IN THE DISTRICT COURT OF APPEAL
IN AND FOR THE STATE OF FLORIDA
SECOND DISTRICT

LEXON INSURANCE COMPANY

Appellant,

Case No. 2D16-1533
Lower Tribunal No. 12-CA003073

v.

CITY OF CAPE CORAL, et al.

Appellees.
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On Appeal from the Circuit Court, Twentieth
Judicial Circuit, in and for Lee County, Florida

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# AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF APPELLEE COCO OF CAPE CORAL, LLC

November 21, 2016

**Debbie Sines Crockett**
Florida Bar No. 33706
Cheffy Passidomo, P.A.
400 N. Ashley Drive, Suite 2540
Tampa, FL 33602
239-261-9300
DSCrockett@NaplesLaw.com
Counsel for United Policyholders

**Lisha Bowen**
Florida Bar No. 0169374
Lisha Bowen, P.A.
PO Box 173442
Tampa, FL 33672
813-995-5580
Lisha@BowenTrials.com
Co-Counsel for United Policyholders

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page**

**Case Law**

**Florida Statutes**

## PRELIMINARY STATEMENT

"AB" shall refer to Coco's Answer Brief.

"Bonds" shall refer to both Subdivision Bond No. 1017885 and Subdivision Bond No. 1017886.

"City" shall refer to the City of Cape Coral, Florida, the Obligee on the Bonds.

"Coco" shall refer to Appellee, Coco of Cape Coral, LLC.

"IB" shall refer to Lexon's Initial Brief.

"Lexon" shall refer to Appellant, Lexon Insurance Company.

"Priority" shall refer to Priority Developers, Inc., the Principal on the Bonds.

"SFAA" shall refer to *Amicus Curiae* for Appellant, The Surety and Fidelity Association of America.

"SFAA Am. B." shall refer to SFAA's *Amicus Curiae* Brief in Support of Lexon.

"UP" shall refer to *Amicus Curiae* for Appellee, United Policyholders.

The clerk of the lower tribunal assigned the pleadings portion of the lower court's record to 5,283 pages. The Record will be cited to with the abbreviation "R" followed by the Record page number. Condensed transcripts of the three-day bench trial have been assigned to Record pages 1442 through 1722, and will be cited to with the abbreviation "Trial Tr." Followed by the transcript page number, and line numbers (*e.g.*, Trial Tr. 201:1-5).

## INTEREST OF UNITED POLICYHOLDERS

UP is a unique non-profit, tax-exempt charitable organization founded in 1991 that provides valuable information and assistance to the public concerning the rights of insureds and the duties of insurance carriers. UP monitors insurance marketplace and legal developments across the country, and is a voice for policyholders in legislative and regulatory forums. UP helps preserve the integrity of the insurance system by educating consumers and advocating for fairness in policy sales and claims. UP's activities in the State of Florida have included providing long term hurricane recovery assistance, consumer advocacy related to homeowners' insurance rates and availability, and coordination with the Office of Insurance Regulation on various policy matters.

In furtherance of its missions, UP regularly submits *amicus curiae* brief in courts around the country to advance policyholders' perspectives on insurance cases likely to have widespread impact. UP has filed over 400 *amicus* briefs in state and federal courts since it was founded.

UP has an interest in this appeal because this Court's decision on whether to affirm or reverse the trial court's final judgment will have a widespread impact on the both the surety industry and the policyholders in Florida.

## SUMMARY OF ARGUMENT

Subdivision bonds are intended to protect the City, to protect the public, and to ensure that lot purchasers are provided with the promised improvements. A surety's liability under a bond is controlled by the language of its bond and the ordinance requiring a bond. In this matter, the unconditional language of Lexon's Bonds mandate that if improvements are not completed, then Lexon must either complete the improvements or pay the City. The mere fact that the City's did not return subdivided land to acreage is not a breach of the implied duty of good faith. Further, Lexon cannot meet its burden to impose an equitable lien as there is no evidence of fraud or misrepresentation on the part of the City, and Lexon failed to show any close personal relationship as required. Once Lexon pays, it may have equitable subrogation rights against Priority, but first, it must pay City. Finally, pursuant to Florida contract law and the express language of Lexon's Bonds, until Lexon refused to pay or perform, there was no breach, and thus no cause of action could have even been pled. Even if this Court finds that the limitations period had run, Lexon is equitably estopped from relying on this avoidance.

## ARGUMENT

### I. Under the Bonds, Lexon was Obligated to Either Pay or Perform.

Lexon and SFAA incorrectly limit their analysis to the sale of lots to "homeowners and residents" who need the use of the contemplated improvements.

