

SUPREME COURT OF FLORIDA

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CASE NO. 77,286

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AMERICAN HOME ASSURANCE COMPANY

Petitioner,

v.

LARKIN GENERAL HOSPITAL, LTD., etc.

Respondent.

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ON DISCRETIONARY REVIEW UPON CERTIFIED CONFLICT  
FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

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PETITIONER'S INITIAL BRIEF ON THE MERITS

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KIMBRELL & HAMANN, P.A.  
SUITE 900, BRICKELL CENTRE  
799 BRICKELL PLAZA  
MIAMI, FLORIDA 33131

James F. Crowder, Jr., Esquire  
J. Steven Hudson, Esquire

KIMBRELL & HAMANN, P.A.

SUITE 900 BRICKELL CENTRE, 799 BRICKELL PLAZA, MIAMI, FLORIDA 33131-2805 • TELEPHONE (305) 358-8181

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**STATEMENT OF CASE AND FACTS**

**A. NATURE OF THE CASE, ISSUE PRESENTED,  
AND PRELIMINARY STATEMENT**

The Third District Court of Appeal in its opinion filed below certified conflict with the First District Court of Appeal on the following legal issue:

**ISSUE PRESENTED: WHETHER THE SURETY'S PERFORMANCE BOND PROVIDES COVERAGE FOR CONSEQUENTIAL DELAY DAMAGES SUSTAINED BY AN OWNER DUE TO A CONTRACTOR'S DEFAULT.**

Petitioner seeks review of the appellate court's ruling on this issue.

The underlying suit is a contract action brought by an owner against a surety that bonded a construction project. The Petitioner and Defendant below is the surety, AMERICAN HOME ASSURANCE COMPANY, and is referred to herein as "AMERICAN". The Respondent and Plaintiff below is the owner of the project and bond obligee, LARKIN GENERAL HOSPITAL, LTD., and is referred to herein as "LARKIN". The contractor on the project and principal on the performance bond, H CORPORATION/CAZO ARDAVIN JOINT VENTURE II, is referred to as "Contractor".

Items in the record on appeal are referenced as "R.", followed by the record volume and page numbers. The transcript of the hearing and trial held March 6, 1990 is referenced as Volume III of the record: e.g., "R.III-6" references page number 6 of the trial transcript. Trial exhibits are referenced as "Tr.Exh.", followed by the exhibit number or letter.

**B. STATEMENT OF FACTS**

On December 15, 1982, LARKIN and Contractor entered into a contract for the construction of improvements at the Larkin General Hospital in Dade County, Florida. R.II-157. AMERICAN was the surety on the project. Id. The project was to commence on or about January 1, 1983. R.II-157.

Under the terms of the construction contract, the project was scheduled to be substantially completed by May 31, 1984. R.II-157. As of May 31, 1984, Contractor's progress on the project was slightly over eighty percent complete. R.II-160 ; R.III-147. At that time, however, LARKIN did not terminate Contractor or notify surety of Contractor's default. Eighteen (18) months later, on November 23, 1985, LARKIN notified AMERICAN of the default and terminated Contractor. R.II-158 ; R.III-48. LARKIN inexcusably waited, in the words of its representative, to the point "of no return" before notifying AMERICAN. R.III-86.

Because of the eighteen- month delay in the construction progress that had transpired between the anticipated completion date and the receipt of notice of default from LARKIN, AMERICAN ultimately elected not to complete the project, accepting that it would be responsible to LARKIN for the costs of completion. R.III-29-30, 34. LARKIN then completed the project by June 1986. R.II-158.

### C. COURSE OF PROCEEDINGS

#### 1. LARKIN's Proceedings with Contractor.

On April 10, 1986, Contractor served a Demand for Arbitration to resolve before the American Arbitration Association its disputes with LARKIN under the construction contract.<sup>1/</sup> Tr.Exh.3. AMERICAN was not even mentioned in the Demand for Arbitration. Id.

