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**WATCH OUT! THE GATOR WILL BITE YOU!
IDIOSYNCRASIES OF FLORIDA LAW
THAT ALL CLAIMS PERSONS SHOULD KNOW**

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Over the years, the writer has received numerous telephone calls from bond claims persons located outside the State of Florida. Sometimes these claims persons are new to the industry. Other times they are experienced claims persons who have not previously handled claims in Florida.

The tenor of the telephone call usually is that the claims person has recently received a letter or a telephone call from a Florida lawyer demanding that the bonding company pay or defend a particular claim. Sometimes the claims person has already denied the claim and now a suit has been filed at the time of the call. Other times, the claims person is calling upon receipt of the letter or following the conversation with the Florida attorney. In either case, the claims person usually says words to the effect: "That stupid Florida lawyer wants us to pay such and such or do such and such! I KNOW THAT'S NOT COVERED UNDER OUR BOND IS IT?"

Unfortunately, in Florida, often the answer is: "Yes, it is covered by the bond," even though this would not be the case in many or most other jurisdictions. These numerous telephone calls over the years have spawned this paper which attempts to set forth some of the most common idiosyncrasies of Florida law which can constitute traps for the unwary claims person handling a claim in Florida.

Idiosyncrasy Number 1: Recovery of Attorney's Fees

The so-called "American Rule" generally provides that, in the absence of a statute or enforceable contractual provision allowing recovery of attorney's fees, each party in a litigated matter bears its own attorney's fees. *F.D. Rich Co., Inc. v. United States, ex rel. Indus. Lumber Co.*, 417 U.S. 116, 126 (1974); *Fleishman Distilling Corp. v. Miller Brewing Co.*, 386 U.S. 714, 718 (1967).

In Florida, contractual provisions allowing recovery of attorney's fees by one party against the other are common and wholly enforceable. *American and Foreign Ins. Co. v. Avis Rent-A-Car System, Inc.*, 401 So.2d 855, 858 (Fla. 1st DCA 1981); see also *Sybert v. Combs*, 555 So.2d 1313, 1314 (Fla. 5th DCA 1990)(courts have no discretion to decline to enforce provisions in contracts for awards of attorney's fees); *Pelican Bay Homeowners Ass'n, Inc. v. Sedita*, 724 So.2d 684, 685 (Fla. 5th DCA 1999)(when parties by contract determine that the prevailing party shall be awarded attorney's fees, the question before the court is not whether fees should be awarded; the issue is which is the prevailing party). In addition, Florida has enacted numerous statutes permitting recovery of attorney's fees by parties under certain circumstances. The statutes applicable to bond claims and some of the cases decided under them are discussed below.

A.Recovery of Attorney's Fees in Federal Miller Act Claims in Florida.

The general rule is that if the contract between the claimant and the Miller Act principal contains a provision awarding attorney's fees, the Miller Act surety will also be liable for attorney's fees under the provision of the Miller Act providing that claimants: "shall have the right to sue on such payment bond ... for the sum or sums justly due him." 40 U.S.C.A., § 270b(a) (West 1986); see generally *F.D. Rich Co., Inc. v. United States, ex rel. Indus. Lumber Co.*, 417 U.S. 116, 126 (1974) (in Miller Act actions, attorney's fees are not recoverable unless there is ... an enforceable contractual provision providing therefore); *United States ex rel. Reed v. Callahan*, 884 F.2d 1180, 1185-86 (9th Cir. 1989).

In addition, most federal jurisdictions will also permit recovery of attorney's fees from a Miller Act surety by claimants not in privity with the Miller Act principal so long as the claimant has an attorney's fees clause in its contract with a subcontractor of the Miller Act principal. *United States ex rel. Maddux Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 86 F.3d 332, 336 (4th Cir. 1996); *Travelers Indemnity Co. v. United States*, 362 F.2d 896, 899 (9th Cir. 1966); *D & L Constr. Co. v. Triangle Elec. Supply Co.*, 332 F.2d 1009, 1013 (8th Cir. 1964).

