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**“THE YING AND YANG SURETY DEFENSES: FAILURE OF
OBLIGEE TO GIVE PROPER NOTICE OF DEFAULT AND/OR
ACCEPTANCE BY OBLIGEE OF IMPROPER WORK, SOME
NEW WRINKLES”**

PRESENTED BY:

**STEVEN G. SCHEMBER, ESQUIRE
SHUMAKER, LOOP & KENDRICK, LLP
101 East Kennedy Boulevard, Suite 2800
Tampa, FL 33602
(813) 229-7600
(813) 229-1660**

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The Ying: Failure of Obligee to give proper Notice of Default.

I.

We are all familiar with the provisions of the AIA document A311 and A312 performance bonds. For purposes of this paper, the critical language of the A311 performance bond states:

“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 if 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 the Owner to Contractor.

Any suit under this bond must be instituted before the expiration of two (2) years from the date on which the final payment under the Contract falls due.

No right of action shall accrue in this bond to or for the use if any person or corporation other than the Owner named herein or the heirs, executors, administrators or successors if the Owner.”

The A312 performance bond provides:

3. If there is no Owner Default, the Surety’s obligation under this Bond shall arise after:

3.1 The Owner has notified the Contractor and the Surety at its address described in Paragraph 10 below that the Owner is considering declaring a Contractor Default and has requested and attempted to arrange a conference with the Contractor and the Surety to be held not later than fifteen days after receipt of such notice to discuss methods of performing the Construction Contract. If the Owner, the Contractor and the Surety agree, the Contractor shall be allowed, a reasonable time to perform the Construction Contract, but such an agreement shall not waive the Owner’s right, if any, subsequently to declare a Contractor Default; and

3.2 The Owner has declared a Contractor Default and formally terminated the Contractor's right to complete the contract. Such Contractor Default shall not be declared earlier than twenty days after the Contractor and the Surety have received notice as provided in Subparagraph 3.1; and

3.3 The Owner has agreed to pay the Balance of the Contract Price to the Surety in accordance with the terms of the Construction Contract or to a contractor selected to perform the Construction Contract in accordance with the terms of the contract with the Owner.”

As is the case with the AIA A311 bond, once the owner has complied with paragraph 3 of the A312 bond, the Surety has similar options as to what course of action it wishes to take. These options are spelled out in considerably more detail in the A312 bond than the are in the A311 bond:

4. When the Owner has satisfied the conditions of Paragraph 3, the Surety shall promptly and at the Surety's expense take one of the following actions:

4.1 Arrange for the Contractor, with consent of the Owner, to perform and complete the Construction Contract; or

4.2 Undertake to perform and complete the Construction Contract itself, through its agents or through independent contractors; or

4.3 Obtain bids or negotiated proposals from qualified contractors acceptable to the Owner for a contract for performance and completion of the Construction Contract, arrange for a contract to be prepared for execution by the Owner and the contractor selected with the Owner's concurrence, to be secured with performance and payment bonds issued on the Construction Contract, and pay to the Owner the amount of damages as described in Paragraph 6 in excess of the Balance of the Contract Price incurred by the Owner resulting from the Contractor's default; or

4.4 Waive its right to perform and complete, arrange for completion, or obtain a new contractor and with reasonable promptness under the circumstances:

.1 After investigation, determine the amount for which it may be liable to Owner and, as soon as practicable after the amount is determined, tender payment therefor to the Owner; or

.2 Deny liability in whole or in part and notify the Owner citing reasons therefor.

Both the A311 and the A312 bonds are truly “performance” bonds. Both bond forms contemplate early and active involvement of the Surety in the completion of a project once a default has been declared as to the Surety's principal on the project. Both bond forms require two express conditions to be met before the Surety becomes obligated to perform under the terms of the bond:

1. The principal under the bond must in fact be in default (material breach) under the underlying contract covered by the bond; and
2. The owner must declare the principal under the bond to be in default (material breach).

The leading case establishing these principles is L&A Contracting Company v. Southern Concrete Services, Inc., 17 F.3d 106 (5th Cir. 1994). In L&A Contracting, the general contractor had become disenchanted with the work of its bonded subcontractor and wrote several letters to the Surety for the bonded subcontractor complaining about the subcontractor's performance and urging the Surety to take action to ensure that the subcontractor properly performed. One letter asked the Surety to take the necessary steps "to fulfill the contract to prevent further delays and costs," but failed to declare the subcontractor in default. *Id.* The subcontractor eventually completed its subcontract, and its work was accepted by the general contractor. *Id.*

Thereafter, the general contractor sued the subcontractor and its Surety for breach of contract. *Id.* The Federal District for the Southern District of Mississippi, applying Florida law, found in favor of the general contractor and against both the subcontractor and its Surety. *Id.* at 909. On appeal to the Fifth Circuit, the District Court's judgment against the Surety was vacated and judgment was rendered in favor of the Surety. *Id.* at 113.

