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**REVISITING CHAPTERS 255 AND 713, FLORIDA STATUTES:
Ignorance IS an Excuse!**

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INTRODUCTION

Gordon: What do we do about escalation?
Batman: Escalation?
Gordon: We start carrying semi-automatics, they buy automatics. We start wearing Kevlar, they buy armor-piercing rounds.
Batman: And?
Gordon: And you're wearing a mask and jumping off rooftops. Now, take this guy. Armed robbery, double homicide. Got a real taste for the theatrical, like you. Leaves a calling card...

"Batman Begins."

As a young Police Lieutenant, James Gordon, laments the price to be paid for the appearance of a costumed vigilante in fictional Gotham City, the movie-goer is treated to a trading card foreshadowing the rise of a legendary super-criminal—The Joker. In the world of comic book superheroes, the theory is that Bruce Wayne's donning of the cowl as Batman paves the way for criminals to similarly raise the stakes, leading to equally theatrical villains such as Scarecrow, The Joker, or Two-Face. The good guys create new technologies to defeat the bad guys, and the bad guys retaliate by using newer technology to again gain the upper hand.

This process of escalation is not unique to detective comics—advancements in legal theory are just as easily countered by new theories of defense. This is no more

¹ **Note:** The views expressed in this article are those of the authors and do not necessarily reflect the views of Forcon International Corp. or Shumaker, Loop & Kendrick, LLP. This article is for general informational purposes only. None of it constitutes legal advice, nor is it intended to create any attorney-client relationship between you and the authors. You should not act or rely on this information concerning the meaning, interpretation, or effect of particular contractual language or the resolution of any particular demand, claim, or suit without seeking the advice of your own attorney.

evident than in the fight for statutory protection for payment bonds, and the conflict between surety and bond claimant, each of whom have failed to comply with statutory obligations, that has raged for decades.

Although the Florida Legislature has required, for more than 25 years, that bonds issued on all public projects be statutory bonds, only recently have the Florida courts acknowledged the effect of the statutory amendments. However, with this recognition, the courts also raised the stakes for sureties attempting to enforce their statutory rights—creating a burdensome “estoppel” defense that allows an ignorant claimant to defeat the statutory requirements.

THE BATTLE BEGINS: COMMON LAW BONDS VERSUS STATUTORY BONDS

With the sources of possible litigation arising from construction projects virtually limitless, it is no surprise that the legal system and construction industry share an intimate relationship. As one commentator has noted, “the primary path to the courtroom is most often paved by a pen, not a pulley.”² One of these paths is the fight between surety companies and payment bond claimants, whose victory often turns on whether or not the payment bond at issue can be considered a “statutory bond” or a “common law bond,” the former of which is subject to the requirements of the applicable statutes, while the latter is free of demanding statutory constraints.

A common law bond is a bond that was not issued in compliance with the relevant statute, even if an attempt was made but compliance was lacking.³ A statutory bond, on the other hand, is one that is issued pursuant to the provisions of a particular statute, such as Florida Statutes §§255.05, 713.23, 713.245, or 337.18. Section 255.05 requires the acquisition of a payment and performance bond by any person entering into a formal contract with any public authority or political subdivision thereof (i.e., the State of Florida, a county, a municipality, etc.), for the construction or repair of a public building or for public work. Section 713.23 governs *any* form of bond (as opposed to those exclusively associated with public entities) given by a contractor for the improvement of real property, conditioned to pay for labor, services, and material used for said improvement.

Prior to 1980, there was considerable litigation over whether a payment bond was statutory or common law, with the primary hurdle being that “[s]tatutory bonds are those which meet the minimum requirement of [the relevant statute]; common law bonds are those that provide coverage in excess of the minimum statutory requirements.”⁴ Thus, when the surety’s obligations had not been extended beyond

² Scott Brian Dranoff, *Not All Bonds Are Created Equal: Distinguishing A Common Law Bond From A Statutory Bond*, 79 FLA. B.J. 28 (Feb. 2005).

