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IN THE SUPREME COURT OF FLORIDA

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TRANSAMERICA INSURANCE COMPANY,
Petitioner,

vs.

Case No. 72,531

BARNETT BANK OF MARION COUNTY, N.A.,
Respondent.

On Review from the Fifth
District Court of Appeal

Initial Brief of Amicus Curiae,
American Insurance Association

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PREFACE

The American Insurance Association is a national trade association headquartered in Washington D.C. The association is composed of over one hundred seventy property and casualty insurance companies, including many of the largest insurers doing business in Florida.

Pursuant to this court's order of June 15, 1988, the American Insurance Association submits this brief in support of the position of petitioner, Transamerica Insurance Company. The arguments presented will, however, be limited to challenging the correctness of the holdings of the district court below regarding a surety's right to equitable subrogation and the application of the Uniform Commercial Code in the area of suretyship. Consequently, the issue statements in this brief will differ somewhat from those contained in petitioner's Initial Brief.

STATEMENT OF THE CASE
AND OF THE FACTS

Amicus curiae, the American Insurance Association, adopts and incorporates herein the statement of the case and of the facts contained in the Initial Brief of petitioner, Transamerica Insurance Company.

SUMMARY OF ARGUMENT

The decision of the district court below deviated from the rules of law uniformly followed by the courts in this state and in most jurisdictions of the United States. The district court concluded that a surety's only remedy for recovering money expended to perform a construction contract after the bonded contractor's default is under the surety's contractual assignment of rights. However, the rule of law recognized by this court, the highest courts of the several states in which the question has been addressed, and the United States Supreme Court is firmly established in American jurisprudence: A surety is entitled to rely on the doctrine of equitable subrogation to obtain reimbursement for money the surety expends completing a construction contract after a contractor's default, when the surety is

obligated to do so under payment and performance bonds issued on the contract, notwithstanding the fact that the contractor may have executed an assignment of rights agreement to secure the surety's performance.

On the basis of its erroneous holding that a surety may rely only on its assignment of rights, the district court concluded that a surety's right to earned but unpaid funds held by the owner at the time of the contractor's default is governed exclusively by the provisions of the Uniform Commercial Code. This ruling avoids the question presented to every other court which has considered the effect of the Uniform Commercial Code on a surety's right to recover its losses in completing a construction contract: Is the surety's right to equitable subrogation governed by the provisions of the Uniform Commercial Code? The courts have uniformly ruled that, because the right to equitable subrogation is not created by contract, it is not a "security interest" as defined by the Uniform Commercial Code and is not subject to the Code's filing, perfection, and priority provisions.

Sureties issuing payment and performance bonds on public and private construction contracts should be assured that the laws of the various jurisdictions are consistent both with regard to the recognition of the sureties' right to equitable subrogation and to the construction of the Uniform Commercial Code. Indeed, one of the primary purposes for the enactment of the Code in Florida was to

assure uniformity in the law of commercial transactions. This court should, therefore, disapprove the decision of the district court below and recognize the rules of law which have been established both in this court's previous decisions and in the decisions rendered in the overwhelming majority of jurisdictions in the United States in which the issues presented in this case have been considered.

ARGUMENT

This court has exercised its discretionary conflict jurisdiction to review the decision of the Fifth District Court of Appeal in Transamerica Insurance Co. v. Barnett Bank, 524 So. 2d 439 (Fla. 5th DCA 1988). In Transamerica, the district court was asked to resolve the competing claims of Transamerica Insurance Company ("Transamerica"), a surety which performed under construction payment and performance bonds after the bonded contractor's default, and Barnett Bank, a lender which provided financing to the contractor for construction of the projects at issue. The funds involved were progress payments earned by the contractor before its default on the contracts but held by the owner of the projects at the time the projects were completed by the surety. The majority of the district court concluded that

