IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1295
L.T. CASE N0. 2D 03-134

UNITED STATES FIRE INSURANCE COMPANY,

Petitioner,

v.

J.S.U.B., INC.,

Respondent.

AMICUS CURIAE BRIEF OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, FLORIDA A.G.C. COUNCIL, INC., THE ASSOCIATED GENERAL CONTRACTORS OF GREATER FLORIDA, INC., SOUTH FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS, FLORIDA EAST COAST CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., AMERICAN SUBCONTRACTORS ASSOCIATION, INC. AND AMERICAN SUBCONTRACTORS OF FLORIDA, INC. IN SUPPORT OF J.S.U.B., INC.

ON DISCRETIONARY CONFLICT REVIEW OF A DECISION FROM THE SECOND DISTRICT COURT OF APPEAL

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IDENTITY AND INTEREST OF AMICI CURIAE

The Associated General Contractors of America (AGCA) is the oldest and the largest of the nationwide trade associations of construction contractors. AGCA was formed in 1918 and today it represents more than 32,000 firms in nearly 100 chapters throughout the United States. Among the association's members are more than 7,000 of the nation's leading general contractors, more than 11,000 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry. The Associated General Contractors of Greater Florida, Inc., South Florida Chapter of the Associated General Contractors, and Florida East Coast Chapter of the Associated General Contractors of America, Inc., are all chartered chapters of AGCA. Collectively, they have over five hundred members and they represent over 100 of the general construction contractors active in the State of Florida. The Florida A.C.C. Council, Inc., is an organization comprised of the three Florida chapters of AGCA, which represents the interests of the chapters and their members on matters of statewide importance.

American Subcontractors Association, Inc. ("ASA") is a non-profit corporation supported by the membership dues paid by approximately 5,000 members nationally. American Subcontractors of Florida, Inc. serves as a statewide organization for 105 Florida members. The majority of ASA member businesses are subcontractors and suppliers.

INTRODUCTION

Amici Curiae and others interested in construction within the State of Florida regularly confront the issue before this Court, as they seek to manage the considerable risks associated with building construction. While Florida contractors and subcontractors strive, and usually succeed, in providing quality construction services to owners and upper tier contractors, these firms can occasionally make inadvertent mistakes that result in construction defects. Florida contractors and subcontractors have always paid substantial premiums for liability insurance to provide at least financial protection from liability for the property damage arising out of certain of these defects. If accepted, the arguments that Petitioner, United States Fire Insurance Company ("USF"), makes to this Court would nearly, if not completely, eliminate this customary means of accounting for the risk of such liability and purchasing a measure of protection from it. USF seeks to do so by simply disregarding the language of the policy it sold. It is this threat which has united AGC and ASA in submitting this brief in support of the position of Respondent, J.S.U.B, Inc. ("JSUB").

The issues before this Court crystallize the studied attempt of USF to rewrite and significantly reduce the coverage that it promised to provide when it sold a standard form commercial general liability ("CGL") insurance policy. That type of policy purports to provide a large measure of coverage for construction defects to

nearly all participants in the construction process, including general contractors, subcontractors and material and equipment suppliers, together with all other parties affected by defective construction. These other parties include project owners, both public and private, as well as homeowners. Commercial insurance is a critical element of any construction project, and commercial insurers accept substantial exposures in exchange for equally substantial premiums.

Generally, buildings and other improvements are built pursuant to contracts in which the contractor or subcontractor[1] obligates itself to construct the project in accordance with the plans and specifications. One of the risks is that the project will not be built according to those plans and specifications. Another is that the plans and specifications are inadequate to the task. Either risk can result in construction defects. Contrary to the strained arguments of USF, a construction defect that causes neither expected nor intended property damage is, and always has been, an "occurrence" under Florida insurance law. Amici Curiae do not contend that every construction defect is an "occurrence," the repair of which is insured under a CGL policy. Obviously, intentionally sloppy or shoddy workmanship that damages a project is not an "occurrence." But at the same time, simply because the performance of faulty workmanship may breach the

[1] For simplicity's sake, this brief often uses the generic term "contractor." This term includes subcontractors that in turn subcontract out their work to sub-subcontractors or obtain materials from suppliers.

construction contract, it does not follow that the property damage resulting from that faulty workmanship is expected or intended from the standpoint of the insured. Certainly, those damages are not by definition foreseeable for purposes of CGL coverage as USF contends.