On May 20, 1986, LARKIN served an Answer ( Tr.Exh.4 ) and a Counterclaim against Contractor ( Tr.Exh.5 ) in the American Arbitration Association proceedings between LARKIN and Contractor. As with Contractor's pleading, there was no mention of AMERICAN in the pleadings filed by LARKIN in the LARKIN - Contractor arbitration proceedings. Tr.Exhs. 4 & 5. The pleadings filed by the parties to the arbitration proceedings did not raise the issue of the surety's coverage under the performance bond for consequential delay damages. See Tr. Exhs. 3, 4, & 5. <sup>2/</sup>

The Contractor-LARKIN dispute was submitted to the arbitration panel for a hearing on the merits, with LARKIN and Contractor as the sole participants. R.II-158,159. The arbitration proceedings

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<sup>1/</sup> Later, in 1987, Contractor filed suit in Dade County circuit court against LARKIN ( Case No. 87-04340 ) to foreclose on a mechanics lien. Ultimately, after the arbitration resulted in an award, upon LARKIN's motion the mechanics lien action was consolidated with LARKIN's action against AMERICAN. R.I-32.

<sup>2/</sup> The arbitration pleadings "unambiguously set forth the issues ... which were the subject of the arbitration proceeding: whether contractor breached the contract; whether contractor timely performed the contract; whether contractor was properly terminated; and damages." LARKIN's Answer Brief, p.9 (also p.5), filed in the third district court of appeals.



determined all disputes between LARKIN and Contractor, i.e. all disputes arising under the construction contract. R.II-159 ; and see fn. 2, *infra*. The performance bond was not introduced into evidence, and was not an exhibit, in the LARKIN - Contractor arbitration proceedings. R.II-160.

In the arbitration proceeding, LARKIN filed a statement of claim against Contractor for \$201,945.76 in costs of completion over the contract balance and \$5,832,000 in consequential damages for delay to the project.<sup>3/</sup> R. II-161 ; Tr.Exh.F.

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<sup>3/</sup> The consequential damages claimed by LARKIN were as follows:

- a. Surgical Suite lost profits: \$801,000.00. LARKIN claimed a seven month delay in the opening of the hospital's surgical suite. The surgical suite opened in July, 1985, prior to LARKIN's notice of default and termination of Contractor.
- b. Psychiatric Unit lost profits: \$524,000.00. LARKIN claimed a ten month delay in the opening of the hospital's psychiatric unit. The psychiatric unit opened in March, 1985, prior to LARKIN's notice of default and termination of Contractor.
- c. Project in its Entirety, lost profits: \$4,348,000.00. The project was completed in June of 1986, a period of twenty-five (25) months after the original completion date, and seven (7) months after LARKIN's notice of default and termination of Contractor.
- d. Lost interest on note for hospital's sale: \$159,000.00. LARKIN incurred a three month delay between the date of the sale of the hospital and the date that a Certificate of Occupancy for the hospital was obtained. The purchaser refused to pay the interest on the note covering the hospital's purchase for the time that there was no Certificate of Occupancy.

R.II-161 & 162; Tr.Exh. F.

In March of 1988, the arbitration panel entered an arbitration award of \$194,000 to Contractor and \$2,054,545 to LARKIN, resulting in a net award to LARKIN of \$1,860,545. Tr.Exh.6.

**2. LARKIN's Proceedings with AMERICAN.**

**A. In the trial court.**

In February 1986, LARKIN instituted this action against AMERICAN for breach of the performance bond.

A default was sought by LARKIN, and on June 16, 1986 a default was entered. R.I-9. AMERICAN subsequently filed a verified motion to vacate the default ( R.I-10 ) and later filed an amendment thereto that included a proposed Answer, Affirmative Defenses, and Counterclaim. R.I-33. On August 10, 1988 an order was entered granting the motion to vacate default. R.I-48.

In its affirmative defenses and counterclaim, AMERICAN opposed LARKIN's action with various personal defenses; these defenses were not within the scope of the LARKIN - Contractor construction contract issues determined in their arbitration proceeding. R.I-36. One of AMERICAN's personal defenses was a limitation of liability to the costs of completion under the terms of the performance bond. R.I-37 ; R.II-164. <sup>4/</sup> Moreover, AMERICAN by its

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<sup>4/</sup> AMERICAN also raised as a personal defense the prejudice it suffered due to the eighteen-month delay (between the May 31, 1984 scheduled completion date and the November 1985 notice of default and termination from LARKIN) in LARKIN's furnishing of a notice of default to AMERICAN. R.II-149 & 153 ; R.II-163. Despite a trial on this issue, the trial court failed to reach the merits of the defense since it concluded that AMERICAN was bound by the arbitration award obtained against Contractor in its entirety.

counterclaim sought a declaratory decree that the performance bond does not provide coverage for consequential delay damages. R.I-37. On January 2, 1987, having already filed the verified motion to vacate the default one month earlier, AMERICAN filed a motion to dismiss or abate the action pending the resolution of the LARKIN - Contractor arbitration proceedings. R.I-29. No order was ever entered on the motion to dismiss or abate. Nevertheless, the case was inactive for more than one year.