³ See *Professional Plastering & Stucco, Inc. v. Bridgeport-Strasberg Joint Venture*, 940 So. 2d 444 (Fla. 5th DCA 2006),

⁴ *Florida Keys Community College v. Ins. Co. of North America*, 456 So. 2d 1250, 1251 (Fla. 3d DCA 1984). Compare *United Bonding Ins. Co. v. City of Holly Hill*, 249 So. 2d 720, 724 (Fla. 1st DCA 1971)

minimum requirements, the bond remained a statutory bond.⁵ In most of the litigation during this period, recovery was dependent on whether the bond claimant had met all statutory prerequisites, and thus critical issues included whether the statutory notice provisions were applicable;⁶ whether the statute of limitation would be one year or five years;⁷ and whether there were recoverable items that were allowed by the bond conditions in excess of what as required by statute.⁸

FLORIDA'S STATUTORY COWL: SECTION 255.05

Florida Statutes §255.05, commonly referred to as “Florida’s Little Miller Act,” is designed to afford protection for those providing work and materials on public projects, because these persons and entities cannot perfect a lien on public property.⁹ Additionally, the statute protects the public, as “owner” of the project, by guaranteeing that all subcontractors and materialmen will be paid, and by guaranteeing the performance of the contract.¹⁰ Section 255.05(2) also prevents contractors and their sureties from being compelled to account to unknown suppliers and subcontractors by requiring claimants not in privity with the contractor (i.e. sub-subcontractors and material suppliers) to give notice if they intend to look to a bond for payment.¹¹

(deeming bond a common law bond because the document failed to reference §255.05 and applicable time limitations, and provided coverage in excess of that required by the statute); *S.W. Fla. Water Mgmt. Dist. ex rel. Thermal Acoustic Corp. v. Miller Constr. Co.*, 355 So. 2d 1258, 1259 (Fla. 2d DCA 1978) (deeming bond a common law bond because it provided coverage in excess of that required by law) *with State Dep't of Transp. ex rel. Consol. Pipe & Supply Co. v. Houdaille Indus., Inc.*, 372 So. 2d 1177, 1178 (Fla. 1st DCA 1979) (determining that the failure to reference the notice requirement and time limitation of §255.05 did not recast a statutory bond as a common law bond where the document specifically referenced the statutory provision and did not expand the scope of coverage beyond the statutory requirement).

⁵ *Florida Keys*, 456 So. 2d at 1251-52.

⁶ *American Cast Iron Pipe Co. v. Peabody-Petersen Co.*, 328 So. 2d 229 (Fla. 4th DCA 1976).

⁷ *United Bonding*, 249 So 2d at 724; *General Ins. Co. of Am. v. Sentry Indem. Co.*, 384 So. 2d 1305 (Fla. 5th DCA 1980); *Allan Electric Co. v. Power Facilities, Inc.*, 450 So. 2d 1145 (Fla. 5th DCA 1984). At the time of these cases the statute of limitations on a common law payment bond was 5 years. Since 2001, § 95.11(5)(e), Florida Statutes, provides a one year limitation of action for claims on payment bonds given by contractors, subcontractors, and sub-subcontractors.

⁸ *Phoenix Indemnity Co. v. Board of Public Instruction*, 114 So. 2d 478 (Fla. 1st DCA 1959).

⁹ See *Coastal Caisson Drill Co. v. Am. Cas. Co. of Reading, Pa.*, 523 So. 2d 791, 793 (Fla. 2d DCA 1988), *approved*, 542 So. 2d 957 (Fla. 1989); *William H. Gulsby, Inc. v. Miller Const. Inc., of Leesburg*, 351 So. 2d 396, 397 (Fla. 2d DCA 1977).

¹⁰ *Coastal Caisson*, 523 So. 2d at 793.

¹¹ See *Sch. Bd. of Palm Beach County v. Vincent J. Fasano, Inc.*, 417 So. 2d 1063, 1065 (Fla. 4th DCA 1982).

In accordance with the intent to protect these various interests, §255.05 attempts to create a clear and simple method of bonding payment for, and performance of, public construction projects. Subsection (1) requires that persons contracting with any Florida public entity for construction or repairs must provide a payment and performance bond insuring completion of the work and payment of subcontractors, which must be filed in the public records of the county where the project is located. Subsection (1) also prescribes information that “must be stated” in the bond. For example, the “bond must state the name and principal business address of both the principal and the surety and must contain a description of the project sufficient to identify it.”