The law in Florida is in accord with this general rule with respect to Miller Act claims. Both the Eleventh Circuit Court of Appeals, as well as its predecessor in Florida, the Fifth Circuit, have ruled that a supplier or laborer not in privity with the Miller Act principal can nonetheless recover attorney's fees from the Miller Act surety if the contract between the supplier or laborer and subcontractor of the Miller Act principal contains an attorney's fees clause. *United States ex rel. Carter Equipment v. C.B. Morgan*, 544 F.2d 164, 166 (5th Cir. 1977); *United States ex rel. Southeastern Municipal Supply Co. v. National Union Fire Insurance Co.* 876 F.2d 92 (11th Cir. 1989).

While most federal jurisdictions will allow recovery of attorney's fees by a claimant not in privity with the Miller Act principal, it is respectfully submitted that this result is illogical and contrary to the intent of the Act. The purpose of the Miller Act is to guarantee payment for labor and materials furnished to a federal job site. If a claimant in privity with the Miller Act principal has an attorney's fees provision in its contract with the Miller Act principal, then an award of attorney's fees against the Miller Act Surety can arguably be justified because of the provision of the Miller Act providing that the bond covers "all sums justly due" to the claimant under its contract with the Miller Act principal. Since the Miller Act principal has obligated itself to pay attorney's fees, the Miller Act surety arguably should be obligated as well to pay attorney fees.

However, in the case of a claimant not in privity with the Miller Act principal, the Miller Act principal has made no agreement at all with the claimant, let alone one to pay its attorney's fees. Oftentimes the attorney's fees clause is contained in a general credit agreement between the not in privity claimant and the subcontractor which predates the bond and covers all dealings between the parties, not just those covered by the Miller Act bond. Other times the attorney's fees clause is contained in a sub-subcontract which did not even exist at the time the bond was issued. In either case the purpose of the Miller Act, to guarantee payment for labor or materials furnished to a job site, is not at all served by making a Miller Act surety pay attorney's fees provided for in a sub-subcontract or credit agreement over which the surety has no control and which probably did not even exist at the time of issuance of the bond.

Nevertheless, this rule, no matter how unfair or illogical, is clearly established in Florida.

B. Recovery of Attorney's Fees Under Bonds Issued in Florida.

For a variety of reasons, Florida State Law clearly permits recovery of attorney's fees against a surety in the State of Florida.

First, as set forth above, contractual provisions allowing recovery of attorney's fees from one party or the other are common in Florida and wholly enforceable. *American and Foreign Ins. Co.*, 401 So.2d at 858. When the surety bond expressly incorporates a document by reference, the document will be interpreted as part of the bond and the surety will be bound by the incorporated provisions. *Henderson Inv. Corp. v. Int'l Fidelity Ins. Co.*, 575 So.2d 770, 771 (Fla. 5th DCA 1991); *OBS Company, Inc. v. Pace Constr. Corp.*, 558 So.2d 404, 406 (Fla. 1990). Therefore, if the bond issued by the surety in Florida incorporates a contract containing an attorney's fees clause by reference, the surety will be liable under the contract for attorney's fees in the same manner as provided in the contract.

Second, even in the absence of a contractual provision allowing for recovery of attorney's fees, payment for such will most likely be required under the bond. There are several Florida statutes which, when read together, permit recovery of attorney's fees by claimants against sureties:

Section 627.428(1), *Fla. Stat.* (1998), provides:

Upon rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recover is had.

Section 627.756(1), *Fla. Stat.* (1998),¹ provides:

¹ Section 627.756 does provide some relief to sureties. Specifically subsection (2) of the statute states:

(2) A surety who issues a bid, performance, or payment bond in connection with construction activities where hazardous substances exist or are discovered is liable under ss. 376.308 and 403.727 only to the extent provided in this subsection. In case of a default, the surety is liable only for the cost of completion of the contract work in accordance with the plans and specifications, less the balance of funds remaining to be

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Section 627.428 applies to suits brought by owners, subcontractors, laborers, and materialmen against a surety insurer under payment or performance bonds written by the insurer under the laws of this state to indemnify against pecuniary loss by breach of a building or construction contract. Owners, subcontractors, laborers, and materialmen shall be deemed to be insureds or beneficiaries for the purpose of this Section.