The Fifth Circuit in L&A Contracting construed the language of the A311 bond quoted above. The Court found the language of the A311 bond requiring a declaration of default to be clear and unambiguous. L&A Contracting, at 110-111. The Court further held that the declaration of default must be made to trigger the Surety's liability and such declaration must be made in "clear, direct and unequivocal language." *Id.* at 111. The Court further held that the declaration of default must inform the Surety that the principal "committed a material breach or series of material breaches of (the bonded contract), that the obligee regards the (bonded contract) as terminated, and that the Surety must immediately commence performing under the terms of its bond." *Id.* at 111.

After examining the correspondence from the general contractor to the Surety, the Court found no correspondence that contained an unequivocal declaration of default. *Id.* Therefore, the Court held that the general contractor had failed to prove a necessary precondition to the Surety's liability under the performance bond. *Id.*

In Insurance Company of North America v. Metropolitan Dade County, 705 So.2d 33, (Fla. 3d DCA 1997) the Surety issued an AIA A311 performance bond. The County gave no notice to either the contractor or the Surety of any alleged default by the contractor until after the work had been completed by the contractor. Thereafter, the County brought in a new contractor that performed repairs to correct allegedly defective construction by the contractor. After those repairs had been completed, the County then placed the Surety on notice of the contractor's default and demanded that the Surety pay the cost of correcting the repairs by the completion contractor to the County.

In reversing a trial court summary judgment in favor of the County, the Florida Third District Court of Appeals held that the requirement of notice contained in the Bond was a “critical and bargained for provision of the Surety Contract.” *Id.* The County’s failure to notify the Surety of the alleged default was a material breach that stripped the Surety of its bargained for rights and thereby relieved the Surety of its liability. *Id.*

Not only must the obligee provide a clear and unequivocal declaration of default, termination of contract, and demand that the Surety perform, but also the obligee must thereafter give the Surety a reasonable opportunity to investigate the matter and select one of its alternative courses of action provided for under the terms of its bond. The failure of an obligee to do so has been held to “preempt” the Surety from exercising its rights under the bond, and has therefore discharged the Surety from liability under the bond.

In Dragon Construction Company v. Parkway Bank & Trust, 678 NE.2d 55 (Ill. App.3d 1997), the owner terminated the contractor and hired a replacement contractor without notification to the Surety until four days after the termination. The Illinois Appeals Court affirmed a summary judgment for the Surety entered in the trial court, holding:

“since the (owner) replaced (contractor) with (replacement contractor) before informing (surety) that (contractor) was to be terminated and without consulting (surety) as to the successor, (surety) was stripped of its contractual right to minimize its liability under the performance bond by ensuring that the lowest responsible bidder was selected to complete the job. (surety) would be entitled to select, or at the very least participate in selecting, the lowest bidding contractor to complete the project in order to mitigate its damages under the performance bond. Surely, (surety) would not have issued the surety bonds if it did not have the authority to protect itself through the selection of the successor contractor.” Dragon 678 NE.2d at 55.

Nearly all the jurisdictions considering the above issues have rendered decisions consistent with the views set forth in the cases cited above. AM-Haul Carting, Inc. v. Contractors Cas, and Sur., 33 F.Supp.2d 235, 242 (S.D.N.Y 1998); Central Louisiana Elec. Co. v. Dolet Hills Min, 116 F.Supp.2d 726, 738 (W.D.La 2000); Balfour Beatty Constr. Inc. v. Colonial Ornamental Iron Works, Inc., 986 F.Supp. 82, 86 (D.Conn.1997); The School Bd. of Escambia County v. TIG Premier Ins., 110 F.Supp.2d 1351, 1353 (N.D.Fla. 2000). But see Siegfried Constr., Inc. v. Gulf Ins. Co., 2000 US App. Lexis 1304 (4th Cir. 2000) in which the 4th Circuit, fortunately in an unpublished opinion, refused to follow L&A Contracting and held that a series of letters similar to those in L&A Contracting were sufficient notice of “default” to the Surety.