Barnett Bank was entitled to the funds solely because it first filed and, therefore, first perfected a security interest in the proceeds of the construction contracts pursuant to the provisions of Article 9 of the Uniform Commercial Code ("U.C.C."), chapter 679 of the Florida Statutes.¹

In reaching this conclusion, the district court first reviewed the historical origins of the doctrine of equitable subrogation and held, as a matter of law, that a modern-day payment and performance bond surety is not entitled to rely on this doctrine to obtain reimbursement for money the surety expends, pursuant to its bond obligations, completing the construction contracts and paying labor and material suppliers after the default of its principal, the construction contractor. Id. at 445-46. Rather than permit a surety to rely on its equitable right to subrogation for reimbursement of money so expended, the district court limited a surety's remedy to its right to conventional, or contractual, subrogation; that is, under the rule stated by the district court, a surety's right to recover money expended pursuant to its bond obligations derives solely from the indemnification and assignment of rights agreement routinely executed by a contractor prior to the surety's

1. The majority opinion was accompanied by a lengthy and well-reasoned dissent by Judge Sharp. Transamerica, 524 So. 2d at 447-51.

issuance of the payment and performance bonds. Id. The district court further held that this assignment is a security interest subject to the perfection and filing requirements of the U.C.C., id. at 444, and that, therefore, the surety's right of reimbursement is determined exclusively by the priorities established by the U.C.C. Id. at 444-45.

The conclusion, holdings, and reasoning of the district court are not supported by any legal authority of this state or of any jurisdiction in the United States. In its opinion, the district court impliedly refused to follow the precedents established by this court and uniformly followed in Florida, and the precedents established by the highest courts of the several states in which virtually identical cases have been decided.² In addition, the district court expressly refused to follow the precedents established by the United States Supreme Court and by the various federal courts of appeals and federal district courts deciding virtually identical cases. Rather, in an opinion remarkably devoid of any citation to, or discussion of, legal authority, the majority of the district court rendered a decision which, in its reasoning and its holding, is

2. The only case cited by the district court in support of its decision was Waterhouse v. McDevitt & Street Co., 387 So. 2d 470 (Fla. 5th DCA 1980), a case which is not relevant to the issues presented in Transamerica. The district court did not mention any of the relevant cases previously decided by this court or by any other court of this or other states.

directly contrary to the decisions reached by virtually every court which has considered the question of a surety's right to rely on the doctrine of equitable subrogation. Consequently, this court should disapprove the decision of the district court below.

I. SURETIES OBLIGATED UNDER CONSTRUCTION PAYMENT AND PERFORMANCE BONDS ARE ENTITLED TO REIMBURSEMENT UNDER THE DOCTRINE OF EQUITABLE SUBROGATION FOR THE MONEY EXPENDED IN THE PERFORMANCE OF THEIR BOND OBLIGATIONS AFTER THE BONDED CONTRACTOR'S DEFAULT.

Taking the district court's opinion as a whole, it appears that the determinative issue was whether Transamerica could rely on the doctrine of equitable subrogation in asserting its claim to earned but unpaid funds owing its bonded contractor prior to the contractor's default on several construction contracts. The district court apparently reasoned that a surety cannot, under any circumstances, resort to an equitable doctrine because the surety may always obtain a contractual assignment of rights to secure its promise of performance under the payment and performance bonds. Transamerica, 524 So. 2d at 445-46. On the basis of this reasoning, the district court ruled that a surety cannot rely on the doctrine of equitable subrogation and that Transamerica's only basis for recovery in this case was the assignment of rights executed by the contractor prior to the issuance of the payment and performance bonds.

