**IN THE SUPREME COURT OF FLORIDA**

**CASE NUMBER: SC06-779**
**L.T. CASE NO.: 05-10559-BB**

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**AUTO-OWNERS INSURANCE COMPANY,**

**Appellant,**

**v.**

**POZZI WINDOW COMPANY,**

**Appellee.**

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# AMICUS CURIAE BRIEF OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, FLORIDA A.G.C. COUNCIL, INC., THE ASSOCIATED GENERAL CONTRACTORS OF GREATER FLORIDA, INC., SOUTH FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS, FLORIDA EAST COAST CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., AMERICAN SUBCONTRACTORS ASSOCIATION, INC. AND AMERICAN SUBCONTRACTORS OF FLORIDA, INC. IN SUPPORT OF POZZI WINDOW COMPANY

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**ON A QUESTION CERTIFIED**
**FROM THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases:**

**OTHER**:

## IDENTITY AND INTEREST OF AMICI CURIAE

The Associated General Contractors of America (AGCA) is the oldest and the largest of the nationwide trade associations of construction contractors. AGCA was formed in 1918 and today it represents more than 32,000 firms in nearly 100 chapters throughout the United States. Among the association's members are more than 7,000 of the nation's leading general contractors, more than 11,000 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry. The Associated General Contractors of Greater Florida, Inc., South Florida Chapter of the Associated General Contractors, and Florida East Coast Chapter of the Associated General Contractors of America, Inc., are all chartered chapters of AGCA. Collectively, they have over 500 members and they represent over 100 of the general construction contractors active in the State of Florida. The Florida A.C.C. Council, Inc., is an organization comprised of the three Florida chapters of AGCA, which represents the interests of the chapters and their members on matters of statewide importance.

American Subcontractors Association, Inc. ("ASA") is a non-profit corporation supported by the membership dues paid by approximately 5,000 members nationally. American Subcontractors of Florida, Inc. serves as a statewide organization for 105 Florida members. The majority of ASA member businesses are subcontractors and suppliers.

As influential representatives of broad segments of the construction industry, AGCA and ASA have all submitted amicus curiae briefs in numerous jurisdictions. They have a substantial interest in the many risks that inhere in the construction process, and in the insurance that has long played an important role for their members in managing those risks.

## INTRODUCTION

Amici Curiae and others interested in construction within the State of Florida regularly confront the question certified to this Court, as they seek to manage the considerable risks associated with building construction. While Florida contractors and subcontractors strive, and usually succeed, in providing quality construction services to owners and upper tier contractors, these firms can occasionally make inadvertent mistakes resulting in construction defects. Florida contractors and subcontractors have always paid substantial premiums for liability insurance to provide at least financial protection from liability for the property damage arising out of certain of these defects. If accepted, the arguments that Auto-Owners Insurance Company ("Auto-Owners") makes to this Court would nearly, if not completely, eliminate this customary means of managing for the risk of such liability. Auto-Owners seeks to do so by simply disregarding the language of the policy it sold. It is this threat which has united AGC and ASA in submitting

this brief in support of the position of Appellee, Pozzi Window Company ("Pozzi"), urging the Court to answer the certified question in the affirmative.

The certified question before this Court crystallizes the studied attempt of Auto-Owners to rewrite and significantly reduce the coverage that it promises to provide when it sells its standard form commercial general liability ("CGL") insurance policy to contractors, a policy written on the standard form that was promulgated in 1986. That type of policy purports to provide a large measure of coverage for construction defects to nearly all participants in the construction process, not only contractors, but also project owners. Commercial insurance is a critical element of any construction project and commercial insurers accept substantial exposures in exchange for significant premiums.

