

April 2006

## Construction Law: Enforcing the Notice and Filing Time Requirements of "Florida's Little Miller Act"—an Adventure in Statutory Construction

John H. Rains IV

Follow this and additional works at: <https://scholarship.law.ufl.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

John H. Rains IV, *Construction Law: Enforcing the Notice and Filing Time Requirements of "Florida's Little Miller Act"—an Adventure in Statutory Construction*, 58 Fla. L. Rev. 425 (2006).

Available at: <https://scholarship.law.ufl.edu/flr/vol58/iss2/4>

This Case Comment is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Law Review by an authorized editor of UF Law Scholarship Repository. For more information, please contact [kaleita@law.ufl.edu](mailto:kaleita@law.ufl.edu).

CONSTRUCTION LAW: ENFORCING THE NOTICE AND FILING  
TIME REQUIREMENTS OF “FLORIDA’S LITTLE MILLER  
ACT”—AN ADVENTURE IN STATUTORY CONSTRUCTION

*American Home Assurance Co. v. Plaza Materials Corp.*,  
908 So. 2d 360 (Fla. 2005)

*John H. Rains IV* \* \*\*

Respondent, a materials supplier, sought payment from bonds issued by Petitioner, a surety,<sup>1</sup> for materials Respondent supplied for the construction of a public highway.<sup>2</sup> After the subcontractor and general contractor failed to pay Respondent and both filed for bankruptcy, Respondent looked to Petitioner’s bonds for payment.<sup>3</sup> Respondent, however, failed to perfect its claims in accordance with section 255.05(2) of the Florida Statutes,<sup>4</sup> which sets forth notice and time requirements for claimants seeking to recover against bonds issued for state contracts.<sup>5</sup>

---

\* J.D. expected May 2007, University of Florida Levin College of Law. I wish to thank John H. Rains, III, Karan Rains, and Thomas F. Icard, Jr. for their helpful criticism of this Comment. I am also grateful for the patient interest of Perrin Rains as I incessantly discussed “Florida’s Little Miller Act.”

\*\* This Case Comment won the George W. Milam award for best case comment.

1. A surety is a person or entity “who is primarily liable for the payment of another’s debt or the performance of another’s obligation.” BLACK’S LAW DICTIONARY 1482 (8th ed. 2004).

2. *Am. Home Assurance Co. v. Plaza Materials Corp.*, 908 So. 2d 360, 362 (Fla. 2005) (quoting *Am. Home Assurance Co. v. Plaza Materials Corp.*, 826 So. 2d 358, 359 (Fla. 2d DCA 2002)). The Respondent, Plaza Materials Corp. (Plaza Materials), provided stone road base products to Fulton Construction (Fulton), a subcontractor hired by the general contractor, Cone Constructors, Inc. (Cone), to purchase and haul road base materials to the job site for sections 3A, 3B, and 6A of the Polk Parkway. Brief of Respondent at \*2, *Am. Home Assurance Co. v. Plaza Materials Corp.*, 908 So. 2d 360 (Fla. 2005) (No. SC02-1257), 2002 WL 32131771. The Florida Department of Transportation (FDOT) contracted with Cone to build the highway and paid Cone for the materials and labor furnished by Fulton and Plaza Materials. *Plaza Materials*, 908 So. 2d at 362. Cone allegedly paid Fulton, but Fulton failed to pay Plaza Materials. *Id.* Plaza Materials then made a claim against the bonds posted by Cone’s surety, American Home Assurance Company (American Home), the Petitioner. *Id.*

3. *Plaza Materials*, 908 So. 2d at 362. American Home paid almost \$1.4 million to other claimants on the Polk Parkway project and sought payment from the FDOT under the doctrine of equitable subrogation for sums withheld by the FDOT from Cone on other projects. *See In re Cone Constructors, Inc.*, 265 B.R. 302, 303-04 (Bankr. M.D. Fla. 2001).

4. *Plaza Materials*, 908 So. 2d at 362.