Subsection (2) establishes certain deadlines claimants must meet to recover payment under the bond. For example, within forty-five days of beginning work, a claimant must notify the contractor that the claimant will look to the bond for protection. Then, within ninety days of completing the work, a claimant who has not been paid must notify the contractor and the surety of both the completion of the work and the nonpayment. This subsection warns that “[n]o action ... may be instituted against the contractor or the surety unless both notices have been given.” In addition, subsection (2) establishes a one-year statute of limitations.

Subsection (3) contains a form for a public construction bond, but specifies only that the “bond required in subsection (1) may be in substantially the following form.” And, subsection (6) imposes notice requirements on the issuer of the bond, stating that “[a]ll bonds executed pursuant to this section shall make reference to the notice and time limitation provisions of this section.”

Thus, the statute requires public works contractors to furnish a bond, it provides a model bond contractors can use, it requires claimants to meet certain deadlines, it requires the bond to notify claimants of these deadlines, and it provides that the deadlines apply regardless of the form of the bond.

A TASTE FOR THE THEATRICAL: INCONSISTENT INTERPRETATIONS OF SUBSECTION (4) OF §255.05

Subsection (4) of §255.05 was added in 1980, in response to growing concerns of sureties that “common law bond arguments” were frequently being used to evade the notice requirements of §255.05(2).¹² Notwithstanding the legislature’s attempts to eliminate the common law vs. statutory bond controversy, Florida courts continued to

¹² Prior to 2005 amendments to the §255.05, subsection (4) stated that “[t]he payment provisions of all bonds furnished for public work contracts described in subsection (1) shall, *regardless of form*, be construed and deemed statutory bond provisions, subject to all requirements of subsection (2).” FLA. STAT. §255.05(4) (2003) (emphasis added). As discussed further in the text, as of 2005, subsection (4) states that “[t]he payment provisions of all bonds furnished for public work contracts described in subsection (1) shall be construed and deemed statutory payment bonds furnished pursuant to this section and such bonds shall not *under any circumstances be* converted into common law bonds.” FLA. STAT. §255.05(4) (2006) (emphasis added). Clearly, prior to its amendment in 2005, subsection (4) was less direct with its statutory mandate, giving rise to much of the interpretation hurdles described in this article.

rule that bonds that were obviously intended to be §255.05 bonds were, due to technical deficiencies, not statutory bonds.

In *Martin Paving Company v. United Pacific Insurance Company*,¹³ a sub-subcontractor brought an action against the surety for the general contractor under a public construction payment bond. The bond, however, had not been recorded in the public records of the county where the improvement was located, as required by §255.05(1).¹⁴ The surety alleged that the sub-subcontractor was precluded from recovering under the bond because it had failed to comply with the notice provisions of §255.05(2). The Florida Fifth District Court of Appeals, therefore, had to determine if the surety, who had failed to comply with §255.05(1), could enforce the notice and time requirements of §255.05(2) against a claimant that had failed to comply with those requirements. The court, narrowly construing subsection (4) and reversing summary judgment granted in favor of the surety, rejected the surety's contention that the enactment of subsection (4) meant that *all* bonds issued on public works projects must be construed as statutory bonds.¹⁵

Instead, with no apparent support in the text of the statute, the court stated that subparagraph (4) of §255.05 was limited to "bonds furnished for public work contracts described in subsection (1)" and that "unless subsection (1) is complied with, subsection (4) does not operate to require the claimant's compliance with subsection (2)."¹⁶ Thus, the sub-subcontractor, Martin, had no duty to comply with the notice requirements of the statute because the surety had failed to record the bond. The court went on to declare:

The same result is reached by application of common sense. Here Martin claims to have followed the statutory path to discover the bond in order to comply with the requirements for perfecting a claim. Because of the failure of others, Martin did not find the bond in time to timely assert its claim. The current statutory scheme plainly does not contemplate that the principal and surety can defeat a payment bond claim by avoiding detection. The amended statutory procedure is simple enough for the surety and principal to follow in order to insure the coveted protections of subsection (2) of 255.05. If they cannot follow the procedure, they cannot expect the

¹³ 646 So. 2d 268 (Fla. 5th DCA 1994).

