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Court Sides with Surety, Majority Rule, on A311 Bond's Conditions Precedent

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In *Flintco LLC v. Total Installation Management Specialists, Inc.*,[1] the Oklahoma Supreme Court delivered a significant opinion on the scope of a surety's liability under the AIA A311 performance bond, resolving a long-standing question in Oklahoma regarding the A311's conditions precedent. The Court held that the declaration of a default and notice to the surety was a mandatory condition precedent to the surety's obligation under the A311 performance bond, which accords with the majority of jurisdictions in the United States. The Court's ruling reaffirms fundamental principles of suretyship—that a surety's obligations arise only after strict compliance with the conditions precedent stated in the bond—and rejects attempts to expand a surety's liability beyond the express terms of the contract.

The case involved the construction of new student housing facilities at Oklahoma State University. Flintco was the general contractor and subcontracted the flooring work to Total Installation Management Specialists, Inc. ("Total"). Total secured a performance bond from Oklahoma Surety Company ("OSC") using the AIA A311 form. The bond expressly stated: "Whenever Principal shall be, and declared by Obligee to be in default under the subcontract, the Obligee having performed Obligee's obligations thereunder: ...Obligee *after reasonable notice to Surety* may, or Surety upon demand of Obligee may arrange for the performance of Principal's obligation under the subcontract..."

Total's performance faltered in terms of management, manpower, materials, and progress, upon which Flintco supplemented the workforce and undertook the work itself for more than five weeks before notifying OSC. By the time notice was given, Flintco had effectively displaced the subcontractor through supplemental subcontractors and completed the work, exceeding Total's contract amount by $618,654.23. Flintco then sued Total and OSC for reimbursement of the completion costs.

The central issue before the Court was whether Flintco's failure to declare default and give prior notice to the surety barred recovery under the bond. The Court answered emphatically in the affirmative, holding that the notice requirement constituted a mandatory condition precedent to the surety's liability.

The Court emphasized that a performance bond must be interpreted according to its clear terms. The Court reaffirmed that a surety cannot be held beyond the express language of its undertaking. The A311 bond language, the Court reasoned, unambiguously made the surety's liability contingent on two sequential acts: the declaration of the principal's default and reasonable notice to the surety of the default.

The decision reaffirms three substantive tenets of surety law. First, the bond language is the primary legal source for the surety's liability. While the bonded subcontract allowed

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Appellate Court Affirms Surety's Win in Dispute with Completing Contractor

MICHAEL F. HIGGINS

A recent case out of the 8th Circuit highlights that courts are unafraid to strictly enforce the terms of a contract between sophisticated parties. In *E&I Global Energy Services v. Liberty Mutual Insurance Company*,[1] the principal of a completion contractor entered into a completion contract through a company he controlled, E&C. When that entity failed to obtain a bond, the principal performed the contract through another entity he controlled, E&I. This error proved fatal when the completing contractor sought additional payment and attempted to recover as E&I, not E&C. The court denied these claims because it was E&C who had entered into the contract, not E&I. E&C also failed to properly assign its contract to E&I.

Liberty Mutual and the Insurance Company of the State of Pennsylvania as surety issued performance and payment bonds in connection with the construction of an electrical substation for the Western Area Power Administration. When the general contractor encountered difficulties, it hired E&I as its subcontractor to assist with completion.

The general contractor ultimately defaulted, the surety timely investigated, and the surety searched for a completion contractor. The

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A Farewell from Todd Braggins

Thirty-two years ago I walked into the offices of Ernstrom & Dreste, LLP, having spent ten years at other law practices. I had no idea what to expect, but as a newlywed, I needed a job. Unbeknownst to me, I was soon to be introduced to something called surety law. Like most of you reading this, my surety career fell into my lap. What transpired over the following years was nothing short of pure serendipity.

I have been blessed with incredible partners, co-workers, mentors, clients, consultants, and ultimately, friends. I learned so much from each of you. More importantly, I now have a network of colleagues and friends that spans the entire country.

The surety industry has been wonderful to me, my firm, and my family. It provided challenges, opportunities, and rewards. I thank each and every one of my colleagues, past and present, for the knowledge, inspiration, and support you provided.

