DADELAND DEPOT AND SURETY BAD FAITH

Construction Law Section

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Most construction lawyers have probably heard about the recent Dadeland Depot decision by the Florida Supreme Court. The opinion answered 5 questions certified by the Eleventh Circuit. This article addresses only the first certified question:

> Is the obligee of a surety contract considered an "insured" such that the obligee has the right to sue the surety for bad-faith refusal to settle claims under § 624.155(1)(B)(1)?

The court answered the question in the affirmative, which was incorrect for the following reasons:

Legislative Amendment

During the 2005 session, the Florida Legislature amended § 624.155 to state: "A surety issuing a payment or performance bond on the construction or maintenance of a building or roadway project is not an insurer for purposes of subsection (1)." Though the legislature's amendment did not bind the court, the court should have given more weight to the legislature's effort to eliminate the ambiguity the opinion addressed.

Doing Nothing Was Surety's Option

The majority failed to acknowledge that the performance bond expressly allowed the surety to "[d]eny liability in whole or in part" if the obligee declared the principal in default. AIA 312 Bond § 4.4.2. Surety bonds are contracts. The bond language establishes the surety's duties and liabilities. The surety was within its rights to deny liability and do nothing.

Surety Relationship Is Unique

The majority misapprehended the tripartite surety relationship as one of insurance. Importantly, a surety is only *secondarily* liable to an obligee for the principal's performance. Under insurance contracts, the insurer is *primarily* liable to first and third parties for damages. Decades of common law recognizes that "suretyship is not insurance."

Factual Vacuum

The majority answered the certified questions in a vacuum. The majority stated: "[T]his decision does not address the merits of Dadeland's claim as we merely construe the language" of the statute. The underlying facts suggest that the surety did not deny the obligee's bond claim in bad faith. The obligee originally claimed $4.4M in damages and later increased its demand to $8M. The parties arbitrated the dispute and the panel determined that the obligee's damages were about $1.16M after set-off for unpaid contract balances. The majority did not address how a refusal to pay an overstated damages claim could be bad faith on the surety's part.

Bad Public Policy

As illustrated by the amicus briefs, the majority opinion is bad public policy for Florida's construction industry. The Academy of Florida Trial Lawyers briefed in favor of the obligee's ability to sue a surety for bad faith. The Florida Associated General Contractors, Florida Transportation Builders, and Florida ABC briefed in favor of the surety, stating: "The lifeblood of the commercial construction industry is surety bonding. . . . if the surety is to be routinely exposed to litigation involving claims of bad-faith . . . sureties will likely exert overwhelming pressure on the contractor [principal] to settle the claim regardless of fault."

Conclusion

In light of the above issues, Dadeland Depot should have little or no affect on surety law in Florida.

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