Accordingly, the “bottom line” is that with respect to the AIA 311, AIA 312 ,or other similarly worded bonds containing notice provisions, the Surety is entitled to a clear and unequivocal declaration of default by the obligee, termination of the underlying contract by the obligee and demand upon the surety by the obligee to perform as set forth in the bond. Not only is the Surety entitled to receive these unequivocal notices, but the Surety is also entitled

to a reasonable period of time to investigate the status of the defaulted project, and to determine which course of action it will select as provided in its bond.

With the law apparently so well settled, a Surety not receiving the clear and unequivocal notices and opportunity to cure set forth above would appear to be “home free” and totally discharged from any of its obligations under the bond. However, one should never underestimate the ingenuity, often born of desperation, of obligees and their counsel in attempting to circumvent the bond requirements and the law set forth above.

A recent case in which the writer was involved illustrates this point. The owner on a project who became disenchanted with the performance of his general contractor undertook the following activities all within an hour or two on the same day:

1. Faxed a letter to the general contractor terminating the general contract and declaring the general contractor in default;
2. Filed a lawsuit against the general contractor and the general contractor's Surety;
3. Signed a contract with a new contractor to act as construction manager to complete the project;
4. Entered into new, direct, cost plus, contractual agreements with 27 of the previous 29 subcontractors on the project, all of whom who had previously had fixed price subcontracts with the general contractor;
5. Faxed a notice of default and termination of contract to the Surety for the general contractor demanding that the Surety take action to perform its obligations under its bond.

The owner/obligee described above did in fact clearly and unequivocally declare its general contractor in default, and did clearly and unequivocally call upon the Surety for the general contractor to perform under the terms of the bond. However, the facts that its owner/obligee also simultaneously filed a lawsuit against both the defaulted general and its Surety, signed a contract with a construction manager, and entered into direct contracts with all but two of the former subcontractors of the general, would appear on their face to clearly be an improper default under the terms of any of the AIA form bonds discussed above.

However, the owner/obligee in this case also, simultaneously with taking all the actions set forth above, sent a notice to the Surety that the owner/obligee was willing to “stand aside”, terminate its construction Management Agreement, terminate its direct contracts with the former subcontractors, and allow the Surety to perform under its bond. The Surety was told that it could, as soon as it was ready, select one of the options available under its bond and complete the contract.

In addition, the Surety was reminded in writing by the owner that time was of the essence in completing the contract, and that there were significant liquidated damage penalties for late completion of the project. The owner advised the Surety that it was certainly within its

rights to conduct its investigation of the project and to select its own completing contractor as provided in the bond, but that to do so would subject the Surety to enormous delay damage claims. The Surety was urged to simply ratify the Construction Management Agreement and Cost Plus Agreements entered into by the owner/obligee, and to stand by until the project was completed, at which time the owner/obligee would advise the Surety of the damages that it would have to pay.

When the Surety refused to ratify the contracts already entered into by the owner/obligee, the owner/obligee then took the position that the Surety had in fact been given an opportunity to perform under the terms of its bond, and had refused to do so. The Surety then filed for summary judgment based upon the failure of the principal to give proper notice and an opportunity to cure.

The scenario set forth above is an actual case in which both the owner/obligee and the Surety were playing a very high risk, high stakes, game involving millions of dollars. On the one hand, the Surety, at the summary judgment hearing, was able to present its compelling arguments based upon its rights to receive notice and an opportunity to cure under the bond. On the other hand, the owner/obligee was also able to make compelling arguments concerning the need for speed in completing the contract, which simply would not justify the luxury of the Surety's conducting an investigation, obtaining bids from potential completing contractors, and tendering one of them to the owner/obligee without great cost to all concerned.

While the battle described above was going on between the owner/obligee and the Surety for the general contractor, a somewhat different, but equally interesting, battle was taking place between the general contractor and the Surety for the primary subcontractor on the project. The work of this subcontractor was being blamed by the owner/obligee as being both a major source of defective construction on the project as well as a major cause for delay of completion of the project.

The general contractor gave no declaration of default or notice of termination of contract to its subcontractor, and further, did not make any demand upon the Surety for the subcontractor to perform under the terms of the subcontract bond. Rather, the general contractor wrote a letter to the subcontractor's Surety putting the Surety on notice of a "potential default".