[SFAA Am. B. p. 9]. This argument disregards the stated and intended purpose of the Bonds under Florida law. Florida courts recognize that the purpose of a subdivision bond is to protect the municipality and the public, and "to insure to purchasers the promise of the subdivider to furnish the improvements contemplated in their purchase of a lot in the subdivision." *Lake Sarasota, Inc. v. Pan American Surety Co.*, 140 So. 2d 139, 142 (Fla. 2d DCA 1962). Therefore, Florida law and the Bonds' language unconditionally require Lexon to either complete the improvements or pay the City. [R1959].

Suretyship contracts "are to be construed most strongly against the surety and in favor of the indemnity which the obligee has reasonable grounds to expect." *Phoenix Indem. Co. v. Bd. of Public Instruction of Alachua Co.*, 114 So. 2d 478, 481 (Fla. 1st DCA 1959); *Dev't Corp. of America v. United Bonding Ins. Co.*, 413 F. 2d 823, 826 (5th Cir. 1969) ("Florida has adopted the principle that contracts of a surety for hire are construed most strictly against them and in favor of the obligee.").

Despite this principle of construction, Lexon and SFAA cite to *Westchester Fire Ins. Co. v. City of Brooksville*, 731 F. Supp.2d 1298 (M.D. Fla. 2010) and *Mohave Co. v. Lexon Surety Group, LLC*, 2015 WL 9690913 (D. Ariz. 2015) as their argument that Lexon is not obligated to pay. However, both cases have material differences in the language of their ordinances and bonds that result in a different

outcome. The primarily difference is that the bonds in both *Westchester* and *Mohave* contained condition language relating to payment.

In *Westchester,* the bonds, issued in accordance with a local ordinance requiring that the bonds guarantee access to certain public utilities before people purchased the homes. *Westchester,* 731 F. Supp.2d 1298. However, the bond expressly required the city to complete the improvements. *Id*. The *Westchester* bonds stated that "[i]f the Developer failed to complete the required improvements...the Surety must...promptly pay over to the City the unreleased portion of the bond **so that the City, or its agent, can complete the unfinished improvements**..." (emphasis added). *Id.* at 1300-01. The Court found that Westchester had neither attempted to start improvements nor established the expected cost of construction of Phase Two. *Id*. at 1304. Similarly, in *Mohave*, the bond required that Lexon "must pay any **damages or costs incurred**" by the County as a result of a default or breach (emphasis added). *Mohave*, 2015 WL 9690913 at 2. The Court found that the County had not demonstrated that "it has sustained, or will sustain" damages. *Id*. at 6.

The Bonds issued in this matter by Lexon were **unconditional** and provided Lexon with only two options in the event of the Priority's default - either complete the improvements or pay the City. [R1953]. *See also Clark Co. v. Hanover Ins. Co.*, 2014 WL 2442729 (Nev. Dist. Ct. 2014) (reiterating *Brooksville's* inapplicability where "the bond ... is unconditional and the surety's obligation is absolute" and

"construction of the off-site improvements has commenced"). There is no evidence that Lexon chose to complete the improvements.

Additionally, unlike *Westchester* and *Mohave*, in this case, there is no evidence that improvements will not be completed or if they are completed, that the City will not be obligated to pay for completion. This Court should not presume or imply that the City would pocket the funds, rather than pay to complete the improvements. *Great American Ins. Co. v. School Bd. of Broward Co., Fla.*, 2010 WL 4366865, *23 (S.D. Fla. 2010) ("Florida law recognizes that a bond obligee *(e.g.,* municipality) has an implied duty not to intentionally or negligently waste contract funds and [that] a breach of this duty is actionable.").

If Lexon is not required to pay out under the Bonds, and the development remains stalled, marketability impaired, and infrastructure unfinished, then Coco's purchase, in reliance on the existing development scheme, governing ordinance, and Bonds, will result in damage to Coco. *Lake Sarasota*, 140 So. 2d at 143 (finding error in the lower court's failure to recognize the fact that property owners purchased lots in reliance on the construction the contemplated improvements). The uncontroverted testimony and the language of the Ordinance and the Bonds indicate that the parties intended to provide security for full completion of improvements. Absent completion by Priority or Lexon, payment on the Bonds is due.