The district court's holding regarding a surety's right to rely on the doctrine of equitable subrogation is in direct conflict with this court's decisions in Phifer State Bank v. Detroit Fidelity & Surety Co., 97 Fla. 538, 121 So. 571 (1929), Union Indemnity Co. v. City of New Smyrna, 100 Fla. 980, 130 So. 453 (1930), and Commercial Bank v. Board of Public Instruction, 55 So. 2d 552 (Fla. 1951). In Phifer State Bank, this court affirmed the decree of the chancellor awarding earned but unpaid funds held by the owner to the surety who performed a construction contract after the bonded contractor's default. 97 Fla. at 544, 121 So. at 573. Before the surety issued the bond, it had obtained an indemnity agreement from the contractor. Id. at 539, 121 So. at 572. After the bond was issued, the contractor entered into the construction contract and obtained a \$10,000.00 loan from the Phifer State Bank. The contractor assigned its rights to the progress payments due on the contract to the bank to secure the loan, and the owner paid \$6,000.00 in progress payments directly to the bank at the contractor's request. When the contractor defaulted, the owner held \$4,000.00 in progress payments earned by the contractor but not paid. The surety completed performance on the contract, and the owner paid the surety all sums owing on the contract except for the \$4,000.00.

The financing bank and the performing surety both claimed entitlement to the \$4,000.00. This court found that

the surety was entitled to the entire amount under the doctrine of subrogation. Id. at 541-44, 121 So. at 572-73. This court observed, in 1929, that "[t]he law in the case is well settled in this country," even though the precise question had not yet been decided by the Florida Supreme Court. Id. at 541, 121 So. at 572. This court then quoted from several appellate opinions, including Prairie State National Bank v. United States, 164 U.S. 227 (1896), the rule of law that a surety completing a construction contract after a bonded contractor's default is entitled to reimbursement of the money expended in performing the contract under the doctrine of equitable subrogation. Furthermore, the rule quoted with approval by this court specifically states that, on the basis on its subrogation rights, a surety is entitled to priority as against a bank which has an assignment of the proceeds of the contract to secure a loan obtained by the contractor. Finally, and most importantly in light of the decision of the district court below, the quoted authorities, and this court under the facts in Phifer State Bank, unequivocally ruled that the surety's right to equitable subrogation and priority over an assignee bank exists "'irrespective of the assignment to the . . . [surety] provided in the contractor's application [for the bond].'" Id. at 542, 121 So. at 573.

The year after deciding Phifer State Bank, this court decided Union Indemnity Co. v. City of New Smyrna. Although

the facts in this case were somewhat different from those in Phifer State Bank, the case concerns the competing claims of a performing surety and an assignee bank to earned but unpaid funds held by the owner on a construction contract, where the contractor had defaulted and the surety had completed the contract under its bond. In Union Indemnity, this court held that the surety was entitled to the funds under the doctrine of equitable subrogation. This court reasoned that the surety has an obligation to pay the claims of laborers and material suppliers and that, to the extent of the money expended by the surety in completing the contract, the surety was subrogated to the rights of the owner in the funds held by the owner. 100 Fla. at 988, 130 So. at 456.

In Commercial Bank v. Board of Public Construction, this court again decided that a performing surety was entitled to the earned but unpaid funds held by the owner under the doctrine of equitable subrogation. The facts in Commercial Bank were virtually identical to the facts in Phifer State Bank and in the instant case: A construction contractor executed an agreement of indemnity in favor of a surety, which subsequently issued a performance bond on a construction contract; the contractor obtained a loan from the bank and executed in favor of the bank an assignment of the contract proceeds to secure payment of the loan; the contractor defaulted on the contract, and the surety

completed performance; when the contract was completed, the owner held funds earned by the contractor but unpaid at the time of its default. 55 So. 2d at 552-53. In holding for the surety, this court did not state its reasoning but cited its prior decisions in Union Indemnity and Phifer State Bank. Id. at 554. Because those decisions were decided exclusively on the basis of the surety's right to equitable subrogation, it is clear that equitable subrogation was the basis of the decision in Commercial Bank notwithstanding the fact that the contractor executed the assignment to the surety prior to executing the assignment to the bank. See id. at 553.