¹⁴ This requirement has been interpreted to mean that a payment bond on a public construction contract must be recorded in the "official records" of the county where the improvement is located as maintained by the clerk of the court. See *WPC, Inc. v. Hartford Accident & Indemnity Co.*, 698 So. 2d 1324, 1326 (Fla. 1st DCA 1997).

¹⁵ *Martin Paving*, 646 So. 2d at 269-70.

¹⁶ *Id.* at 271.

claimant to do so either. In such a case, the claim is governed by the terms of the bond.¹⁷

Eight years after its decision in *Martin Paving*, the Florida Fifth District Court of Appeals was again faced with interpreting §255.05 in the face of the failure of both a surety and claimant to comply with the provisions of the statute. This time, however, in *Florida Crushed Stone Co. v. American Home Assurance Co.*,¹⁸ the surety's failure was not that it failed to record the bond pursuant to §255.05(1); it instead had failed to specifically reference the notice and time requirements of subsection (2), as required by subsection (6). Instead of holding that the bond's non-compliance with the statutory requirements automatically excused claimants from complying with the provisions of subsection (2), the Fifth District, again without any apparent support within the statutory language, stated that a bonding company that has issued a bond that fails to incorporate all statutorily required information may be *estopped* from asserting the claimant's non-compliance with the provisions of subsection (2) *if such non-compliance has resulted from the failure of the bond to contain the information required by the statute.*

In so ruling, the court basically re-wrote its *Martin Paving* decision, stating:

In *Martin Paving*, we held that “unless subsection (1) is complied with, subsection (4) does not operate to require the claimant's compliance with subsection (2).” We construe this statement to mean that when neither party has complied with the requirements of section 255.05, we are free to fashion a remedy which does not require compliance with subsection (2) by the claimant if such non-compliance has resulted from the failure of the bond to include the information required by subsections (1) or (6). This statement in *Martin Paving* does not mean, we suggest, that in all cases in which the bond fails to provide all statutorily required information that the provisions of subsection (2) automatically become inapplicable. This statement was made in recognition of the fact that in *Martin Paving* the failure to record the bond prevented the claimant from knowing about the bond in order to permit timely compliance. In other words, it would be unfair to insist on the timely performance by the claimant when such non-performance was caused by the failure of the bond to be recorded. This interpretation gives proper weight to all provisions of the statute and seems far more consistent with the intent of the legislature to require both disclosure in the bond and timely performance by the claimant.¹⁹

¹⁷ *Id.*

¹⁸ 815 So. 2d 715 (Fla. 5th DCA 2002).

¹⁹ *Id.* at 717 (emphasis added).

In fact, the Fifth District went on to criticize the previous *Martin Paving* decision, stating that the court's "payment provisions" distinction regarding subsection (4) was unpersuasive and a "semantical argument" of "little moment."²⁰ The court, therefore, concluded that only actual prejudice stemming from the failure of the surety to reference part of the statute could prevent the enforcement of the notice and time requirements.²¹ Thus, because the court found that the claimant was "familiar with the intricacies of surety bonding" and "did not prove that its failure to comply with subsection (2) was because of the inadequacies of the notice provisions of the bond," the court affirmed summary judgment in favor of the surety.²²

Despite the seemingly giant step forward the Fifth District's ruling in *Florida Crushed Stone* took with regard to a surety's rights under §255.05(4), there remained hurdles for the surety to overcome. In a companion case to *Florida Crushed Stone*, dealing with the same bond and construction project, the Florida Second District Court of Appeals, in *American Home Assurance Co. vs. Plaza Materials Corp* ("*Plaza Materials I*"),²³ reached a conclusion diametrically opposed to the Fifth District's ruling. Instead of adopting the estoppel defense outlined in *Florida Crushed Stone*, the Second District held that the surety's failure to specifically reference the notice and time requirements of §255.05(2) as required by subsection (6) "transforms the statutory bond into a common law bond, or at least renders the time restrictions in subsection (2) unenforceable."²⁴ Recognizing its refusal to adopt the estoppel defense, the court scolded the surety, stating:

[O]ur opinion does not require Plaza to prove that it was misled or confused by the failure of American Home to comply with subsection (6) in order to receive a longer claims period. We conclude that the legislature added the notice requirement in subsection (6) to eliminate the cost and necessity of litigating complex issues of waiver or estoppel. American Home had the opportunity to demand that [the Department of Transportation] utilize a bond form that complied with subsection (6). It chose not to do so. Under these circumstances, we conclude that the better

²⁰ *Id.* at 717 n.4.

