IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

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By
Deputy Clerk

TRANSAMERICA INSURANCE COMPANY,

Petitioner,

vs.

BARNETT BANK OF MARION COUNTY, N.A.

Respondent

SUPREME COURT
CASE NO. 72,531

FIFTH DISTRICT COURT
CASE NO. 86-1328

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

Tim D. Haines
Green and Simmons, P.A.
Post Office Box 3310
Ocala, FL 32678
(904)732-8121
Attorneys for Respondent

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ISSUES ON APPEAL

TRANSAMERICA has identified four (4) separate issues in its Initial Brief filed herein. **BARNETT** believes that the issues set forth as I and II in **TRANSAMERICA'S** Initial Brief are similar enough to warrant treatment as a single issue, identified as Issue I below. **BARNETT** further believes that the Briefs on the Merits have made clear the lack of a basis for this Court to exercise its discretionary jurisdiction and has included, as Issue IV, a brief discussion of this issue. Finally, **BARNETT** has included an additional Issue V addressing an issue raised, for the first time, in the Brief of Amicus Curiae, Reliance Insurance Company, et. al.

ISSUE I

WHETHER A SURETY'S RIGHT TO "EARNED BUT UNPAID" REMAINING CONTRACT FUNDS IN THE HANDS OF AN OWNER/BOND OBLIGEE, UNDER THE DOCTRINE OF EQUITABLE SUBROGATION, IS A SECURITY INTEREST SUBJECT TO THE FILING AND/OR PERFECTION REQUIREMENTS OF ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE (CHAPTER 679, FLORIDA STATUTES)

ISSUE 2

WHETHER THE TRIAL COURT DENIED TRANSAMERICA A SETOFF RIGHT TO WHICH IT IS ENTITLED AND IMPROPERLY ENTERED A SUMMARY JUDGMENT ON AN ISSUE NOT BEFORE THE COURT.

ISSUE 3

WHETHER THE TRIAL COURT'S FINDING THAT "BARNETT FINANCED THE CONSTRUCTION ACTIVITIES OF TURNER DURING THE PERIOD OF ACTIVE OPERATION BY TURNER WITH ACTUAL CASH" AND "THAT ACTUAL CASH WAS USED BY TURNER IN THE

NORMAL COURSE OF ITS BUSINESS OPERATION..." CONSTITUTES AN IMPROPER FACTUAL DETERMINATION.

ISSUE 4

WHETHER THE WRIT OF CERTIORARI FOR CONFLICT JURISDICTION WAS IMPROVIDENTLY GRANTED BY THIS COURT.

ISSUE 5

WHETHER THE DISTRICT COURT'S DECISION SHOULD BE APPLIED RETROACTIVELY SINCE IT IS CONTRARY TO PRIOR CASE LAW.

PRELIMINARY STATEMENT

The Appellant, **TRANSAMERICA INSURANCE COMPANY,** was the Defendant below. For purposes of this appeal Appellant will be referred to as **"TRANSAMERICA"** or **"SURETY"**. In addition, within this brief **TRANSAMERICA** and the Amicus Curiae will be referred to collectively as **"THE SURETIES"**. The Appellee, **BARNETT BANK OF MARION COUNTY, N.A.,** was Plaintiff below and for purposes of this appeal will be referred to as **"BARNETT"** or **"BANK"**. References to the record on appeal will be by the use of the symbol "R" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Barnett accepts the description of the prior legal proceedings as contained in the Initial Brief of Transamerica. In order to more clearly present the factual circumstances which were the bases of said proceedings, however, Barnett would add the following to the statement of facts as contained in Transamerica's Initial Brief.

G. P. Turner Construction, Inc. (hereinafter referred to as "Turner Construction") was a contractor engaged in the construction business. At various times from 1981 through 1984 Turner Construction borrowed funds from, and executed notes in favor of, Barnett. R217-338 As security for the above-mentioned obligations Barnett received from Turner Construction, and perfected, a security interest in all inventory, accounts receivables, chattel paper, contract rights, and general

intangibles owned or thereafter acquired by Turner Construction. (R1068). During this time period, Transamerica provided various bonds on behalf of Turner Construction. Under the terms of said bonds Transamerica acted as surety for Turner Construction's payment and performance of various contracts with third parties. R1316-1351

The competing claims of Barnett and Transamerica concern assets of Turner Construction which were earned by, or came into the possession of, Turner Construction prior to default. R1559-1726 Transamerica claims entitlement to these funds pursuant to the doctrine of equitable subrogation. R1316-1319 Barnett claims entitlement to said funds pursuant to its perfected Article 9 security interest in the accounts receivables, chattel paper, contract rights, and general intangibles of Turner Construction. R1559-1726

SUMMARY OF THE ARGUMENT

ISSUE I

WHETHER A SURETY'S RIGHT TO "EARNED BUT UNPAID" REMAINING CONTRACT FUNDS IN THE HANDS OF AN OWNER/BOND OBLIGEE UNDER THE DOCTRINE OF EQUITABLE SUBROGATION, IS A SECURITY INTEREST SUBJECT TO THE FILING AND/OR PERFECTION REQUIREMENTS OF ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE (CHAPTER 679, FLORIDA STATUTES)

A surety's right to "earned but unpaid" remaining contract funds in the hands of an owner/bond obligee, whether the right arises under the doctrine of equitable subrogation or as the result of an express assignment, is a security interest subject to the filing and/or perfection requirements of Article 9 of the Uniform Commercial Code. The purpose of the Uniform Commercial Code is to simplify the law of commercial transactions and to increase certainty and uniformity in such transactions. These goals are best served by subjecting the surety's interest to the filing and perfection requirements of the Code. While a variety of cases have held that a surety's rights arising under the doctrine of equitable subrogation are not subject to the Code perfection requirements, a review of these cases establishes that they were decided in a factual context, or based solely upon other cases which were decided in a factual context, which bears little relevance to the modern day dispute between sureties and banks. This case law, relied upon by the sureties, is unconvincing in light of an analysis of the policies and provisions of the Uniform Commercial Code. The express language

of the Code, scholarly commentaries, the actual practicalities of construction financing, as well as general equitable principles all support the Lower Court's holding that the surety's right to earned but unpaid contract funds is subject to the filing and/or perfection requirements of Article 9.

ISSUE 2

WHETHER THE TRIAL COURT DENIED TRANSAMERICA A SETOFF RIGHT TO WHICH IT IS ENTITLED AND IMPROPERLY ENTERED A SUMMARY JUDGMENT ON AN ISSUE NOT BEFORE THE COURT

Transamerica was not denied a setoff right to which it is entitled. Transamerica seeks to set off deficits arising under various contracts between Turner Construction and third parties against surpluses arising out of other contracts between Turner Construction and third parties. Florida Law, while recognizing the right to setoff, does not recognize the right to setoff in the face of claims by creditors who are strangers to the original transaction. Any right of Transamerica's to setoff the funds is a right it holds against Turner Construction and not against Barnett. Because the claims of setoff do not exist between the same parties, and in the same right, the required mutuality of claims in nonexistent and Transamerica has no right to set off.

ISSUE 3

WHETHER THE TRIAL COURT'S FINDING THAT "BARNETT FINANCED THE CONSTRUCTION ACTIVITIES OF TURNER DURING THE PERIOD OF ACTIVE OPERATION BY TURNER WITH ACTUAL CASH" AND "THAT ACTUAL CASH WAS USED BY TURNER IN THE NORMAL COURSE OF ITS BUSINESS OPERATION..." CONSTITUTES AN IMPROPER FACTUAL DETERMINATION.

The Trial Court's finding that "Barnett financed the construction activities of Turner during the period of active operation by Turner with actual cash" and "that actual cash was used by Turner in the normal course of its business operation..." is a proper statement and adequately supported by the record. The deposition testimony of officers of the Appellee, Barnett, as well as the defaulting contractor, adequately support the above statements. A reading of the record makes clear that Turner Construction's loan arrangement with Barnett was similar to a revolving line of credit in which Turner Construction would pay down the loans as accounts receivables came in and would, between such pay downs, increase the loan amounts as draws were made to cover normal operating expenses. Transamerica has cited no evidence to the contrary and the record itself reveals none.