Over a year after the termination of the general contractor by the owner/obligee, the general contractor sued the subcontractor's Surety. The operative claim against the subcontractor's Surety states:

"Owner has sued General and has alleged that work within the scope of Subcontractor's subcontract was not timely performed or was improperly performed. General has denied these allegations. However, in the event Owner is able to establish that the work subcontractor provided was not properly and timely performed, then Subcontractor and its Surety are jointly and severally liable to General for said damages pursuant to the performance bond."

The Surety, of course, filed affirmative defenses setting forth the failure of the general contractor to comply with the default and termination provisions of the AIA 311 bond issued by the Surety, and the failure of the general contractor to give the Surety notice and an opportunity to cure as required under the bond.

In response to the affirmative defenses of the Surety, the General replied:

“General denies that any of its claims are barred by its failure to fulfill any conditions set forth in the performance bond issued by Surety. However, if it is found that General failed to fulfill one or more of the contractual conditions precedent listed in Surety’s defenses, General was excused from doing so based upon, but not limited to, the fact that General was wrongfully terminated by the owner. This termination was an intervening/superseding event preventing General from performing its concessions precedent under the subcontract agreement.”

In the case of the subcontractor’s Surety, the facts are even more clear that no attempt was ever made by the general contractor to declare its subcontractor in default and make a demand upon the subcontractor’s Surety bond. Nevertheless, the general contractor strongly argued that it was “impossible” for it to have complied with the notice provisions of the bond since its general contract had been terminated by the owner prior to its having had any opportunity to declare a default and terminate its subcontractor. The general contractor argued that the law did not require it to perform “meaningless acts”, and that a declaration of default, notice of termination, and demand upon the subcontractor’s Surety to perform were all “meaningless acts” in light of the termination of the general contract by the owner. Accordingly, the general argued that even if it had called upon the Surety to perform, there was nothing in fact for the Surety to perform, and therefore the general was excused from the notice provisions under the terms of the bond.

Fortunately for both of the Sureties in the case described above, the Trial Court granted summary judgment in their favor based upon the failure of the owner/obligee and general contractor, respectively, to comply with the notice and opportunity to cure provisions of the respective bonds.

With respect to the claim by the owner that it had offered to discharge its construction manager and allow the general contractor’s Surety to come in and finish the job under one of its bond options, the Court ruled that such argument was “unavailing.” The Court found as follows:

“The Court thinks it highly doubtful that [owner] would have terminated [construction manager] and let [general’s Surety] perform. For [general’s Surety] to hire its own construction manager and take bids from or renegotiate contracts with subcontractors and suppliers, or take bids and submit a completion general contractor would take time and further delay the work. Whether it would have been less costly for [general’s

Surety] to finish the project under one of its bond options is beside the point. The bottom line is that by acting as it did, [owner] prevented [general's Surety] from *attempting* to minimize its costs of completion through one of its performance options. By so doing, [owner] materially breached the bond contract. It is a settled principle of general contract law that an anticipatory breach or an actual breach of a contract by one party excuses the other party from performance or tender of performance. ... [Citations omitted.] Consequently, when [owner] materially breached the bond contract, [general Surety] was discharged from its obligations to tender performance or to perform under the bond."

With respect to the argument by the general contractor that its termination by the owner rendered it impossible for it to comply with the notice and opportunity to cure provisions of the subcontractor's bond, the Court did not even address this argument. Instead, the Court simply cited L&A Contracting, and Metropolitan Dade County, as well as, other decisions requiring notice and an opportunity to cure, and entered summary judgment for the subcontractor's Surety.

Both of the foregoing summary judgments entered by the trial court are on appeal. While it is submitted that the rulings of the trial court are correct, and will no doubt be upheld, the time, energy, and effort spent in litigating these issues demonstrates again the constant vigilance that must be maintained by both Surety claims representatives and the attorneys representing Sureties. In the cases described above, it was essential to the successful outcomes in both decisions that both the in-house claims representatives for the respective Sureties, as well as their outside counsel, quickly recognized the legal defenses available to them, and quickly took steps to raise and preserve those defenses and develop them for purposes of presenting summary judgment motions.

II. The Yang: Acceptance by Obligee of Improper Work.

The first section of this paper discussed instances where the bonds involved were so called "performance" bonds, such as the AIA A311 and A312 bonds. These "performance" bonds require notice and an opportunity to cure be given to the Surety as a condition precedent to the Surety's performance under its bond.