After obtaining the favorable (net) arbitration award against Contractor, LARKIN moved for consolidation of the two circuit court actions, Contractor v. LARKIN and LARKIN v. AMERICAN. On April 19, 1988 the trial court consolidated the two cases. R.I-32.

Following consolidation, LARKIN filed an application to confirm the award against both Contractor and AMERICAN, even though AMERICAN was not named in the award. R.I-44. On March 6, 1990, a hearing and trial were conducted, whereupon the trial court granted LARKIN's application to confirm the arbitration award against AMERICAN. R.II-250. The trial court held that AMERICAN was bound by the arbitration award on all issues.<sup>5/</sup> R.II-237; R.II-249.

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<sup>5/</sup> Earlier, by order filed February 1, 1990, the trial court had denied AMERICAN's motion for partial summary judgment on the issue of coverage for consequential damages raised by AMERICAN's counterclaim for declaratory relief. R.II-136. After the March 6, 1990 hearing, the trial court made the following conclusions of law:

1. AMERICAN HOME's liability to LARKIN on the Bond is not limited to cost of completion; AMERICAN HOME's liability includes consequential (i.e., delay) damages that are due LARKIN for breach of the construction contract.

A Final Judgment was entered, dated March 22, 1990 and filed March 24, 1990 ( R.II-210 ), as revised by the Corrected Final Judgment dated April 17, 1990. R.II-245. The amount of the Corrected Final Judgment was \$2,314,579.58.

**B. On appeal.**

On April 23, 1990, AMERICAN filed its Notice of Appeal of the adverse final judgment. R.II-240. AMERICAN also filed a notice of appeal on an order assessing attorney's fees ( R.II-244 ), and the two appeals were consolidated by the district court.

The district court affirmed, per curiam, the trial court's final judgment in an opinion filed October 23, 1990. On November 5, 1990, AMERICAN filed a motion for certification of conflict with the decision of the First District Court of Appeal in **United States Fidelity and Guaranty Company v. Gulf Florida Development Corporation**, 365 So.2d 748 (Fla. 1st DCA 1978). On December 26, 1990, the district court filed its (revised) opinion, on the motion for certification of conflict. In that opinion, the district court certified conflict with the First District Court of Appeal:

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2. The Arbitration Panel determined the amount of damages due LARKIN under the construction contract, and AMERICAN HOME is bound by that determination having had notice of the proceeding and having had the opportunity to participate.

R.II-249.

While our decision herein is in accordance with the Fourth District Court of Appeal's decisions in Arbor Club [of Boca Raton, Inc. v. Omega Construction Co.], 565 So.2d at 357 [Fla. 4th DCA 1990], and [St. Paul Fire & Marine Ins. Co. v.] Wooley/Sweeney [Hotel No. 5], 545 So.2d at 958 [Fla. 4th DCA 1989], inasmuch as both cases held, as we do, that a surety on a performance bond can be held liable for delay damages due the property owner under a construction contract, we certify conflict with the First District Court of Appeal's decision in United States Fidelity & Guar. Co. v. Gulf Florida Dev. Corp., 365 So.2d 748 (Fla. 1st DCA 1978), which held to the contrary.

On January 16, 1991, AMERICAN filed its Notice to Invoke Discretionary Jurisdiction for review of the certified conflict between the district courts of appeal.

## SUMMARY OF ARGUMENT

The First District Court of Appeal in **United States Fidelity and Guaranty Company v. Gulf Florida Development Corporation**, 365 So.2d 748 (Fla. 1st DCA 1978) recognized that a surety on a performance bond is not liable for more than the reasonable cost of completion in the event of the contractor's default. As a matter of law, a performance bond surety is not liable to an owner for consequential delay damages incurred by the owner due to the bonded contractor's default.

