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MEMORANDUM

TO: **RPPTL Construction Law Committee**

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

DATE: **July 9, 2012**

RE: **Case Law Update**

MILLER ACT

In *U.S. for the use of Postel Erection Group, L.L.C. v. Travelers Casualty and Surety Company of America*, Case No. 6:12-cv-182 (M.D. Fla. June 28, 2012) a second-tier subcontractor sued the sureties on the prime contractor's Miller Act payment bond. The first tier subcontractor was engaged in arbitration with the prime contractor, and the sureties moved to stay the Miller Act suit pending the outcome of the arbitration. The court granted the sureties' motion based on its inherent power to control its docket and the interests of judicial economy. The court noted that there was a "murky" but close relationship between the first tier subcontractor and the claimant but did not depend on that relationship in granting the motion.

PERFORMANCE BOND

In *Candlelight Mini Storage, Inc. v. Chubb Group Insurance Companies*, Case No. 8:12-cv-393 (M.D. Fla. June 13, 2012) a purchaser of property was the obligee of a bond provided by the developer of the property to secure construction of certain improvements. The purchaser alleged that the improvements were not built and sued the surety. In addition to breach of contract, the complaint sought to "foreclose" on the bond. The court granted the surety's motion to dismiss the foreclosure count and instructed the plaintiff, if it chose to re-plead, to explain what it was seeking in addition to a breach of contract claim.

SECTION 718.202, FLORIDA STATUES

In *Bruno v. Mona Lisa at Celebration, LLC (In re Mona Lisa at Celebration, LLC)*, Case No. 6:09-bk-458, Adv.Proc. No. 6:09-ap-49 (Bankr.M.D.Fla. May 16, 2012) numerous prospective purchasers of units in a hotel-condominium made deposits but, after the Florida condominium market collapsed, did not go through with their purchases and demanded return of their deposits even though the project was constructed as promised ("The likely reason the plaintiffs rely on these conclusory statements is that they cannot demonstrate any actual damages because, by and large, Mona Lisa did everything it promised.") Pursuant to section 718.202, Florida Statutes, Mona Lisa posted a bond to allow it to use the first 10% of the prospective purchasers' deposits. Many of the plaintiffs had deposited more than 10%, and the Act permitted the developer to use such excess deposits for construction and development, but not for advertising. The court found several technical violations, including that the over 10% deposits were transferred to an operating account and comingled with other funds and that some advertising expenses (rent on the sales office) were paid from the comingled account. The court held that the developer owed the plaintiffs their deposits plus interest, costs and attorneys' fees. It held that the surety was responsible for the deposits, up to the penal sum of the bond, but not the other items. The court rejected the surety's argument that the bond covered only the first 10% of the deposits because the bond itself was conditioned on refund of deposits, not just the first 10%.

SURETY'S CLAIMS AGAINST ARCHITECT

In *Safeco Insurance Company of America v. Victoria Management, LLC*, 2012 WL 1606101 (S.D. Fla. May 7, 2012) the surety on a private project sued, among others, the project architect. As to the architect, the surety alleged claims for professional negligence and common law indemnity. The architect moved to dismiss the common law indemnity claim and argued that there was no "special relationship" between the architect and the surety or the bond principal. 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. . . . Accordingly, the Court finds these allegations sufficiently state a cause of action for common law indemnity against MSA Architects and denies the motion to dismiss."

SALVAGE

In *SureTec Insurance Co. v. National Concrete Structures, Inc.*, Case No. 12-cv-60051 (S.D. Fla. July 3, 2012) the surety paid losses and expenses and sued the principal and individual indemnitors on account of those losses. One of the individual indemnitors filed a counterclaim for damages and rescission based on alleged violation of the federal Equal Credit Opportunity Act ("ECOA"). The surety moved to dismiss the

counterclaim. The court held that "neither the payment and performance bonds issued by SureTec nor the Indemnity Agreement constitute a credit transaction within the meaning of the ECOA, because no defendant obtained any right to defer the payment of a debt." The court therefore dismissed the indemnitor's ECOA counterclaim with prejudice.