5. FLA. STAT. § 255.05(2) (1995) provides in relevant part:

A claimant . . . who is not in privity with the contractor shall, within 45 days

Petitioner's bond, which followed a form supplied by the Florida Department of Transportation (FDOT), did not reference the notice and time requirements, in violation of section 255.05(6) of the Florida Statutes.<sup>6</sup> The trial court permitted Respondent's claims because Petitioner's failure to comply with section 255.05(6) rendered its bonds common law bonds.<sup>7</sup> The circuit court reached this conclusion despite the language of section 255.05(4) of the Florida Statutes, which requires that all bonds issued under section 255.05 be deemed statutory bonds.<sup>8</sup> The District Court of Appeal for the Second District of Florida affirmed,<sup>9</sup> certifying a question of great public importance to the Florida Supreme Court.<sup>10</sup> Quashing the Second District's opinion in part, the Florida

---

after beginning to furnish labor, materials, or supplies for the prosecution of the work, furnish the contractor with a notice that he or she intends to look to the bond for protection. A claimant who is not in privity with the contractor and who has not received payment . . . shall, within 90 days after performance of the labor or after complete delivery of the materials or supplies . . . deliver to the contractor and to the surety written notice of the performance of the labor or delivery of the materials or supplies and of the nonpayment. No action for the labor, materials, or supplies may be instituted against the contractor or the surety unless both notices have been given. No action shall be instituted against the contractor or the surety on the payment bond or the payment provisions of a combined payment and performance bond after 1 year from the performance of the labor or completion of delivery of the materials or supplies.

*Id.* References in the text to FLA. STAT. § 255.05 are to the 1995 version of the statute unless otherwise indicated. The 1995 version governed in the instant case. *See Plaza Materials*, 908 So. 2d at 364.

6. *Plaza Materials*, 908 So. 2d at 362. FLA. STAT. § 255.05(6) (1995) provides that “[a]ll bonds executed pursuant to this section shall make reference to this section by number and shall contain reference to the notice and time limitation provisions of this section.” *Id.*

7. *Plaza Materials*, 908 So. 2d at 362, 366 (quoting *Plaza Materials*, 826 So. 2d at 360). The primary significance of a bond being deemed a common law bond is that such bonds do not have to comply with the statutory notice and time requirements and were not, at the time of the dispute giving rise to the instant case, subject to a one year statute of limitations. *See id.* at 365-67 & n.5; cf. FLA. STAT. § 255.05(2) (1995) (imposing a one year statute of limitations for statutory bonds).

8. *Plaza Materials*, 908 So. 2d at 362 (citing *Plaza Materials*, 826 So. 2d at 358). FLA. STAT. § 255.05(4) (1995) provides 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).” *Id.*

9. *Plaza Materials*, 908 So. 2d at 362.

10. *Id.* at 361-62. District courts certify questions of great public importance in order to trigger the limited discretionary review of the Florida Supreme Court. *See generally* Gerald B. Cope, Jr., *Discretionary Review of the Decisions of Intermediate Appellate Courts: A Comparison of Florida's System with Those of the Other States and the Federal System*, 45 FLA. L. REV. 21 (1993) (discussing the limited discretionary review of the Florida Supreme Court). The Second District presented the question in the following language: “IF A STATUTORY PAYMENT BOND DOES NOT PROVIDE NOTICE TO THE NOTICE AND TIME LIMITATION

Supreme Court did not construe Petitioner's bond as a common law bond, but nevertheless HELD that a surety who fails to reference the statutory notice and time requirements in its bond may be estopped from asserting the requirements as a defense if the claimant can prove that it lacked actual knowledge of the notice and limitations provisions.<sup>11</sup>

Section 255.05 of the Florida Statutes, commonly referred to as "Florida's Little Miller Act,"<sup>12</sup> affords protection to subcontractors, material suppliers, and laborers who cannot bring claims of lien<sup>13</sup> to recover payment for work or materials supplied for public construction projects.<sup>14</sup> The statute also protects the state from defaults by the general contractor in both the performance of the contract and the payment of subcontractors and material suppliers.<sup>15</sup> Finally, section 255.05 protects contractors and their sureties from unforeseen claims by requiring sub-subcontractors and material suppliers to give notice that they intend to look to a bond for payment.<sup>16</sup>

PROVISIONS OF SECTION 255.05(6), ARE THOSE NOTICE AND TIME LIMITATIONS NEVERTHELESS ENFORCEABLE BY THE SURETY, OR IS THE CLAIMANT ENTITLED TO RELY UPON THE NOTICE AND TIME LIMITATIONS APPLICABLE UNDER THE COMMON LAW?" *Plaza Materials*, 908 So. 2d at 361-62 (capitalization in original).