The novel interpretation of the definition of "occurrence" argued by USF before this Court is a clear departure from the interpretation of coverage as marketed by the insurance industry to purchasers of CGL policies, including thousands of AGC and ASA members in Florida and nationally. That marketing emphasizes the availability of coverage for various categories of defective work, including property damage arising out of the work of the insured's subcontractor. This coverage is accomplished through an intricate series of exclusions directed primarily at service providers such as contractors and subcontractors.

If property damage to a construction project arising out of defective work can never constitute an "occurrence," then these policy provisions serve no purpose whatsoever. At the same time, basic tenets of insurance policy contract interpretation are violated. In response to JSUB's claim for coverage, USF would have this Court disregard the terms of the policy it sold, in favor of vague principles of inapplicable law. Amici Curiae ask nothing from this Court but to apply the language of the CGL policy for which USF accepted payment.

SUMMARY OF THE ARGUMENT

The arguments of insurers such as USF and its supporting Amici Curiae ("Insurer Amici") suffer from a fatal flaw in that they do not address, and in fact, they avoid, any rational discussion of the very terms of the CGL policy which are at the heart of the case. If this Court were to accept such arguments, it would be placed in the anomalous position of interpreting a standard form insurance contract in use throughout the State of Florida, and throughout the United States, without giving due consideration to the terms of that contract itself. USF's arguments that forsake the terms of its standard CGL policy, and the response of Amici Curiae to them, include:

- *Under LaMarche v. Shelby Mutual Ins. Co. and its progeny, there can be no coverage under the CGL policy for property damage arising out of the repair or replacement of a subcontractor's defective work.* No. The broad pronouncements of *LaMarche* as to the 1966 policy form do not apply to the subsequent 1986 policy form, expressly stating that property damage arising from the work of subcontractors is not excluded.

- *Upholding coverage for property damage arising out of defective work transforms the CGL policy into a performance bond.* No. "Occurrences" of unexpected and unintended "property damage" may trigger both the CGL policy and the bond and, due to the inherent differences between the policy and the performance bond, the CGL policy ultimately provides coverage in those instances. A CGL policy does not function as a performance bond.

By presenting its arguments in isolation from the policy terms, USF tries to avoid the effect of the carefully drafted policy exclusions since those exclusions

place limits on the general notion that a CGL policy does not cover a contractor's risk of faulty work.

ARGUMENT

Under Florida law, an insurance policy is to be read as a whole, giving every provision its full meaning and operative effect. *Auto-Owners Ins. Co. v. Anderson*, 756 So.2d 29, 34 (Fla. 2000). In other words, an incomplete analysis of the CGL policy written by USF is impermissible, in that an insurance contract, like any other contract, must be interpreted so as to give meaning to all of its provisions. USF violates every tenet of insurance policy interpretation under Florida law in its total disregard of the policy language, invoking general principles that lack a basis in the policy language, including "defective work as business risk" and "transformation of the CGL policy into a performance bond," and even a "public policy" patently inapplicable to its policy language. USF cannot be allowed to rely on these vague notions in order to sidestep the coverage provided by the 1986 CGL policy it sells to Florida contractors and subcontractors. Acceptance of USF's arguments prevents application of the carefully tailored property damage exclusions that are designed to provide insured builders with coverage under the policy for the property damage arising out of their subcontractors' work.[2]

[2] This amici curiae brief will address only selected issues raised by USF and will not re-state arguments already made by J.S.U.B. in its brief, in which the numerous cases that uphold coverage for unexpected and unintended property damage arising

I. CGL COVERAGE FOR PROPERTY DAMAGE TO THE NAMED INSURED'S WORK IS NOT CONTRARY TO FLORIDA LAW, AT LEAST WHERE SUCH DAMAGE ARISES OUT OF SUBCONTRACTORS' WORK

USF seeks to avoid any rational discussion of the exclusions contained in the CGL policy and their effect upon defective work claims. The obvious reason is that Exclusion (1), the Your Work Exclusion, actually preserves coverage under the facts of this case. Briefly, that exclusion states that the insurance does not apply to:

> 'Property damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.'
>
> ***This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.*** [Emphasis added.]

The term "your work" refers to the work of the insured contractor and its subcontractors. The exclusion only applies to property damage that is included in the "products-completed operations hazard," and there is no dispute that at the time the property damage occurred, all work had been completed under J.S.U.B.'s contract and the homes had been put to their intended use, satisfying the definition of a completed operation under the policy.