One of the risks facing the insured contractor is that the project will not be built according to the plans and specifications contained in the contract. Another is that the plans and specifications are inadequate to the task. Either risk can result in construction defects. Some risks of defective workmanship are insurable, particularly if the property damage occurs subsequent to completion of the work. Amici Curiae do not contend that property damage arising out of ***every*** construction defect is insured under a CGL policy. Obviously, intentionally sloppy or shoddy workmanship that damages a project is not insured. But at the same time, from the point of view of the insured contractor, there is a certain amount of

fortuity associated with the work of its subcontractors. On its face, the CGL policy recognizes that reality by preserving coverage for property damage arising out of the faulty workmanship of subcontractors. This coverage is accomplished through an intricate series of exclusions directed primarily at service providers such as contractors and subcontractors. For simplicity's sake, this brief often uses the generic term "contractor." This term includes subcontractors that in turn subcontract out their work to sub-subcontractors or obtain materials from suppliers.

Auto-Owners would have this Court disregard the terms of the policy it sold in favor of vague principles of inapplicable law. Amici Curiae ask nothing from this Court but to apply the language of the CGL policy for which Auto-Owners accepted payment.

## SUMMARY OF THE ARGUMENT

The arguments of insurers such as Auto-Owners suffer from a fatal flaw in that they do not address, and in fact, they avoid, any rational discussion of the very terms of the CGL policy which are at the heart of the case. If this Court were to accept such arguments, it would be placed in the anomalous position of interpreting a standard form insurance contract in use throughout the State of Florida, and throughout the United States, without giving due consideration to the terms of that contract itself. Such an interpretation would be contrary to Florida

contract law, as applied to insurance policies, which requires the Court to interpret the contract so as to give effect to all of its provisions.

Auto-Owners' arguments that forsake the terms of its standard CGL policy and the response of Amici Curiae to them, include:

- *Property damage arising out of the repair or replacement of defective work by a subcontractor is excluded from coverage under LaMarche v. Shelby Mutual Ins. Co. and its progeny.* No. The broad pronouncements of *LaMarche* as to the 1966 policy form do not apply to the subsequent 1986 policy form, expressly stating that property damage arising from the work of subcontractors is not excluded.

- *Upholding coverage for an insured contractor for property damage arising out of the work of its subcontractors is an uninsurable business risk.* No. The CGL policy before this Court circumscribes that business risk, limiting the concept, particularly with regard to construction defects arising out of subcontractor work, which is expressly preserved from exclusion. Upholding coverage under these circumstances will not result in double payment to insureds or convert a CGL policy into a performance bond.

- *A majority of other states deny coverage to an insured contractor for property damage arising out of the defective work of its subcontractors.* No. Auto-Owners relies on foreign cases to make broad and unsupportable generalizations as to the insurability of defective workmanship, particularly as to the specific 1986 policy form that is before this Court.

By presenting these arguments in isolation from the policy terms, Auto-Owners tries to avoid the effect of the carefully drafted policy exclusions since those exclusions place limits on the general notion that a CGL policy does not cover a builder's risk of faulty work.

## ARGUMENT

Under Florida law, an insurance policy is to be read as a whole, giving every provision its full meaning and operative effect. *Auto-Owners Ins. Co. v. Anderson*, 756 So.2d 29, 34 (Fla. 2000). In other words, an incomplete analysis of the CGL policy written by Auto-Owners is impermissible, in that an insurance contract, like any other contract, must be interpreted so as to give meaning to all of its provisions. Auto-Owners violates every tenet of insurance policy interpretation under Florida law in its total disregard of the policy language, brashly invoking a "public policy" patently inapplicable to its policy language. Auto-Owners cannot be allowed to abuse public policy in order to dismantle the 1986 CGL policy it sells to Florida contractors and subcontractors.

Of course, Auto-Owners' approach in this case is understandable. When faced with a claim that is squarely within the coverage of its policy, if the insurer nevertheless desires to evade its obligations, it is forced to resort to broad generalities, bordering on worn platitudes in order to sidestep its own policy. Acceptance of Auto-Owners' arguments prevents the application of the carefully tailored property damage exclusions that are designed to provide insured builders with coverage under the policy for the property damage arising out of their subcontractors' work.