11. *Plaza Materials*, 908 So. 2d at 370. The instant court's decision does not refer to or directly affect private payment bonds furnished pursuant to FLA. STAT. § 713.23 (2005) or subcontractors' payment bonds. *See id.*; FLA. STAT. § 255.05 (1995) (governing bonds furnished by sureties on behalf of general contractors).

12. Section 255.05 is referred to as the "Little Miller Act" because it was originally adopted and patterned after the "Miller Act," 40 U.S.C. §§ 3131-3134 (West 2005), a federal law governing public contracting. John W. Bakas, Jr., *The Public Works Contract*, in *FLORIDA CONSTRUCTION LAW AND PRACTICE* §§ 14.1, 14.31, 14.42-43 (4th ed. 2002). Beginning with the 1977 amendments, however, Florida's version of the Miller Act has "radically departed from the federal Miller Act" and "cases decided under the Miller Act potentially are less applicable than those decided under [FLA. STAT. §] 255.05." *Id.* § 14.31. For a comprehensive discussion of the original Florida law and amendments through 2001, *see id.* §§ 14.43-51.

13. A mechanic's lien, called a construction lien in Florida, is "[a] statutory lien that secures payment for labor or materials supplied in improving, repairing, or maintaining real or personal property." *BLACK'S LAW DICTIONARY* 943 (8th ed. 2004). Florida's Construction Lien Law, FLA. STAT. §§ 713.001-.37 (2005), governs claims of lien and the conditions precedent to perfecting such claims. *See generally id.* § 713.08 (specifying requirements to perfect and foreclose a claim of lien); *id.* § 713.01(22) (excluding the government from the definition of an "owner" for purposes of Florida's Construction Lien Law).

14. *See, e.g., City of Fort Lauderdale v. Hardrives Co.*, 167 So. 2d 339, 340 (Fla. 2d DCA 1964) (summarizing the purpose of section 255.05 as "the protection of materialmen, laborers and the like, whose labor and materials are put into public works projects, upon which they can acquire no lien, by substituting a penal bond for the lien allowed by other statutes on private construction projects"); *see also* STEPHEN B. RAKUSIN, 3 *FLORIDA CONSTRUCTION LIEN MANUAL* 29-6.2, 29-6.3 (2001).

15. *Plaza Materials*, 908 So. 2d at 363.

16. *Id.* Subcontractors in privity with the general contractor are not bound by the statutory notice and time requirements. *See* FLA. STAT. § 255.05(2) (2005).

Prior to 1980, courts in Florida looked to the language of bonds posted under section 255.05 to determine whether the bond should be treated as a statutory or common law bond.<sup>17</sup> A common law bond affords greater protection to potential claimants than a statutory bond by providing greater coverage and by not requiring references to the statute.<sup>18</sup> The addition of subsections (4)<sup>19</sup> and (6)<sup>20</sup> to the statute in 1980<sup>21</sup> created a controversy over whether any bond issued pursuant to section 255.05 could be treated as a common law bond.<sup>22</sup>

In *Martin Paving Co. v. United Pacific Insurance Co.*,<sup>23</sup> the Fifth District concluded that in certain instances, a section 255.05 bond still could be deemed a common law bond.<sup>24</sup> Faced with a surety that failed to record its bond in the public records in accordance with section 255.05(1) of the Florida Statutes,<sup>25</sup> the *Martin Paving* court had to determine if the surety could enforce the notice and time requirements found in section 255.05(2) against a claimant that failed to comply with the requirements.<sup>26</sup> Construing section 255.05(4) narrowly, the court reasoned that the specific reference in the statute to “payment provisions,” instead of bonds generally, evidenced a legislative intent to interpret all payment provisions of bonds issued under the statute as statutory bonds—not all bonds, as the surety contended.<sup>27</sup> The court reached this conclusion by reading the plain

17. See *Plaza Materials*, 908 So. 2d at 365 n.5.

18. See *id.*; *Sw. Fla. Water Mgmt. Dist. v. Miller Constr. Co.*, 355 So. 2d 1258, 1259 (Fla. 2d DCA 1978); *United Bonding Ins. Co. v. City of Holly Hill*, 249 So. 2d 720, 724 (Fla. 1st DCA 1971).

19. See *supra* note 8.

20. See *supra* note 6.

21. See 1980 Fla. Laws 32-101.

22. See *Plaza Materials*, 908 So. 2d at 362.

23. 646 So. 2d 268 (Fla. 5th DCA 1994).