Subsequent to this court's decision in Commercial Bank, no reported decisions directly addressing a surety's right to rely on the doctrine of equitable subrogation were issued by Florida courts until the decision of the Fifth District Court of Appeal in the instant case. Apparently, the district court considered itself free to examine "modern day" suretyship practices and to decide anew whether a performing surety should be entitled to reimbursement under the doctrine of equitable subrogation. In doing so, the district court relied on a "short summary" of the development of the doctrine of equitable subrogation contained in the dissent to In re Estate of Mundell, 459 So. 2d 358 (Fla. 5th DCA 1984)(Cowart, J., dissenting), petition for review denied, Cowan v. Sanders, 467 So. 2d 999

(Fla. 1985). The district court reached its conclusion that equitable subrogation is inapplicable to today's sureties without mentioning either the previous decisions of this court to the contrary or the more recent decisions of the highest courts of several states in which the vitality of the doctrine of equitable subrogation in the suretyship context has been reaffirmed. The cases stating this principle are listed by Judge Sharp in the dissent to the majority opinion in Transamerica. 524 So. 2d at 450, n 9.

For example, in Jacobs v. Northeastern Corp., 416 Pa. 417, 423-24, 206 A.2d 49, 52 (1965), the Pennsylvania Supreme Court recognized that "the federal rule . . . and the rule prevailing in most jurisdictions . . . is that the surety, upon payment of claims of labor and materialmen, is entitled to assert the benefits of subrogation against the funds withheld" by the owner after the surety paid such claims pursuant to its bond obligations. Likewise, the court in United States Fidelity & Guaranty Co. v. First State Bank, 208 Kan. 738, 745, 494 P.2d 1149, 1154 (1972), found that the performing surety's right to rely on the doctrine of equitable subrogation "represents the general rule, accepted overwhelmingly if not universally throughout the various jurisdictions in this country. No contrary decisions have come to our attention." In the most recent state supreme court decision located on the issue, the Supreme Court of Alabama, in Fidelity & Casualty Co. v.

Central Bank, 409 So. 2d 788 (Ala. 1982), the court expressly recognized a performing surety's right to equitable subrogation to the extent that it had completed a construction contract after the contractor's default.

Finally, the United States Supreme Court in Pearlman v. Reliance Insurance Co., 371 U.S. 132 (1962), described the performing surety's right to assert the doctrine of equitable subrogation in the following terms:

Traditionally sureties compelled to pay debts for their principal have been deemed entitled to reimbursement, even without a contractual promise such as the surety here had. And probably there are few doctrines better established than that a surety who pays a debt of another is entitled to all the rights of the person he paid to enforce his right to be reimbursed. This rule [is] widely applied in this country and generally known as the right of subrogation.

Id. at 136-37 (footnotes omitted). The Court traced the course of its decisions involving the doctrine of equitable subrogation in the suretyship context, beginning with Prairie State Bank, and unequivocally reaffirmed the continuing availability of the doctrine to sureties performing under payment and performance bonds on construction contracts. Although Pearlman did concern payment and performance bonds issued on a federal construction contract pursuant to the Miller Act, 40 U.S.C. §270a, it is clear that the Court was stating a universal rule of law, not one peculiar to the federal courts in litigation under Miller Act bonds. Needless to say, the rule permitting performing sureties to rely for

reimbursement on the doctrine of equitable subrogation has been uniformly followed by federal courts considering the question.

A close reading of the decision of the district court below reveals that the court may have misunderstood the difference between a surety's right to reimbursement under the doctrine of equitable subrogation and its right to recover under a contractual indemnification and assignment of rights agreement. If the surety wishes to reach proceeds earned by but not paid to its bonded contractor on a contract which the surety did not complete, the surety's only remedy is under its indemnification and assignment of rights agreement. Transamerica, 524 So. 2d at 450 (Sharp, J., dissenting); Travelers Indemn. Co. v. Clark, 254 So. 2d 741, 747 (Miss. 1971). Or, when a surety makes payments on behalf of a contractor who is not in default because the surety considers it expedient to do so, the surety is entitled to recover the money paid only under its contractual assignment agreement. Waterhouse v. McDevitt & Street Co., 387 So. 2d 470, 472 (Fla. 5th DCA 1980). However, it is implicit in every decision on the issue that, under the doctrine of equitable subrogation, a surety is entitled to reimbursement from earned but unpaid progress payments held by an owner to the extent that the surety expended money to complete that particular contract.