## I. CGL COVERAGE FOR PROPERTY DAMAGE TO THE NAMED INSURED'S WORK IS NOT CONTRARY TO FLORIDA LAW, AT LEAST WHERE SUCH DAMAGE ARISES OUT OF SUBCONTRACTORS' WORK

Auto-Owners seeks to avoid any rational discussion of the exclusions contained in the CGL policy and their effect upon defective work claims. The obvious reason is that Exclusion (1), the Your Work Exclusion, actually preserves coverage under the facts of this case. Briefly, that exclusion states that the insurance does not apply to:

> 'Property damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.'
>
> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

The term "your work" refers to the work of the insured contractor and its subcontractors. The exclusion only applies to property damage that is included in the "products-completed operations hazard," and there is no dispute that the Perez home, at the time the property damage occurred, was a "completed operation," since all work had been completed under the building contract of Coral (Pozzi's assignor and the named insured on the Auto-Owners policy), and the home had been put to its intended use.

While the Your Work Exclusion may deny coverage for property damage arising out of Coral's own work on the Perez home, that exclusion does not apply

to this claim, because of the second sentence of the exclusion. That provision (the "Subcontractor Provision") explicitly states that the exclusion does not affect coverage where the damage arises out of work performed by a subcontractor on behalf of the named insured.

### A. The Historical Development of the Subcontractor Provision Supports Coverage Under the Auto-Owners Policy

This Court should not depart from the plain language of the Auto-Owners policy in favor of Auto-Owners' reliance on overly broad platitudes, such as "a CGL policy is not a performance bond" or that "a CGL policy is not intended to cover any cost of repairing defective construction." Some of the case law in this area addresses the issue in terms of the "business risk doctrine," in that a CGL policy is not designed to cover an insured's ordinary business risks, including a contractor's own defective construction. However, that doctrine is carefully circumscribed and limited in the 1986 CGL policy form upon which the Auto-Owners policy is written.

A historical tension has existed between CGL coverage for defective construction work and what insurance underwriters have traditionally referred to as an uninsured business risk. This tension gained momentum with the 1966 revisions to the CGL form promulgated by the Insurance Services Office ("ISO"), the industry organization responsible for drafting the industry-wide standard forms used by insurers. Exclusion (o), the Work Performed Exclusion in the 1966

revisions excluded coverage for property damage arising out of "work performed by or on behalf of the named insured." Then, in 1973, ISO promulgated the Broad Form Property Damage Endorsement ("BFPDE") to the standard policy form. That endorsement expanded the coverage under the 1973 form by modifying the Work Performed Exclusion, to delete the exclusion for work performed "on behalf of" the named insured, so as to provide an insured contractor with coverage for property damage arising out of the defective work of its subcontractors. The only caveat was that the property damage must occur after the completion of the work. *See,* J. D. O'Connor, *What Every Construction Lawyer Should Know About CGL Coverage for Defective Construction*, 21 WTR CONST. LAW. 15, 16 (2001).

In contrast, the Auto-Owners policy is written on a form that was revised in 1986, and through those revisions to the CGL form, ISO sought to clarify the limitations on the business risk concept previously introduced in 1973 by the BFPDE. Due to the popularity of the extra coverage provided by the BFPDE, one major revision was the insertion of the Subcontractor Provision into the Your Work Exclusion, as part of the standard coverage of the policy. That revision confirmed the existence of completed operations coverage for property damage arising out the work of subcontractors.

The notion that a CGL policy should not cover a contractor's business risk of defective construction may have a proper, but limited place in the analysis of

insurance coverage under a CGL policy. While it may contribute to the rationale behind the exclusion of the coverage, any coverage analysis must begin and end at the same point: the plain language of the policy. That recognition is in full accord with the intent of the drafters of the policy. A landmark commentary, published shortly after the 1973 revisions to the CGL policy were promulgated, stated as follows:

> The foregoing is designed to be a descriptive, not a definitive, treatment of an important underwriting concept [the business risk doctrine]. It is recognized that regardless of what concepts underwriters may employ and regardless of what their intent may be, the scope of coverage is found in the four corners of the contract. Nonetheless, an awareness of the business risk concept helps to give dimension and understanding to some of the key provisions of the policy.