Lexon and SFAA incorrectly argue that the City had an obligation to remove improvements and revert the subdivided land to vacant acreage. To support this, Lexon and SFAA state that this alleged obligation arises from the implied duty of good faith inherent in all Florida contracts. This argument fails as it urges this Court to find that the City had an implied contractual duty to expend additional funds to remove improvements from the land to protect Lexon, even if that action was not in the best interest its citizens. In other words, Lexon and SFAA urge this Court to rule that the City somehow breached its implied duty of good faith to Lexon (which it did not) and to further find that implied duty somehow overrides the City's directive to act to promote public health, safety, economy, comfort, order, convenience, and welfare, thus, Lexon should be discharged from the Bonds.

The implied covenant of good faith is a part of every contract. *Co. of Brevard v. Miorelli Eng'g, Inc*., 703 So. 2d 1049, 1050 (Fla.1997). "[G]ood faith means honesty, in fact, in the conduct of contractual relations." *Harrison Land Dev., Inc. v. R & H Holding Co., Inc.*, 518 So. 2d 353, 355 (Fla. 4th DCA 1988). "[A] party's good-faith cooperation is an implied condition precedent to performance of a contract; where that cooperation is unreasonably withheld, the recalcitrant party is estopped from availing himself of his own wrong doing." *Bowers v. Medina*, 418 So. 2d 1068, 1069 (Fla. 3d DCA 1982). Florida law recognizes an independent cause of action for a breach of the implied covenant of good faith, and to prevail on such,

"a party must demonstrate, a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence; but, rather by a conscious and deliberate act, which unfairly frustrates the agreed common purpose and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement." *Shibata v. Lim,* 133 F. Supp.2d 1311, 1319 (M.D. Fla. 2000).

Lexon's and SFAA's argument also fails because it tries to elevate its interpretation of what was required under an implied duty of good faith under the Bonds to control over the express terms of City's Land Development Regulations, which were incorporated by reference into the Development Agreement. The express contractual provisions of the Regulations prevail over the implied obligations Lexon and SFAA are attempting to impose on the City.

Citing to the City's Regulations, Lexon and SFAA assert that "the City was required to minimize Lexon's liability under the Bonds… [and more specifically] **was required** to exercise its authority to return the subdivided land to acreage…." [SFAA Am. B. p. 12] (emphasis added). However, Lexon's and SFAA's argument is undermined by the language cited from City's Regulations as the regulations are expressed in permissive, and not mandatory, terms thereby giving the City discretion to determine when and how the City may revert subdivided land to acreage. In pertinent part, the Regulations provide:

> b. *Reversion by governing body*. The governing body **<u>may</u>**, upon its own motion or recommendation by the Commission, order the vacation and reversion to acreage of all or any part of a subdivision including the vacation of streets or other parcels of land dedicated for public purposes or any of such streets or other parcels, the plat of which subdivision was recorded as provided by law not less than one year before the date of such action, and in which subdivision or part thereof not more than 10% of the total subdivision area has been sold as lots by the original subdivider or his or her successor in title. Such action by the governing body shall not be taken until the Commission has made its recommendation finding that the proposed vacation and reversion to acreage of subdivided land conforms to the Comprehensive Plan of the area, and that the public health, safety, economy, comfort, order, convenience and welfare will be promoted thereby. Before acting on a proposal for vacation and reversion of subdivided land to acreage, the Commission shall hold a public hearing thereon, with due public notice. [R3142] (emphasis added).

In essence, the City's Regulations give the Commission, under certain circumstances, **the right but not the obligation**, to return the subdivided land, and then only if some specific conditions are met. For there to have been an order reverting subdivided land: (1) the governing body must have acted within one year from the recording of the plat, (2) the subdivision lots sold were, at that time, must have been below the 10% threshold, and (3) a public notice and hearing must have been conducted. [*Id*.]. Even if the specific conditions precedent were satisfied, City's Regulations did not require the subdivided land be returned to acreage.

However, the record is either silent as to the satisfaction of those conditions precedent or, in some instances, demonstrate the conditions had not been satisfied. In this case, the plat was recorded on October 27, 2006 [R. 4479], so the order vacating the subdivided land and returning it to acreage would have to have been

entered by October 27, 2007, but was not. Second, there is no evidence in the record as to the percentage of the subdivided area that had been sold as of October 27, 2007. In fact, the record shows that the Bonds were furnished with approximately 50% of the subdivision improvements had been completed, and did not include the already completed improvements. [R1464 (Trial Tr. 80:15-21; R5009-5032]. At the time of the City's last inspection, a majority of the road and infrastructure improvements had been completed. [R1624 (Trial Tr. 424:13-18)].

