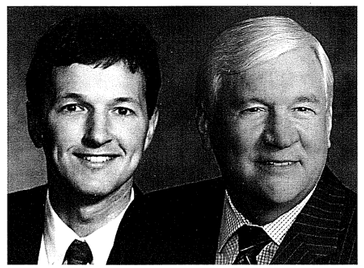
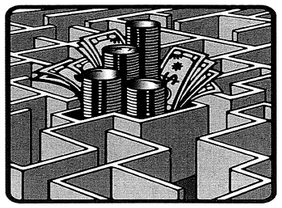
WAIVER OF AIA - A312 PAYMENT BOND DEFENSES AFTER *J.C. GIBSON*

Construction Law Section

Chairs: Neil Sivyer, Sivyer Barlow & Watson, P.A., and Stephen D. Marlowe, Marlowe McNabb & Stayton, P.A.



The United States District Court for the Middle District of Florida recently decided *J.C. Gibson Plastering Company v. XL Specialty Insurance Company,*[1] ruling on summary judgment that the surety failed to comply with its obligations under the AIA - A312 payment bond by not timely responding to a payment claim and that the surety thereby waived its right to dispute the claim. The court noted that neither it nor the parties found Florida law on point and it adopted opinions from Maryland and Virginia holding that a surety waives its defenses to an AIA - A312 payment bond claim if it does not send an answer to the claimant within 45 days stating the amount of the claim that is undisputed and specifying the reasons for any disputed amounts.



In contrast, Florida law is not predisposed against sureties and holds to the maxim that a surety's liability on a bond is determined strictly from the terms and conditions of the bond.

Despite the *J.C. Gibson* court's finding waiver of defenses, the AIA - A312 Payment Bond does not on its face state any consequences for the surety's failure to answer a claim within 45 days. The relevant portion of the bond states:

6. When the claimant has satisfied the conditions of Paragraph 4, the Surety shall

Continued on page 17

WAIVER OF AIA - A312 PAYMENT BOND DEFENSES AFTER J.C. GIBSON

Construction Law Section

Continued from page 16

promptly and at the Surety's expense take the following actions:

6.1 Send an answer to the Claimant, with a copy to the Owner, within 45 days after receipt of the claim, stating the amounts that are undisputed and the basis for challenging any amounts that are disputed.

6.2 Pay or arrange for payment of any undisputed amounts.[2]

This author disagrees with the Middle District of Florida's decision to adopt the law of Maryland and Virginia, which are notoriously punitive toward sureties and favor the liberal extension of sureties' liability on bonds.[3] In contrast, Florida law is not predisposed against sureties and holds to the maxim that a surety's liability on a bond is determined strictly from the terms and conditions of the bond.[4]

Disagreement aside, *J.C. Gibson* is the only case (state or federal) in Florida to decide the issue and may be persuasive to Florida state courts confronting the issue. As such, practitioners should be aware of the *J.C. Gibson* decision and should advise their clients accordingly.

[1] 2007 WL 2916399 (M.D. Fla. Oct. 8, 2007).

[2] AIA - A312 PAYMENT BOND § 6 (1984).

[3] *Lange v. Bd. of Educ. of Cecil County, ex rel. Int'l Bus. Machs. Corp.,* 37 A.2d 317, 321 (Md. 1944) ("[S]ince the advent of corporate bonding companies . . . the liability upon bonds executed by surety corporations has been liberally extended beyond that to which sureties were formerly held."); *see also Century Indem. Co. v. Esso Standard Oil Co.,* 79 S.E.2d 625, 630 (Va. 1954) ("The undertaking of a compensated surety is to be liberally construed in favor of the assured.").

[4] *Am. Home Assurance Co. v. Larkin Gen. Hosp., Ltd.,* 593 So. 2d 195, 198 ("Florida courts have long recognized that the liability of a surety should not be extended by implication beyond the terms of the contract.").

Author: Morgan W. Streetman, Shumaker, Loop & Kendrick, LLP