Construction Law Committee
Memorandum of Committee Minutes

To: All Construction Law Committee Members
The Florida Bar: Real Property, Probate and Trust Law Section

From: Fred R. Dudley, Secretary

Re: Meeting Minutes – February 13, 2012

Chair, Arnie Tritt, called the meeting to order at 11:30.
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NEW RECORDATION OF ATTENDENCE: In an effort to conserve committee time for discussion of pending issues all attendance **must** be recorded BY EACH MEMBER through the use of Google Documents. Instructions for the use of this method of recording attendance will be given at the beginning of each meeting.

1. Opening:

A. The minutes for the committee's previous meeting of January 9, 2012, were approved as circulated.

B. Officers present in addition to the chair were Hardy Roberts, Co-Chair and Fred Dudley, Secretary; Lisa Colon-Heron was not able to attend.

2. Welcome New Members: There were no new members to introduce, but Dan Zorrilla was introduced as the guest of John Rains.

3. New Business: The list serve is being re-done, so if anyone is not getting e-mails please contact one of the committee officers.

Secretary's Note: Following this meeting it was learned that one of our members, Heather Pinder-Rodriquez, as been appointed as a Circuit Court Judge in Orange/Seminole counties. CONGRATUATIONS, HEATHER, AND BEST WISHES IN YOUR NEW CAREER.

4. Subcommittee Reports:

A. ABA Forum Liaison: Cary Wright reported that the Houston meeting was well attended, and asked that any volunteers to serve on the 12 divisions contact him or George Meyer. Future meetings will be held in Las Vegas on April 25-27, 2012, and the fall meeting will be held in Boston on October 18-19, 2012.

B. Construction Regulation: Chair Fred Dudley reported on new appellate and DOAH cases, as well as proposed administrative rules, petitions for rule waivers and petitions for declaratory statement involving construction law and regulations, per a written monthly report which has been circulated to the members.

C. Publications: No report.

IMPORTANT REMINDER: Members are invited to submit proposed articles on a construction law topic for peer review and possible publication in The Florida Bar Journal.

D. 2011 Construction Law Institute: Cary Wright corrected the dates set forth in today's agenda: the FIFTH annual Construction Law Institute will be held on March 22-24, 2012, at the Reunion Resort near Orlando, which is the same exit but across Interstate 4 from Champions Gate (the site of the previous Institutes). A golf tournament will be held on the 22nd, with the seminars beginning on the 23th. A block of rooms has already been reserved, and reservations can be made now. Noted Florida economist, Henry Fishkind, will be the breakfast speaker Saturday morning.

ANOTHER IMPORTANT REMINDER: Members and their firms are invited to serve as sponsors this event for a cost of only $2,000 each, which includes two (2) complimentary admissions and display of member or firm name in the program materials.

E. Certification Review Course: Chair Kim Ashby reported that the annual review course will be held simultaneously with the CLI, and that all the speakers have been designated.

F. 2011 Certification Exam: In the absence of Chair Mike Sasso, Fred Dudley reported that the 2012 examination questions have been completed, and that there are approximately 43 applicants for the May 2012 examination.

YET ANOTHER IMPORTANT REMINDER: Members who are not yet certified have until the application deadline of October 31, 2012, in order to take the certification exam in May 2013.

G. Chinese Drywall: Chair Neil Sivyer reported that the court has given preliminary approval to a Global settlement with Knauf (the manufacturer of approximately 50% of the bad drywall), and the largest supplier, Banner Supply, for repairs of all houses. This has not yet been finalized and no date has yet been set for any "op-outs," but an extension has been proposed for April 11, 2012.

H. Green Building: No report.

I. Small Business Programs: No report in the absence of the Chair Lisa Colon-Heron.

J. Surety and Insurance: Chair Ty Thompson's written report is attached to these minutes. He reported specifically on the application of the "cardinal change" theory as applied to a 144% price increase in the recent Florida case of Harford Cas. Ins. Co. v. City of Marathon issued on November 1l8, 2011, by the U.S. District Court for the Southern District, which allowed the surety to reject coverage under a contract addendum for a separate project in a different location.

K. Website Subcommittee: No report.

L. Legislative Subcommittee: Chair Reese Henderson reported that the lien law bill was advancing with amendments (House Bill 897 and Senate Bill 1202), and mentioned the post-bid closing proposal for immediate opening and posting of all bids.