Therefore, contrary to the holding of the district

court below, the contractual indemnification and assignment of rights agreement is not the sole remedy available to a surety seeking reimbursement from earned but unpaid funds held by an owner for money the surety expended to complete a construction contract after the contractor's default. As stated by the Supreme Court of Mississippi: "The rights of the surety to subrogation for its losses are founded on equitable principles independent of any assignment of contract proceeds in the application of the contractor. The assignment in a bond application is in aid of an equitable right; it does not create that right." Travelers Indemn. Co., 254 So. 2d at 745. This view is consistent with the decisions of this court in Phifer State Bank and Commercial Bank, which remain binding precedent on the courts of this state.

For the reasons stated, this court should disapprove the holding of the district court below that a surety may no longer rely on the doctrine of equitable subrogation for reimbursement of money expended in the performance of a construction contract, after the contractor's default, pursuant to the surety's obligations under payment and performance bonds. The district court's holding conflicts with this court's decisions in Phifer State Bank, Union Indemnity Co., and Commercial Bank. Furthermore, this holding is directly contrary to the rule followed in virtually every jurisdiction in the United States. The

right of a surety to rely on the doctrine of equitable subrogation is "deeply imbedded in our commercial practices, our economy, and our law." Pearlman, 371 U.S. at 140.

II. A PERFORMING SURETY'S RIGHT TO REIMBURSEMENT UNDER THE DOCTRINE OF EQUITABLE SUBROGATION IS NOT AFFECTED BY THE PROVISIONS OF THE UNIFORM COMMERCIAL CODE.

The district court below evaluated the priority question presented in Transamerica exclusively under the filing, perfection, and priority provisions of Article 9 of the Florida U.C.C., chapter 679 of the Florida Statutes. The district court ruled that "the surety's assignment from a contractor . . . constitutes a security interest subject to the filing and performance requirements of the U.C.C. §9-303 and §9-302(1)(§679.303 and 679.302(1), Fla. Stat.)." Transamerica, 524 So. 2d at 444. The court then found that Barnett Bank had priority to the earned but unpaid funds held by the owners as against all claims of Transamerica because Barnett Bank had perfected its security interest in these funds under the U.C.C., while Transamerica had not perfected its security interest by filing its indemnification and assignment of rights agreement.³ Id. at 447.

3. As noted in the dissenting opinion, Transamerica did file its assignment of rights under the U.C.C. some eight months after Barnett Bank filed its assignment. Transamerica, 524 So. 2d at 448. This does not, however, affect the district court's analysis of priority under the U.C.C.

The district court is correct in its holding that the surety's contractual assignment is a security interest. See United States Fidelity & Guar. Co. v. First State Bank, 208 Kan. 738, 749, 494 P.2d 1149, 1157 (1972); Canter v. Schlager, 358 Mass. 789, 791, 267 N.E.2d 492, 494 (1971); Travelers Indemn. Co. v. Clark, 254 So. 2d 741, 747 (Miss. 1971). However, the categorization of the surety's contractual assignment as a U.C.C. security interest was determinative of the decision below only because the district court concluded that a surety does not have the right to seek reimbursement for its losses in performing a bonded construction contract under the doctrine of equitable subrogation but is, instead, limited to recovery under its contractual assignment. As discussed above, this rule is contrary to the overwhelming weight of authority recognizing the continued vitality of the doctrine of equitable subrogation in the suretyship context. Thus, the question addressed by most courts after passage of the U.C.C. was whether the filing requirements of the U.C.C. apply to the equitable subrogation right of a surety. Although this question was presented to a Florida court for the first time in Transamerica, the courts deciding this question have uniformly held that a surety's equitable subrogation rights are not affected by the provisions of the U.C.C.