ISSUE 4

WHETHER THE WRIT OF CERTIORARI FOR CONFLICT JURISDICTION WAS IMPROVIDENTLY GRANTED BY THIS COURT.

This Court has discretionary jurisdiction to review a district court of appeal's decision that expressly and directly conflicts with the decision of another district court of appeal, or of this Court, on the same question of law. Fla. R. App. P. 9.030(a)(2)(A)(IV). The instant case, however, required that the Fifth District Court of Appeal interpret provisions of the Uniform Commercial Code, which did not become law in the State of Florida until 1965. Ch. 65 - 254 Laws of Florida (eff. Jan. 1, 1967). All of the cases relied upon by Petitioner and the Amicus

Curiae were decided prior to the adoption of the Uniform Commercial Code or were rendered by courts which do not qualify as "...another district court of appeal or of this court." Since there is no decision of another district court of appeal or of this court which directly and expressly conflicts with the lower court ruling, this Court's exercise of its discretionary jurisdiction was improvident.

ISSUE 5

WHETHER THE DISTRICT COURT'S DECISION SHOULD BE APPLIED RETROACTIVELY SINCE IT IS CONTRARY TO PRIOR CASE LAW.

The Amicus Curiae, Reliance Insurance Company, et. al., suggests that the District Court's decision is improper in retroactively applying its holding. An Appellant is not entitled, however, to bring up on appeal issues which were not presented to the trial court and, in fact, were not presented to the intermediate appellate court. In addition, an Amicus Curiae is not entitled to go beyond the issues as presented by the original parties to an action. Even if this issue were properly raised, a "retroactive" application of the holding in the present case is justified and proper under the applicable case law.

ARGUMENT

ISSUE I

WHETHER A SURETY'S RIGHT TO "EARNED BUT UNPAID" REMAINING CONTRACT FUNDS IN THE HANDS OF AN OWNER/BOND OBLIGEE UNDER THE DOCTRINE OF EQUITABLE SUBROGATION, IS A SECURITY INTEREST SUBJECT TO THE FILING AND/OR PERFECTION REQUIREMENTS OF ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE (CHAPTER 679 FLORIDA STATUTES).

A. INTRODUCTION

In the proceedings before the Trial Court and the Fifth District Court of Appeal, BARNETT claimed entitlement to the earned but unpaid contract funds owed to Turner Construction based upon a perfected security interest in Turner Construction's accounts receivables. TRANSAMERICA, having perfected its contractual assignment to the accounts receivables after BARNETT, based its claim to entitlement to the same funds upon the doctrine of equitable subrogation. Both the Trial Court and the District Court of Appeal ruled in favor of BARNETT, holding that TRANSAMERICA'S claim to the funds was a security interest subject to the perfection requirements of the Uniform Commercial Code.

The sureties have attacked the lower courts' holding as contrary to the rulings of an impressive number of federal and state courts, concluding that the concurrence of these other courts is sufficient to establish "a universal rule of law" which the Florida courts are bound to follow. Brief of Amicus Curiae American Insurance Association at page 12. The modern pro-surety

decisions are, however, based upon pre-UCC Federal cases which turned upon facts and considerations no longer germane to the dispute between the surety and the bank. A significant change in the factual context of this dispute came with the adoption of the Uniform Commercial Code, which became effective in Florida on June 1st, 1967. Ch. 65-254, Laws of Florida. A review of the policy underlying the Code, as well as its express provisions, establishes that the surety's claim to "earned but unpaid" contract funds is governed by the filing and perfection requirements of Article 9. Finally, this brief will address the central question only lightly touched upon by the sureties, i.e., "Why shouldn't the surety file a financing statement like everyone else?"

B. Development of the Doctrine of Equitable Subrogation.

Primarily as the result of the federal government's history of requiring payment and performance bonds from its contractors, the doctrine of equitable subrogation was largely developed in the federal court system. 2 G. Gilmore, Security Interest in Personal Property, 973 (1965) As early as 1887, the United States Supreme Court ruled that a party's right to equitable subrogation arose outside of any contract. Memphis & L.R.R.Co. v. Dow, 120 U.S. 287, 7 S. Ct. 482 (1887). Shortly thereafter the Supreme Court addressed, for the first time, the priority dispute between the bank and the surety.

Prairie State National Bank of Chicago v. United States dealt with a dispute between the surety on a government

construction contract and a bank which, subsequent to the surety's contract with the contractor, made advances to that contractor. 164 U.S. 227, 17 S. Ct. 142, 41 L. Ed. 412 (1896) Between May and February of 1890 the bank made advances of about $6,000. When the contractor defaulted in May, the surety stepped in and completed the contract at a cost of about $15,000. Both the bank and surety claimed a prior right to the funds remaining in the government's hands upon completion. The court awarded the funds to the surety, holding that:

> [I]t necessarily results that the equity, if any, acquired by the Prairie Bank in the 10 per cent fund then in existence and thereafter to arise was subordinate to the equity which had, in May 1888, arisen in favor of the surety...

164 U.S. 227, 240; 17 S. Ct. 142, 147; 41 L. Ed. 412, 419 (1896)

Because Prairie State is the basis for later pro-surety decisions, the context in which the above holding was made is of crucial importance. 2 G. Gilmore, supra, at 953; E. Dauer, Government Contractors, Commercial Banks, and Miller Act Bond Sureties - A Question of Priorities, 14 B.C. Ind. and Comm. L. Rev. 943, at 947 (19____). As one commentator has noted, "Justice White's opinion did more than decide the outcome of a private dispute: it gave rise to a host of later difficulties." E. Dauer, supra, at 947. First, at the time of Prairie State, and up until 1940, assignments of claims against the United States were, as a practical matter, prohibited. 2 G. Gilmore, supra, at 949. Neither the surety nor the bank could, therefore, rely on the existence of a valid contractual assignment. Id. As

a result the court was called upon to weigh the equities between the surety and the bank. Prairie State, 164 U.S. at 240, 17 S. Ct. at 147, 41 L. Ed. at 419. The Court's nod to the surety is understandable given the bank's failure to establish that its loans were, in fact, applied to the government project in question. Id. at 229, 17 S. Ct. at 143, 41 L. Ed. at _____ (1896). In addition, the surety's ignorance, at the time it completed the project, of the existence of the assignment in favor of the bank further tilted the equities toward the surety. Id.

Subsequently, in October of 1940, the Federal Assignment of Claims Act was enacted. 54 Stat. 1029 (1940) as amended 31 U.S.C. §203, 41 U.S.C. §15 (1950). This act validated assignments of claims against the federal government when made to a "bank, trust company or other financing institution." Id. Such assignments were now "valid...for all purposes." Id. The Assignment of Claims Act seemed to assure the banks' victory, giving banks the only valid contractual assignment of claims against the federal government. See E. Dauer, supra, at 953. While federal courts did begin to rule, with some frequency, in favor of banks, see, e.g., General Casualty Company of America v. Second National Bank of Houston, 178 F. 2d 679 (5th Cir. 1949); Coconut Grove Exchange Bank v. New Amsterdam Casualty Company, 149 F. 2d 73, 78 (5th Cir. 1945); Town of River Junction v. Maryland Casualty Company, 133 F. 2d 57 (5th Cir. 1943), the long-term effect of the Assignment of Claims Act was to

strengthen the sureties position. Federal courts, in general, bolstered and extended the sureties "equitable" rights in order to compensate them for their inability to obtain valid "contract rights". See, e.g., United Pacific Insurance Company v. U.S., 319 F. 2d 893 (Ct. Cl. 1963); In Re. Bruce Construction Corp., 217 F. Supp. 926 (S.D. Fla. 1963); State v. Ingalls, 105 N.H. 244, 197 A.2d 214 (1964). The federal court's development of an almost insurmountable right of equitable subrogation for the surety took place, however, without consideration of the effects of state statutes regulating the pledge of accounts receivables, including Article 9 of the Uniform Commercial Code. 2 G. Gilmore, supra, at 961. (For a more comprehensive review of the development of the doctrine of equitable subrogation, see Id. at 948 - 972; E. Dauer, supra, at 947 - 971.)