Third, the Commission was required to conduct public hearing that must have occurred prior to October 27, 2007. At that hearing, the Commission would have needed to make findings and a recommendation that the reversion of acreage would promote the public health, safety, economy, comfort, order, convenience, and welfare.The record does not demonstrate whether that condition was timely satisfied, such that the City even had the option to consider returning the land to acreage.

Finally, the suggestion that subdivided land should have been returned to acreage ignores the burden, cost, and waste to the City and its citizen taxpayers of destroying the millions of dollars of improvements made. The testimony at trial illustrates that returning acreage would not have been as simple as voiding the plat. [R1469 (Trial Tr. 99:12-19)]. The City had no obligation to remove improvements and revert the subdivided land to vacant acreage. Lexon and SFAA can point to no factual support for its contention that the City "consciously and deliberately" refused

to return the subdivided land to acreage for the purposes of frustrating the agreed common purpose of the Bonds issued by Lexon. [R407-426].

## II. This Court Should Not Impose an Equitable Lien.

Under Florida law, imposition of equitable liens on real property can arise in two scenarios–under the terms of a written contract, or "when general considerations of right and justice require it." *Pegram v. Pegram*, 821 So. 2d 1264, 1266 (Fla. 2d DCA 2002)(citation omitted); *see also MCZ/Centrum Flamingo I, LLC v. AIMCO/Bethesda Holdings, Inc.*, 988 So. 2d 89, 89 (Fla. 3d DCA 2008)("An equitable lien may arise from a written contract which evidences an intention to charge property with a debt or obligation…"); *Blumin v. Ellis*, 186 So. 2d 286, 294 (Fla. 2d DCA 1966). In order to impose a lien when justice requires it, "the party must prove fraud, misrepresentation, or affirmative deception." *Pegram*, 821 So. 2d at 1266 citing *Rinker Materials Corp. v. Palmer First Nat'l Bank and Trust Co. of Sarasota*, 361 So. 2d 156, 158 (Fla. 1978); *Gordon v. Flamingo Holdings P'ship*, 624 So. 2d 294, 297 (Fla. 3d DCA 1993); *Jennings v. Conn. General Life Ins., Co.* 177 So. 2d 66, 68 (Fla. 2d DCA 1965), *certiorari discharged by*, 185 So. 2d 169 (Fla. 1966)(discussed in *Rinker*, 361 So. 2d at 158).

The Florida Supreme Court, however, later clarified that imposing an equitable lien may be appropriate to prevent unjust enrichment, even in the absence of fraud or misrepresentation. *See Palm Beach Saving & Loan Asso. v. Fishbein*, 619

So. 2d 267 (Fla. 1993); *Spridgeon v. Spridgeon*, 779 So. 2d 501 (Fla. 2d DCA 2000). But in such limited circumstances, "[i]n Florida, an equitable lien is an appropriate remedy to prevent unjust enrichment between family members or those with close personal relationships." *Della Ratta v. Della Ratta*, 927 So. 2d 1055, 1059 (Fla. 4th DCA 2006); *Golden v. Woodward*, 15 So. 3d 664, 670 (Fla. 1st DCA 2009); *see also Sonneman v. Tuszynski*, 191 So. 18, 19-20 (1939); *La Mar v. Lechlider*, 185 So. 833, 836 (Fla. 1939).

First, none of the relevant documents, and certainly neither of the Bonds, contain the right to any sort of lien. Second, Lexon's duties and obligations under the Bonds (i.e. the contracts) were to either "complete the improvements or pay" in the event of Priority's failure to complete the improvements. [R1953 and R1959]. There can be no equitable relief for Lexon for it fulfilling its contractual duties and obligations under the Bonds.

Third, SFAA wants this Court to impose equitable liens based on the authority under *Lake Sarasota*. However, this Court stressed that its decision to impose an equitable lien was based on the presence specific factors in that case, and under an unjust enrichment analysis made clear that its holding in *Lake Sarasota* only applied when the surety was the victim of grave conspiracy/fraud. *Lake Sarasota*, 140 So. 2d at 141-143. *Lake Sarasota* does **not** stand for the proposition that sureties are entitled to equitable liens absent "[t]hese circumstances" of "conspiracy and fraud."

*Id*. at 141-143. SFAA's request for equitable liens fails as there was no evidence or findings of fraud or misrepresentation. Its request also fails under an unjust enrichment analysis as Lexon did not innocently, and in the belief that it had the right to do so, place improvements on Subdivision lots such that an owner would have permanent and valuable improvements, and thus it would be inequitable to permit the owner to retain the improvements thereby unjustly enrichred, without compensating Lexon, who placed improvements for **its own** value. Clearly, the requirements are not met as there would be no unjust enrichment to any Subdivision lot owner if Lexon pays on the Bonds.