²¹ *Id.* at 717.

²² As opposed to *Martin Paving*, where the claimant could not even obtain a copy of the bond and sent a notice as soon as it realized that there was a bond, when counsel for the claimant in *Florida Crushed Stone* was asked why the claimant did not comply with the notice provisions, the response was simply "I don't know." *Id.* at 717 n.6.

²³ 826 So 2d 358 (Fla. 2d DCA 2002). The Fifth District described *Florida Crushed Stone* as a "sequel" to the *Plaza Materials* case. *Florida Crushed Stone*, 815 So. 2d at 716.

²⁴ *Plaza Materials I*, 826 So 2d at 361.

rule is to permit the longer claims period without requiring claimants to prove that they were misled by the statutory violation.²⁵

The Second District reaffirmed its position taken in *Plaza Materials I* in *American Home Assurance Co. v. APAC-Florida, Inc.* by holding that "a surety may not invoke the notice requirements and the shorter statute of limitations provided in § 255.05(2) if it agrees to be surety on a bond that fails to comply with the mandatory notice provisions in §255.05(6)." ²⁶ This time, however, instead of ruling that the bond was a "common law" bond due to the failure to comply with §255.05, the Second District stated that the failure "merely subjects the bond to the more general statute of limitations [of section 95.11] because the bond did not contain the notice essential to invoke the more favorable requirements [of §255.05]." ²⁷ The court further placed the burden on complying with § 255.05 on the surety by stating: "We do not believe that the surety should be entitled to force claimants to participate in a jury trial on the issue of whether the omission in the bond misled them when the surety could have avoided the entire issue by requiring a bond in compliance with the notice provisions." ²⁸ The Second District went on to certify its decision in conflict with the Fifth District in *Florida Crushed Stone*.

**AMERICAN HOME ASSURANCE CO. v. PLAZA MATERIALS CORP.:
THE FLORIDA SUPREME COURT LEAVES ITS CALLING CARD**

In 2005, the Florida Supreme Court expressly adopted the Florida Fifth District's analysis of §255.05 from *Florida Crushed Stone*. In *American Home Assurance Company v. Plaza Materials Corp.* ("*Plaza Materials II*"), ²⁹ the review of *Plaza Materials I*, the Florida Supreme Court could not agree with Second District's holding that mandated §255.05 bonds be treated as common law bonds if a surety failed to adhere to the statutory requirements of subsection (6), because such a holding "completely write[s] subsection (4) out of existence." ³⁰

From the outset, the Florida Supreme Court identified an operational conflict between §§255.05(4) and (6)—subsection (4) requiring the construction of the payment provisions of §255.05 bonds as statutory bonds, and subsection (6) requiring §255.05 bonds to reference the notice and time requirements of subsection (2). Unwilling to

²⁵ *Id.* The Second District provided no support—legislative history, committee review or otherwise—for its determination that the "legislature added the notice requirement in subsection (6) to eliminate the cost and necessity of litigating complex issues of waiver or estoppel."

²⁶ 834 So. 2d 369, 370 (Fla. 2d DCA 2003).

²⁷ *Id.*

²⁸ *Id.*

²⁹ 908 So. 2d 360 (Fla. 2005).