As a result of the circumstances in which the federal court cases were considered, including the nonassignability of claims to entities other than banks, and the failure of the federal courts to consider the effect of state statutes regulating assignments of receivables, the federal line of cases has little relevance to the surety/bank disputes of today. Unfortunately, however, the federal and state courts which have considered the dispute since the adoption of the Uniform Commercial Code have relied excessively, and perhaps blindly, upon the federal decisions. "What has happened is that lawsuits between bankers and sureties have come, even in the private construction cases, to be governed by a federal rule fashioned to implement a federal

policy which might or might not hold water in a private case." E. Dauer, supra, at 966-67; see also 2 G. Gilmore, supra, at 961. The reasoning of the premier post-UCC decision, National Shawmutt Bank of Boston v. New Amsterdam Casualty Co., 411 F.2d 893 (1st Cir. 1969), has simply been echoed in the cases relied upon by the sureties, without any analysis of the underlying issue. E. Dauer, supra, at 970-71. Simply put, the federal and state cases upon which the sureties rely are based upon premises inapplicable to the present circumstances. For this reason the majority opinion of the Fifth District Court of Appeal determined that it was not in the best interest of the State of Florida to follow non-binding precedents from other state or federal courts. Transamerica Ins. v. Barnett Bank, 524 So.2d 439, 444 (Fla. 5th DCA 1988). The Fifth District Court of Appeal proceeded to analyze the issue in light of the purposes and express language of the Uniform Commercial Code and the realities of present day construction financing.

C. Effect of the UCC and Its Policies.

The adoption of the Uniform Commercial Code drastically altered the context in which the bank/surety dispute took place. For instance the Code, for the first time, did away with the distinction between earned and unearned rights and permitted the assignment of contract rights. Note, Jacobs v. Northeastern Corp.: Surety's Dilemma - Subrogation Rights or Perfected Security Interest, 69 Dick. L. Rev. 1972 (1965); See also Fla. Stat. §671.102(2). The purpose of the Code was to avoid

unnecessary confusion in the commercial sector by simplifying and streamlining the law of commercial transactions. See §671.102, Fla. Stat. (1987) To achieve this end the drafters identified three underlying purposes and policies:

> a. To simplify, clarify and modernize the law governing commercial transactions;
>
> b. Permit the continued expansion of commercial practices through custom, usage, and agreement of the parties;
>
> c To make uniform the law among the various jurisdictions.

§671.102(2), Fla. Stat. (1987)

The sureties argue that the Trial Court and Fifth District Court of Appeal's decisions are contrary to the majority of decisions rendered by other courts and are, therefore, violative of the Code's general policy of uniformity between the jurisdictions. See, e.g., Brief of Amicus Curiae Reliance Insurance Company, et. al., at page 20. Uniformity is, however, only one goal of the UCC. The first articulated goal is to simplify and clarify the law governing commercial transactions. Members of the surety industry itself have acknowledged that exempting sureties from the filing requirement of the Code violates this premiere policy. R. Hoffman, Jacobs-Sureties' Panacea or Narcosis? Article 9 - The Uniform Commercial Code-Some Practical Aspects, 34 Ins. Coun. J., 387, 393-94 (July 1967) Indeed, to assure the simplicity and clarity sought by the Code all exceptions to the Code's filing requirements should be looked upon with disfavor. See Sun Bank, N.A. v. Parkland Design and

Development Corp., 466 So.2d 1089, 1092 (Fla. 5th DCA 1985); citing In Re Cawthorne, L., 36 UCC Rep. Serv. (Callaghan) 1730 (N.D. Tenn. 1937); and H. & Val. J. Rothchild, Inc. v. N. W. National Bank of St. Paul, 309 Minn. 35, 242 N.W. 2d 844 (1976).

The inclusive nature of the Code, in the secured transactions area, is further mandated by the broad definition of a secured transaction contained in Article 9. §671.102, Fla. Stat. (1987) Article 9 applies to "any transaction, regardless of its form, which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel papers or accounts". §679.102(a), Fla. Stat. (1987) (emphasis added) In the instant case the surety's interest in Turner Construction's accounts receivables was clearly intended as security for its obligation to complete construction of defaulted projects. As indicated by Transamerica in its Initial Brief, the agreement of indemnity entered into between Transamerica and Turner Construction specifically provides:

> That this Agreement shall constitute a Security Agreement to the surety and also a Financing Statement both in accordance with the provisions of the Uniform Commercial Code of every jurisdiction wherein such Code is in effect and may be so used by the Surety without in any way abrogating, restricting, or limiting the rights of the Surety under this Agreement or under law or in equity.

Initial Brief of Petitioner, at page 22; R723.

Undeniably, Transamerica intended that it should have a security interest in the accounts receivables of Turner Construction as a result of its agreement of indemnity. Just as

clearly, Transamerica intended to have a security interest in said funds arising out of other legal or equitable sources. This intent to create a security interest is all that is necessary to bring the rights of Transamerica under the Uniform Commercial Code and to subject the surety's interest to the filing requirements set forth therein. Official Comments to §679.102, Fla. Stat. (1987)

The surety's effort to give itself the rights available under the Uniform Commercial Code, which are perfected by filing, while preserving its rights in equity, for which filing has not traditionally been required, is an attempt to "have one's cake and eat it too" Transamerica Ins., 524 So.2d at 446, n. 18. The Trial Court and the Fifth District Court of Appeal recognized, however, that to arrive at different results under the two theories, contractual assignment and equitable subrogation, is illogical. As one commentator has noted "...in construction financing the two legal theories, subrogation and assignment creating a security interest, differ only in origin. Arriving at different results under the two theories appears unjustified." Note National Shawmutt Bank: Another Step Toward Confusion in Surety Law, 64 Nw. U. L. Rev. 582, 593 (1969). Basic concepts of equity, as well as specific Code provisions, offer abundant support for the Fifth District Court's holding that both the right arising out of the contractual assignment and the right arising out of the doctrine of equitable subrogation are subject to Code filing and perfection requirements.

To refute the Code's seemingly clear intent that a surety's interest in "earned but unpaid" contract funds falls under the provisions of the Uniform Commercial Code, and thereby assuring the applicability of the pro-surety federal cases, sureties have traditionally relied upon the inclusion, or deletion, of various Code provisions. Specifically, many of the cases upon which sureties rely point to the proposed inclusion in the Uniform Commercial Code of §9-312(7), stating that:

> A security interest which secures an obligation to reimburse a surety or other person secondarily obligated to complete performance is subordinate to a later security interest given to a secured party who makes a new advance, incurs a new obligation, releases a perfected security interest or gives other new value to enable the debtor to perform the obligation for which the earlier secured party is liable.

Text and Comments to Uniform Commercial Code, Official Draft, §9-312(7) (1952)

The sureties maintain, first, that the deletion of the above language indicates the Code drafters' intention that a surety's rights under the doctrine of equitable subrogation not be considered a "security interest". Prior courts have uniformly relied on the deletion of the above provision, or upon prior cases which themselves relied on the deletion, to conclude that a surety's rights under the doctrine of equitable subrogation are not subject to perfection and filing requirements of the Code. See, e.g., In Re J. V. Gleason Co., 452 F. 2d 1219, 1221 (8th Cir. 1971); National Shawmutt Bank of Boston v. New Amsterdam Casualty Co., 411 F.2d 843, 846 (1st Cir. 1969). In interpreting the deletion as a statement that the doctrine of equitable

subrogation is not subject to the perfection and filing requirements of the Code, however, the sureties, and the courts, have reached an illogical conclusion.

The proposed §9-312(7) would have completely obliterated the existing rights of sureties. Text and Comments to Uniform Commercial Code, Official Draft, §9-312(7) (1952). The provision went far beyond requiring the sureties to comply with Code filing and perfection requirements to establish a priority and made it impossible for a surety, whether filed or not, to hold a priority position. The surety's interest were made subordinate to <u>later</u> security interests of a secured lender in the contract payments, <u>whether or not</u> the surety had perfected its own interest. 2 G. Gilmore, <u>supra,</u> at 977.