Fourth, if there was an argument that Subdivision lot owners would be unjustly enriched if Lexon pays on the Bonds, in the absence of fraud of misrepresentation, this does not apply as it is clear that Lexon has "no close personal relationships" with any of the Subdivision lot owners, including but not limited to Coco, the City, or Priority. *Della Ratta,* 927 So. 2d at 1059.

Lastly, Lexon was well within its rights to have required some sort of indemnity and hold harmless agreement with Priority or personal guarantees from Priority's principals, which would have required the indemnitees (or personal guarantors) to indemnify (reimburse) Lexon in the event it had to pay under the Bonds. Plus, like any other surety or insurance company, Lexon can seek subrogation. *In re Cone Constructors, Inc.*, 265 B.R. 302, 306 (Bankr. M.D. Fla.

2001) citing *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 136–37 (1962)("It is well-recognized that a surety who has been compelled to pay the debts of its principal possesses a right of equitable subrogation"…. "And probably there are few doctrines better established than that a surety who pays the debt of another is entitled to all the rights of the person he paid to enforce his right to be reimbursed. This rule, widely applied in this country and generally known as the right of subrogation…") and citing *Transamerica Ins. Co. v. Barnett Bank of Marion County, N.A.*, 540 So. 2d 113, 115–16 (Fla. 1989). But in order to seek such remedies, Lexon must first pay under the Bonds. Again, Lexon's obligation under the Bonds was to either "complete the improvements or pay" in the event of Priority's failure. [R1953 and R1959]. As such, there can be no equitable relief for Lexon for it fulfilling its contractual obligations under the Bonds. Lexon actions for reimbursement are still available to it **against other parties**, which is yet another reason why the request for an equitable lien must fail. *See Edd Helms Elec. Contracting, Inc. v. Barnett Bank of S. Fla,. N.A.*, 531 So. 2d 238, 239 (Fla. 3d DCA Sept. 20, 1988); *Hallmark Mfg. Inc., v. Lujack Const. Co., Inc.*, 372 So. 2d 520 (Fla. 4th DCA 1979)(no cause of action for equitable lien exists where complaint alleged…no grounds on which to base equitable lien, and plaintiff has adequate remedy at law); *Cohen v. Lunsford*, 362 So. 2d 383 (Fla. 1st DCA 1978); *Crane Co. v. Fine*, 221 So. 2d 145 (Fla.1969). As explained succinctly in *Cone*, 265 B.R. at 306:

> A typical surety relationship is created where a contractor undertakes a construction project and obtains a bond to assure its performance…. Contractors that undertake public projects generally are required by statute to obtain both payment and performance bonds. If the contractor on a public project defaults on the contract, and the surety performs under its bond obligations, the surety is entitled to its right of equitable subrogation as set forth in *Transamerica.*

This case is no different. Therefore, although equitable circumstances other than fraud or misrepresentation, including the prevention of unjust enrichment, are grounds for imposing an equitable lien, an equitable lien is not appropriate here.

## III. A Cause of Action for Breach of the Begins to Accrue When the Surety Breaches its Obligation to Pay or Perform by Denying the Claim.

In *Federal Ins. Co. v. Southwest Fla. Retirement Ctr., Inc.*, 707 So. 2d 1119, 1121 (Fla. 1998), the Court held that in applying Florida Statute §95.11(2) to actions on performance bonds, such accrue "on the date of acceptance of the project as having been completed in according to the terms and conditions set out in the construction contract." In *Southwest*, the owner sued the surety on the performance bond for **latent defects** discovered ten years after completion. *Id.* at 1121 (emphasis added). The Court rejected that the limitations period was tolled due to the later discovery of latent defects, and rejected that surety's liability was co-extensive with contractor even if the construction contract was incorporated into the bond. *Id*.