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out of the work of the insured's subcontractors are discussed. Supplementing that brief as to additional cases that continue the trend of upholding that coverage, *see Lee Builders, Inc. v. Farm Bureau Mutual Ins. Co.*, 137 P.3d 486 (Kan. 2006); *Pine Oak Builders, Inc. v. Great American Lloyds Ins. Co.*, ___ S.W.3d ___, 2006 WL 1892669 (Tex.App. – Houston [14th Dist.] July 6, 2006); *Supreme Services and Specialty Co. v. Sonny Greer, Inc.*, 930 So.2d 1077 La. App. 3 Cir. 2006).

While the Your Work Exclusion may deny coverage for property damage arising out of J.S.U.B.'s own work on the homes, that exclusion does not apply to this claim, because of the second sentence of the exclusion. That provision (the "Subcontractor Provision"), emphasized above, explicitly states that the exclusion does not affect coverage where the damage arises out of work performed by a subcontractor on behalf of the named insured. Here, a subcontractor of JSUB performed the defective site preparation that resulted in the property damage to the homes.

It is little wonder that USF concentrates its argument on "occurrence," despite the fact that it has already been decided by this court that unexpected and unintended property damage arising out of defective work is an "occurrence" under a CGL policy. *State Farm Fire & Cas. Co. v. CTC Development Corp.*, 720 So.2d 1072 (Fla. 1998). Nevertheless, USF seeks to "cut the policy off at the knees," and to ignore the property damage exclusions, especially where a claim involves property damage arising out of the work of the insured's subcontractors.

A. The Historical Development of the Subcontractor Provision Supports Coverage Under the USF Policy

This Court should not depart from the plain language of the USF policy in favor of USF's reliance on overly broad platitudes, such as "a CGL policy is not a performance bond" or that "a CGL policy is not intended to cover any cost of repairing defective construction." That policy language indicates that even though

a CGL policy may not be designed to cover an insured's ordinary business risks, including a contractor's own defective construction, that doctrine is carefully circumscribed and limited in the 1986 CGL policy form upon which the USF policy is written.

A historical tension has existed between CGL coverage for defective construction work and what insurance underwriters have traditionally referred to as an uninsured business risk. This tension gained momentum with the 1966 revisions to the CGL form promulgated by the Insurance Services Office ("ISO"), the industry organization responsible for drafting the industry-wide standard forms used by insurers. Exclusion (o), the Work Performed Exclusion, in the 1966 revisions excluded coverage for property damage arising out of "work performed by or on behalf of the named insured." Then, in 1973, ISO promulgated the Broad Form Property Damage Endorsement ("BFPDE") to the standard policy form; otherwise, the Work Performed Exclusion was identical to the 1996 version. That endorsement expanded the coverage under the 1973 form by modifying the Work Performed Exclusion, to delete the exclusion for work performed "on behalf of" the named insured, so as to provide an insured contractor with coverage for property damage arising out of the defective work of its subcontractors. The only caveat was that the property damage must occur after the completion of the work.

See, J. D. O'Connor, *What Every Construction Lawyer Should Know About CGL Coverage for Defective Construction*, 21 WTR CONST. LAW. 15, 16 (2001).

In contrast, the USF policy is written on a form that was revised in 1986, and through those revisions to the CGL form, ISO sought to clarify the limitations on the business risk concept previously introduced in 1973 by the BFPDE. Due to the popularity of the extra coverage provided by the BFPDE, one major revision was the insertion of the Subcontractor Provision into the Your Work Exclusion, as part of the standard coverage of the policy. That revision confirmed the existence of completed operations coverage for property damage arising out the work of subcontractors. The Subcontractor Provision in the Your Work Exclusion on the 1986 CGL policy form circumscribes and limits the business risk concept and USF and its supporting amici cannot evade that coverage by borrowing sweeping concepts from case law that interpreted 1966 or 1973 CGL policy forms that did not include a Subcontractor Provision.

That case law is *LaMarche v. Shelby Mutual Ins. Co.*, 390 So.2d 325 (Fla. 1980), and the line of Florida cases that have extended *LaMarche* to policies to which its rationale does not apply. The *LaMarche* case should be understood for what it was, a perfectly correct interpretation of the 1966 edition of the CGL policy, containing a very broad exclusion for property damage arising out of the workmanship of the insured contractor. One of the specific exclusions before this

Court in that case was Exclusion (o), the Work Performed Exclusion, discussed above, providing that the insurance did not apply "to property damage to work performed ***by or on behalf of*** the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith." *Id.* at 326, emphasis added. The emphasized language ***"by or on behalf of"*** indicates that, unlike the CGL policy before this Court, the exclusion for property damage to work of the named insured in *LaMarche* did not include an exception for work performed by subcontractors.