The first court to address the relationship between a surety's right to equitable subrogation and the U.C.C. was

the Pennsylvania Supreme Court in Jacobs v. Northeastern Corp., 416 Pa. 417, 206 A.2d 49 (1965). The conflicting claims presented to the court were those of a surety performing under construction payment and performance bonds to reimbursement for money expended to complete the contract after the bonded contractor's default and those of the contractor's receiver in bankruptcy on behalf of its general creditors. The court first concluded that the surety had a right to reimbursement under the doctrine of equitable subrogation, but then observed that the receiver had raised the argument that the surety did not file financing statements pursuant to the U.C.C., and, therefore, held an unperfected security interest in contract proceeds which did not have priority as to the general creditors. Id. at 427, 206 A.2d at 54.

The court in Jacobs held that the surety was not required to file financing statements under the U.C.C.: "None of the purposes or objectives of the Code's filing requirements would be served by holding that the subrogation to the contract balance now due is an assertion of a 'security interest' and therefore subject to the filing provisions of Article 9." Id. at 428, 206 A.2d at 54. Additionally, the court found that, because Article 9 applies to "'security interests created by contract,'" a surety's right of subrogation was, by definition, not a security interest. Id. at 429, 206 A.2d at 55. "Rights of

subrogation, although growing out of a contractual setting and oftentimes articulated by the contract, do not depend for their existence on a grant in the contract, but are created by law to avoid injustice." Id.

The Jacobs case was followed in 1969 by the decision in National Shawmut Bank v. New Amsterdam Casualty Co., 411 F.2d 843 (1st Cir. 1969), in which the court held that a surety's right to equitable subrogation was not a security interest subject to filing under the U.C.C. as adopted in Massachusetts. In 1971, the court in In re J. V. Gleason Co., 452 F.2d 1219 (8th Cir. 1971), held that a surety's right to equitable subrogation was not a security interest subject to filing under the U.C.C. as adopted in Minnesota. Following suit in 1971 was the Supreme Judicial Court of Massachusetts in Canter v. Schlager, 358 Mass. 789, 267 N.E.2d 492 (1971), and the Supreme Court of Mississippi in Travelers Indemnity Co. v. Clark, 254 So. 2d 741 (Miss. 1971); in 1972, the Supreme Court of Kansas in United States Fidelity & Guaranty Co. v. First State Bank, 208 Kan. 738, 494 P.2d 1149 (1972); in 1976, the Court of Appeals of Maryland in Finance Co. of America v. United States Fidelity & Guaranty Co., 277 Md. 177, 353 A.2d 249 (1976); in 1978, the Supreme Court of Alaska in Alaska State Bank v. General Insurance Co. of America, 579 P.2d 1362 (Alaska 1978); and, in 1980, the Supreme Court of Tennessee in Third National Bank v. Highlands Insurance Co., 603 S.W.2d 730 (Tenn.

1980). Finally, in Fidelity & Casualty Co. v. Central Bank, 409 So. 2d 788, 790 (Ala. 1982), the last reported decision of a state's highest court on this issue, the Supreme Court of Alabama observed that the bank "recognizes that Article 9 of the Uniform Commercial Code is not applicable" to determine the priority between an assignee bank and a surety seeking reimbursement under the doctrine of equitable subrogation.

Although the analyses of these courts differ somewhat in tone, emphasis, and complexity, the courts all base their holdings on the following reasoning: A surety obligated under payment and/or performance bonds is entitled to seek reimbursement under the doctrine of equitable subrogation for money the surety expends completing construction contracts after the bonded contractor defaults. The right to equitable subrogation is not created by contract but arises by operation of law to prevent injustice. Because a security interest under the U.C.C. is, by definition, created by contract, the right to equitable subrogation is not a security interest. The surety need not, therefore, file financing statements under the U.C.C. to assure its entitlement to earned but unpaid funds held by the owner at the time of the contractor's default, to the extent that the surety seeks reimbursement of the money expended in completing the contract.