³⁰ *Id.* at 367.

cede supremacy to one subsection, as the Second District had done in *Plaza Materials I*, the Court sought to give “significance and effect” to “every word . . . of the statute.”³¹ Noting that the legislature added subsections (4) and (6) to §255.05 simultaneously and that it would “defy logic to conclude that the Legislature intended two contemporaneous amendments to negate one another,” the Court concluded that the “most viable method” to give each provision equal weight was to adopt the estoppel approach of the Fifth District’s ruling in *Florida Crushed Stone*.³² Thus, the Court ruled:

[T]he payment provisions of bonds posted pursuant to the provisions of section 255.05(1) shall, “regardless of form, be construed and deemed statutory bond provisions, subject to all requirements of subsection (2).” However, a company issuing a bond which fails to incorporate all statutorily required information from subsection (6) may be estopped from asserting the claimant’s noncompliance with the notice provisions of subsection (2) if the claimant’s noncompliance has resulted from the failure of the bond to contain the information required by the statute.³³

The Court’s purpose in adopting this defense was simply to give “some consequence” to “compliance or non-compliance” for both parties, and to “preserve principles of fairness and equity.”³⁴ Thus, upon a prima facie showing by a claimant that a payment bond is facially deficient under subsection (6) and after the claimant has shown by a preponderance of the evidence that it did not have actual notice of the provision, the surety is estopped from attempting to enforce the limitations of §255.05(2) that were not referenced on the face of the bond, as statutorily required.³⁵

³¹ *Id.* at 366 (quoting *Hechtman v. Nations Title Ins.*, 840 So. 2d 993, 996 (Fla. 2003)).

³² *Id.* at 368-69.

³³ *Id.* at 369 (internal citations omitted).

³⁴ *Id.* at 368-69.

³⁵ The *Plaza Materials II* decision was hardly unanimous, as three judges dissented, in part, to the majority opinion. In an opinion written by J. Cantero, the dissent stating that the text of §255.05(4) resolved any potential conflict between the provisions of the bonds, noting:

What happens when, as occurred here, the bond fails to warn of the deadlines and the claimant fails to meet them? Subsection (4) answers that question: the statutory deadlines apply *regardless* of the form of the bond.

...

The lack of any sanction for noncompliance in subsections (1) and (6), combined with the unequivocal “regardless of form” language of subsection (4) referring to subsection (2) and the equally unequivocal language of subsection (2), demonstrates that the Legislature intended to enforce the statutory deadlines regardless of whether the bond referred to them.

REVIEW AND EFFECT OF THE §255.05 ESTOPPEL DEFENSE

As a result of *Plaza Materials II*, a surety may now be comfortable knowing its statutory payment bonds will not be converted to common law bonds due to technical deficiencies, but there remains significant obstacles to enforcement of all provisions of §255.05 favorable to the surety. Under the *Plaza Materials II* holding, despite well-established legal principles that every person is presumed to know the law and that ignorance of the law is no excuse, it appears that a claimant's ignorance as to the law may now be excused. The curious result is that claimants that keep informed of statutory requirements must comply with the deadlines, while those that blind themselves to changes in the law may get a free pass.

Additionally, the estoppel defense adopted by the Florida Supreme Court may substantially increase the costs of litigating claims against payment bonds. Because ignorance is nearly always an issue of fact, the Florida Supreme Court has invited lengthy and costly litigation to determine whether a claimant's failure to comply with the statute was a result of a deficiency in a surety's bond. Moreover, even knowledgeable claimants may use this threat of lengthy litigation regarding its actual knowledge of statutory requirements to pressure sureties into paying otherwise barred claims.

Approximately three months *before* the Florida Supreme Court rendered its decision in *Plaza Materials II*, the Florida Legislature further amended §255.05 to strengthen the prohibition against construing public works bonds as common law bonds. Subsection (4) now states that the "payment provisions of all bonds furnished for public work contracts described in subsection (1) shall be construed and deemed statutory payment bonds furnished pursuant to this section and *such bonds shall not under any circumstances be converted into common law bonds.*"³⁶ This change further clarifies the Legislature's intent to have all bonds issued on public projects be treated as statutory bonds, but the Legislature, perhaps not foreseeing the Florida Supreme Court's adoption of an estoppel defense, did not expressly require the enforcement of the notice and time limitations regardless of a surety's compliance with subsections (1) and (6). This issue remains ripe for clarification in a subsequent amendment to §255.05.

