The practical considerations which have been advanced by other courts for the exclusion of subrogated claims from the operation of Article 9 were completely ignored by the lower

court in this case. One of the fundamental purposes of the filing and recording requirements of the UCC is notice. However, anyone lending money on a government project, as in this case, must know that bonds are required by state and federal law. 524 So. 2d at 451, n.16; § 255.05, Fla. Stat. In addition, one can fairly assume that banks are sufficiently sophisticated to know that sureties are present on most large construction contracts; therefore, requiring sureties to file financing statements would not solve a notice problem. With even more confidence it can be said that people who deal with a contractor must know that they are subject to the rights of owners and subcontractors, and no one should be surprised to find that those rights continue rather than die when a surety fulfills the contractor's obligations. This too, was overlooked by the lower court.

Conspicuous by its absence was the lack of any case law to support the decision below. Barnett Bank attempted to support the decision on policy grounds, but this was also transparent and noticeably deficient with citation to legal authority. The weakness of the bank's position is perhaps best highlighted by its reliance on the lone decision of Waterhouse v. McDevitt and Street Co., 387 So.2d 470 (Fla. 5th DCA 1980), which is factually and legally inapposite to the case at bar. There, unlike the present case, the contractor was not in default and the surety's right to

reimbursement was based solely on its contract agreement with the contractor. The court specifically noted that "no equitable subrogation" was involved, and it strains credibility to suggest that this decision is even persuasive in the present case. Id. at 472. Moreover, while the Waterhouse court did hold that the surety's purely contractual right of subrogation was governed by the UCC, the only case it cited in support of this statement held exactly to the contrary. E.g., First Alabama Bank of Birmingham v. Hartford Accident & Indemnity Co., 430 F. Supp. 907, 910 (N.D. Ala. 1977) (surety's equitable subrogation rights arise by operation of law, not contract, and the UCC is inapplicable).

Barnett Bank also attempted to support the lower court's decision on the basis that the surety had an adequate remedy at law, i.e. recording, which it should have resorted to prior to the invocation of any equitable rights such as subrogation. It is clear, however, that the surety's contingent right of assignment 2/ does not afford an adequate remedy at law as regards the contract funds. This can be best illustrated by a simple example. Assuming the surety perfected a security interest in the contract fund by filing before the bank, the surety would have priority over the bank

2/ Even the district court in the lower case recognized that the Surety's rights were contingent. 524 So.2d at 444.

which would become effective only in case of a default by the contractor. Meanwhile, the bank would be receiving contract monies for payments on account, subject to later disgorgement to the surety if a default occurred and the surety suffered a loss. Obviously, this confused situation would have an adverse effect upon the contractor-bank relationship and the surety's ultimate goal to avoid inhibiting the contractor's finances. As recognized by Chief Judge Sharp's dissent, the "consternation and disarray caused by such a change in the law and business practice would serve no useful purpose". 524 So.2d at 451.

Based on the foregoing, it is evident that the decision below must be reversed. Despite nearly two decades of uniform decisions holding that a surety's rights of equitable subrogation do not constitute a security interest subject to the UCC, none of the legislative bodies across this country have sought to amend the provisions of the Code. Resistance and disarray will surely accompany a judicially unforeshadowed change in the law governing the relationships and priorities between a surety and a financing bank. The proverbial "race to the courthouse" will take on an added dimension, as sureties will be certain to seek relief in the federal forum (either on diversity grounds or by encouraging the debtor to file bankruptcy), where their rights of equitable subrogation will be recognized, and the banks will

seek relief in the state courts of Florida. Such a result is undesirable and unwarranted, particularly in light of the conflict the decision of the Fifth District has created with the decisions of our sister states and the goal of maintaining uniform interpretation of the UCC.

II. THE DISTRICT COURT'S DECISION SHOULD NOT BE APPLIED RETROACTIVELY SINCE IT REPRESENTS A GROSS DEPARTURE FROM PAST PRECEDENT ON WHICH SURETIES AND BANKS HAVE RELIED IN STRUCTURING THEIR COMMERCIAL DEALINGS

In light of the discussion above, there can be no doubt that the decision of the Fifth District radically departs from well entrenched Florida law, and a storm of interstate authority, including that of the United States Supreme Court. While amicus curiae submit that the decision must be overturned, it contends in the alternative that the decision cannot be applied retroactively to subrogation rights which are already in existence, whether inchoate or otherwise. The rule followed by the Florida courts in determining whether to give retroactive effect to a newly declared principle of civil law, is that announced by the United States Supreme Court in Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971):

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed .... Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in

> question, its purpose and effect, and whether retrospective operation will further or retard its operation". Finally, we [must] weigh the inequity for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity". (citations omitted)

See also Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So. 2d 251, 253 (1944); International Studio Apartment Association, Inc. v. Lockwood, 421 So. 2d 1119, 1121 (Fla. 4th DCA 1982).

Consideration of the third criterion outlined in Chevron is dispositive of the present case. To apply retroactively a rule of commercial law that overrules a principle that has stood for over three quarters of a century and on which parties to commercial dealings relied and had a right to rely would be most inequitable. The parties to this case and to other existing surety arrangements structured their business affairs and evaluated their decisions to extend performance and payment bonds and lines of credit to contractors based on the time honored concept of equitable subrogation. It would be unreasonable and unfair to now apply to these dealings a totally different rule of law, and the district court's decision, to the extent it has any vitality, should be limited to a prospective operation only.

CONCLUSION

Amicus curiae respectfully request that this Court reverse the decision of the Fifth District Court of Appeal and the partial summary judgment entered by the trial court, and direct that a partial summary judgment be entered in favor of Transamerica based on its priority right of equitable subrogation to earned but unpaid contract balances, which is unaffected by the UCC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 10th day of October, 1988 to Robert E. Morris, Esq. Morris & Rosen, P.A., Suite 1100, Freedom Savings Building, 220 East Madison, Tampa, FL 33602; Tim Haines, Esq., 125 N.E. First Florida Avenue, Suite 1, Ocala, FL. 32670; and Thomas J. Maida, Esq., P.O. Box 229, Tallahassee, FL 32302-0229.

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