The above-stated rule of law, recognized by the First District Court of Appeal, properly limits the coverage of the surety to its contractual undertaking. For over a decade, the rule enunciated in **Gulf Florida**, recognizing that delay damages are not recoverable against a performance bond surety, was the law of the land in Florida. The First District in **Gulf Florida** enunciated the appropriate rule of law, consistent with the surety's contractual undertaking, unlike recent district court decisions in conflict.

AMERICAN is not liable under its bond for consequential delay damages. The coverage issue of whether the performance bond provides coverage for such consequential damages was not determined by the arbitrators. However, the arbitration award that LARKIN obtained against Contractor included consequential delay damages. Accordingly, the district court erred in affirming the trial court's confirmation of the arbitration award in its entirety, inclusive of consequential delay damages, and entering judgment thereon against AMERICAN.

## ARGUMENT

### I.

#### **THE PERFORMANCE BOND DOES NOT PROVIDE COVERAGE TO THE OWNER FOR DELAY DAMAGES INCURRED DUE TO THE CONTRACTOR'S DEFAULT.**

**1. Performance Bond Coverage Is Limited To The Costs Of Completion. United States Fidelity And Guaranty Company v. Gulf Florida Development Corporation, 365 So.2d 748 (Fla. 1st DCA 1978).**

AMERICAN's performance bond, pursuant to its terms, provides coverage to the owner (the bond obligee, in this case LARKIN) limited to the direct costs of completion or remedial work in excess of the contract price. **United States Fidelity And Guaranty Company v. Gulf Florida Development Corporation**, 365 So.2d 748 (Fla. 1st DCA 1978). The district court erroneously concluded that the coverage provided by AMERICAN's performance bond included consequential damages for delay.

A bond is a contract subject to the general law of contracts. **United States v. James A. Mack**, 295 U.S. 480 (1935); **Crabtree v. Aetna Casualty and Surety Co.**, 438 So.2d 102 (Fla. 1st DCA 1983). Contract law recognizes that the intention of the parties governs, as determined by the language used and the object to be accomplished. **Bal Harbour Shops, Inc. v. Greenleaf & Crosby Co.**, 274 So.2d 13 (Fla. 3d DCA 1973).

A hundred years ago, the Florida Supreme Court in **Robinson v. Epping**, 24 Fla. 237, 4 So. 812, 822 (1888), stated a corollary principle applicable to suretyship:

A surety does not undertake to do more than is expressed in his obligation and [the surety] has the right to stand upon the strict terms of the same as to his liability thereon. It is not to be implied that [the surety] has undertaken more than is within the precise terms of his undertaking.

(citations omitted). In **Gato v. Warrington**, 37 Fla. 542, 19 So. 883, 884 (1896), the Florida Supreme Court again recognized that coverage provided by a surety is determined by the terms of its bond:

The rule is well settled that the liability of a surety is not to be extended by implication, beyond the terms of his contract; and to the extent, in the manner, and under the circumstances pointed out in his undertaking that he is bound no further.... The sureties have a right to stand upon the strict terms of their engagement ....

**Accord**, **Parrish v. Board of Public Instruction**, 82 Fla. 11, 89 So. 317 (1921); **J.B. McCary Co. v. Dade County**, 80 Fla. 652, 86 So. 612, 617 (1920); **Crabtree v. Aetna Casualty and Surety Company**, 438 So.2d 102 (Fla 1st DCA 1983); **State of Florida v. Wesley Construction Co.**, 316 F. Supp. 490, 497 (S.D. Fla. 1970).

In **United States Fidelity & Guarantee Co. v. Gulf Florida Development Corp.**, 365 So.2d 478 (Fla. 1st DCA 1978), the First District Court of Appeal followed these rules of law to determine the scope of coverage provided by a bond identical to the one issued by AMERICAN. The First District Court of Appeal in **Gulf Florida** held that under the provisions and terms of the bond the owner's damages were limited to the costs of completion in excess



of the contract price. After quoting the bond's language, the First District in **Gulf Florida** acknowledged:

The terms of the bond control the liability of [the surety] .... [U]nder the above-stated provisions of the bond, the damages recoverable from [the surety] are limited to the cost of completion and the cost of curing any defective work performed by [the contractor].