To conclude from the deletion of such an onerous provision that a surety's interest is not a security interest is illogical. Firstly, the deleted subsection is, and would have been, meaningless without a prior recognition that the surety's interest qualifies as a security interest. Note, <u>Equitable Subrogation - Too Hardy a Plant to be Uprooted by Article 9 of the UCC?</u>, 32 U. Pitt. L. Rev. 580, 588 (1971). Secondly, the proposed provision placed a surety in a "no-win" situation. Whether the surety filed or not, a later secured party would be given priority over the surety. 2 G. Gilmore, <u>supra</u>, at 977. The logical conclusion is that the deletion merely took the super-priority away from the subsequent lender. The super-priority provision having been removed, the surety's position as a secured

creditor would be subject to the general filing requirements of the Code and controlled by the general priority provision and the basic rule of "first in time, first in right".[1] See §679.312(5), Fla. Stat. (1987); see also Note Jacobs v. Northeastern Corp.: Securities Dilemma - Subrogation Rights or Perfected Interests, 69 Dick. L. Rev. 172, 178-9 (1965).

Sureties have traditionally cited two additional code provisions in an attempt to establish that the right of the surety to contract funds fails to constitute a security interest under the Code, and thereby preserve the vitality of the pro-surety federal cases. The surety's interest certainly fulfills the basic definitional requirements of the Code, being clearly

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Footnote 1. An example of a similar situation makes the logical fallacy in the surety's position clearer. Subsection 9-312(4) of the UCC gives a purchase money security interest priority over a conflicting security interest if perfected at the time a debtor receives possession of the collateral or within ten days thereafter. If this provision were deleted from the Uniform Commercial Code and the logic of sureties and the courts cited above applied, the conclusion would be that purchase money security interests are not security interests for Code purposes. This is clearly illogical. The correct conclusion, and the conclusion which Barnett maintains is reasonable under the present circumstances, is that the drafters' intended purchase money security interests to be treated as any other security interests. Priority would be determined under §9-312(5) and the basic doctrine of "first in time, first in right".

intended to create a security interest. See §671.201(37), Fla. Stat. (1987); §679.102(1)(a), Fla. Stat. (1987). The sureties argue, however, that their interest is excluded under 679.302(1)(e) and 679.104(6), which read as follows:

§679-302(1) A financing statement must be filed to perfect all security interests except the following:...

(e) An assignment of accounts which does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the outstanding accounts of the assignor.

§679.104 This chapter does not apply:...

(6) To the sale of accounts or chattel paper as part of a sale of the business out of which they arose, or an assignment of accounts or chattel paper which is for the purpose of collection only, or a transfer of a right to payment under a contract to an assignee who is also to do the performance under the contract or a transfer of a single account to an assignee in whole or partial satisfaction of a pre-existing indebtedness; (emphasis added)

The sureties maintain, with no supporting authority, that the above provisions exclude the sureties' rights under the doctrine of equitable subrogation from the filing requirements of the Code. See, e.g., Brief of Amicus Curiae Reliance Insurance Company, et. al., at page 11.

The above conclusions are manifestly incorrect. Section 679.302(1)(e), set out above, would only exempt assignments of an insignificant portion of the assignor's outstanding accounts. The purpose of this subsection is to protect casual or isolated assignments. Official Comments to Fla. Stat. §679.302(1)(e). Transamerica has made no showing, as required, to indicate that

the accounts transferred to it are an insignificant portion of Turner Construction's total accounts. See Sun Bank, N.A. v. Parkland Design and Development Corp., 466 So.2d 1089 (Fla. 5th DCA 1985). Even if Transamerica could establish that filing was not required to perfect its interest, however, it would still have an interest subordinate to a prior perfected lender such as Barnett. Note, supra, 32 U. Pitt. L. Rev. at 590

The exemption contained in 679.104(6) is equally inapplicable. The exemption for transfers "...of a right to payment under a contract to an assignee who is also to do the performance under the contract" was intended to exclude non-security transfers in which there was both an assignment of right and a delegation of duties. See Official Comments to §679.104(6), Fla. Stat. (1987) The Code authorities have expressed dissatisfaction with the view that this exemption was intended to apply to an assignment to a surety whose only liability is contingent and arises solely in the event of default. Note, supra, 32 U. Pitt. L. Rev. 580 at 586, citing 1 G. Gilmore, Security Interests in Personal Property, 308-310 (1965) and 2 G. Gilmore, Security Interests in Personal Property, 973(1965).

The sureties principal attack on the Code is an attempt to distinguish between a surety's rights arising under the contractual assignment and under the doctrine of equitable subrogation. The sureties' position is that even if the contractual assignment is subject to UCC filing and perfection

requirements, the equitable right to contract funds is not. The underlying basis for this contention is the Code section providing that "Unless displaced by the particular provisions of this Code, the principles of law and equity...shall supplement its provisions." 671.103, Fla. Stat. (1987)

The Fifth District Court of Appeal failed to find any basis for arriving at inconsistent requirements for perfecting the surety's rights under the contract and under the doctrine of equitable subrogation. The Court felt that such a "...result is at odds with the original purpose of equitable subrogation, which is to provide a remedy to one who otherwise has no remedy. The surety's attempt to acquire a contractual subrogation right and still retain its equitable remedy is not binding on courts when the very essence of the existence of that contract right with its legal remedy eliminates the need for an extraordinary equitable remedy." Transamerica Inc. v. Barnett Bank, 524 So.2d at 446, n. 18.

The Code's language, as well as the basic concepts underlying equitable remedies, supports the Fifth District Court of Appeal's interpretation. The Code provision cited above, §671.103, clearly does not state that equitable doctrines will remain unaltered or inviolate. Instead the Code provides that equitable doctrines shall "supplement" its provisions. "Supplement" may be defined as something which "completes or makes an addition." Websters' Ninth New Collegiate Dictionary at 1186 (1983). Equitable doctrines will, therefore, supplant the

Code only in situations where the Code is incomplete, that is in situations where the Code fails to adequately address the commercial situation. See Note, Suretyship: Subrogation under the Uniform Commercial Code, 65 Colum. L. Rev. 927, 933 (1965). As explained hereinafter, however, the Code does provide an adequate solution to the bank/surety dispute.

The existence of an adequate remedy in the Code also undermines the equitable basis of the surety's right to subrogation. A condition precedent to the application of an equitable remedy is a determination that no adequate remedy is available at law. See, e.g., Digge v. First State Bank, 145 Fla. 438, 199 So. 564 (1940); Richard v. Gulf Theatres, 155 Fla. 626, 21 So. 2d 715 (1945). As the following analysis will show, however, an adequate remedy is provided by the Code. The existence of this remedy undermines the need to adhere to the federal holdings exempting the surety's rights under the doctrine of equitable subrogation from the application of Code perfection and filing provisions by both refuting the contention that such an exemption "supplements" the Code and by depriving the surety of the precondition necessary to establish entitlement to any equitable remedy at all.