G. H. Tinker, *Comprehensive General Liability Insurance–Perspective and Overview*, 25 FED. INS. Q. 217 (1975), p. 226.

The drafters of the 1973 revisions of the CGL policy recognized that the policy language itself shapes and limits underwriting concepts such as the business risk doctrine. That is exactly what the Subcontractor Provision in the Your Work Exclusion on the 1986 form accomplishes, as did the predecessor BFPDE attached to the 1973 form. They circumscribe and limit the business risk concept. Auto-Owners cannot now evade that coverage by borrowing sweeping concepts from case law that interpreted 1966 0r 1973 CGL policy forms that did not include a

Subcontractor Provision in an attempt to formulate some sort of public policy to support an otherwise unsupportable position under its policy language.

### B. *LaMarche v. Shelby Mutual Ins. Co.* Does Not Apply

The cornerstone of Auto-Owners' "no coverage for defective work" campaign is an overly broad reading of *LaMarche v. Shelby Mutual Ins. Co.*, 390 So.2d 325 (Fla. 1980), and the line of Florida cases that have extended *LaMarche* to policies to which its rationale does not apply. Fortunately, this Court is not bound by those lower appellate and federal court decisions and it can properly uphold the existence of CGL coverage for property damage arising from subcontractor work without running afoul of *LaMarche*.

The *LaMarche* case should be understood for what it was, a perfectly correct interpretation of the 1966 edition of the CGL policy, containing a very broad exclusion for property damage arising out of the workmanship of the insured contractor. One of the specific exclusions before this Court in that case was Exclusion (o), the Work Performed Exclusion discussed above, providing that the insurance did not apply "to property damage to work performed ***by or on behalf of*** the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith." *Id.* at 326, emphasis added. The emphasized language "***by or on behalf of***" indicates that, unlike the CGL policy before this Court, the exclusion for property damage to work

of the named insured in *LaMarche* did not include an exception for work performed by subcontractors.

Auto-Owners seizes upon sound bytes from the opinion for the purpose of constructing its out-of-context generalization that *LaMarche* stands for the proposition that no property damage arising out of the repair of the defective work of an insured contractor is ever covered under a CGL policy. The fallacy of this over-generalization is obvious, considering the broad scope of the exclusionary policy language that this Court was interpreting in that case. This Court's observations as to the insurability of property damage caused by the insured were clearly made within the context of the peculiar policy language before it. This Court limited its analysis to the specific policy before it, stating:

> The majority view holds that the purpose of ***this*** comprehensive liability coverage is to provide protection for personal injury or for property damage caused by the completed product, but not for the replacement or repair of that product.

*Id.* at 326.

The *Lamarche* Court looked to *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 405 A.2d 788 (1979), for that "majority view." Auto-Owners mischaracterizes this case as "good and viable," but like *LaMarche*, the *Weedo* court's observations as to the scope of coverage provided for construction defects were made in the context of a 1966 policy including the now superceded Work Performed Exclusion (o). While *Lamarche/Weedo* may have represented the majority view as to earlier

1966 policy form, that view drastically changed with revised 1986 policy form that added the Subcontractor Provision, preserving coverage for property damage arising out of the defective work of subcontractors.

In *Weedo*, a claim was made against the insured contractor for faulty masonry work on two homes. In the course of ultimately denying coverage based on the damage to the products and the work performed exclusions, the court engaged in an extended analysis of insurable versus uninsurable risks**.** However, that analysis applied to the limited coverage under the 1966 CGL policy form before the court. As such, the court's analysis was relatively uncomplicated, but inapplicable to other cases, including this one.