Section 624.03, *Fla. Stat.* (1998), provides:

“Insurer” includes every person engaged as indemnitor, surety, or contractor in the business or entering into contracts of insurance or of annuity.

Chapter 713, Part I, Florida Statutes, mainly dealing with private construction projects in Florida, allows a contractor, subcontractor, sub-subcontractor, laborer or materialman who contracts with the owner, a contractor, a subcontractor, or a sub-subcontractor, to place a construction lien on the real property. Any action brought under Chapter 713, Part I, to enforce a lien or to enforce a claim against a bond, entitles the prevailing party to recover attorney’s fees from the surety. See §713.29, *Fla. Stat.* (1998).

Similarly under §255.05(2)(a)(2), *Fla. Stat.* (1998), which deals with public construction projects in Florida, the prevailing party in an action brought to enforce a claim against a public payment bond is entitled to the recovery of attorney’s fees from the non-prevailing party.

Prior to 1997, there had been some “wiggle room” available to sureties to argue that their particular bonds did not permit recovery of attorney’s fees in Florida. Unfortunately, this “wiggle room” was almost totally removed by the Florida Supreme Court in the recent case of *Nichols v. Preferred Nat’l Ins. Co.*, 704 So.2d 1371 (Fla. 1997). *Nichols* clearly established that sureties are considered to be “insurers” within the meaning of §627.428(1) cited above. *Id.* at 1373. In addition, the Florida Supreme Court not only held that sureties are subject to the attorney’s fees provision in the statute, but also held that attorney’s fees could be assessed against sureties in excess of the penal sum of the bond if the surety “failed to act diligently and unreasonably delayed payment of a claim...” *Id.* at 1374.

There is, however, a potential loophole in this general rule allowing recovery of attorney’s fees against bonding companies. The Court in *Nichols* held that the general attorney’s fees provision under §627.428(1) applies to claims against sureties unless there is a specific statutory provision pertaining to the particular type of bond involved. In such cases, the specific provision applies instead of the general attorney’s fees provision. *Id.* at 1373.

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paid under the contract, up to the penal sum of the bond. The surety is not liable on a bond to indemnify or compensate the obligee for loss or liability arising from personal injury or property damage, whether or not caused by a breach of the bonded contract. Further, a right of action does not accrue on a bond to or for the use of any person other than the obligee named in the bond.

As set forth above, §627.756(1) is a specific provision pertaining to suits brought by “owners, subcontractors, laborers, and materialmen against a surety insurer under payment or performance bonds.” Conspicuously absent from the coverage of this provision are general contractors. Under the rule stated in *Nichols*, §627.756(1) is arguably a specific statutory provision with respect to construction payment or performance bonds, and that specific statute takes precedence over the general attorney’s fees provision of §627.428(1). The argument therefore can be made that the exclusion of general contractors from the provisions of §627.756(1) means that general contractors in construction suits cannot avail themselves of the Florida attorney’s fees statute.

Accordingly, if the contract between the general contractor and the owner or between the general contractor and subcontractors does not contain an attorney’s fees provision, or only has a limited attorney’s fees provision, this argument might be used to prevail in a claim by a general contractor to recover attorney’s fees against a performance or payment bond issued in Florida.

The “bottom line,” however, is that any bond claims person handling a claim in the State of Florida should be aware from the outset that a claimant against a bond in Florida, whether it is a Federal bond, Florida public bond, or private bond, will more likely than not be entitled to recover its attorney’s fees incurred in making the claim from the bonding company.

Idiosyncrasy Number 2: Finance Charges.