SFAA misconstrues the holding of *Southwest* when it cites it for the proposition that: (1) "the cause of action against the surety accrues with the principal [Priority] **breaches** its underlying bonded obligation," and (2) "when the bond

principal [Priority] **defaults**, the cause of action against the surety accrues and the statute of limitations begins to run." [SFAA Am. B. p. 17] (emphasis added). While it is true that the surety is only liable to the extent of its principal and the surety's obligation under its bond is commensurate with that of the principal, the Court made it clear, that "[r]egardless of the 'spin' put upon it, the statute of limitations for [the surety's] obligation **in respect to latent defects accrues from the acceptance of the construction project**", which presumes **completed projects and completed projects that have been accepted**. *Id*. at 1121 n. 5. (emphasis added). This case is completely distinguishable to the facts of *Southwest.*

Such distinguishing facts were pointed out in *BDI Const. Co. v. Harford Fire Ins. Co.*, 995 So. 2d 576 (Fla. 3d DCA 2008). In *BDI*, the owner claimed that it had yet to accept the entire project, as the entire project had not been completed. *Id*. 578. However, as to the stucco and drywall work, that subcontractor claimed that 100% of its scope of work on the project was complete and had been accepted. *Id*. at 577. The Court noted that *Southwest* did **not** involve an owner who refused to accept the project as complete, and recognized, "[o]stensibly, as the owner has yet to accept the project, the statute has yet to commence running." *Id*. at 578.

Here, the road and infrastructure work was never fully completed by either the general contractor or its subcontractor. Neither the City nor Priority ever accepted either a fully completed Project or any completed road and infrastructure

work. These are the facts even as recounted by Lexon, as it stated, "Priority was eligible to have its Bonds released **upon completion** of [the] Bonded Improvements." [IB p. 4] (emphasis added). The Bonds were never released by Lexon, which is why the City filed a claim against the Bonds on October 27, 2010, and eventually, on July 23, 2012, enacted a resolution calling-in the Bonds and declaring that Priority failed to complete the road and infrastructure work. [R1985-1990, R2000-2001; IB p. 6]. If this Court decides, in accordance with *Southwest* and *BDI*, that accrual begins "on the date of acceptance of the project as having been completed", then, technically, the limitations period has yet to begin to accrue.

Lexon and SFAA take to position that the breach action accrued when Priority breached its obligations pursuant to Ordinance 14-05. [SFAA Am. B. p. 18; R1907-1937]. But Lexon and SFAA have tried to fit the round peg of "March 22, 2007, [] the last date of work on the Project" into the square hole of the date "when Priority defaulted" and "breached its obligations under the Development Agreement." [IB. p.4, 16; SFAA Am. B. p. 18]. Priority's last date of work on the Project is not the date that Priority breached Ordinance 14-05. This is evidenced by the fact that the City did not consider Priority in breach of Ordinance 14-0 as Priority was allowed to start and stop depending on market conditions so long as the Project was completed by January 31, 2017. [R1907-1937, 1938]. The City did not declare Priority in default until its October 27, 2010 notice of claim to Lexon and its July

23, 2012 resolution calling-in the Bonds. In applying Lexon's and SFAA's proposed accrual start date–when Priority breached–the accrual would begin, at the **very earliest** on October 27, 2010, the date of the City's notice. So even using Lexon's proposed accrual date–the date of Priority's breach–it is clear that the statute of limitations had not expired when suit was filed on October 23, 2012. Plainly, the proper date of accrual of the statute of limitation is the date that Lexon breached the Bonds by denying the claims and failing to pay under the Bonds; otherwise, without Lexon's breach, no cause of action for breach of the Bonds could have been pled.

**a. Accrual of Statute of Limitations – Breach of Contract**

As agreed, Florida Statute §95.11(2)(b), which provides a five-year statute of limitations for a breach of contract action applies. Florida Statute §95.031(1) states that a "cause accrues when the last element constituting the cause of action occurs." "A bond is a contract, and, therefore, a bond is subject to the general laws of contracts." *American Home Assurance Co. v. Larkin General Hosp., Ltd.*, 593 So. 2d 195 (Fla. 1992) (citations omitted). As to insurance carriers, a cause for breach of a policy does not accrue until the denial of the claim, which is when a carrier breaches its obligation, based upon the application of §95.11(2)(b) and §95.031. *See State Farm Mut. Auto. Ins. Co. v. Lee*, 678 So. 2d 818, 821 (Fla. 1996) ("Using the date the insurance contract is breached is the most logical event to begin the running of the statute of limitations."); *Passman v. State Farm Fire & Cas. Co.*, 779 So. 2d

323, 325 (Fla. 2d DCA 1999) (prior to enactment of §95.11(2)(e), effective May 17, 2011, the applicable limitations period involving property insurance claims was five years from the date of breach, and §95.11(2)(e) is not retroactive.[1]); *BDI*, 995 So. 2d at 578. "However, a cause of action cannot be said to have accrued, within the meaning of the statute of limitations, until an action may be brought." *Lee*, 678 So. 2d 818, 821. Thus, regardless of whether sureties are treated like insurance companies, clearly, the City could **not** have brought suit for breach of the Bonds until there was a denial of the claim– i.e. Lexon's breach of the Bonds by its refusal to either pay or perform. Simply, until Lexon refused to pay or perform, there was no breach upon which the City could have even stated a claim.