365 So.2d. at 751. The First District held that it was error to award damages against the surety for costs caused by delay in completion of the contract. *Id.*

The First District Court of Appeal in **Gulf Florida**, follows the traditional rule of law regarding the surety's performance bond obligations. "[H]istorically, performance bonds guarantee the completion of the bonded contract, and a surety thereon will generally pay no more than the reasonable cost of completion in the event of the contractor's default." **Arbor Club of Boca Raton Inc., Ltd. v. Omega Construction Company, Inc.**, 565 So.2d 357, 360 (Fla. 4th DCA 1990) (citing Sobel, **Owner Delay Damages Chargeable to Performance Bond Surety**, 21 Cal. W.L. Rev. 128 (1984)).

The law followed by the First District Court of Appeal in **Gulf Florida**, recognizes that the intent of the parties as expressed in the performance bond will govern the surety's obligations on its bond. The performance bond is solely intended to assure that the owner will not have to pay to complete the construction project in the event the contractor defaults. And that is all that the bond covers. Period. The surety's performance bond is not underwritten

to provide protection to the owner from any and all losses sustained due to a contractor's default.

The applicable language in the bond states as follows:

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that, if Contractor shall promptly and faithfully perform said Contract, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

Whenever Contractor shall be, and declared by Owner to be in default under the Contract, the Owner having performed Owner's obligations thereunder, the Surety may promptly remedy the default, or shall promptly -

1. Complete the Contract in accordance with its terms and conditions, or

2. Obtain a bid or bids for completing the Contract in accordance with its terms and conditions, and upon determination by surety of the lowest responsible bidder, or, if the Owner elects, upon determination by the Owner and the Surety jointly of the lowest responsible bidder, arrange for a contract between such bidder and Owner, and make available as Work progresses (even though there should be a default or a succession of defaults under the contract or contracts of completion arranged under this paragraph) sufficient funds to pay the cost of completion less the balance of the contract price; but not exceeding, including other costs and damages for which the Surety may be liable hereunder, the amount set forth in the first paragraph hereof. The term "balance of the contract price," as used in this paragraph, shall mean the total amount payable by Owner to Contractor under the Contract and any amendments thereto, less the amount properly paid by Owner to Contractor.

Tr.Exh. 2. The surety's obligations are specifically stated in the bond: Upon receipt of notice of default by the bond obligee and upon the principal's default, the surety is to complete the project or pay the costs of the completion in excess of the contract price. This is the sum and substance of the coverage provided by the performance bond triggered by the contractor's default, pursuant to the express obligations set forth in the bond.

If the surety completes the project or pays the owner its completion costs that exceed the contract price, then the surety is not in breach of its bond obligation (even though the contractor is clearly in breach of the construction contract). Instead, the surety's bond obligation upon contractor's default is satisfied by the surety's act of either completing the project or paying completion costs. In such circumstances, since the surety is not in breach of the performance bond it is not liable to the owner for damages. No damages because no breach (of the performance bond), though the owner may be entitled to consequential delay damages against the contractor for the contractor's breach of the construction contract.

If the surety fails to complete the project or fails to pay the owner its completion costs in excess of the contract price, then the surety has breached its performance bond obligation. The owner (as it did here) is entitled to bring an action against the surety for breach of the performance bond. However, the surety's breach of its bond obligation to complete or pay does not entitle the owner to recover more than its completion costs.<sup>6/</sup> The owner is not entitled to more (from the surety) than the benefit of its (performance bond) bargain. As in the instance where the surety duly performs its bond obligation, the owner is not entitled to anything from the surety other than (a) a completed project or (b) completion costs.

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<sup>6/</sup>Although by statute, of course, the surety may also be responsible for attorneys fees and court costs. These are extracontractual obligations imposed by the legislature.

The scope of coverage provided by the performance bond is not determined by whether the surety performs its obligation (i.e., completes or pays) upon default of the contractor. The performance bond does not provide coverage for the owner's delay damages due to contractor's default in those instances where the surety completes (or pays completion costs). Likewise, the bond does not provide coverage for such consequential damages where the surety has not completed (or paid completion costs).