M. CLE Subcommittee: Hardy Roberts introduced our February CLE presenter, Langford White, who will speak on "Bankruptcy Considerations in the Construction Industry."

REMINDER: Each committee member is responsible for posting their own CLE credits on TFB website; neither the committee nor subcommittee can do so.

5. Continuing Legal Education Presentation: (Started at 12:06 until 1:00)

Mr. White presented a 6-page written outline with exhibits, including a D & B report dated February 2012 regarding U. S. Business Trends, as well as a NAHB House and Interest Rate Forecast as of December 30, 2011, and a 40-page description of the applicable bankruptcy code provisions, all of which were distributed to the members.

NOTE: **Volunteer speakers for future CLE presentations are encouraged to notify Chair Colon-Heron as soon as possible.** Presentations should be in 25-minute segments, but may be continued to a subsequent meeting if more time is required, and may include more than one speaker; discussion and debate will be welcome.

6. Closing:

No further business appearing at this time, the meeting was adjourned at 1:01 p.m.

REMINDER: The next scheduled meeting of the committee will be held on **Monday, March 12, 2012,** beginning at 11:30 a.m., as a regular conference call.

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MEMORANDUM

TO: **RPPTL Construction Law Committee**

FROM: **Ty G. Thompson**
Surety & Insurance Subcommittee

DATE: **February 13, 2012**

RE: **Case Law Update**

Cardinal Change

On November 18, 2011, the United States District Court for the Southern District of Florida in *Hartford Cas. Ins. Co. v. City of Marathon* - 2011 WL 5825503 (S.D. Fla.), held that a performance bond surety would not be responsible for a cardinal change in the bonded contract, notwithstanding language in the contract where the surety consented to changes. A copy of the decision is attached. A summary of the facts and law are:

The Plaintiff, Hartford Casualty Insurance Company's and Defendant City of Marathon's cross motions for summary judgment... Court finds that Plaintiff Hartford Casualty Insurance Company is entitled to summary judgment....

Defendant Intrastate Construction Corp. ("Intrastate"), a construction company incorporated under the laws of Florida, submitted its bid for the **Area 3 Project**....Intrastate's $2,061,000.00 construction bid was recommended and determined to be the lowest responsive and responsible bidder for the **Area 3 Project**....The project consists of constructing tanks, buildings, and installing wastewater treatment and plumbing facilities, complete, in place, all in accordance with the construction drawings and technical specifications."...

...On or about June 3, 2009, Plaintiff Hartford Casualty Insurance Company ("Hartford") issued statutory **performance and payment bonds for the Area 3 Project** under bond

number 35 BCSFD 6127 (the "Bonds"). Hartford executed ... **The Area 3 Performance Bond**, issued in favor of Marathon, guaranteed Intrastate's performance on the contract entitled, City of Marathon Service Area 3 Wastewater and Stormwater Project. The Area 3 Payment Bond guaranteed payment to Intrastate's subcontractors, sub-subcontractors, laborers, and materialmen on the contract entitled, City of Marathon Service Area 3 Wastewater and Stormwater Project.

...On or about April 27, 2010, Intrastate and Marathon executed a document entitled Change Order No. 1 to "provide the same type of services to build another treatment plant," known as the **Area 7 Wastewater Treatment Facility Project**...5.5 miles away from the **Area 3 Project**...Hartford informed Marathon by letter that it had not and would not bond the **Area 7 Change Order** and thereby extend the value of its bond from $2,061,000.00 to $5,045,487.00.

...Upon review of the plain language of the contracts, the Court finds that Hartford consented to changes, including "additions, deletions, or revisions in the Work," as well as "change affecting the general scope of the Work." The Court rejects, however, Marathon's proposition that Marathon had the unlimited, unilateral right to change the price and scope of the underlying contract....Although Hartford consented to change orders through the change provisions of the underlying construction contract, if the nature and magnitude of the change order is far beyond what the parties anticipated when they entered into the contract, it may nevertheless qualify as a ***cardinal change*** to relieve Hartford of liability...turns on the extent to which the undisputed material facts indicate that the Area 7 Change Order was a significant enough deviation from the scope of the underlying construction contract to relieve Hartford of its liability under the performance bond.