The *LaMarche* case should also be recognized for what it wasn't. The court made no observation, determination or holding as to the existence of an "occurrence" in the policy before it. Rather, the court's observations as to the scope of CGL coverage for property damage arising out of defective workmanship were based upon the exclusions in the policy before it, primarily Exclusion (o), the Work Performed Exclusion. In that context, its emphasis upon the policy exclusions indicates that it in fact recognized that the deficient work of a contractor on a home constituted an "occurrence" of "property damage," but that exclusion nevertheless applied to deny coverage.

In the course of its opinion, the court stated that it agreed with the "logic and reasoning" of *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 405 A.2d 788 (1979), a case that also applied Exclusion (o), the Work Performed Exclusion, so that the

policy form before that court did not include a Subcontractor Provision. The New Jersey Supreme Court did not base its ruling on the definition of "occurrence" or "property damage," so that neither *LaMarche* nor *Weedo* supports a *carte blanche* denial of coverage for property damage arising out of defective workmanship, whether based on the insuring agreement, and the accompanying definitions of "occurrence" and "property damage," and where the CGL policy is written on the 1986 form that includes the Subcontractor Provision extending coverage for property damage arising out of the work of subcontractors.

B. The Subcontractor Provision Is Affected By New Endorsements.

In 2001, ISO promulgated a standard endorsement, Endorsement CG 22 94 10 01, to eliminate the Subcontractor Provision from the Your Work Exclusion. It did so by simply deleting the clause that stated that the exclusion did not apply to property damage arising out of the work of subcontractors, so that the exclusion is amended to apply to "'property damage' to 'your work' arising out of it or any part of it and included 'products-completed operations hazard'." Since the term "your work" is defined in the policy to include work performed by both the insured contractor and its subcontractors, the endorsement eliminates coverage for property damage arising out of a subcontractor's work.

As such, this endorsement belies the arguments of insurers, such as USF and the Insurer Amici, that the policy was never intended to provide that coverage on

the pretext that the costs of repair do not constitute an "occurrence" of "property damage" under the policy. If that is true, there would be no need for such an endorsement.

II. A CGL POLICY IS NOT TRANSFORMED INTO A PERFORMANCE BOND BY APPLYING THE POLICY LANGUAGE

USF and the Insurer Amici insist that upholding coverage for defective workmanship claims such as the one before this Court will mysteriously, but impermissibly, transform the insurance policy into a performance bond. Applying the policy language will do nothing of the kind and this false analogy is intended by USF to divert the attention of this Court away from the policy language. In order to accept the performance bond argument, this Court would have to forsake the ordinary meaning of the language of the policy before it.

USF makes a great effort to distinguish a CGL policy from a performance bond. That is not a particularly difficult task, and in emphasizing the differences between them, USF and its supporting Amici defeat their own argument since the dissimilarities between a CGL policy and a bond illustrate why upholding coverage under these circumstances will not transform the policy into a performance bond.

A. An Insurance Policy Spreads The Contractor's Risk While A Bond Financially Guarantees Its Performance

A performance bond is not insurance. The insurance policy is a contract of indemnity, while a surety bond is a guaranty of the performance of the principal's

obligations. An insurance policy is issued based on an evaluation of risks and losses that is actuarially linked to premiums. In other words, losses are expected. In contrast, a surety bond is underwritten based on what amounts to a credit evaluation of the particular contractor and its capabilities to perform its contracts, with the expectation that no losses will occur. As part of the underwriting of bonds, the surety analyzes the strengths and weaknesses of the contractor and its ability to perform its obligations. In short, the underwriting process is very similar to the process used by a lender in making a loan. In contrast to insurance, losses are not expected. In addition, the performance bond is not for the protection of the contractor, but rather for the protection of the owner (the "obligee").

The performance bond is a three-party instrument between the obligee, the surety, and the contractor, with the surety retaining a right of indemnity against the contractor as well as other third-party indemnitors, typically the individual owners of the construction company. In the event of a claim, the surety will invoke the indemnity agreement with its principal (the contractor) and the indemnitors to hold it harmless and often to defend it against the claim. Thus, the contractor will, in effect, be required to pay the loss from its own funds when it indemnifies the surety. Of course, an insurance company has no right of indemnity against its insured, although it may seek to recover its losses from third parties through subrogation (or through an increase in premiums).