Further, the Bonds clearly contained a condition precedent:

> …if [Priority] shall construct…the improvements…and shall save the [City] harmless from any…damage by reason of its failure to complete said work, then this obligation shall be null and void, **otherwise to remain in full force and effect**, and [Lexon], **upon the receipt of a resolution of the [City] indicating that the improvements have not been installed or completed, will complete the improvements or pay** to the [City]…up to the…amount of this bond which will allow the [City] to complete the improvements. [R1953 and R1959] (emphasis added).

The Bonds would only be "null and void" if: (1) Priority constructed the improvements (did the work), and (2) "save[d] the [City] harmless…by reason of

[1]*Donovan v. Florida Peninsula Ins. Co.*, 147 So. 3d 566 (Fla. 4th DCA 2014)("Section 95.11(2)(e) does not contain evidence of the legislature's intent for retroactive application, on its face or in its legislative history.")(citations omitted).

[Priority's] failure to complete said work". [Id.] But, if those two events did **not** occur, which in this case neither occurred, then the Bonds were "**otherwise to remain in full force and effect**" **until** Lexon's receipt a resolution of the City. [Id.]. In essence, the phrase "**otherwise to remain in full force and effect**" can be construed to operate as an extension of the statute of limitations. [R1953 and R1959]. While Florida law does not permit contracting parties to shorten limitations periods, the defense of statute of limitation is certainly waivable, and seemingly there is no prohibition to parties agreeing to extend a limitation period, which is precisely what the Bonds have done by their plain language. *See* Fla. Stat. §95.03; *Larkin,* 593 So. 2d at 197 ("The terms of the performance bond control the liability of [the surety].").

Based on basic contract law, until Lexon breached the Bonds–by denying the claim and failing to either complete the work or pay–no cause of action could have even been properly stated or pled. As to the limitations period for breach of bonds, when the work is **not** complete and has **not** been accepted, it must begin to accrue upon denial, i.e. the date the surety breaches the bonds.

**b. Doctrine of Equitable Estoppel**

In essence, the doctrine of equitable estoppel has been raised[2]. "[It] embraces the notion that a party should not be permitted to profit by asserting rights against

[2] "Under the "tipsy coachman doctrine," an appellate court should affirm a trial court that "reaches the right result, but for the wrong reasons" if there is "support for the alternative theory or principle of law in the record before the trial court."" *Shands*

another when that party's own inequitable conduct has lulled the other into action or inaction detrimental to its position." *Nat'l Auto Serv. Centers, Inc. v. F/R 550, LLC*, 192 So. 3d 498, 512 (Fla. 2d DCA 2016), *reh'g denied* (May 25, 2016), *review denied sub nom, F/R 550, LLC v. Nat. Auto Serv. Centers, Inc.*, 2016 WL 6299565 (Fla. Oct. 27, 2016) *citing Fla. Dept. of Health & Rehab. Servs. v. S.A.P.*, 835 So. 2d 1091, 1097 (Fla. 2002). However, this doctrine should be applied **only if** it the limitations period has expired, and in such an event, the defendant is estopped from it as an affirmative defense. *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1076 (Fla. 2001). "Equitable estoppel is not a tolling doctrine…rather it is an estoppel doctrine, operating upon the defendant." *Id*. at 1077.

In *Glantzis*, the Court found that insurance carriers can be "equitably estopped from relying on the statute of limitations defense because of its conduct", and stated:

> We find it difficult to envision a more unfair position for a party to assume. When appellants demanded arbitration, they also had the option to file suit. However, when State Auto accepted the demand to arbitrate and proceeded along those lines, the necessity for appellants to file suit was obviated. Having lulled appellants into this false sense of security, no fair-minded person could condone abandoning the arbitration and invoking the statute of limitations. That would seem to be "gotcha" practice at its best. *Glantzis v. State Auto. Mut. Ins. Co.*, 573 So. 2d 1049 (Fla. 4th DCA 1991) (citation omitted).