24. *Id.* at 271.

25. See *id.* at 269. FLA. STAT. § 255.05(1) (1993) provides in relevant part:

Any person entering into a formal contract with the state or any county, city, or political subdivision thereof, . . . for the construction of a public building, for the prosecution and completion of a public work, or for repairs upon a public building or public work shall be required, before commencing the work, to execute, deliver to the public owner, and record in the public records of the county where the improvement is located, a payment and performance bond with a surety . . . .

*Id.* The 1993 version of the statute was at issue in *Martin Paving*. 646 So. 2d at 270 n.3.

26. *Martin Paving*, 646 So. 2d at 269-70. As in the instant case, the bond in *Martin Paving* did not reference the notice and time requirements of subsection (2). *Id.* at 270 n.3. The court declined to reach this issue, however, concluding that the “omission [was] not material under the facts of [the] case.” *Id.*

27. *Id.* at 270.

language of the statute and by looking to legislative staff reports.<sup>28</sup> Based on the support of these staff reports, the *Martin Paving* court held that a bond issued under section 255.05 that was not recorded in the public records was a common law rather than a statutory bond, and therefore the notice and time requirements of the statute did not apply to the claimant.<sup>29</sup>

*Florida Crushed Stone Co. v. American Home Assurance Co.*,<sup>30</sup> a “sequel” to the instant case “involv[ing] the same surety and the same [highway],”<sup>31</sup> afforded the Fifth District an opportunity to decide an issue it declined to address in *Martin Paving*—the status of section 255.05 bonds that fail to specifically reference the notice and time requirements of subsection (2).<sup>32</sup> Distinguishing *Florida Crushed Stone* from *Martin Paving*,<sup>33</sup> the Fifth District held that the bond was a statutory bond, but that the surety would have been estopped from enforcing the notice and time requirements if the claimant’s failure to comply with the statute “was because of the inadequacies of the notice provisions of the bond.”<sup>34</sup> The court found the *Martin Paving* court’s “payment provisions” distinction regarding subsection (4) unpersuasive and dismissed it as a “semantical argument” of “little moment.”<sup>35</sup> Instead, the court 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.<sup>36</sup> The Fifth District also certified the issue before it to the Florida Supreme Court as “one of great importance throughout the state.”<sup>37</sup>

In the instant case, the Second District reached a different conclusion. Instead of adopting the estoppel defense outlined in *Florida Crushed*

28. *Id.* at 270-71. The court also embraced a common sense argument that if a claimant cannot read the bond because of the failure of a surety to record it or supply it upon request, then the surety should not be able to enforce the statute, because the claimant would be unaware of the statutory notice and time requirements. *Id.* at 271.

29. *Id.*

30. 815 So. 2d 715 (Fla. 5th DCA 2002).

31. *Id.* at 715-16.

32. *See id.* at 716-17. The court noted the factual similarities with the instant case, observing that “[t]he bond issued in this case is the same bond involved in *Plaza Materials* and therefore suffers the same deficiency.” *Id.* at 716.

33. *Id.* at 717. 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.” *Id.* When counsel for the claimant was asked why the claimant did not comply with the notice provisions, the response was “‘I don’t know.’” *Id.* at 717 n.6. This differs remarkably from *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. *Martin Paving*, 646 So. 2d at 269.

34. *Fla. Crushed Stone*, 815 So. 2d at 716-17.

35. *Id.* at 717 n.4.

36. *Id.* at 717.

37. *Id.*

*Stone*, the Second District held that Petitioner's failure to specifically reference the notice and time requirements of section 255.05(2) in its bond converted the bond to a common law bond, or in the alternative, rendered the notice and time requirements unenforceable.<sup>38</sup> The court found no textual support in section 255.05(6) for the estoppel defense adopted in *Florida Crushed Stone*, and concluded that the legislature intended to bar sureties from enforcing the section 255.05(2) notice and time requirements if specific reference to the requirements was omitted from the text of a bond.<sup>39</sup> Finally, the Second District rejected Petitioner's argument that it should not be penalized for employing a bond form that the FDOT supplied.<sup>40</sup>

Approximately three months before the instant court rendered its decision, the Florida Legislature amended section 255.05 of the Florida Statutes, adding a reference to the notice and time requirements in the model bond form<sup>41</sup> and emphasizing that no bonds issued for public works in Florida could be construed as common law bonds.<sup>42</sup> As the amendment contained no retroactivity provision,<sup>43</sup> bonds issued before the statute's effective date would still be governed by the instant case.<sup>44</sup>

The instant court approved the Fifth District's holding in *Florida Crushed Stone*, quashing the Second District's opinion in *Plaza*

38. *Am. Home Assurance Co. v. Plaza Material Corp.*, 826 So. 2d 583, 360-61 (Fla. 2d DCA 2002).