Many bonds, however, are so-called "indemnity" bonds which contain no notice or opportunity to cure provisions. Typically, these "indemnity" bonds contain language similar to the following:

"Now, therefore, the condition of this obligation is such, that, if the principal shall faithfully perform said contract according to its terms, covenants, and conditions, then this obligation shall be void; otherwise it shall remain in full force and effect."

The standard Miller Act performance bond binds the Surety to the United States of America for the payment of the penal sum of the bond. The only condition to this obligation is if the principal:

“(a)(1) performs and fulfills all the undertakings, covenants, terms, conditions, and agreements of the contract during the original term of the contract and any extensions thereof that are granted by the Government, with or without notice to the Surety(ies), and during the life of any guaranty required under the contract, and (2) performs and fulfills all the undertakings, covenants, terms conditions, and agreements of any and all duly authorized modifications of the contract that hereafter are made. Notice of those modifications to the Surety(ies) are waived.”

When bonds such as the foregoing are utilized, the Surety is not entitled to any notice of default or opportunity to cure other than possibly that which may be also contained in the underlying contract being bonded.

In addition, even when “performance” bonds are utilized, oftentimes the obligee on the bond will provide proper notice of default upon termination of the underlying contract, and a clear and unequivocal demand upon the Surety to perform under the terms of the bond. Even under such circumstances, however, more often than not, there are still defenses available to the Surety to claims made by obligees.

All too often, the Surety, after receiving a proper notice and demand from the obligee, will undertake an investigation of the defaulted project only to find that there are little, if any, contract balances left unpaid on the project. Nevertheless, the obligee will be claiming enormous damages for completion of the project, and for repair and/or replacement of improper or defective work performed by the principal on the project. After years of handling claims against performance bonds brought by obligees, this writer is still astounded at how many times the obligee, and its counsel, are firmly convinced they have no obligation whatsoever to inspect and approve work being done by the principal under the contract, and have no obligation whatsoever to refuse to pay for work either not performed or improperly or defectively performed.

Fortunately, in Florida, as well as in most jurisdictions, the law is reasonably well settled that :

“Before accepting the work as being in full compliance with the terms of the contract, (the owner) is presumed to have made a reasonably careful inspection thereof, and to know of its defects, and if he takes it in the defective condition, he accepts the defects and the negligence that caused them as his own, and thereafter stands forth as their author.” Slavin v. Kay, 108 So.,2d 462 (Fla. 1958) at 466.

Another Florida case has held:

“Where an owner accepted work with knowledge that it had not been done according to the contract or where the defects were discoverable by reasonable inspection, the owner’s acceptance was a waiver of defective performance.” School Board of Pinellas

County v. St. Paul Fire and Marine Insurance Company, 449 S.2d 872 (Fla. 2d DCA 1984) at 873-74.

Similarly, yet another Florida court has held:

“We recognize that an owner’s acceptance of work with knowledge that it had not been completed in accordance with the contract would waive a claim for defective performance.” Mastor v. David Nelson Construction Company, 600 S.2d 555 (Fla. 2d DCA 1992) at 556-57.

The rule set forth above in Slavin, School Board of Pinellas County and Mastor, however,

“Has limitations and is not applicable to the situation *sub judicie*, where the defect is latent and not discoverable by a reasonably careful inspection.” Forte Towers South Inc. v. Hill York Sales Corp., 312 S.2d 512, 514 (Fla. 3d DCA 1975).

The test as to whether or not a defect is “latent” or “patent” is whether or not the defect is:

“...[N]ot apparent by use of ones ordinary senses from a casual observation of the premises... or ‘hidden from the knowledge as well as from the sight and... not (discoverable) by the exercise of reasonable care’... (latent defect is one not discoverable by reasonable inspection)... (latent defect is one not discernible by the exercise of reasonable care)...”
KALA Investments, Inc. v. Isaac Sklar, 538 So.2d 909, 913 (Fla. 3d DCA 1989).

As is the case with the notice and opportunity to cure provisions of the “performance bonds” discussed in Section 1 of this paper, this so called “acceptance rule” has been adopted by nearly all of the jurisdictions considering it. Williams v. Dudley Trust Foundation, 675 A.2d 45, 56 (D.C. 1996); Maloney v. Oak Builders, Inc., 224 So.2d 161 (La.App 4th Cir. 1969); Phenix-Georgetown v. Chas. H. Tompkins Co., 477 A.2d 215 (D.C. 1984); Eastover Corp. v. Martin Builders, 543 So.2d 1358 (La. Ct. App. 1989); Florida Ice Machine Corp. v. Branton Insulation, Inc., 290 So.2d 415 (La. Ct. App. 1974); Spartan Mech. V. St. Paul Fire & Marine, 414 N.W.2d 476 (Minn. Ct. App. 1987); Lindsay Mfg. Co. v. Universal Sur. Co., 519 N.W.2d 530 (Neb. 1994); Stevens Constr. Corp. v. Carolina Corp., 217 N.W.2d 291 (Wis. 1974).