I know that the industry is in good hands because I have had the good fortune to meet so many of our future leaders. You are bright, energetic, and ready to lead this industry as the world around us evolves. Thank you for providing a member of the old guard with the opportunity to become friends with the next generation.

To my more "seasoned" contemporaries, thank you for all our experiences together, especially the camaraderie and laughs. You have equipped me with stories for a lifetime.

I will miss you all, but I leave knowing that somewhere along the line I became the George Bailey of surety (Google it). Until next time....

P.S. My cell number will remain the same, but my new email is tbraggins85@gmail.com. I'd love to hear from you.

New Managing Partner, Brian Streicher (Left) joins E&D's former Managing Partner Todd Braggins (Right) for a round of golf at the National Bond Claims Association's Annual Meeting in Carlsbad, CA in October 2025.

CONTINUED "COURT SIDES WITH SURETY, MAJORITY RULE, ON A311 BOND'S CONDITIONS PRECEDENT"

Flintco to supplement the subcontractor's work, the bond gave OSC independent contractual rights—to investigate, remedy, or arrange completion. Particularly, although the bonded subcontract was incorporated by reference into the bond, the Surety's primary risk profile is driven by the bond itself.

Second, notice provisions serve as material, not technical, requirements. The Court characterized notice as a substantive component of the surety's bargain, not a mere formality. The surety's opportunity to act before the obligee undertakes self-help is intrinsic to its risk allocation.

Third, the Court rejected expansion of the surety's role into that of a commercial guarantor. Flintco had urged the Court to adopt reasoning from *Colorado Structures, Inc. v. Insurance Company of the West*[2] and other minority jurisdictions, which treated the A311 bond's "condition" clause as creating absolute liability once the principal failed to perform. The Oklahoma Supreme Court declined, observing that such a reading "would turn a performance surety into a commercial guarantor—an undertaking well beyond the limits of the surety bond."

One of the cases rejected by the *Flintco* Court is *Walter Concrete Construction Corp. v. Lederle Laboratories*,[3] in which New York's highest court held that the A311 language does not contain an express condition precedent of declaration of default and notice to the surety. The *Flintco* Court downplayed New York's *Walter Concrete* decision as a "memorandum opinion containing only three paragraphs of brief analysis." The Flintco Court further remarked: "[Walter Concrete] fails to properly give effect to the plain meaning of the bond provisions and subjects the surety to liability beyond that which it expressly agreed to undertake." The Oklahoma Supreme Court rightly rebuked the New York Court of Appeals' decision, which unfortunately remains the law in New York and a minority of other jurisdictions.

The *Flintco* decision harmonizes Oklahoma law with the majority rule nationally and signals to contractors and owners that performance bond obligations are reciprocal. A bond is not a blank check; it is a conditional undertaking that depends on the obligee's adherence to notice and default procedures. Obligees seeking to preserve bond coverage under the A311 in majority-rule jurisdictions must formally declare default and promptly notify the surety before self-performing or hiring replacements. The ruling stabilizes expectations within the surety marketplace and reinforces the principle that freedom of contract governs the allocation of risk in bonded construction relationships. E&D

1 576 P.3d 915 (Okla. 2025).
2 161 Wash.2d 577 (2007).
3 99 N.Y.2d 603 (2003).

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principal of E&I negotiated a completion contract with the surety through a different legal entity, E&C. The completion contract between the surety and E&C contained a "non-assignment" clause, prohibiting E&C from assigning the contract to any other entity without the consent of the owner and the surety.

The principal of both E&I and E&C claimed that when he read the proposed completion contract, he asked the owner to change the completion contractor to E&I. E&I did, in fact, operate as the completion contractor, but never entered into a written completion agreement. E&I could not show that there was any agreement, even an oral agreement, to assign the completion contract to E&I.

Assignments, even oral assignments, are enforceable under South Dakota state law. The parties' actions can sometimes waive a non-assignment clause and the formalities of a written assignment. Yet in this case, the court held that E&I did not meet the low bar to show that there was an assignment. Under South Dakota Law, despite the existence of a non-assignment clause, an oral assignment is generally valid if "any language however informal" shows "clear evidence of the intent to transfer rights." It was not sufficient that the principal of E&I purportedly told the owner that he wanted to change the contracting entity to E&I. Nor was it sufficient that E&I actually performed the work. In any event, a careful completion contractor could have resolved this problem by either (1) executing an assignment in writing or (2) executing a new completion contract between the correct entity and the surety.