The conclusions stated in the opinion of the district

court below are totally inconsistent with the conclusions reached by these courts. The district court did not even engage in the analysis common to these cases because, as a predicate to its ruling that the U.C.C. governs the question of priority between a bank with a perfected security interest in contract proceeds and a surety which completes a construction contract under its bond obligation, the district court ruled that a surety cannot rely on its right to equitable subrogation. Certainly, when a surety is permitted to seek reimbursement from money expended in performing its bond obligations only under its contractual indemnification and assignment of rights agreement, the filing, perfection, and priority provisions of the U.C.C. will govern the surety's right to recover.

However, in the overwhelming majority of those jurisdictions in which the question has been considered, the surety's right to recover is not limited to the rights secured by its contractual assignment when the surety is seeking reimbursement for money expended in completing a construction contract after the bonded contractor's default. Rather, in cases involving both legal and factual issues similar to those in the instant case, "the majority of American jurisdictions which have considered the question have accepted the theory of equitable subrogation as the rule." Alaska State Bank, 579 P.2d at 1366. In addition, the courts which have considered the question have

unanimously and unequivocally held that a surety's right to equitable subrogation is not governed by the provisions of the U.C.C.

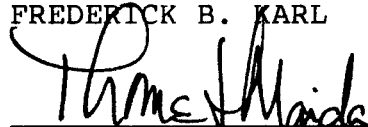
To assure uniformity among the various jurisdictions in the law of commercial transactions, which was the stated purpose of the Florida legislature in adopting the U.C.C., §671.102(2)(c), Fla. Stat., this court should disapprove both the reasoning and the decision of the district court below. The AIA, on behalf of surety companies doing business in every state in the United States, urges this court to reaffirm the continued vitality of the rule of law stated in Phifer State Bank v. Detroit Fidelity & Surety Co., 97 Fla. 538, 121 So. 571 (1929), Union Indemnity Co. v. City of New Smyrna, 100 Fla. 980, 130 So. 453 (1930), and Commercial Bank v. Board of Public Instruction, 55 So. 2d 552 (Fla. 1951), that a payment and/or performance bond surety has a right to rely on the doctrine of equitable subrogation to obtain reimbursement from earned but unpaid funds held by the owner for money the surety expends in performing its bond obligations by completing the contract after the bonded contractor's default. The AIA further urges this court to adopt the rule of law established by the courts in the cases cited above and hold that a surety's right to equitable subrogation is not affected by the filing requirements of the U.C.C.

CONCLUSION

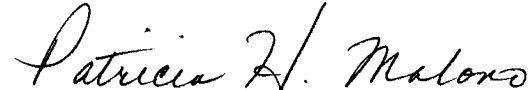
For the foregoing reasons, the American Insurance Association, appearing as amicus curiae in support of the position of petitioner, Transamerica Insurance Company, requests that this court disapprove the decision of the district court below.

Respectfully submitted,

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KARL, McCONNAUGHAY, ROLAND
& MAIDA, P.A.

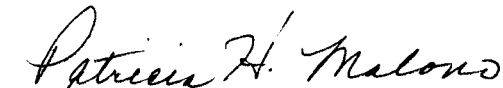
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail to Robert E. Morris, Morris & Rosen, P.A., 4016 Henderson Boulevard, Tampa, Florida 33629; Tim Haines and Young Joe Simmons, Green & Simmons, P.A., Post Office Box 3310, Ocala, Florida 32678; and David T. Knight and Jeanne T. Tate, Shackelford, Farrior, Stallings & Evans, Suite 1400, One Mack Center, 501 East Kennedy Boulevard, Tampa, Florida 33602 this 10th day of October, 1988.



PATRICIA HART MALONO