In support of its denial of coverage, the *Weedo* the court quoted from a law review article published in 1971 and authored by Roger Henderson, "Insurance Protection for Products Liability and Completed Operations – What Every Lawyer Should Know," 50 NEB. L. REV. 415, 441 (1971). This law review article, for better or for worse, is one of the most frequently cited authorities in connection with the denial of coverage for defective workmanship to an insured contractor. At the time of its publication in 1971, the primary purpose of the Henderson article was to analyze the ***1966*** revisions to the CGL form. Due to its 1971 vintage, the article, for obvious reasons, contains no analysis as to the effect of the addition of the Subcontractor Provision to the 1986 form. Thus, the business risk doctrine as

described by Henderson (at least as to coverage for property damage arising out of the repair of subcontractor work) has been drafted out of the newer policy forms by insurers like Auto-Owners, willing to expand coverage in order to sell policies and collect higher premiums from insured contractors.

Nevertheless, the *Weedo* case, and its reliance upon the Henderson law review article, became the cornerstone of arguments by insurers, like Auto-Owners, that the business risk doctrine applies to support a ***carte blanche*** denial of coverage for defective workmanship claims, ***regardless*** of the fact the policy language has changed dramatically over the years. That argument does not square with the 1986 policy form before this Court.

### C. Subsequent Florida Case Law Has Misapplied *LaMarche*

Unfortunately, lower Florida courts, both state and federal, have essentially done what Auto-Owners is asking this Court to do: to misapply *LaMarche v. Shelby Mutual Ins. Co.* to subsequent policy forms, including the 1986 form that includes a provision preserving coverage for property damage arising out of the work of subcontractors. While acknowledging the differing policy language, several of those courts inexplicably failed to recognize the importance of the policy differences, woodenly applying the *LaMarche*/*Weedo* rationale as if it fit the policies before them. Such cases include *Home Owners Warranty Corp. v. The Hanover Ins. Co.*, 683 So.2d 527 (Fla. 3d DCA 1996); *Aetna Casualty & Surety*

*Co. v. Deluxe Systems, Inc. of Florida*, 711 So.2d 1293 (Fla. 4th DCA 1998); *Lassiter Construction Co., Inc. v. American States Ins. Co.*, 699 So.2d 768 (Fla. 4th DCA 1997); *Auto-Owners Ins. Co. v. Travelers Casualty & Surety Co.*, 227 F.Supp.2d 1248 (N.D. Fla. 2002); *Tucker Construction Co. v. Michigan Mutual Ins. Co.*, 423 So.2d 525 (Fla. 5th DCA 1982) (ignoring modification of policy language to provide coverage for subcontractor work in predecessor insurance form). Some of these courts applied the *LaMarche/Weedo* rationale without even citing, and perhaps without considering, the actual provisions of the policy contracts before them. *See, Sekura v. Grenada Ins. Co.*, 896 So.2d 861 (Fla. 3d DCA 2005); *Auto Owners Ins. Co. v. Tripp Construction, Inc.*, 737 So.2d 600 (Fla. 3d DCA 1999).

For these reasons, Amici Curiae respectfully submit that the post-*Lamarche* Florida case law does a disservice to the language of the 1986 CGL policy. Fortunately, this Court is not bound by the lower court precedent that has so over-broadly applied the *LaMarche/Weedo* interpretation of older CGL policy forms that did not preserve coverage for certain construction defects through the Subcontractor Provision.

Correctly deciding this case does not require overruling *LaMarche.* It simply requires this court to acknowledge that the 1986 policy form now before this court circumscribes and limits the "business risk" rationale of

*LaMarche/Weedo.* Unlike the older precedent which Auto-Owners cites, and particularly *Tucker Construction v. Michigan Mutual* and *Auto-Owners Ins. Co. v. Travelers Casualty & Surety*, the most recently decided cases conclude that the *Lassiter/Weedo* rationale is inapposite. It does not address coverage for the costs to repair defective workmanship under the 1986 CGL policy form before this Court. *J.S.U.B, Inc. v. United States Fire Ins. Co.,* 906 So.2d 303 (Fla. 2d DCA 200), *rev. granted,* 925 So.2d 1032 (2006); *Essex Builders Group, Inc. v. Amerisure Ins. Co.*, 429 F.Supp.2d 1274 (M.D. Fla. 2005).