The commentators have almost universally agreed that the Code created a mechanism for protecting the surety's interest in accounts receivables. See, e.g., Note, supra 32 U. Pitt. L. Rev. 580, 591; Note, supra, 69 Dick. L. Rev. 172, 180; Note, supra, 65 Colum. L. Rev. 927, 933 (1965). Indeed, even courts which have

ruled that the Code's perfection and filing requirements do not apply to a surety's rights under the doctrine of equitable subrogation have recognized that subjecting the surety to the Code's filing requirements might improve the system for financing construction contracts. National Shawmutt Bank, 411 F.2d at 849. In order to perfect the security interest created in the assignment, the surety must simply file a financing statement with the appropriate state or county officials. See §679.201; 679.302; 679.303; 679.304; 679.401; 679.402; 679.403; 679.404. Fla. Stat. (1987) This filing is no more than is required of any other secured party, and would entitle the surety to a priority as set forth in the Code's general priority section. See §679.312(5), Fla. Stat. (1987). Since a surety normally enters into its financing arrangement with the contractor prior to the bank, the surety's priority to earned but unpaid contract funds is assured. See 2 G. Gilmore, supra, at page 976; Note, supra, 32 U. Pitt. L. Rev. at 592. Indeed, that is the factual scenario presented in the instant case. R1067-1129. If Transamerica had filed when the bonding arrangement was entered into, and Barnett had filed, as it did, in the normal course of its lending relationship, the surety would have had the superior right to the accounts receivables. See §679.312(5), Fla. Stat. (1987)

Under the above scenario, for Barnett to have taken priority over the surety, Barnett would have had to negotiate a subordination agreement with Transamerica. Even had Transamerica

entered into the relationship with the contractor after the Bank, however, the surety's position still remains far from inequitable. The surety may seek subrogation to the bank's prior perfected interest. Since this is the normal procedure the bank is required to follow when it becomes aware of a previously filed financing statement, it is hardly inequitable that the surety bear an identical burden. Given the Code's extensive protection of the surety's interest, the need for application of an equitable doctrine is clearly unnecessary and said doctrine is, therefore, unavailable. Nevertheless, in the face of the clear language of the Code, and the protection offered by filing, the sureties continue to refuse to file. This brings to the forefront the question which sureties have continually skirted, i.e., Why shouldn't sureties file like everyone else?

D. The Sureties' Reasons for Not Filing.

In maintaining that they should be treated differently from all other secured parties, the sureties have articulated four reasons for their refusal to file financing statements. First, they have maintained that the expense of filing would be intolerable. R. Hoffman, supra, at 391. Second, the sureties express a concern that filing "would be substantially or totally disruptive of credit upon which the contractors depend." Id. In other words, the sureties fear that if they notify third parties of the existence of their liens by filing, those third parties will refuse to extend credit to the contractors.

Strangely, the sureties then do an about-face and give, as

their third basis for not filing, the argument that the banks already know of their existence and, therefore, filing would serve no purpose. See Transamerica Ins., 524 So.2d at 451 (Sharpe, J., dissenting) citing Carter v. Schlager, 358 Mass. 789, 267 N.E. 2d 492 (Mass. 1971); U.S. Fidelity and Guaranty Company v. First State Bank of Salina, 208 Kan. 738, 494, P. 2d 1149 (Kan. 1972). The last reason given for not filing may be called a "status" argument. "We should not have to file", the sureties argue, "because we are not a financing entity like banks, but are instead more like the parties to whom we have traditionally subrogated, laborers, materialmen, or even owners, none of whom need to file." An example of the articulation of this reasoning is found in the brief of the Amicus Curiae Reliance Insurance Company, et. al. in which the sureties argue that "It has never 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." Brief of Amicus Curiae, Reliance Insurance Company, et. al., at page 15 - 16.

The first argument, that complying with the filing requirements is overly expensive, is so ludicrous as to require minimal attention. The cost of filing a financing statement is minor in light of the vast sums often involved in large construction contracts. Moreover, it is untenable to allow the sureties to base their "equitable" claim on a desire to save a

few dollars, when the necessity of lending institutions incurring the filing costs goes unquestioned. Equity requires the conclusion that if it is "fair" to require that banks pay for filing financing statements, it is "fair" to require that sureties do the same.

The argument that filing would frighten away other sources of financing is particularly interesting for it highlights not only the inequity of not requiring that the surety file, but also highlights the basis for the bank's own, often overlooked, equitable claim to the funds. In a typical case, the surety will enter into its indemnity agreement before the bank arrives on the scene. See 2 G. Gilmore, supra, at 976. The bank will subsequently lend funds for use in the construction project, often secured by the contractor's only available assets, contract rights and accounts receivables. E. Dauer, supra, at page 1006. As sureties admit by even positing this basis for non-filing, the bank's willingness to finance is largely the result of its lack of notice of the existence, or the extent, of the surety's security interest.

As a result of the bank's financing, the contractor will commence construction and may well proceed to substantial completion prior to default. See, e.g., Henningsen v. United States Fidelity & Guaranty Co., 208 U.S. 404, 28 S.Ct. 389, 52 L. Ed. 547 (1908) (contractor completes job but defaults in payment of laborers); Martin v. National Surety Co., 300 U.S. 588, 57 S. Ct. 531, 81 L. Ed. 822 (1937) (contractor completes job

leaving unpaid bills to laborers and materialmen.) The surety must, therefore, step in and finish an already substantially completed job and, in return, receives retained earnings and progress payments generated not by the surety's efforts, but by the bank's financing.

Without the bank's participation the contractor might never commence construction and, under any circumstances, would certainly default at a much earlier time. The surety's efforts and costs to complete the contract would be much greater, and the return to it of funds generated by others' efforts would be substantially less. As Professor Grant Gilmore, a principal drafter of the Code, has stated, "This is expressed by the formula that the bank's contribution has in fact relieved the surety from liability which he would have otherwise have borne: the bank loan has enabled the contractor to get that much further, to the obvious benefit of the surety, before default." 2 G. Gilmore, supra, at 979. Clearly the surety's refusal to file is based, in large part, on its desire to shift as much of its bonded risk to the bank as possible. For the surety to adopt such a self-serving strategy as a basis for preserving an equitable doctrine defies logic. See E. Dauer, supra, at 950. The lower appellate court perceived this inequity and ruled that "...equitable subrogation is governed by the operation of equitable principles and is not applied where it works an injustice to third parties. Having the convenient and practical remedy of filing its security agreement under the UCC, the surety

is not entitled to disregard it and rely on the remedy of equitable subrogation to ambush a financing bank which has dutifully filed a security interest as provided by law." Transamerica Ins., 524 So.2d at 436.

The above scenario also points out the basis for the bank's own equitable claim to the earned but unpaid progress payments and retainage. Just as the surety has an equitable claim to funds it has "created" through completing construction, so does the bank have an obvious equitable claim to funds it has "created" through financing. This analysis of the realities of construction financing was, in fact, one of the Trial Court's bases for originally ruling in favor of the Respondent.

> 11. At issue between Barnett and Transamerica is the priority held by the two parties (Barnett under a Uniform Commercial Code secured party position and Transamerica under a doctrine of equitable subrogation) with respect to accounts receivable of Turner which existed at the moment before Turner defaulted under any particular bonded construction project. Those accounts receivable (the amount involved with respect to each individual account receivable is not before the Court and not determined by this Order) may have been earned by Turner prior to default, but had not yet been paid to Turner at that time. The Court notes that, at that moment, as between Barnett and Transamerica, Barnett would have been the only one of the two "financiers" who had actually contributed cash to Turner towards the generation of the accounts receivable, and therefore logic would support the proposition that Barnett having actually provided cash used in generating the accounts receivable while Transamerica had not, as to those accounts receivable the claim of Barnett would be superior to the claim of Transamerica. (R1441)

This recognition of the bank's own equitable right to funds has been recognized by other courts as well.

In a pre-UCC decision, the Supreme Court of Missouri went so far as to state that the equity of the surety is, in fact, inferior to the equity of other creditors who have made advances to the contractor and received from the contractor assignments as security. National Security Corp. v. Fisher, 317 S.W. 2d 344 (Mo. 1958). While not going quite as far, Professor Gilmore has recognized that the bank's equitable claim is at least equal to the surety's. "Both the surety and the bank make an essential contribution to the financing of the construction job. It is hard to see that one does more than the other, or, disaster having come, has a more meritorious claim for reimbursement than the other. Both have gambled and lost." 2 G. Gilmore, supra at page 979. Another commentator has stated that, between a surety and "...a commercial lender whose extension of credit has actually gone to reduce the surety's exposure on its bonds, it is difficult at best to argue that justice demands the application of subrogation for the surety's benefit." E. Dauer, supra, at 980. In recognition of these equities the Trial Court and the Fifth District held that both parties are required to file and that the surety's "equitable" position could not supercede the bank's right to progress payments and retainage earned by the contractor prior to default.