By its very nature, a completion contract typically involves a distressed project. Yet, the *E&I* decision cautions that careful attention to the details of the completion agreement is all the more critical in the face of uncertainty. When a dispute arises, courts will not overlook the plain terms of the contract.

Courts are loathe to read into a contract missing essential terms such as the price, subject matter, and—as critical here—the parties to the contract. E&I attempted to rescue its critical error by asserting claims for unjust enrichment, fraud and deceit, and negligent misrepresentation. These claims were unsuccessful, in part, because the surety acted reasonably and in good faith in negotiating the takeover agreement. E&I complained that the surety did not supply complete copies of the project documents. Yet, E&I had access to those documents elsewhere, was aware the documents were incomplete, and as a subcontractor was aware that the project was already disorganized. The surety lacked the intent to deceive. E&I's unjust enrichment claims likewise failed because there was a valid contract between E&C and the surety.

E&I recently filed a petition for appellate review with the Supreme Court of the United States. As discussed in this analysis, one of E&I's main claims is that it was properly assigned the contract, or even if it was not proper, the assignment was good enough. E&I attacks the 8th Circuit's ruling as "unduly formalistic." In this observer's view, the Supreme Court is unlikely to take up this case or excuse E&I and E&C's lax approach to contracting. One thing is certain, sureties and contractors can be assured that the best protection against litigation risk is the careful attention to the terms of the completion contract, including assuring that the contract is with the right parties. E&D

1 134 F.4th 504 (8th Cir. 2025).

On October 24, 2025, Partner, Brian Streicher (Center), Associate Attorneys, Mike Higgins (Left) and Cavan Boyle (Right), and Office Manager, Erin Warr (not pictured), attended the Syracuse University College of Law Career Expo to meet with law students and discuss professional opportunities available within the areas of Construction & Surety Law and Commercial Litigaiton. We enjoyed connecting with many future law professionals and sharing a little about our firm.

(Photo L to R) Kevin Peartree, Martha Connolly, Brian Streicher and Todd Braggins at the CFMA Heidi Caton Classic Golf Tournament at The Links at Greystone on August 7, with E&D sponsoring at the Bronze Level.

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Ernstrom & Dreste, LLP also publishes the ContrACT Construction Risk Management Reporter. If you would like to receive that publication as well, please contact Jenna Ellis at jellis@ed-llp.com. Copies of ContrACT Construction Risk Management Reporter and The Fidelity & Surety Reporter can also be obtained at Ernstrom & Dreste, LLP's website (ernstromdreste.com).

FIRM NEWS

Six attorneys were recognized by *Best Lawyers in America*® 2026 Edition in Construction Law/Litigation: Todd Braggins, Martha Connolly, John Dreste, Brian Geary, Mike Higgins, and Kevin Peartree. Another, Cavan Boyle, was named to its *Ones to Watch*® list.

Todd Braggins will retire from law practice at year's end, after an extraordinary 32-year career with E&D, serving as Managing Partner since 2012. As Todd prepares for this well-earned next chapter, we are grateful for his legacy and confident in the firm's continued success under the capable leadership of new Managing Partner, Brian Streicher.

Brian Streicher was a featured speaker at the Syracuse Surety Association's 2025 Surety Day on November 5, 2025, presenting on the topic "Understanding the Risks of Non-AIA Bond Forms: An Illustration of Standard, Large Public Owner, and Manuscript Bond Forms."

Brian Streicher and Cavan Boyle authored an article entitled "Irreparable Harm and Injunctive Relief: Why Failure to Deposit Collateral is Not Enough" for publication in the National Association of Surety Bond Producers *Surety Bond Quarterly*, Winter Edition.

Mike Higgins taught Business Law at Monroe Community College this past fall semester.

Kellie Ricker recently joined E&D as a Claims Analyst. Kellie has an extensive background in preconstruction planning, construction project management and scheduling.

Brian Streicher and Cavan Boyle plan to attend the ABA/TIPS Fidelity & Surety Law Committee Midwinter Conference in Washington D.C, January 21-23, 2026