39. *Id.* at 361.

40. *Id.* The bonds in the instant case were "essentially identical to the forms used in *Martin Paving*." *Id.* at 359 n.1.

41. *See* 2005 Fla. Laws 281-1 to -2. (adding a specific reference to the notice and time requirements of section 255.05(2) to the model bond form in section 255.05(3)).

42. *Id.* ("[P]ayment bonds furnished pursuant to this section . . . shall not under any circumstances be converted into common law bonds."). The Florida Senate Judiciary Committee Staff analysis accompanying this change noted that *Plaza Materials* was pending before the Florida Supreme Court. STAFF OF FLA. S. JUDICIARY COMM., SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, S.B. 652, at 1-3 (2005), available at [www.flsenate.gov/data/session/senate/bills/analysis/pdf/2005s0652.ju.pdf](http://www.flsenate.gov/data/session/senate/bills/analysis/pdf/2005s0652.ju.pdf). The staff report framed the issue facing the instant court as simply whether a section 255.05 bond could ever be construed as a common law bond. *Id.* at 1. Predicting the economic impact of the amendments, the report noted that the change "should result in the payment provisions of all public construction bonds being subject to the statutory notice and statute of limitations provisions." *Id.* at 5. The report did not consider the possible effect of the Supreme Court adopting the *Florida Crushed Stone* estoppel defense. *See id.* at 1-3, 5.

43. 2005 Fla. Laws 281-1 to -2.

44. *See* *Foley v. Morris*, 339 So. 2d 215, 217 (Fla. 1976) (explaining that statutes are not applied retroactively absent "express, clear, or manifest" legislative intent to so do). The universe of disputes to which the instant case applies may be shrinking, as fewer and fewer bonds issued under older versions of the statute become subjects of litigation. It is possible that the legislature failed, however, to eliminate the applicability of the instant case to future disputes. *See infra* note

90.

*Materials*.<sup>45</sup> From the outset, the court identified an operational conflict<sup>46</sup> between sections 255.05(4) and (6)—one provision requires the construal of the payment provisions of section 255.05 bonds as statutory bonds;<sup>47</sup> the other requires section 255.05 bonds to reference facially<sup>48</sup> the subsection (2)<sup>49</sup> notice and time requirements.<sup>50</sup> Unwilling to cede supremacy to one subsection, the instant court harmonized the provisions to give ““significance and effect”” to ““every word . . . of the statute.””<sup>51</sup> Noting that the legislature added subsections (4) and (6) to section 255.05 simultaneously,<sup>52</sup> and relying on legislative staff reports that clarified that the bond form in section 255.05(3) was permissive and not mandatory,<sup>53</sup> the instant court concluded that both provisions should be given equal weight.<sup>54</sup>

To achieve this harmonization, the instant court remanded the case to afford Respondent the opportunity to argue an estoppel defense.<sup>55</sup> To avoid the notice and time requirements, the court required Respondent to make “a prima facie showing that the bond is facially deficient under subsection (6)” and then at an evidentiary hearing, establish “by a preponderance of

---

45. *Am. Home Assurance Co. v. Plaza Materials Corp.*, 908 So. 2d 360, 370-71 (Fla. 2005).

46. That is, a conflict created by the facts of the instant case. *See id.* at 365 (“In essence, the text of the statute before us on these facts mandates either that neither or that both parties before us should prevail.”).

47. *See* FLA. STAT. § 255.05(4) (1995).

48. *See id.* § 255.05(6) (1995).

49. *See id.* § 255.05(2) (1995).

50. *Plaza Materials*, 908 So. 2d at 365 (citing FLA. STAT. § 255.05(6) (1995)).

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

52. *Id.* at 368 (citing 1980 Fla. Laws 101).