The Complex Insurance Claims Litigation Association, in its amicus curiae brief in support of USF, cites to a book authored by the undersigned counsel, INSURANCE FOR DEFECTIVE CONSTRUCTION, BEYOND BROAD FORM PROPERTY DAMAGE COVERAGE (2000), implying that the undersigned counsel believes that the surety's indemnity rights against an insured contractor should be regarded as a factor against upholding coverage for J.S.U.B. and similarly situated contractors. Nothing could be farther from the truth. In an effort to offer a more balanced portrayal of the opinions offered in that book, in the second edition, the undersigned counsel addresses the weaknesses in the insurance industry's arguments in this regard as follows:

> While the above discussion described the 'CGL policy as performance bond' argument as a line of reasoning or rationale, that description, in reality, elevates this view. It is little more than a shortsighted analogy that, though descriptive of certain claims, it nevertheless short-circuits the analysis. Rather than emphasizing a careful application of the terms of the entire policy to the facts of the claim, it allows for an easy invocation of a maxim that adds nothing to the analysis. [Footnote omitted.]

Patrick J. Wielinski, INSURANCE FOR DEFECTIVE CONSTRUCTION, Second Edition (2006), p. 296.

Courts have also recognized the profound differences between performance bonds and liability insurance. In *Fidelity & Deposit Co. of Maryland v. Hartford Cas. Ins. Co.*, 189 F.Supp.2d 1212 (D.Kan. 2002), F&D, the surety on the performance bond, sought subrogation against Hartford, the liability insurer of

National, its principal, for the costs of curing a default, including the repair of construction defects. The court rejected Hartford's argument that the damage to the project caused by National and the negligent workmanship of its subcontractor, Midwest Drywall, was not covered because providing coverage for the damage would transform the insurance policy into a performance bond. The court stated:

> The court is also not persuaded by Hartford's argument that if the structural damage caused by faulty workmanship constitutes an 'occurrence,' then the CGL and umbrella policies will be transformed into a performance bond. … '[A] performance bond does not 'insure' the contractor[,] [i]t runs to the benefit of the third party owner only.' [Citation omitted.] F&D provided a performance bond on the project that ran to the benefit of the School District, not to National or Midwest Drywall. Since F&D sued National and Midwest Drywall pursuant to an indemnification clause in the performance bond for expenses incurred in finishing the project, the performance bond in no way protected or insured National or Midwest Drywall from liability.

Id. at 1218. Another court summarily rejected the argument by a CGL insurer that payment of a claim would convert its policy into a performance bond. In *Commercial Union Assurance Companies v. Gollan*, 394 A.2d 839, 843 (N.H. 1978), the court stated as follows:

> Commercial Union also argues that a holding for the defense in this case would convert the insurance policy into a performance bond. A performance bond is a guaranty by the surety that 'the building will be completed within the contract price without extra cost to the owner ... [and that] payment will be made by the contractor to subcontractors and to those who furnish labor and materials.' ... our construction of the policy does not create a performance bond, but simply protects the insured if liability arises from work performed as defined.

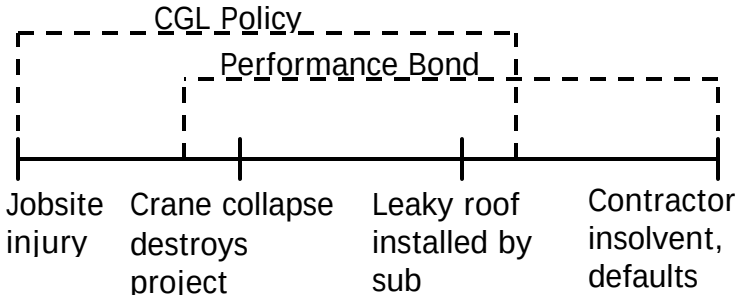
In other words, upholding coverage under a CGL policy for property damage arising out of the defective work of a subcontractor will not transform that policy, an adhesionary risk transfer contract, into a third party financial guaranty such as a performance bond.