Additionally, the *Plaza Materials II* decision leaves open the possibility that failure to comply with the initial provisions of subsection (1) of §255.05 may still prohibit enforcement as a statutory bond.³⁷ While it may be mere semantics to link the Court's decision relating to a surety's failure to reference the notice and timing requirements of subsection (6) to a failure to comply with filing requirements subsection (1), especially

³⁶ § 255.05(4) (2006) (emphasis added).

³⁷ See, e.g., *APAC-Florida, Inc. v. One Beacon Ins. Co.*, 888 So. 2d 126 (Fla. 3d DCA 2004).

considering the Court's disapproval of the ruling in *Martin Paving* and the recent amendment to subsection (4), no specific ruling was made in *Plaza Materials II*.³⁸

RELATING THE §255.05 ESTOPPEL DEFENSE TO §713.23 AND §337.18

The ruling in *Plaza Materials II* has already been applied to the requirements of §713.23. Despite the lack of a provision similar to § 255.05(4) in §713.23, the Florida Fifth District in *Professional Plastering & Stucco, Inc. v. Bridgeport-Strasberg Joint Venture*,³⁹ ruled that a subcontractor who failed to notify the surety of nonpayment pursuant to statutory requirements cannot avail itself of a surety's technical errors unless prejudice results from the surety's errors. In so ruling, the Fifth District stated:

A contrary rule would grant claimants, who failed to fulfill statutory conditions precedent to recovery, a powerful incentive to salvage their noncompliance for spurious reasons. These claimants could dig for "noncompliance" wholly unrelated to the work the claimants performed and the conditions the claimants failed to meet. This would encourage needlessly expensive and time-consuming litigation and discovery over tangential issues, and trial courts, rather than granting summary judgment because claimants did not fulfill the statutory conditions precedent, could expend further resources on irrelevant issues. Such a rule might also needlessly increase the transaction costs of bonding construction projects because a surety could no longer rely on the notice requirements provided by statute if it erroneously relied on a principal's representations that, for example, work had not already commenced. Moreover, this contrary rule would serve no purpose other than to relieve the subcontractor from its own failure to comply with the statute's explicit condition precedent.

Of note is the court's apparent deep concern for "needlessly expensive and time-consuming litigation," waste of judicial resources, and increasing transaction costs that would arise from a rule that allowed claimants to rely on a surety's noncompliance to relieve them of their own statutory compliance. Yet, the court ignores the equal increase of litigation costs and resources expended as a result of requiring a surety to litigate a claimant's ignorance. Moreover, although the court is concerned with claimants "digging" for noncompliance, the estoppel defense adopted allows claimants to merely threaten ignorance to force a surety's hand.

³⁸ The dissent, however, does specifically note that "subsections (1) and (6) have two things in common. First, they both specify required information for the contents of the bond. Second, neither subsection-nor any other part of the statute-prescribes a consequence for failing to comply with these requirements." *Id.* at 373.

³⁹ 940 So. 2d 444 (Fla. 5th DCA 2006).

The estoppel defense may similarly be applicable to bonds issued pursuant to §337.18, Florida Statutes—the provision created in 2005 to apply to all bonds issued on Florida Department of Transportation projects. Subsection (1)(f) of §337.18 specifically states that the “bonds provided for in this section are statutory bonds” and that the “provisions of section 255.05 are not applicable to bonds issued pursuant to this section,” but this mandate is no more clear as to who prevails between non-complying surety and non-complying claimant than subsection (4) of §255.05.

CONCLUSION

More than 25 years in the making, Florida courts have finally recognized the importance of the Florida Legislature’s decree in Florida Statute §255.05(4) that all payment bonds issued on public projects be considered statutory bonds. Yet, much like costumed criminals followed the first appearance of Batman, with the escalation of the surety’s statutory rights, the Florida Supreme Court similarly escalated the obstacles for a surety to obtain relief pursuant to the statute, creating an estoppel defense unsupported by the terms of the statute that effectively rewards claimants who keep themselves blissfully unaware of the law. Thus, the surety issuing payment bonds intended to be covered under Florida’s statutory bond scheme—whether that be Florida Statutes §§255.05, 713.23, 713.245, or 337.18—must take great care to notify all potential claimants of the requirements of the respective statute.