53. *Id.* (stating that the “bond form . . . would continue to be permissive” and requiring all bonds “to refer to the statute and to the time and notice limitations of the statute”) (quoting FLA. S. COMM. ON GOVERNMENTAL OPERATIONS, STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN COMMITTEE SUBSTITUTE FOR SENATE BILL 33 (1980)) (emphasis omitted). The majority defended this reliance on legislative staff reports in the face of criticism from the dissent, *id.* at 368-69, by citing several binding precedents that relied on similar reports. *See, e.g.*, *Knight v. State*, 808 So. 2d 210, 213 n.4 (Fla. 2002) (employing legislative history from staff reports to interpret the Prison Releasee Reoffender Act). The majority criticized the dissenters’ use of non-binding dissents and concurrences by United States Supreme Court Justice Antonin Scalia. *Plaza Materials*, 908 So. 2d at 369 n.7 (citing *Mitchum v. State*, 251 So. 2d 298, 300 (Fla. 1st DCA 1971) (observing that concurring opinions from the United States Supreme Court are not binding precedents in state courts)). The instant case highlights an emerging division within the Florida Supreme Court over the use of legislative staff reports to determine legislative intent. *See Bush v. Holmes*, Nos. SC04-2323 to SC-4-2325, 2006 WL 20584, at \*20 (Fla. Jan. 5, 2006) (Bell, J., dissenting) (citing *Plaza Materials*, 908 So. 2d 360 (Fla. 2005)) (arguing that the majority in *Holmes* failed to correctly apply the instant case to the interpretation of the voters’ and drafters’ intents in *Holmes*).

54. *See Plaza Materials*, 908 So. 2d at 368 (arguing that “it is clear that the Legislature did not intend for either subsection (4) or (6) to have a completely preclusive effect as the parties and the dissent assert in this dispute”).

55. *Id.* at 371.

the evidence that [Respondent] did not have actual notice of [subsection (2)].”<sup>56</sup> If Respondent prevailed at this hearing, Petitioner would be estopped from enforcing the notice and time requirements of subsection (2).<sup>57</sup> The instant court’s avowed purposes in creating this defense were to give “some consequence” to “compliance or non-compliance” for both parties,<sup>58</sup> and to “preserv[e] principles of fairness and equity.”<sup>59</sup>

The three dissenting justices<sup>60</sup> refused to recognize a conflict between subsections (4) and (6), instead arguing that subsection (4) resolved the conflict by abolishing common law bonds for public works.<sup>61</sup> The dissenters also criticized the majority’s reading of the statute,<sup>62</sup> reliance on legislative staff reports to determine legislative intent,<sup>63</sup> creation of a remedy under subsection (6) when the statute itself affords none,<sup>64</sup> and de facto abrogation of the statute of limitations for actions to recover on section 255.05 bonds.<sup>65</sup> Furthermore, the dissenters characterized the majority’s actual knowledge test as a reward for ignorant claimants.<sup>66</sup> Finally, because Petitioner’s bond was an FDOT standard form, the dissenters objected to the majority’s approach as a potential punishment of the surety for a mistake made by a government agency.<sup>67</sup>

56. *Id.* at 369.

57. *Id.*

58. *Id.* at 368.

59. *Id.* at 369.

60. Justice Cantero dissented in part and concurred in part. *Id.* at 371 (Cantero, J., concurring in part and dissenting in part). Justice Bell concurred with Justice Cantero’s dissent. *Id.* (Bell, J., concurring with dissent by Cantero, J.). Justice Wells joined in Justice Cantero’s opinion, except for the portions relating to the use of legislative staff reports. *Id.* (Wells, J., concurring in part with dissent by Cantero, J.).

61. *Id.* at 372 (Cantero, J., dissenting). The dissent suggests that

subsection (4) actually *resolves* a potential conflict. That conflict is between subsection (2), which establishes the statutory deadlines, and subsection (6), which requires the bond to warn about those deadlines. 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.

*Id.* The dissenters note that the Fifth District in *Florida Crushed Stone* recognized “a clear and unambiguous abrogation of common law payment bonds on public works projects” by the legislature. *Id.* at 373 (citing Fla. Crushed Stone v. Am. Home Assurance Co., 815 So. 2d 715, 716 (Fla. 5th DCA 2002)).

62. *Id.* at 372-75.

63. *Id.* at 375-77.

64. *Id.* at 377.

65. *Id.* at 378-79.

66. *Id.* at 377.

67. *Id.* at 377-78.