**D. Applicable Foreign Authorities Limit The Business Risk Doctrine**

Other courts have faced with the identical issue before this one: whether precedent applying the business risk doctrine to prior policy forms is compatible with the expanded scope of coverage provided to insured contractors in the 1986 policy form. A primary example is *Wanzek Construction, Inc. v. Employers Ins. of Wausau,* 679 N.W.2d 322 (Minn. 2004). In that case, the insured general contractor sought coverage for the costs of repairing property damage to defective coping stones provided by its subcontractor. Like Auto-Owners, the insurer argued that the court was bound by prior precedent, including *Knutson Construction Co. v. St. Paul Fire & Marine Ins. Co.*, 396 N.W.2d 229 (Minn. 1986), cited by Auto-Owners to this Court, and *Bor-son Building Corp. v. Employers Commercial Union Ins. Co. of America,* 323 N.W.2d 58 (Minn. 1982). Those two cases had

applied the same *Weedo* business risk rationale that this Court applied in *LaMarche* to earlier policy forms, and particularly to the Work Performed Exclusion, to deny coverage to general contractors for subcontractor work.

In *Wanzek*, the Minnesota Supreme Court rejected the argument that it was bound by case law applying the prior policy forms, including *Weedo v. Stone-E-Brick*, as applied in the *Bor-son* and *Knutson* opinions, stating as follows:

> Consequently, the suggestion by Wausau [the insurer] that the principles of *Bor-son* and *Knutson*, in combination with the general principles of the business-risk doctrine, should drive the interpretation of the words of the 1986 standard-form exclusions, is incorrect. We conclude that the extent to which Wausau's CGL policy covers the risk of Wanzek must be determined from the specific terms of the insurance contract.

*Id.* at 327. The court went on to apply the Subcontractor Provision in upholding coverage for the insured contractor for the property damage arising out of its subcontractor's work in light of the language of 1986 policy language before it.

Authorities cited to this Court by Pozzi in its Answering Brief also demonstrate that numerous courts recognize the limitation placed upon the business risk doctrine through the inclusion in the policy of the Subcontractor Provision and will not be reiterated here. Like those courts, this Court should not succumb to the over-generalizations and misplaced appeal to business risk/public policy argued for by Auto-Owners. That over-generalized appeal has no basis in the policy language.

While Auto-Owners berates Pozzi for relying on better-reasoned foreign authorities that apply the 1986 policy language, Auto-Owners itself cites to a large number of foreign cases (twenty-five in one footnote alone), again to support its overly broad generalization that CGL policies do not cover the cost of repair of the insured's own work. Many of these foreign cases suffer from the same infirmity as Auto-Owners' Florida authorities – most of them make sweeping pronouncements that apply to policy language that differs from that before this Court.

Two examples are illustrative of the weakness of Auto-Owner's authorities. It cites *Reliance Ins. Co. v. Povia-Ballantine Corp.,* 738 F. Supp. 523 (M.D. Ga. 1990), for the proposition that CGL policies exclude coverage for claims for property damage for the repair of a product constructed in an unworkmanlike manner. But Auto-Owners neglects to mention that in that case, the court applied the "Alienated Premises" and the "Products" Exclusions to deny coverage, neither of which are involved in the Pozzi claim. Auto-Owners also cites *Qualls v. Country Mutual Ins. Co.,* 123 Ill.App.3d 831, 462 N.E.2d 1288 (1988), to support its assertion that a CGL policy with products-completed operations coverage "does not cover the cost of remedying insured's work product." That statement accurately describes the situation before the court in that case since the claim involved the work of the insured carpenter itself. Thus the extra coverage provided by the Subcontractor Provision was not involved. In citing these and other cases

for such overly broad generalities, Auto-Owners is comparing apples with oranges, and most of its foreign authorities similarly do not withstand close scrutiny.