AMERICAN's bond obligation is limited to LARKIN's costs of completion in excess of the contract balance. **Gulf Florida, supra.** AMERICAN's performance bond is identical to that at issue in **Gulf Florida**. R.I-82; Tr.Exh. 2; 365 So.2d at 750-51. AMERICAN is entitled to stand upon the terms of its contractual agreement. The performance bond's coverage does not include consequential damages for delay incurred by the owner due to the contractor's default.

**2. Performance Bond Coverage Has Been Erroneously Expanded By Some Florida District Courts To Include Consequential Delay Damages Incurred By An Owner Due To The Contractor's Default.**

The Fourth District Court of Appeal in **St. Paul Fire & Marine Insurance Co. v. Wooley/Sweeney Hotel No. 5**, 545 So.2d 958 (Fla. 4th DCA 1989), review denied, 553 So.2d 1166 (Fla. 1989), announced that a surety is liable for consequential delay damages. The **Wooley/Sweeney** court did so without any reasoning whatsoever in its opinion.<sup>7/</sup> **Wooley/Sweeney**, in direct conflict with **Gulf Florida**, deviates from the longstanding recognition of Florida courts that a surety is entitled to stand upon the express terms of its performance bond.

The Fourth District later, in **Arbor Club of Boca Raton Inc., Ltd. v. Omega Construction Company, Inc.**, 565 So.2d 357, 360 (Fla. 4th DCA 1990), provided some reasoning, however flawed. The **Arbor Club** court noted that it was required to honor its previous decision

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<sup>7/</sup> The trial court in its order denying partial summary judgment ( R.II-137 ) claimed that "the Fourth District's opinion in **Wooley/Sweeney** is the better reasoned and more compelling rule of law" on the delay damages coverage issue. The trial court overlooked what is readily apparent from reading **Wooley/Sweeney**: the Fourth District Court of Appeal did not provide any "reasoning" when it summarily concluded that the surety was to be liable for delay damages. See 545 So.2d at 959. In contrast, the First District Court of Appeal in **United States Fidelity and Guaranty Company v. Gulf Florida Development Company**, 365 So.2d 498 (Fla. 1st DCA 1978) carefully considered the language contained in the performance bond, whereupon it decided that the surety is not liable for damages resulting from the contractor's delay to project completion.

in **Wooley/Sweeney, supra**. 565 So.2d at 359. The **Arbor Club** court also claimed that it was following a "trend" that expands the performance bond coverage to include delay damages. 565 So.2d at 360. The **Arbor Club** case **AMERICAN** respectfully submits that any such "trend" is unwarranted and contrary to the surety's undertaking in the performance bond.

In **Arbor Club**, the Fourth District favored "the broadening of coverage" in reliance upon the California appellate case of **Amerson v. Christman**, 261 Cal.App.2d 811, 68 Cal.Rptr. 378 (Cal. 1968). See 565 So.2d at 360. Yet the First District in **Gulf Florida, supra**, decided ten years after **Amerson**, did not follow the lead of the California appeals court. Unlike the Fourth District a decade later, the First District chose not to (in the words of **Arbor Club**, 565 So.2d at 360) "enlarge and broaden the obligations of the surety."

Moreover, the **Arbor Club** opinion itself reflects a significant flaw in the reasoning of the **Amerson** court. The Fourth District in **Arbor Club** quoted a commentator's criticism that specific bond language relied upon in **Amerson** to find the surety liable for delay damages was obviously intended to limit the surety's liability, not expand it:

. . . The [Amerson] court bolstered its conclusion by pointing to the following language in the bond: "[Surety] is obligated to make available sufficient funds to pay the cost of completion less the balance of the contract price; but not exceeding, including other costs and damages for which the surety may be liable hereunder, the amount set forth above".

The court did not say why this language made the surety liable. It is obvious that the provision was intended to limit the surety's liability, not extend it. In any event, the court concluded that [Surety] was "equally liable" with Christman for damages "consequentially caused by the contractor's breach," primarily damages for delay.

565 So.2d at 1863, quoting Sobel, **Owner Delay Damages Chargeable to Performance Bond Surety**, 21 Cal. W.L. Rev. 128 (1984). The California appeals court in **Amerson** took a contractual phrase intended to limit the surety's liability, and used that phrase to expand coverage to include consequential damages arising from a contractor's default.