Once again, however, surety claims representatives and their outside counsel need to maintain constant vigilance to prevent the eroding of this rule by ingenious, and often desperate, owners and their inspecting architect/engineers, seeking to avoid the effects of such rule.

On most occasions, it will be necessary for Surety's counsel to conduct thorough discovery to obtain all of the obligee's documents, and also to depose the pertinent representatives of the obligee in order to establish an "acceptance" defense. More often than not, however, once such discovery has been conducted, the facts become undisputed, and a summary judgment motion based upon "acceptance" by the obligee of incomplete, improper or defective work, and overpayment therefore, becomes appropriate.

On most major projects, the owner has an architect or engineer who is charged with the responsibility of inspecting and approving work performed by general contractors, and through those general contractors, their subcontractors. Almost always therefore, the Surety will be in a position of contending that the owner's agent, the architect/engineer, failed to properly inspect the project and approved payment for incomplete, improper or defective work.

Unfortunately, the owner's/architect/engineer has a variety of arguments to counter the Surety's claims. The most commonly employed argument is the simple assertion that the architect/engineer never in fact accepted the work. Often this argument is accompanied by reference to clauses in the various contracts requiring the contractor performing the work to tear it out and replace it even after installation if the architect/engineer determines, after the fact, it is not in compliance with the contract. The architect/engineer will also point to clauses in the construction contract documents stating that payment for work and approval of work for purposes of pay requests does not constitute acceptance of the work, and that the contractor is still obligated to perform work in accordance with the contract.

Another defense commonly employed by architects/engineers is to point to clauses within the construction documents which exempt the architects/engineers from liability for supervising or approving the "means and methods of construction" used by the general contractor or subcontractors on the project. Most architects/engineers will advocate the broadest possible definition of "means and methods of construction" to the point where such phrase includes all aspects of the design functions for which the architects/engineers have been paid thousands of dollars.

Yet another defense commonly raised by architects/engineers is that the defects now being complained of simply were not ascertainable upon a reasonable inspection. A corollary to this argument is the contention by the architect/engineer that the owner was unable or unwilling to pay the engineer/architect for a proper inspection.

A defense that has become more popular in recent years is the architect's/engineer's contention that its plans and specifications for the project are so called "performance" specifications rather than "design" specifications. If an owner, through its architect/engineer, specifies a specific standard of performance for certain equipment or materials on a project, or calls for the equipment and materials to perform within a particular range of variables, or calls for specific results to be obtained by the equipment or materials, and leaves the method of achieving those results to the contractor, the resulting specification is sometimes referred to as a "performance" specification.

On the other hand, if the owner, through its architect/engineer, specifies a particular product or design, or specifies the method of performance, and the contractor has little or

nothing to do with either product selection or design, and is not permitted to deviate from the prescribed method of performance, this type of specification will be referred to as a “design” specification.

Architects/engineers will argue that their specifications were “performance” specifications leaving the method of complying with the standards of those specifications up to the contractor. The design professionals will therefore argue that they had little ability or duty to inspect and approve the methods by which the contractor chose to meet the so called “performance” specifications.

In some cases, some or all of these defenses mentioned above may in fact be meritorious, or at least partly so. If, after thorough discovery from the owner and its design professional, it appears that any of these defenses have merit, then it behooves the Surety to attempt to negotiate as favorable a settlement as possible.

On the other hand, much of the time, the foregoing defenses raised by the owner and its design professionals are simply “smoke screens” to hide their own negligence in the design, supervision and inspection of the project.

Again, thorough discovery from the owner and its design professional, including obtaining all pertinent documents and taking appropriate depositions, is essential to establishing an “acceptance or overpayment” defense.

If the claimed improper work involves the installation of a particular type of product, then get an actual sample of that type of product. If it is true that a picture is better than a thousand words, then having the actual product is better than a thousand pictures. If, indeed, there is an apparent visible difference between the product actually installed and that which the design professional now contends should have been installed, the best way to display that and to show that the design professional knew or should have known of the difference is to have the actual products in front of the judge, jury, or panel deciding your case.

