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MEMORANDUM

TO: RPPTL Construction Law Committee

FROM: Ty G. Thompson
Surety & Insurance Subcommittee

DATE: May 14, 2012

RE: Case Law Update

PERFORMANCE BOND

In *Safeco Ins. Co. of Am. v. Victoria Mgmt., LLC*, 2012 WL 1606101 (S.D. Fla. May 7, 2012), the surety issued performance and payment bonds for the construction of a nursing home. The surety required the contractor and others to execute a general agreement of indemnity in its favor as a condition of issuing the bonds. The owner of the nursing home terminated the contractor and called upon the surety to complete the project in accordance with the terms of the bonded contract. The surety sued the owner for amounts due under the contract for approved change orders totaling \$3,201,326.63. The surety also sued the architect for common law indemnity and professional negligence.

The architect moved to dismiss the surety's common law indemnity claim arguing that there was no special relationship between the architect and the surety or the contractor. Citing to *Amwest Surety v. Ernst & Young*, 677 So. 2d 409 (Fla. 5th DCA 1996), the court disagreed and held, "the surety can maintain a claim against an architect where the allegations are that the architect's professional negligence caused or contributed to the loss." The court therefore denied the architect's motion to dismiss.

INDEMNITY

In *Guarantee Co. of N. Am. USA v. Mercon Constr. Co.*, Case No. 6:11-cv-1400 (M.D. Fla. April 12, 2012), the surety settled with the obligee and sued the principal and indemnitors under the general agreement of indemnity. The defendants filed two counterclaims, which the

surety moved to dismiss. The first counterclaim alleged a bad faith claim against the surety. The court noted that bad faith could be used as an affirmative defense to the surety's indemnity claim but not as a counterclaim, and dismissed the bad faith claim. The second counterclaim sought damages for the surety's settlement of the principal's affirmative claims against the obligee's surety. The defendants argued that the right to settle claims provision of the general indemnity agreement applied to claims against the surety not the principal's affirmative bond claims. The surety pointed to other provisions of the indemnity agreement that assigned the affirmative claim to the surety. The court agreed with the surety and dismissed the counterclaim and also noted that even if the surety did not have authority to settle the affirmative claim it would not have breached the indemnity agreement by doing so. The settlement might not have been effective, but the indemnity agreement would not have been breached.