Finally, the **Arbor Club** court acknowledged the existence of "persuasive authority to the contrary, i.e., that a performance bond like the present one is not intended to cover consequential damages, such as damages for delay." 565 So.2d at 360. Nevertheless, having already decided the issue in **Wooley/Sweeney, supra**, the Fourth District followed its previous ruling. The Third District below also chose to follow **Wooley/Sweeney** rather than the persuasive authority to the contrary represented by the historical rule and those cases applying it such as **Gulf Florida, supra**.

## II.

### **AMERICAN IS ENTITLED TO A REMAND FOR DETERMINATION OF THE AMOUNT OF ITS LIABILITY TO LARKIN UNDER THE PERFORMANCE BOND.**

#### **1. AMERICAN Is Not Liable For Delay Damages.**

For the reasons set forth above in Argument I, AMERICAN's performance bond did not provide coverage to LARKIN for consequential delay damages incurred by LARKIN due to Contractor's default. AMERICAN's liability does not exceed its coverage. Therefore, AMERICAN's liability is limited to the cost of completion of Contractor's work in excess of the contract price. AMERICAN's liability to LARKIN does not include consequential delay damages.

#### **2. Delay Damages Coverage Issue Was Not Determined In Arbitration.**

The LARKIN - Contractor arbitration did not determine the issue of coverage under the performance bond for consequential damages due to the default of Contractor. The arbitration proceeding addressed claims and issues arising solely under the contract for construction, issues between the arbitration parties: Contractor and LARKIN.

AMERICAN was not a party to the arbitration. AMERICAN was not mentioned in the arbitration pleadings. See Tr. Exhs. 3, 4, & 5. Issues of AMERICAN's defenses arising under the performance bond were not addressed in the arbitration proceedings. The



coverage provided by the performance bond was not an issue in the LARKIN - Contractor arbitration proceedings.<sup>8/</sup> Thus, the arbitration award was not conclusive with respect to whether AMERICAN's performance bond covered LARKIN's delay damages. The trial court erroneously held that the arbitration award was binding "in all areas" on AMERICAN, whereupon it granted confirmation against AMERICAN of the arbitration award obtained against Contractor.<sup>2/</sup>

LARKIN's own Statement of Claim recognized that the demand for arbitration was for "arbitration of all disputes between the parties under the Contract." Tr.Exh.F., p.1 (emphasis added). That is, LARKIN - Contractor disputes under the construction contract. The sole issues in arbitration were those regarding performance of the construction contract itself:

- whether contractor breached the contract;
- whether contractor timely performed the contract;
- whether contractor was properly terminated; and
- damages.

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<sup>8/</sup> Likewise, the arbitration proceedings between LARKIN and Contractor did not include within its scope AMERICAN's defense, raised in the trial court, of entitlement to setoff for the prejudice from LARKIN's failure to notify of Contractor's default for eighteen months. See *infra*, fn. 4.

<sup>2/</sup> Moreover, the trial court went beyond the four corners of the arbitration award when it granted confirmation of the award against AMERICAN. AMERICAN was not even named in the award.

LARKIN's Answer Brief, pp. 5 & 9, filed in the Third District Court of Appeals; Tr. Exhs. 3, 4, & 5.

In any event, the performance bond coverage issue was not a matter for determination by the LARKIN - Contractor arbitration panel. Coverage issues are to be determined by a court, not by arbitrators. **Bruno v. Travellers Insurance Company**, 386 So.2d 251 (Fla. 3rd DCA 1980).<sup>10/</sup>

In **American Fidelity Fire Insurance Co. v. Richardson**, 189 So.2d 486 (Fla. 3d DCA 1966), a trial court's confirmation of an arbitration award against an insurer was reversed where the insurer filed a counterclaim setting forth matters regarding coverage that had not been addressed in the arbitration proceeding. The **Richardson** court's rationale was as follows:

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<sup>10/</sup> Also, **United States Fidelity and Guarantee Co. v. Woolard**, 523 So.2d 798, 799 (Fla. 1st DCA 1988) ("appellant's action for declaratory relief clearly involves coverage questions which, as appellee's admit, are matters to be determined by a court, and not by arbitrators . . ."); **Criterion Insurance Co. v. Amador**, 479 So.2d 300 (Fla. 3d DCA 1985) "The question of coverage under an insurance policy is for the trial court . . ."; **Nationwide Insurance Co. v. Cooperstock**, 472 So.2d 547 (Fla. 4th DCA 1985) ("Coverage issues are for a court of law to decide"); and **Vigilant Insurance Co. v. Kelps**, 372 So.2d 207 (Fla. 3d DCA 1979) ("It is well settled that issues concerning the existence of . . . coverage may be determined only by the court, and, conversely, may not be a subject of the arbitration proceedings. . .").