The sureties' third argument stands their second argument on its head. The sureties maintain that filing is unnecessary because financing banks are already aware of their existence. This argument, even if the underlying premise is correct, is not

a sufficient reason to absolve the surety from the filing requirements imposed by the Code. As the Fifth District pointed out, the UCC contains no "good faith" provision entitling a prior unperfected interest to take precedence over a subsequent interest acquired with actual knowledge of the earlier interest. Transamerica Ins., 524 So.2d at 445. The lower appellate court went on to note that "A superior filing system discards knowledge as a determinant fact and instead turns on some easily determined objective event, such as the date of filing in a public office." Id.

Furthermore, the "super priority" and "secret lien" available to the surety through the doctrine of equitable subrogation should be discouraged for the negative effect it has been shown to have on a bank's willingness to make loans to contractors. E. Dauer, supra, at page 1006. The commentators have pointed out that, in the face of secret liens in favor of sureties, prudent banks are often forced to view loans to contractors as unsecured. Id., citing Robert Morris Associates, Bank-Surety Relationship: an Impasse? at 18 (RMA Occasional Paper 1971). Not surprisingly, such a position often prevents the contractor from receiving financing from a bank. Id. "The banks' lower status in the bank-surety priority disputes is having, and will continue to have, an inhibitory affect on the financing of small business contractors." Id. at 1009. By requiring that sureties file, the courts can allow banks to begin to make an educated determination of whether or not to loan to

contractors, and the UCC goals of simplifying and streamlining commercial transactions, and allowing the continued expansion of commercial practices, will be greatly facilitated. See §679.102, Fla. Stat. (1987)

Finally, the sureties maintain that filing is unnecessary given their status as subrogees to third parties. Because these third parties do not have to file, the sureties argue, neither should they. See, e.g., Brief of Amicus Curiae, Reliance Insurance Corp., Inc., et. al., at page 15-16. The surety's status as subrogee to third parties is based on its completion of the construction project after default and the creation thereby of additional "earned" contract funds. As discussed at length above, however, the bank's financing also creates funds and the bank's equitable claim to be subrogated to the rights of third parties, at least to the extent of sums generated prior to default, is equal to the surety's.

Moreover, the attempt of the sureties to equate their position to third parties such as laborers and materialmen is misleading. The sureties argue that their rights are not, as the banks are, the result of an extension of credit, but are instead the result of their completion of the contract and are more akin to the rights of laborers and materialmen. See Note, supra, 32 U. Pitt. L. Rev. at 585. The sureties conclude that their rights are not the result of the type of transaction which the Code was designed to address. Id.

That conclusion, however, ignores commercial reality. The

surety's decision to issue a bond is, in fact, virtually identical to the decision made by a bank in determining whether to loan a contractor funds. See, e.g., R. Hoffman, supra, at 395-96 (setting forth the sureties' analysis of whether to bond a job when aware of existence of a lending bank). Unlike the laborer, materialman or even the owner, the chief concern of the bank and the surety is the financial soundness and profitability of the contractor. See generally E. Dauer, supra, at 998 et. seq. (discussion of the function of surety as "screener" of contractors for financial soundness) Both the bank and the surety profit from the success of the contractor, and face serious problems if the contractor becomes financially incapable of completing the contract. Having entered into relationships with the contractor based upon the same analysis, the bank and surety should logically be treated the same in terms of perfecting their rights to accounts receivables. In short, there is simply no reason, practical or philosophical, that the surety should not be required to perfect its security interest by filing. Nothing in a surety's involvement in the construction process entitles it to preferential treatment and, indeed, equity demands a more even-handed treatment.

E. Conclusion

Clearly, the general purpose of the Uniform Commercial Code, as well as the actual practicalities of construction financing, mandate application of Code filing and perfection provisions to a surety's right to earned but unpaid contract funds. As the Fifth

District Court of Appeal held, this conclusion is proper regardless of the source of the surety's rights. The express provisions of the Code, as well as general legal and equitable principles, support a decision to uphold the Lower Court and the Fifth District Court of Appeal's holding that the surety's right to "earned but unpaid" contract funds is subject to filing and/or perfection requirements of the Uniform Commercial Code.

ISSUE 2

WHETHER THE TRIAL COURT DENIED TRANSAMERICA A SETOFF RIGHT TO WHICH IT IS ENTITLED AND IMPROPERLY ENTERED A SUMMARY JUDGMENT ON AN ISSUE NOT BEFORE THE COURT.

The Trial Court, in its Partial Summary Judgment, held that "Barnett has a superior claim to all accounts receivable and contract rights of Turner which were earned or vested, but unpaid, as of the moment of the default by Turner under any job or contract". R1343 The Court further stated that its order pertained to "those accounts receivable of Turner which were earned but unpaid as of the moment of the default by Turner under any individual job." Id. Transamerica maintains that the language contained in the above-quoted portions of the Partial Summary Judgment deprives it of a right of setoff to which it is entitled. The Trial Court's limitation of Transamerica's setoff right to a job-by-job basis is, however, a determination concerning a purely legal issue and properly the subject of Summary Judgment. Moreover, the case law clearly establishes the correctness of the Lower Court's ruling. Transamerica has no

right, legal or equitable, to setoff deficits occurring under one contract between Turner Construction and a third party against surpluses occurring under an entirely separate contract between Turner Construction and a third party.

A party's right to setoff is well established in the Florida Law. See, e.g., Lynch v. Florida Mining and Materials Corp., 382 So.2d 325 (Fla. 2d DCA 1980). The right is of statutory origin, however, and did not exist at common law. Proodian v. Plymouth Citrus Growers Association, 149 Fla. 507, 6 So. 2d 531 (1942). The cases interpreting the right to setoff have uniformally required that a mutuality of claims exists between the parties. Griffin v. Gulf Life Insurance Company, 146 So.2d 901 (Fla. 1st DCA 1962). In other words, the claims to be setoff against each other must exist between "...the same parties and in the same right." Everglade Cypress Co. v. Tunnicliffe, 148 So. 192 (Fla. 1933). A review of prior case law indicates that, in the instant case, the required mutuality of claims is non-existent and Transamerica has no right to setoff against a third party, Barnett.

In Everglade Cypress Co. vs. Tunnicliffe the Florida Supreme Court considered the right of setoff under circumstances similar to the instant case. Id. In that case the State Bank of Orlando and Trust Company ("State Bank") failed and went into liquidation. Id. at 192. At the time of its failure State Bank had approximately $55,000.00 in cash assets on deposit with Atlantic National Bank of Jacksonville, Florida ("Atlantic")

and, at the same time, owed Atlantic $200,000.00 pursuant to a demand note. Id. Atlantic set off the cash on deposit against the $200,000.00 owed it under the demand note. Id. The question before the Court was whether Atlantic had a right to so set off the funds in the face of claims by third-party creditors. Id. at 193.

The Supreme Court denied Atlantic's right to set off, pointing out that "...the very essence of and basis for setoff is mutuality of claims; that is to say claims existing between the same parties and in the same right." Id. [Emphasis added.] The Supreme Court further pointed out that a provision in the demand note securing it, in part, with funds on deposit was good only between the maker and the bank. The provision gave the bank no right to set off against a third party with claims to the funds. Id.

The circumstances in the instant case are comparable to those before the Supreme Court in Everglades. Transamerica claims a right to set off deficits arising under one construction contract between Turner Construction and a third party against a surplus arising under a separate contract between Turner Construction and a third party. The surplus is, however, properly the subject of a claim by Barnett. The Everglades Cypress Co. holding clearly indicates that this situation lacks the required mutuality of parties and of rights. The rights do not arise out of a single contract between Transamerica and Barnett. Instead, Transamerica's right arises under its

Indemnity Agreement and Barnett's right arises under its Security Agreement. Just as in Everglades Cypress Co. where Atlantic's right arose under one agreement, and the third-party creditors under another, no right of setoff exists. See also Griffin v. Gulf Life Insurance Company, 146 So.2d 901 (Fla. 1st DCA 1962)

Even if the surety had a right to apply the proceeds of one contract to a deficit arising under another, this right could only arise out of its contractual rights set forth in the bonding agreement. Even cases upholding the suretys' equitable lien have acknowledged that the surety goes to far in attempting to extend that lien beyond the immediate contract. See Travelers Indemnity Co. v. Clark, 254 So.2d 741, 747 (Miss. 1971); Transamerica Ins. v. Barnett, 524 So.2d at 450 (Sharpe, J., dissenting). The Mississippi Supreme Court has held that:

> [T]he assignment contained in the bond application may not be used to create a security interest in the proceeds of an entirely independent and different construction contract unless there is compliance with provisions of the Uniform Commercial Code. When the surety seeks to use the assignment on the bond application to reach beyond the immediate contract so as to claim a security interest in another contract involving another owner, the assignment loses its identity as an aid to the equitable lien which a surety of a defaulting contractor has. The assignment thereupon becomes, to the extent that such non-indemnification is claimed thereunder, a merely financing transaction subject to the filing requirements of the Uniform Commercial Code.