Section 713.06, *Fla. Stat.* (1998), dealing mainly with private performance and payment bonds, allows recovery against the payment bond surety of finance charges charged by a laborer or supplier to a subcontractor not in privity with the principal, if the contract between the supplier or laborer and the subcontractor who is not in privity with the principal contains a provision for finance charges.

Section 255.05, dealing with public construction projects, also permits recovery of finance charges against the surety in the same fashion as does §713.06.

Once again, as with attorney’s fees, a surety issuing a bond to a general contractor in the State of Florida will be required to pay finance charges contained in an agreement between a subcontractor and a supplier or laborer even if the general contractor is not a party to that agreement and even if the agreement predated the issuance of the bond or did not exist when the bond was issued.

While there is no case law as yet on this particular issue, it would appear that if the Florida federal courts apply the same rationale to finance charges as they have to attorney’s fees provisions, then finance charges contained in a contract between a supplier and a subcontractor would also be recoverable against the Miller Act surety. See *generally*, *Carter Equip.*, 544 F.2d 164; *Southeastern Mun. Supply Co.*, 876 F.2d 92.

Idiosyncrasy Number 3: Arbitration.

A. Arbitration Under the Miller Act in Florida.

The Miller Act provides that the federal court is the exclusive jurisdiction for hearing claims against Miller Act sureties. 40 U.S.C.A. §270b(b). However, if the general contract or any subcontract bonded by the Miller Act surety contains an arbitration provision, and if the Miller Act bond issued by the surety incorporates that contract by reference, the Miller Act surety will be held to have agreed to arbitrate claims against it. *J. S. & H. Constr. Co. v. Richmond County Hos. Auth.*, 473 F.2d 212, 215 (5th Cir. 1973).

On the other hand, if the Miller Act bond does not contain any provision incorporating the general contract or subcontract, then the law is clear that the Miller Act surety will not be required to arbitrate, and exclusive jurisdiction over claims against the Miller Act surety remains in federal court. *United States ex rel. Portland Constr. Co. v. Weiss Pollution Control Corp.*, 532 F.2d 1009, 1012 (5th Cir. 1976); *In re Interactive Video Resources, Inc.*, 170 B.R. 716, 722 (S.D. Fla. 1994).

B. State Arbitration Proceedings.

In Florida, the rule is much different regarding the binding effect of arbitration on sureties than it is under the Miller Act. Generally speaking, a surety which knows of and has the right to participate in an arbitration proceeding involving its principal will be held to be bound by the results of that arbitration, even if it is not required to, and does not, participate in the arbitration, and even if the bond issued by the surety does not incorporate the contract containing the arbitration provision. *Fewox v. McMerit Constr. Co.*, 556 So.2d 419, 425 (Fla. 2d DCA 1989); *Kidder Elec. of Florida, Inc. v. United States Fidelity & Guar. Co.*, 530 So.2d. 475, 476-77 (Fla. 5th DCA 1988). Conversely, if the principal has agreed to arbitration in the contract and the bond incorporates the contract, a surety under Florida law can also require arbitration of claims against the surety bond if it so desires. *Henderson Inv. Corp.*, 575 So.2d at 772.

Unfortunately, Florida has an incredibly harsh rule with respect to the binding nature of arbitration upon a surety even if the surety is not aware of the pending arbitration and has no opportunity to appear in it. Florida law clearly establishes that even if the surety has no knowledge of the pending arbitration against its principal, and even if the surety has not been afforded an opportunity to appear and defend in the arbitration, the surety will nevertheless be bound by the results of the arbitration in the absence of fraud or collusion. The only defenses remaining to a surety under these circumstances are coverage defenses. The surety is bound by any factual determinations in the arbitration other than whether or not the particular claim was covered by its bond. See *Von Eng. Co. v. R. W. Roberts Constr. Co., Inc.*, 457 So.2d 1080, 1082 (Fla. 5th DCA 1984); *Fewox*, 556 So.2d at 425.