Obtaining the pay applications submitted for approval to the owner and its design professional is an absolute necessity. The design professional will often contend that it had never inspected, approved or accepted the work of the contractor which it is now insisting needs to be totally replaced. Almost all pay application forms contain certification by the design professional that it has inspected the work and it is in accordance with the plans and specifications.

It is also essential that the inspection reports of the onsite design professional be obtained. These inspection reports will often show that the design professional performed numerous onsite inspections of the very product or work at issue in the case.

Another absolute necessity is to obtain the entire contractual agreement between the design professional and the owner. Often the contract will contain detailed descriptions of reviews of submittals, reviews of proposed products, and onsite inspections of the job during the course of construction which the design professional agrees to perform in order to justify the fees being charged by the design professional. Many times a specific dollar amount is

allocated to the performance of these various functions. It is surprising how often it turns out that the design professional performed little, if any, of the tasks which it said it was going to do in its contract with the owner, and for which it was paid significant sums of money.

Another absolute necessity is to obtain all of the various sets of plans and revisions thereto used on the project. It is also essential that copies of any and all shop drawings, manufacturers product descriptions, and other such items be obtained. Again, it is surprising how many cases occur where the design professional submits plans for the project that are at considerable variance with the design professional's specifications for the same project. The design professional will then compound its error by receiving, but hardly reviewing, shop drawings and manufacturers product submittals which contain substantial differences from the plans and specifications.

III. Conclusion

As set forth above, a surety can be discharged from its obligations under its bond if the bond executed by the surety contains notice and opportunity to cure provisions which were not complied with by the obligee under the bond.

Conversely, even if there are no notice or opportunity to cure provisions in the bond, or if the obligee has complied with the notice and opportunity provisions, there are still many defenses available to the performance bond surety based upon the failure of the owner, usually through its design professional, to properly inspect the work of the principal. This results in an overpayment to the principal for incomplete, improper or defective work which the obligee is now insisting needs to be completed, repaired or replaced by the Surety.

These "notice" and "acceptance" defenses complement each other and are the "Ying and Yang" of Surety defenses. However, despite the existence of these defenses, obligees, through their attorneys, are constantly devising new ways to attempt to avoid the consequences of failing to comply with the terms of the bonds executed in their favor. Eternal vigilance is necessary on the part of both the Surety claims representative and outside Surety counsel to ensure that all defenses of the Surety are appropriately raised and developed on behalf of the Surety.

STEVEN G. SCHEMBER, born Dayton, Ohio, July 7, 1945; admitted to bar, 1970, Michigan; 1979, Florida. U.S. District Court, Western District Michigan, Middle District Florida, Southern District Florida, Northern District Florida; United States Court of Appeals, Fifth Circuit, Sixth Circuit, Eleventh Circuit; United States Supreme Court. Education: United States Coast Guard Academy, (B.S. with highest honors in English and History, 1967); University of Michigan, (J.D. 1970).

Author:

Lecturer, 1986 AFTL Commercial Litigation Section Annual Meeting, "Punitive Damages in Commercial Cases - Is There Anything Left After the 1986 Tort Reform Act."

Lecturer, 1988 AFTL Commercial Litigation Section Annual Meeting, "Handling Claims in Arbitration vs. Stockbrokers."

Lecturer, 1989, 1990, and 1991 AFTL Legislative Seminars, "Legislative and Caselaw Updates - Commercial Litigation."

Author and Program Chairman, 1989 and 1990 AFTL Commercial Litigation Seminars, "Trying the Commercial Jury Case - The 'Big Hitters' Tell How Its Done," Parts I and II.

Lecturer, 1990 AFTL Annual Meeting Paralegal Program, "Handling the Commercial Litigation Case."

Lecturer, 1991 AFTL Spring Seminar, "Selecting, Analyzing, and Trying a Lender Liability Case."

Lecturer, 1991 AFTL Jury Selection Seminar, "Jury Selection In The Commercial Case."

Lecturer, 1990 Southeast Surety Seminar, Atlanta, Georgia, 1990 Northeast Surety Seminar, Hartford, Connecticut, "Selection & Management of Counsel for Surety in Construction Claims."

Lecturer, 1991 Southeast Surety Seminar, Atlanta, Georgia, and 1991 Northeast Surety Seminar, Hartford, Connecticut, "The Cardinal Rule of Change Orders As It Affects Surety's Rights."