Here, the Trial Court found that the City, "had not yet filed suit because it was attempting to provide documentation and work with Lexon in Lexon's review of the

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*Teaching Hosp. & Clinics, Inc. v. Mercury Ins. Co. of Fla.*, 97 So. 3d 204 (Fla. 2012); *Meyer v. Meyer*, 25 So. 3d 39, 42 (Fla. 2d DCA 2009).

claim, and was simultaneously working with potential buyers to take over the development of the property." [R1856]. Testimony included that any delay in the City's accrual of the City's cause of action was caused by Lexon's refusal to deny the claim and by Lexon continually stating that the claim was still "under review." [R1644 (Trial. Tr. 505:7-15)]. Based on trial evidence, between the time of City's notice of claim to Lexon on October 27, 2010 to the July 23, 2012 resolution enactment, it has been proven that Lexon made representations and took actions (or lack thereof to actually deny the claim), upon which the City relied, which caused the City to not proceed with enacting a resolution calling-in the Bonds until July 23, 2012 and not filing suit until October 23, 2012.

Additionally, as discussed *supra*, if the City's issuance of a resolution was a condition precedent to filing suit, then Lexon should be estopped from claiming that any delay by the City in enacting said resolution (the condition precedent) specifically resulted in the running of the statute of limitations. *See Salcedo v. Asociacion Cubana, Inc.*, 368 So. 2d 1337, 1339 (Fla. 3d DCA 1979). In sum, **if** there is a determination that the statute of limitations expired, then pursuant to the doctrine of equitable estoppel, Lexon should be estopped from asserting a statute of limitations defense due to its own conduct.

## CONCLUSION

WHEREFORE, based on the foregoing arguments of *Amicus Curiae* United Policyholders and of Appellee, this Honorable Court should affirm the Trial Court's rulings, deny Appellant Lexon Insurance Company the relief it requests through its appeal, and award Appellee any and all relief this Court deems just and proper.

Respectfully Submitted,


*/s/ Debbie Sines Crockett*
**Debbie Sines Crockett**
Florida Bar No. 33706
Cheffy Passidomo, P.A.
400 N. Ashley Drive, Suite 2540
Tampa, FL 33602
239-261-9300
DSCrockett@NaplesLaw.com
Co-Counsel for United Policyholders

*/s/ Lisha Bowen*
**Lisha Bowen**
Florida Bar No. 0169374
Lisha Bowen, P.A.
PO Box 173442
Tampa, FL 33672
813-995-5580
Lisha@BowenTrials.com
Co-Counsel for United Policyholders

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of November, 2016, a true and correct copy of the foregoing was electronically filed with the Clerk of Court pursuant to Administrative Order AOSC13-7, and will be served electronically via the Florida Courts E-Filing Portal to:

John H. Pelzer, Esq.
Greenspoon Marder, P.A.
200 E. Broward Blvd., Suite 1800
Fort Lauderdale, FL 33301
john.pelzer@gmlaw.com
*Counsel for Appellant*

Victor Kline, Esq.
Greenspoon Marder, P.A.
201 East Pine Street, Suite 500
Orlando, FL 32801
victor.kline@gmlaw.com
*Counsel for Appellant*

Robert E. Ferencik, Jr., Esq.
Laura A. Baker, Esq.
Ferencik Libanoff Brandt Bustamante and Goldstein, P.A.
150 S. Pine Island Road, Suite 400
Fort Lauderdale, FL 33324
rferencik@flblawyers.com
lbaker@blflawyers.com
*Counsel for Appellant*

Bruce L. Maas, *pro hac vice*
Harris Beach PLLC
99 Garmsey Road
Pittsford, NY 14534
bmaas@harrisbeach.com
*Counsel for Appellant*

Edmond E. Koester, Esq.
Alex R. Figares
Coleman, Yovanovich & Koester, P.A.
4001 Tamiami Trail North, Suite 300
Naples, FL 34103
ekoester@cyklawfirm.com
afigares@cyklawfirm.com
*Counsel for Appellee, Coco of Cape Coral, LLC*

E.A. "Seth" Mills, Jr., Esq.
S. Jordan Miller, Esq.
Mills Paskert Divers P.A.
100 N. Tampa Street, Ste. 3700
Tampa, FL 33602
smills@mpdlegal.com
jmiller@mpdlegal.com
*Counsel for Amicus Curiae Surety and Fidelity Association of America*

*/s/ Debbie Sines Crockett*
**Debbie Sines Crockett, Esq.**
Florida Bar No. 33706

## CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I CERTIFY that this Brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2) and is printed in Times New Roman 14-point font.

*/s/ Debbie Sines Crockett*
**Debbie Sines Crockett, Esq.**
Florida Bar No. 33706