"The counterclaim [requesting the court to construe the terms of the policy] questions the existence of the right sought to be enforced by the arbitration proceeding. The insurer's liability for the loss was not within the arbitrator's sphere of inquiry. Therefore, the award is binding as to the extent of damages incurred by the appellees but the [insurer's] liability for the loss has not been determined."

189 So.2d, at 489 (emphasis added). By the same token, in the arbitrated case between LARKIN and Contractor, the arbitrators' sphere of inquiry did not include the issue of coverage provided by the performance bond.

### 3. The Arbitration Award Included Delay Damages.

The award of the arbitrators to LARKIN included, primarily, consequential delay damages. LARKIN's arbitration claim against Contractor for completion costs was relatively small, approximately ten percent of the total award to LARKIN by the arbitrators. The remainder of LARKIN's claim was for delay damages, and it is readily apparent that the bulk of the arbitration award was comprised of delay damages.

In the arbitration proceeding, LARKIN presented a statement of claim for damages totalling \$201,945.76 for costs of completion in excess of the contract balance. R.II-161; Tr.Exh. F. The American Arbitration Association awarded \$2,054,545.00 to LARKIN on its counterclaim against Contractor. Tr.Exh. 6. Aside from the

\$201,945.76 in completion costs, LARKIN's entire remaining claim against Contractor, in the amount of \$5,832,000, was for various consequential delay damages. R. II-161 ; Tr.Exh.F ; see *infra*, fn.

3. A substantial portion of the arbitration award against Contractor compensated LARKIN for delay damages.

Since LARKIN is not entitled to recover against AMERICAN for consequential delay damages, LARKIN is not entitled to a judgment against AMERICAN in the entire amount of the arbitration award. The trial court, by failing to apply the appropriate rule of law, erred in granting confirmation of the arbitration award in its entirety, inclusive of consequential delay damages, against AMERICAN. The district court, in affirming the judgment of the trial court, likewise erred.

CONCLUSION

The performance bond does not provide coverage to an owner for consequential delay damages incurred because of the bonded contractor's default. **United States Fidelity and Guaranty Company v. Gulf Florida Development Company**, 365 So.2d 498 (Fla. 1st DCA 1978). As recognized in by the First District in **Gulf Florida**, the performance bond guarantees the completion of the bonded contract, and the surety is not liable for more than completion costs in the event of the contractor's default. *Id.*

The arbitration award obtained by LARKIN against Contractor included consequential damages for delay, damages not within the performance bond's coverage. The legal issue of the performance bond's coverage was not decided in arbitration, and was wrongly decided by the trial court. Accordingly, the trial court erred in granting confirmation against AMERICAN of the arbitration award LARKIN obtained against Contractor, and entering judgment thereon.

WHEREFORE, the final judgment and corrected final judgment entered by the trial court in favor of LARKIN must be REVERSED and REMANDED for a determination of the amount of AMERICAN's liability under the performance bond.

Respectfully submitted,

KIMBRELL & HAMANN, P.A.  
Suite 900, Brickell Centre  
799 Brickell Plaza  
Miami, Florida 33131-2805

By:   
J. STEVEN HUDSON, ESQUIRE  
Florida Bar No. 602639

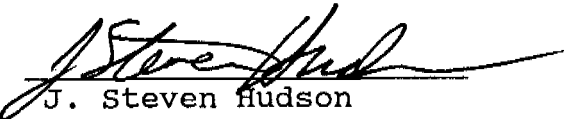
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief on the Merits was served by hand delivery on this 4th day of March, 1991 to JAMES E. GLASS, ESQUIRE, James E. Glass Associates, 6161 Blue Lagoon Drive, Suite 350, Miami, Florida 33126.

KIMBRELL & HAMANN, P.A.  
Suite 900, Brickell Centre  
799 Brickell Plaza  
Miami, Florida 33131-2805  
(305) 358-8181

By:

  
J. Steven Hudson