Idiosyncrasy Number 4: Recovery against the Surety for Greater than the Penal Sum of the Bond.

As set forth above, if the damages awarded a claimant against a surety bond are less than the penal sum of the bond, then attorney's fees and costs can be awarded against the surety up to the penal sum of the bond. However, as pointed out above, the recent decision by the Florida Supreme Court in *Nichols*, provides that if the surety unreasonably delays in investigating and paying a claim, an award of attorney's fees and costs may be made in excess of the penal sum of the bond. 704 So.2d at 1374.

The practical effect of *Nichols* will be that following every determination that a surety is liable for the penal sum of its bond on the merits of a claim against a bond issued in Florida, a "mini trial" will then be held to determine whether or not the surety's failure to pay the claim was reasonable, thus justifying an award of attorney's fees over and above the penal sum of the bond. Claims representatives handling claims in the State of Florida need to take extra special care to document their files and the reasons for denying a claim or they will face the risk of having attorney's fees and costs awarded over and above the penal sum of the bond.

Idiosyncrasy Number 5: Pay when Paid Provisions.

In most jurisdictions, the so called "pay when paid" provisions are either unenforceable, or if enforceable, are merely construed as timing provisions rather than conditions precedent to entitlement to payment by a claimant against a bond. *Federal Ins. Co. v. Mackey*, 71 Cal. Rptr. 2d 164, 166 (Cal. Ct. App. 4th 1998); *West-Fair Elec. Contractors v. Aetna Cas. & Sur. Co.*, 661 N.E. 2d 967, 971 (N.Y. 1995). By statute in Florida, however, "pay when paid" provisions in construction contracts for private projects are enforceable and provide an absolute bar to recovery by a claimant against a surety bond. Section 713.245, *Fla. Stat.* (1998), dealing with private performance and payment bonds, provides that pay when paid clauses are enforceable in Florida if the bond issued by the surety contains certain statutorily prescribed language as follows:

This bond only covers claims of subcontractors, sub-subcontractors, suppliers, and laborers to the extent the contractor has been paid for the labor, services, or materials provided by such persons. This bond does not preclude you from serving a notice to owner or filing a claim of lien on this project.

Oddly enough, there is no similar "pay when paid" provision in §255.05 dealing with public performance and payment bonds in Florida.

However, one caveat does exist. The duty of the surety to pay lienors is coextensive with the duty of the contractor to pay. As a result, if the principal's contract with the claimant does not contain a similar "pay when paid" provision, the surety will not be permitted to invoke the protection of the statute. *North American Specialty Ins. Co. v. Hughes Supply, Inc.*, 705 So.2d 616, 618 (Fla. 4th DCA 1998). Thus, in Florida, a surety complying with the requirements of the above statute can avail itself of the protection of a "pay when paid"

provision in its principal's contract.

Idiosyncrasy Number 6: Recording of Bonds in the Public Records

Section 255.05(1)(a) requires that in any public project in the State of Florida, a copy of the statutory bond shall be recorded in the public records of the County in which the improvement is located. The statute provides that it is the principal contracting with the public entity which is required to record the bond. However, the statute does not provide any penalties against the principal for failing to record the bond. Rather, it is the surety issuing the bond which bears all the penalties for the failure to record it. Case law in Florida has clearly decided that the failure to record the bond as required by statute renders the bond a "common law bond" under Florida law, thus eliminating the many protections as far as notice, shortened time limits for commencing suit, and other similar protections afforded under the Florida statutory bond laws. See *generally, Martin Paving Co. v. United Pacific Ins. Co.*, 646 So.2d 266, 270-71 (Fla. 5th DCA 1994). Accordingly, it is imperative that sureties writing bonds in the State of Florida take every effort to insure that their bonds have been properly recorded so as to not lose the protection of the statute.

CONCLUSION

The above discussion lists some of the more common idiosyncrasies of Florida law of which claims persons handling claims in the State of Florida should be aware. Failure to be cognizant of these various idiosyncrasies can be disastrous to the surety.

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