LAWYER

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ACCRUAL REALITY – WHEN A CLAIM ARISES UNDER A SURETY BOND

Construction Law Section

Chairs: J. Derek Kantaskas – TMD Companies, LLC & Gregg E. Hutt – Trenam Law

While surety bonds are a type of insurance contract, the unique and distinct nature of the surety contract bases the surety's liability on the liability of the principal.

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Distinguishing suretyship from insurance takes a herculean effort — even more so when trying to determine when a surety's obligation is triggered. In *Lexon Insurance Company v. City of Cape Coral*, the Second District Court of Appeal differentiated surety contracts from insurance contracts by explaining that a surety bond is breached when the bond principal breaches its obligation — not when the surety denies a claim. 238 So. 3d 356 (Fla. 2d DCA 2017), review denied, 2018 WL 3282013 (Fla. 2018).

The *Lexon* case involved bonds governing a 400-plus acre development. In June 2006, Lexon, as surety, issued two subdivision bonds totaling $7.7 million that named the developer as principal and the City as the obligee. In March 2007, the contractor for the project stopped work because the developer stopped paying on the parties' contract. By June 2007, the City had stopped performing inspections at the property.

But the City waited until October 2012 to sue Lexon for breach of contract and for declaratory relief. Lexon moved to dismiss the City's claim as untimely. The trial court, however, characterized the bonds as an insurance contract and ruled that the bonds were not breached until Lexon denied the claim. In doing so, the trial court rejected Lexon's argument that because the surety bonds are a contract, the principal

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breached the contract in early 2007, thereby rendering the City's claims time barred.

The Second District Court of Appeal disagreed, holding that the five-year statute of limitations for an action based in contract was applicable to the City's breach of contract claim and that the City's bond claim accrued when the developer abandoned the project in March 2007.

The Second DCA relied on well-settled law that the surety's liability to the obligee is based on the liability of its principal. *Lexon Ins. Co.*, 238 So. 3d at 359 (relying on *Am. Home Assurance Co. v. Larkin Gen. Hosp., Ltd.*, 593 So. 2d 195, 198 (Fla. 1992)). In *Lexon*, the bonds obligated the principal, the developer, to construct improvements on the project. When the developer failed in its obligation, the City's cause of action accrued.

While surety bonds are a type of insurance contract, the unique and distinct nature of the surety contract bases the surety's liability on the liability of the principal. The principal's default "was the act that breached the bonds and started the running of the statute of limitations" — not the City's demand for damages. *Id.* at 360. So the statute of limitations began to run in March 2007, when the developer abandoned the project.

Suretyship is undoubtedly a difficult area of law to navigate, but the *Lexon* case further clarifies and provides more certainty as to when a surety's obligation under a bond begins to accrue.

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Construction Law Section Luncheon

On September 20, the Construction Law Section held their first luncheon of the new Bar year, where they received an informative presentation on construction defect cases involving roofing. The speaker, Lance Manson, who is a senior consultant and registered roof consultant at Delta Engineering and Inspection, Inc., discussed ways to measure and vet experts for roof construction defects cases, and the investigative tasks required for each roof system type. Manson also gave examples of various cases that illustrate the importance of an expert's experience and the method of investigative tasks used to prepare for a successful litigation.