Travelers Indemnity Co., 254 So.2d at 747.

ISSUE 3

WHETHER THE TRIAL COURT'S FINDING THAT

"BARNETT FINANCED THE CONSTRUCTION ACTIVITIES OF TURNER DURING THE PERIOD OF ACTIVE OPERATION BY TURNER WITH ACTUAL CASH" AND "THAT ACTUAL CASH WAS USED BY TURNER IN THE NORMAL COURSE OF ITS BUSINESS OPERATION..." CONSTITUTES AN IMPROPER FACTUAL DETERMINATION.

A moving party is entitled to Summary Judgment "...if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact..." Fla. R. Civ. P. 1.510. In paragraph 10, page 5, of the Partial Summary Judgment, the Lower Court states that "Barnett financed the construction activities of Turner during the period of active operation by Turner with actual cash." The Court further states "that actual cash was used by Turner in the normal course of its business operation..." R1340. There is no genuine issue as to the veracity of these factual statements. This description of Barnett's financing relationship with Turner Construction is more than adequately supported by the record.

The deposition of Richard C. Andrews of Barnett Bank R762-818, of David S. Sutphin of Barnett Bank R819-899, and of John R. Brinson, Jr. R955-1011 provide adequate support for the language cited above. Each of the depositions, but particularly the first two, discusses the lending relationship between Barnett Bank of Marion County and Turner Construction. A reading of these depositions makes it abundantly clear that Turner Construction's loan arrangement with Barnett Bank was similar to a revolving line of credit. Turner Construction would pay down the loans as

accounts receivable came in and would, between such pay downs, increase the loan amounts as draws were made to cover normal operating expenses. Specific reference to this scenario appears in the deposition of John R. Brinson, Jr. which contains the following questions and responses:

> Q. Had you a history of drawing up and down loans with Barnett?
>
> A. Yes.
>
> Q. Okay. And were those loans drawn up and down on a frequent basis?
>
> A. Yes.
>
> Q. Okay. And I would be correct in stating that the loans tended to draw up when you were not getting receivables in from the State and were paid with some portion of your receivables?
>
> A. Certainly. R1004

In addition to the above-referenced material, the deposition of David Sutphin contains the following questions and responses

> Q. How did Turner pay its bills then if Barnett Bank paid down all receivables -- took all receivables of Turner?
>
> A. Mr. Morris, that's the nature of an operating line of credit. Their payable cycle and receivable cycle-- they would simply collect money at one time, and then throughout the month they would advance on a line of credit to meet their payables. It minimizes the interest cost.
>
> Q. Okay.
>
> A. It was a very standard operating procedure for months and months with the company. R849

The attorney for Transamerica, in his questioning of Mr. Sutphin, himself expressed an understanding of this situation in the following dialogue:

Q. If the receivables came into the control account and the bank refused to advance any more funds, it's certainly logical to conclude that the company would have no operating funds; is that not correct?

A. That's the logical conclusion but one subject to a lot of -- there are so many circumstances. There's a lot of what goes into that assumption. R892

Finally, the Memorandum to the Executive Committee of Barnett, attached as Defendant's Exhibit No. 5 to the deposition of David S. Sutphin, clearly recognizes that the loans of Barnett Bank were to be used to "...keep payables current, meet payrolls and service debt... [and] to meet the cash requirements." R980

From the above citations, as well as a general reading of the depositions appearing in the record, there clearly exists adequate factual support for the Trial Court's statement that "Barnett financed the construction activities of Turner during the period of active operation by Turner with actual cash" and "that actual cash was used by Turner in the normal course of its business operation..." R1340 The extent to which all parties accepted this arrangement as a factual basis for the Motion for Summary Judgment is indicated by the transcript of said proceedings. R1067-1129 At no time during the hearing on Summary Judgment did Transamerica, by its attorney, object to Barnett's description of its financing relationship with Turner Construction. See, e.g., R1087-1090; R1092.

No evidence has been presented, or exists in the record, to refute the Trial Court's statements. In its discussion of this issue Transamerica cites numerous documents indicating that Turner Construction was not paying its business related bills as

they became due. This is the only support that Transamerica offers for its position that the Court lacked an adequate basis for its statement that "Barnett financed the construction activities of Turner during the period of active operation by Turner with actual cash." Whether or not Turner was paying its debts as they became due, however, has little to do with the use to which Turner was putting funds received from Barnett. Quite obviously Turner Construction could have been using the actual cash supplied by Barnett in the normal course of its business operations, as the deposition testimony indicates, while still failing to pay all of its business related bills as they became due.

In conclusion, there was abundant evidence for the Trial Court to conclude that "Barnett financed the construction activities of Turner during the period of active operation by Turner with actual cash" and that "that actual cash was used by Turner in the normal course of its business operations..." R1340 In addition, there is no evidence to suggest that this is an inaccurate representation of Barnett's financing relationship with Turner. The letter of Mr. Robert Morris, counsel for Transamerica, protesting the inclusion of the above statements in the Summary Judgment clearly shows that this issue was brought specifically to the Trial Court's attention. R1324-1327 The Trial Court's retention of these statements in its Final Order indicates that it determined that no genuine issue of fact existed.

ISSUE IV

WHETHER THE WRIT OF CERTIORARI FOR CONFLICT JURISDICTION WAS IMPROVIDENTLY GRANTED BY THIS COURT.

This Court has discretionary jurisdiction to review a district court of appeal's decision that expressly and directly conflicts with a decision of another district court of appeal or of this Court on the same question of law. Fla. R. App. P. 9.030(a)(2)(A)(IV). In order to establish the Supreme Court's jurisdiction based upon the conflict, the decision of the district court must conflict, on its face, with a prior decision of another district court or the Supreme Court of Florida "on the same point of law so as to create an inconsistency or conflict among the precedents." Kincaid v. World Insurance Company, 157 So.2d 517 (Fla. 1963) The Fifth District Court of Appeal's decision in the instant case does not present such a conflict. Indeed, even the dissenting opinion relied on extensively by the Petitioner includes a statement that "...no Florida post-U.C.C. court decisions are on point". Transamerica Ins. v. Barnett Bank, 524 So. 2d at 450 (Sharpe, J., dissenting). Because the Fifth District decision concerns a different point of law, interpretation of the UCC, no conflict can arise. See Kyle v. Kyle, 139 So.2d, 885, 887 (Fla. 1962).

Obviously, the Fifth District has enunciated a rule of law quite different from that set forth in prior Florida decisions. The rules of law do not conflict, however, but are the result of interpreting and applying a previously non-existent statute to a

similar fact pattern. The existence of the Uniform Commercial Code was clearly the basis for the Fifth District's arrival at a different end result in the contractor/surety dispute. The District Court noted that adoption of the Code altered the surety's position since, "having the convenient and practical remedy of filing its security agreement under the U.C.C., the surety company is not entitled to disregard it and rely on the remedy of equitable subrogation to ambush a financing bank which has dutifully filed its security interest as provided by law" Transamerica, 524 So.2d at 446. Reliance upon a previously non-existent statute to arrive at a different result is not sufficient under the express language of Florida Rule of Appellate Procedure 9.030 to provide the necessary conflict. See Ellsworth v. Nash Miami Motors, Inc., 142 So.2d 733 (Fla. 1962); see also In Re. D. A. W., 193 So.2d 433 (Fla. 1967). The decision of the Fifth District Court is, in fact, one of first impression and is not reviewable by certiorari, absent some constitutional ground other than conflict. See Nash, 142 So. 2d at 734.