Despite the instant court's recognition that all section 255.05 bonds are statutory,<sup>68</sup> new difficulties may arise with the assertion of the estoppel defense by bond claimants. Although the extent of the instant case's effect is difficult to measure,<sup>69</sup> the estoppel defense may render the statutory notice and time requirements potentially unenforceable against bond claimants.<sup>70</sup> The existence of this defense may encourage claimants to come forward with claims otherwise barred by the notice and time requirements of section 255.05(2).<sup>71</sup> The disposition of these claims could strain already over-taxed judicial resources.<sup>72</sup> Furthermore, even if no additional claims are brought as a result of the instant court's decision, the court's disposition of this case also rewards claimants that fail to research and determine the law governing public contract bonds.<sup>73</sup> Petitioner's bond followed an FDOT standard bond form, referencing section 255.05 generally;<sup>74</sup> Respondent could have familiarized itself with the statute prior to seeking recovery against the bonds.<sup>75</sup>

Aside from potential practical effects resulting from the instant court's decision, several dimensions of the instant case deserve closer examination. First, the conflict that the majority finds between the plain language of subsections (4) and (6)<sup>76</sup> is not inevitable. Although it is possible for both sureties and claimants to violate the statutory mandates, as occurred in the instant case,<sup>77</sup> subsection (6) specifies no consequences for sureties that violate its requirement.<sup>78</sup> Subsection (4), in contrast, uses "unequivocal 'regardless of form' language"<sup>79</sup> to emphasize that payment provisions of bonds posted under section 255.05 be construed in

---

68. *See id.* at 369 (majority opinion).

69. The Second District noted in its opinion that "[t]he [F]DOT standard contract bond form is the subject of ongoing litigation throughout the state." *Am. Home Assurance Co. v. Plaza Materials Corp.*, 826 So. 2d 358, 361 (Fla. 2d DCA 2002). Further, the instant case is already being applied to other cases. *See, e.g., Am. Home Assurance Co. v. APAC-Florida, Inc.*, 913 So. 2d 540, 540 (Fla. 2005) (quashing the Second District opinion and remanding the case with similar facts for disposition consistent with the instant case). The Second District's opinion in this case is reported in *American Home Assurance Co. v. APAC-Florida, Inc.*, 834 So. 2d 369 (Fla. 2d DCA 2003).

70. *See supra* notes 55-59 and accompanying text.

71. As the dissenters point out, this defense requires a factual determination, and thus, claimants with enough evidence to survive summary judgment could advance their claims to a hearing. *See Plaza Materials*, 908 So. 2d at 377 (Cantero, J., dissenting).

72. *See id.*

73. *See id.*

74. *Plaza Materials*, 826 So. 2d at 360 n.1.

75. *See Plaza Materials*, 908 So. 2d at 377 (Cantero, J., dissenting).

76. *See supra* notes 46-50 and accompanying text.

77. *See Plaza Materials*, 908 So. 2d at 362.

78. *See id.* at 373 (Cantero, J., dissenting) (summarizing FLA. STAT. § 255.05(6) (1995)).

79. *Id.*

accordance with the statute.<sup>80</sup> Accordingly, section 255.05 violations by both claimant and surety should be resolved in favor of the surety, absent some legislative directive to decide otherwise, because of the unequivocal language of subsection (4).<sup>81</sup> This alternative approach to interpreting section 255.05 does assign greater importance to subsection (4),<sup>82</sup> but doing so seems logical given the legislature's failure to provide a remedy for violations of subsection (6).<sup>83</sup>

Further, the instant court's conclusion punishes Petitioner for employing an FDOT standard form bond.<sup>84</sup> While the facts of the instant case dictated that some party suffer financial consequences, subjecting Petitioner to a loss when it used a government agency's form and Respondent failed to research the applicable statute seems inconsistent with the principles of equity and fairness embraced by the instant court.<sup>85</sup> Moreover, the instant court's conclusion conflicts with earlier authority suggesting that the terms of a government agency's bond form should not be construed against a party that did not prepare the bond.<sup>86</sup> Finally, the instant court's holding departs from the interpretation of the federal Miller Act, which requires strict compliance with its notice and time provisions.<sup>87</sup>

The instant court's interpretation of "Florida's Little Miller Act" further muddies the water for claimants seeking payment under public construction bonds. Given the significant impact of public construction projects on the state's economy,<sup>88</sup> the instant court's holding could disrupt

80. See FLA. STAT. § 255.05(4) (1995).

81. See *Plaza Materials*, 908 So. 2d at 373-74 (Cantero, J., dissenting).

82. The instant court criticizes Justice Cantero's dissent for taking this approach. See *id.* at 370 (majority opinion).