B. Liability Insurance and Performance Bonds May Converge In Defective Construction Claims

Despite the difference between CGL policies and performance bonds, some claims, particularly claims that involve defective workmanship that cause damage to the project, can trigger ***both***. In that instance, the CGL policy should respond, particularly in light of the contractor's indemnity obligations to the surety. Upon payment to the owner of a performance bond claim involving defective workmanship, the surety is subrogated too the contractor's rights under its CGL policy. A surety's right of subrogation against the CGL insurer of its principal is well recognized under Florida law. *See, Ryan Incorporated Eastern v. Continental Casualty Co.*, 910 So.2d 298 (Fla. 2d DCA 2005) (where surety makes payment to correct defective construction undertaken by its principal, the surety is subrogated to the rights of its principal against its CGL insurer); *Essex Builders Group, Inc. v. Amerisure Ins. Co.*, 429 F.Supp.2d 1274 (M.D. Fla. 2005)(intervention by surety of insured contractor to recover costs of repairing defective workmanship from contractor's CGL insurers); Joanne Brooks, Bruce King, Wayne Lambert, "*The Importance of Insurance Coverages for Sureties*," ABA FORUM ON THE

CONSTRUCTION INDUSTRY/TIPS FIDELITY & SURETY LAW COMMITTEE JOINT PROGRAM MID-WINTER MEETING (2005).

One of the undercurrents of USF's argument is that the scope of a performance bond and CGL policy must be mutually exclusive. While it is true that there are many types of risks and losses that fall within the ambit of a bond and not an insurance policy, and vice vesa, there remains a considerable overlap between the two. This is particularly true, where, as in the case of defective work, a breach of the bonded contract may be involved. In that connection, the following diagram can be considered:



This diagram illustrates a continuum of job-site risks. Along that continuum, at the left are pure CGL policy losses, i.e., bodily injuries, and moving farthest to the right, a performance default by the contractor, a pure performance bond loss. Superimposed on that continuum is the scope of coverage provided by a CGL policy and a performance bond, signified by the dotted lines. As can be seen, there is an overlap in the middle.

Starting at the left, assume that an accident at the job site seriously injures the employee of a subcontractor to the insured. In the event the insured contractor is sued by that employee, the contractor's CGL policy would respond to this claim. The performance bond is not implicated by the bodily injury. Next, assume a subcontractor's crane collapses, causing damage to major portions of the project. The contractor's CGL policy may be required to respond to the property damage caused by that loss. At the same time, the collapse and the attendant damage may breach the general contractor's contract, falling within the bonded obligation of the contractor, and thus the performance bond. Much the same can be said for a leaky roof installed by the roofing subcontractor on a project. Again, the contractor's CGL policy should respond to claims for property damage, even for the cost of repairing the roof itself based upon the Subcontractor Provision in the Your Work Exclusion. Likewise, the roofing failure will constitute a breach of the bonded contract, thus implicating the performance bond. Finally, at the far right of the continuum is a classic default by the bonded contractor caused by insolvency. Such a default is a performance bond matter including financial obligations of the principal and should not impact liability coverage for the contractor as an insured.

Thus, the diagram demonstrates that many claims, particularly defective work claims, may have a potential impact on both the performance bond and the CGL policy. The two seldom can be separated from each other where there is a

breach of contract involving the work. For a case recognizing this overlap, *see*, *Kalchthaler v. Keller Constr. Co.*, 591 N.W.2d 169 (Wis.App. 1999).

USF and the insurer Amici get no mileage out of the "CGL as performance bond" argument. Despite the differences between the CGL policy and a bond, the installation of defective work by a subcontractor that results in property damage to the project can also involve a default by the general contractor under the performance bond. When that occurs, and a surety takes over or finances the completion of the project, it turns its attention to recouping its loss from other parties, including the insured contractor. If the claim involves defective work in breach of the bonded contract and an "occurrence" of property damage that is not subject to exclusion under the CGL policy, particularly the Your Work Exclusion, the surety may seek recovery as an assignee of the insured contractor, or simply under a theory of equitable subrogation. Ironically, if this case involved a public or a larger project for which the contractor was bonded, it is possible that USF would be facing a subrogation claim by the performance bond surety. The irony of such a result is apparently lost on USF.

CONCLUSION

Amici Curiae ask that the Court do nothing more than be true to the language of the policy contract before it and affirm the judgment below.

Respectfully submitted,

/S/ PATRICK J. WIELINSKI
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CERTIFICATE OF SERVICE

Undersigned counsel for Amici Curiae, Associated General Contractors of America, Florida A.G.C. Council, Inc., The Associated General Contractors of Greater Florida, Inc., the South Florida Chapter of the Associated General Contractors; and the Florida East Coast Chapter of the Associated General Contractors of America, Inc; American Subcontractors Association, Inc., and the American Subcontractors of Florida, Inc., hereby certifies that a true and correct copy of the foregoing was mailed this __4th__ day of August, 2006 to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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