Based on the foregoing, Respondent respectfully requests that this Court reconsider its decision to exercise its discretionary jurisdiction to review the decision of the Fifth District Court of Appeal.

ISSUE V

WHETHER THE DISTRICT COURT'S DECISION SHOULD BE APPLIED RETROACTIVELY SINCE IT IS CONTRARY TO PRIOR CASE LAW.

Amicus Curiae, Reliance Insurance Company, United Pacific Insurance Company, and Planet Insurance Company maintain that the District Court's decision should not be applied retroactively. This issue has not been raised in prior proceedings and cannot, therefore, be considered in this Court. Furthermore, the cases cited by the Amicus Curiae in support of their position are not sufficiently analogous to the instant case to warrant departure from the general rule that a court decision will act both retroactively and prospectively.

The issue of whether the Fifth District Court of Appeal's ruling should be applied retroactively has not previously been raised, either before the Trial Court or the Court of Appeal. It is axiomatic that "...the appellate courts will not consider an issue that has been raised for the first time on appeal." P. Padovano, 2 Florida Appellate Practice, Vol. 2 at 81 (1988) "The function of the appellate courts is to review only the actual decisions of the lower tribunals..." and not to decide issues that were not ruled on by the lower courts. Id. (emphasis in original) at 83. For this Court to address the issue of retroactive application of the lower court's rulings would be, therefore, improper.

Moreover, an appellate court is not entitled to consider issues raised, not by the parties, but by an amicus curiae. In Keating v. State of Florida, ex. rel. Ausebel the First District Court of Appeal acknowledged that an "...amicus is not at liberty to inject new issues in a proceeding..." 157 So.2d 568 at 569

(Fla. 1st DCA 1963). This statement of the law was later confirmed by this Court in a decision striking a brief of amicus curiae as a result of the inclusion of matters not raised by the parties. Dade County v. Eastern Airlines, Inc., 212 So.2d 7 (Fla. 1968) Based on the above rulings, the issue of the retroactive application of the Fifth District Court of Appeal's decision should not, and cannot, be addressed by this Court. See also Acton, II v. Ft. Lauderdale Hospital, 418 So. 2d 1099 (Fla. 1st DCA 1982)

Under any circumstances, the District Court's ruling should be applied retroactively, as well as prospectively. Ordinarily a decision of a court, even a decision of a court of last resort which overrules a previous decision, operates retrospectively as well as prospectively. Florida Forest and Park Service v. Strickland, 18 So.2d 251, 253 (Fla. 1944) The Florida courts have recognized only a very narrow exception to this rule "...where a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such right should not be destroyed by giving to a subsequent overruling decision a retrospective operation." Id. This rule of law does not apply to the instant case.

The sureties have cited no decisions by the court of supreme jurisdiction of this state which has been overruled by the decision of the Fifth District, or could be overruled by this Court. The Supreme Court of Florida has simply never been called

upon to resolve the bank/surety dispute in the context of the Uniform Commercial Code. The Amicus Curiae attempts to apply to the instant case a three part analysis promulgated by the United State Supreme Court and cited with favor by a Florida district court of appeal. See International Studio Apartment Association, Inc. v. Lockwood, 421 So.2d 1119, 1121 (Fla. 4th DCA 1982) citing Chevron v. Hutson, 404 U.S.97, 107-07, 92 S. Ct. 349, 355-356, 30 L. Ed. 2d 296, ____ (1971) The Fourth District Court of Appeal made clear, however, that all three parts of the U.S. Supreme Court analysis must be met. International Studio, 421 So.2d at 1121. In the present case, however, the surety has clearly failed to met the third test set forth.

In order to limit a ruling's retroactive application, the court must determine that the decision will produce substantial inequitable results if applied retroactively. There is nothing inequitable, however, about retroactively applying the Code filing requirements. First, the surety's have been well aware of the lending industry's position that their right of equitable subrogation is subject to the filing requirements of the Code. See Brief of Amicus Curiae, Reliance Insurance Company, et. al., at 8 ("Over the years, the banks have relentlessly continued to attack the surety's priority to the contract funds...") In the face of this dispute, however, the sureties have refused to take the simple and inexpensive step of filing necessary to fully perfect their position, having concluded that to file might somehow be viewed as a voluntary relinquishment of their right of

equitable subrogation. Note, supra, 32 U. Pitt. L. Rev. at 585. Knowing full well the disputed nature of their position, the sureties have made a conscious decision not to incur the minimal expense necessary to absolutely protect themselves. They are not the "innocent" party whom the courts have previously sought to protect from the retroactive application of unexpected decisions, see, e.g., Florida Forest, 18 So.2d at 253, and there is nothing inequitable about requiring that they live with the results of their decision. Therefore, the Respondent requests this Court follow the general rule and that the ruling of the Fifth District Court of Appeal be upheld, and be held to apply both retrospectively and prospectively.

CONCLUSION

The Respondent, Barnett, initially requests this Court reconsider its decision to exercise its discretionary jurisdiction. The Briefs of the parties and amicus curiae make abundantly clear that this is a case of first impression in Florida, and no conflict exists between the Fifth District's decision and any decision of another district court of this State or of this Court.

Respondent respectfully requests this Court uphold the Partial Summary Judgment in favor of Plaintiff, Barnett Bank of Marion County, N.A. and uphold the Trial Court's denial of Partial Summary Judgment in favor of Transamerica Insurance Company. The Trial Court properly found that Barnett Bank has a prior right and claim to "earned but unpaid" remaining contract funds in light of Transamerica Insurance Company's failure to properly perfect its security interest in said funds.

The Respondent also requests this Court uphold the Trial Court and the Fifth District's determination that, as a matter of law, Transamerica Insurance Company has no right to set off contract deficits against contract surpluses arising out of entirely separate contracts in face of Barnett's claims to said funds.

Barnett Bank of Marion County, N.A., further requests this Court deny Transamerica's request to strike the Trial Court's

finding that "Barnett financed the construction activities of Turner during the period of active operation by Turner with actual cash" and "that actual cash was used by Turner in the normal course of its business operation..." as said factual statements are adequately supported by the record and no evidence exists in the record to the contrary.

Finally, Barnett requests this Court refrain from ruling on the issue of retroactive application of the Fifth District Court of Appeal's decision, raised for the first time by an amicus curiae. This issue has not been timely presented, nor is an amicus curiae entitled to interject new issues into an appeal. Should this Court determine a ruling is justified, Barnett believes that retroactive application of the District Court's decision is proper and equitable.

Respectfully submitted,

GREEN AND SIMMONS, P.A.
Post Office Box 3310
Ocala, FL 32678
(904)732-8121
Attorney for Respondents

By:
Tim D. Haines

CERTIFICATE OF SERVICE

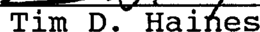
I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail this 24th day of October, 1988 to each of the following:

Robert E. Morris, Esquire
Morris and Rosen, P.A.
Suite 1100 Freedom Savings Building
220 East Madison Street
Tampa, FL 33602
(Attorney for Transamerica Insurance Company)

Frederick B. Karl
Thomas J. Maida
Patricia Hart Malono
Karl, McConnaughhay, Roland & Maida, P.A.
Post Office Drawer 229
Tallahassee, FL 32302-0229
(Attorney for Amicus Curiae, American Insurance Assoc.)

David T. Knight
Jeanne T. Tait
Shackleford, Farrior, Stallings & Evans, P.A.
Post Office Box 3324
Tampa, FL 33601
(Attorney for Amicus Curiae, Reliance Insurance Company, United Pacific Insurance Company and Planet Insurance Company)

GREEN AND SIMMONS, P.A.
Post Office Box 3310
Ocala, FL 32678
(904)732-8121
Attorney for Respondents

By: 
Tim D. Haines

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