## II. UPHOLDING COVERAGE WILL NEITHER RESULT IN DOUBLE PAYMENT NOR TRANSFORM INSURANCE POLICIES INTO *DE FACTO* PERFORMANCE BONDS

Similarly, Auto-Owners' other arguments lack merit.

***Double payment.*** Upholding coverage for an insured contractor for the cost of repairing property damage arising out of the work of its subcontractors does not result in double payment for the insured. The facts of this case themselves serve as a prime example. It was Pozzi that repaired the windows that were defectively installed by Coral's subcontractor. Although Pozzi was initially paid for the windows it supplied, it went out of pocket and paid the costs of repairing them, taking an assignment of Coral's rights against its insurer. Thus, Pozzi did not get paid twice. The insurance proceeds awarded by the federal district court simply reimbursed it for the repair costs, the measure of its damages incurred because of covered property damage as defined in the policy. The same would be true if Coral, the named insured, had made the repairs and suffered the damage.

***CGL policy as performance bond.*** Likewise, upholding coverage under these circumstances will not transform the CGL policy into a performance bond. A performance bond is a three party instrument running in favor of the owner, with the surety guarantying the financial capability of the contractor to complete the

project in accordance with the bonded contract. A bond is written on the basis of a credit evaluation, and unlike insurance, it is underwritten with the expectation that no loss will occur. If a loss occurs, the surety has a contractual right of indemnity against the contractor, quite unlike insurance where an insurer that pays a claim is prohibited from subrogating against its insured. However, where a performance bond default involves property damage caused by defective work, particularly by a subcontractor of the bonded contractor, both the bond and the CGL policy apply. In that instance, if the surety pays the claim, it has a right of equitable subrogation against the contractor's CGL insurer, since it stands in the shoes of the its principal. This right is recognized under Florida law, including authorities relied upon by Auto-Owners. *Auto-Owners Ins. Co. v. Travelers, supra,* 227 F.Supp. at 1259-1260. *See also, Western World Ins. Co., Inc. v. Travelers Indem. Co.*, 358 So.2d 602, 604 (Fla. 1st DCA 1978). While the "CGL policy as performance bond" argument has a certain ring to it, it rings hollow in light of the realities of the construction industry.

## CONCLUSION

Amici Curiae ask that the Court do nothing more than be true to the language of the policy contract before it, answering "yes" to the question certified from the Eleventh Circuit.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

Undersigned counsel for Amici Curiae, Associated General Contractors of America, Florida A.G.C. Council, Inc., The Associated General Contractors of Greater Florida, Inc., the South Florida Chapter of the Associated General Contractors; and the Florida East Coast Chapter of the Associated General Contractors of America, Inc; American Subcontractors Association, Inc., and the American Subcontractors of Florida, Inc., hereby certifies that a true and correct copy of the foregoing was mailed this ___1st____ day of August, 2006 to Denise V. Powers, DENISE V. POWERS, P.A., 2600 Douglas Road, Suite 501, Coral Gables, Florida 33134; David K. Miller and Ginger L. Barry, BROAD AND CASSEL, 215 S. Monroe St., Suite 400, Post Office Drawer 11300, Tallahassee, Florida 32302; Mark A. Boyle, FINK & BOYLE, P.A., 2030 McGregor Boulevard, Fort Myers, Florida 33901; Nancy W. Gregoire, BUNNELL, WOULFE, KIRSCHBAUM, KELLER, McINTYRE & GREGOIRE, P.A., One Financial Plaza, 9th Floor, 100 S.E. 3rd Avenue, Fort Lauderdale, Florida 33394; Keith Hetrick, FLORIDA HOME BUILDERS ASSOCATION, 201 E. Park Avenue, Tallahassee, Florida 32301-1511; David S. Jaffe, NATIONAL ASSOCIATION OF HOMEBUILDERS, 1201 15th Street N.W., Washington, D.C. 20005; Ronald L. Kammer and Sina Bahadoran, HINSHAW & CULBERTSON, LLP, 9155 S. Dadeland Boulevard, Suite 1600, Miami, Florida

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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