The undisputed facts reveal that the Area 7 Change Order obligated Intrastate to build "another treatment plant," based on separate plans and specifications, 5.5 miles away. ***This was not a change order that merely extended or altered the specifications, timeline, or cost of the original treatment plant—this was a change order that ordered the building of a second treatment plant***...The Court finds the fact that the Area 3 Project and the Area 7 Project were both part of an expansive overhaul of the water treatment system in City of Marathon to be insufficient, standing alone, to prove that the addition of the Area 7 Project (or any of the other seven treatment areas) was contemplated at the time Marathon, Intrastate, and Hartford executed the construction and bond contracts for the Area 3 Project....The Area 7 Change Order came at an **additional cost of $2,984,487.00—an increase of over 144 percent** of the original contract sum. Therefore, the Court finds that the undisputed facts show that the change "greatly exceed[ed] the original contract cost" so as to satisfy the third factor.

Miller Act

In *U.S. for the use of McAllister Construction Co., LLC v. Diversified Maintenance Systems Inc.*, 2011 WL 6112903 (N.D. Fla. December 8, 2011) a subcontractor on a federal project sued the Miller Act surety for the prime contractor, and the contractor intervened. The subcontract included an arbitration provision requiring that all disputes be settled by arbitration in Utah. The prime contractor demanded arbitration, but the subcontractor did not participate in the arbitration and claimed that it was invalid. The intervening prime contractor and surety moved for summary judgment. The subcontractor argued that by intervening in the Miller Act suit the prime contractor waived the right to have the dispute resolved by arbitration. The court noted that the petition to intervene cited the arbitration provision and sought to enforce it. The court rejected the subcontractor's waiver argument, granted the motions, and dismissed the case with prejudice.

In *U.S. for the use of Capital Computer Group, LLC v. The Gray Insurance Co.*, Case No. 10-15519 (11th Cir. December 21, 2011) the claimant alleged that it was an unpaid first tier subcontractor on a Miller Act project. The prime contractor had approached another contractor (Code 4 Systems, Inc.) about the work, but Code 4 could not qualify for financing. Code 4 and the claimant then arranged for the claimant to enter into the "subcontract" and sub-subcontract the work to Code 4. The claimant financed the work via a factoring arrangement. The work had been performed and the prime contractor had not paid for it, but the surety argued that the claimant was simply providing financing and thus was not within the coverage of the Miller Act payment bond. The Court looked to the subcontract, which obligated the claimant to perform the work including maintaining insurance for the prime contractor's benefit and indemnifying the prime contractor. The fact that the claimant "performed" by hiring Code 4 to do the actual work did not make it any less of a subcontractor. The Court looked to the written documents and concluded that the claimant was a subcontractor within the coverage of the bond. The Court affirmed summary judgment for the claimant.

Offer of Judgment

In *Southeast Floating Docks, Inc. v. Auto-Owners Insurance Co.*, 2012 WL 301029 (Fla. February 2, 2012) the Florida Supreme Court answered one of the three questions of Florida law certified by the U.S. Court of Appeals for the Eleventh Circuit at 632 F.3d 1195 (11th Cir. February 8, 2011). The surety settled with the obligee and sued the principal and an indemnitor. At the first trial, the jury thought that the surety settled in bad faith and returned a judgment for the defendants. The trial court granted a new trial. After the new trial was granted but more than 45 days before the scheduled date for the second trial, the principal made an offer of judgment of $300,000 conditioned on release of it and the individual indemnitor. The surety rejected the offer and recovered

over $1.1 million at the second trial. On appeal, the Eleventh Circuit reversed grant of the second trial and reinstated the first jury verdict for the defendants. The principal then claimed attorneys fees pursuant to the Florida offer of judgment statute and court rule because the surety recovered less than the offer. The trial court denied the principal's request and the principal appealed. The Eleventh Circuit certified three dispositive questions of Florida law to the Florida Supreme Court: (1) does the Florida statute allow offers of judgment before a second trial, and if so may they be deemed valid if the result of the first trial is reinstated; (2) did the condition of the offer on dismissal of claims against the individual indemnitor make the offer an invalid "joint offer;" and (3) does the Florida offer of judgment statute and regulation apply in a case in which a contractual agreement called for application of another state's law.

The Florida Supreme Court answered the third question. It found that the Florida offer of judgment statute was substantive, as opposed to procedural, and did not apply because the indemnity agreement provided that Michigan law would govern all disputes arising under the agreement. The Court did not reach the other two questions, which were rendered moot by the answer to the third, and remanded the case to the Eleventh Circuit.