Lecturer, 1991 AFTL Ultimate Trial Notebook Seminar, "Non-Standard Jury Instructions."

Lecturer, 1992 Southern Surety & Fidelity Claims Association Conference, Atlanta, Georgia, and 1992 Northeast Surety & Fidelity Claims Conference, Hartford, Connecticut, "Taking the Show on the Road - Preparing and Trying a Surety or Fidelity Case in a Distant and Unfamiliar Venue."

"The New Florida Trade Secrets Act, Its Impact Upon You and Your Business" (address delivered at Intellectual Property Business Seminar, 1992).

Lecturer, 1993 Southern Surety & Fidelity Claims Association Conference, Atlanta, Georgia, and 1993 Northeast Surety & Fidelity Claims Conference, Iselin, New Jersey,

“Handling the Appeal of a Major Fidelity and Surety Bond Case: A Discussion of the ‘Do’s’ and ‘Don’ts’ for the In-House Claims Representative”

Lecturer, 1994 Southern Surety & Fidelity Claims Association Conference, Atlanta, Georgia, and 1994 Northeast Surety & Fidelity Claims Conference, Iceland, New Jersey, “Liability of the Surety For Consequential and Delay Damages - Has American Home v. Larkin Done the Job?”

Lecturer, 1995 Southern Surety & Fidelity Claims Association Conference, Atlanta, Georgia, “Retention Limits in Fidelity Bonds and D&O Policies: One Loss or Multiple Losses? The Wrong Answer Can Cost You Big Bucks!”

Lecturer, 1996 Southern Surety & Fidelity Claims Association Conference, Atlanta, Georgia, and 1996 Northeast Surety & Fidelity Claims Conference, Iselin, New Jersey, “The IRS is at it Again! Personal liability of the Surety and Surety’s Counsel for Unpaid Withholding on Principal’s Payroll!”

Author and instructor, “Surety Case Study”
1997 Northeast Surety & Fidelity Claims Conference, Iselin, New Jersey

Lecturer, 1999 Southern Surety & Fidelity Claims Association Conference, New Orleans, Louisiana, “Watch Out! The Gator Will Bite You! – Idiosyncrasies of Florida Law that All Claims Persons Should Know.”

Author and instructor, “Surety Case Study”
1999 Southern Surety and Fidelity Claims Association Conference, New Orleans, Louisiana

Panelist, 1999 American Bar Association Surety Claims Workshop, Hilton Head, South Carolina

Author and instructor, “Surety Case Study”
2000 Northeast Surety & Fidelity Claims Conference, Atlantic City, New Jersey

Numerous other lectures at schools and before various service and civic groups on various legal matters of general public interest.

Bar Memberships and Certifications: Michigan Bar Association, Florida Bar Association, American Bar Association, (Vice Chair, TIPS, Fidelity & Surety Section, 2000 – present; Trial Techniques Section), Academy of Florida Trial Lawyers, (Chairman, Commercial Litigation Section, 1988 - 90; Member, Board of Directors, 1988 - 93); Board Certified Civil Trial Attorney, 1983 - present; Board Certified Business Litigation Attorney, 1997 – present; Commercial Arbitrator, American Arbitration Association, 1986 - present. “AV” rated by Martindale-Hubbell.

Practice Specialties: Commercial Litigation, Personal Injury, Product Liability, and Wrongful Death Litigation, Securities Litigation, Construction Litigation, Fidelity & Surety Litigation, and Intellectual Property Litigation.

Other Memberships and Activities: Captain, United States Coast Guard Academy Varsity Football Team, 1966 - 67; Rhythm Guitar, Harmonica, and Vocals, “The Gents”, a Rock and

Roll Band, 1965 - 67; Visiting Professor, University of South Florida, "Economic Decision Making and Community Development, a Problems Approach", 1984 - 86; Board of Directors, American Heart Association, Suncoast Region, 1984 - 90; President, American Heart Association, Suncoast Region, 1989 - 90; Chairman of Board, American Heart Association Suncoast Region, 1990 - 91; Board of Directors, American Heart Association, Hillsborough Region, 1991 - 93; American Heart Association, Florida Affiliate, (member Political Affairs Committee; 1990 - present); United States Coast Guard Academy Alumni Association; University of Michigan Alumni Association; Outback Bowl Tampa Bay, [Team Selection Committee Member, 1995 - present, Board Member, 1995 – present, Executive Committee Member, 1998 - present (elected Vice President, 2000)]; various other Civic and Social Clubs.