83. See *id.* at 375 (Cantero, J., dissenting) (rejecting the majority's contention that the subsections share "coequal status"). Courts in Florida have recognized that not all statutes provide remedies for violations of their mandates. See, e.g., *id.* at 374 (citing *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 852 (Fla. 2003) (observing that violations of the Health Management Organization Act do not give rise to a cause of action for damages)).

84. See *id.* at 377-78 (Cantero, J., dissenting). The FDOT prepared the bond used by the surety in 1995. See *Am. Home Assurance Co. v. Plaza Materials Corp.*, 826 So. 2d 358, 360 n.1 (Fla. 2d DCA 2002).

85. See *Plaza Materials*, 908 So. 2d at 377-78 (Cantero, J., dissenting) (stating that a "surety should not be held responsible for the agency's omission").

86. *Id.* (quoting *State Dep't of Transp. v. Houdaille Indus., Inc.*, 372 So. 2d 1177, 1178 (Fla. 1st DCA 1979) ("[I]f any ambiguity arguably existed . . . it could hardly be construed against the surety which did not prepare the bond. . . . The bond's drafter . . . is the only party subject to the rule of strict construction[,] not the surety.")).

87. Federal courts require strict compliance with the notice and time requirements of the Miller Act. See, e.g., *United States ex rel John D. Ahern Co. v. J.F. White Contracting Co.*, 649 F.2d 29, 31 (1st Cir. 1981) ("[The notice requirement] is mandatory and is a strict condition precedent to the existence of any right of action upon the principal contractor's bond.")).

88. Large sums of money are spent every year on public construction projects. See, e.g., Fla.

business in the state. By requiring a finding of actual ignorance on the part of claimants,<sup>89</sup> the Florida Supreme Court invites lengthy and costly litigation to divine whether a claimant's failure to comply with the statute was a result of a deficiency in a surety's bond. Further, the estoppel defense created by the majority lacks basis in the language of the statute. While courts often fill gaps left by the legislature, the instant court's disposition of this case invites future litigation on claims that would otherwise be barred. Accordingly, the Florida Legislature should amend section 255.05 to clarify the effect of noncompliance with subsection (6) and the enforceability, generally, of the notice and time requirements of subsection (2).<sup>90</sup> Legislative inaction risks future uncertainty for sureties and claimants alike.

---

(July 1, 2005), <http://www.dot.state.fl.us/financialplanning/fr/legislationforwebsite2005.pdf> (revealing that \$7.5 billion in state revenue has been allocated for improvements to state transportation systems for fiscal years 2005 through 2015). State, local, and federal spending on highway infrastructure generates significant economic benefits, including higher economic productivity and job growth. *See generally* Thomas F. Keane, *The Economic Importance of the National Highway System*, PUBLIC ROADS, Spring 1996, at 16, available at <http://www.tfrc.gov/pubrds/spring96/p96sp16.htm> (analyzing the economic impact of the National Highway System).

89. *See Plaza Materials*, 908 So. 2d at 369.

90. Indeed, the court invites as much. *See id.* at 370 n.8 ("The parties are urged to take the issues presented . . . to the Legislature for possible amendment . . . [to] eliminate the conflicts which may arise among the provisions in actual operation."). Before the instant court reached its decision, the Florida Legislature amended section 255.05 to strengthen the prohibition against construing public works bonds as common law bonds and added a reference to the notice and time requirements to the model bond form in the statute. *See* 2005 Fla. Laws 1-2. These changes, however, did not expressly require the enforcement of the notice and time limitations regardless of a surety's compliance with subsection (6). *See id.* Therefore, the future enforceability of the notice and time requirements of subsection (2) remains in doubt if a claimant can prove the estoppel defense outlined by the instant court. Additionally, the Florida Legislature has also adopted a separate statutory bond for FDOT projects. FLA. STAT. § 337.18(1) (2005). Of particular note, the statute is clear that "[t]he bonds provided for in this section are statutory bonds. The provisions of [section] 255.05 are not applicable to bonds issued pursuant to this section." *Id.* § 337.18(1)(f). Section 255.05, however, is still generally applicable to government construction contracts and is ripe for similar clarification. *See Fla. Stat.* § 255.05 (2005).

