American Home Assurance Co. v. Plaza Materials Corp.

MARSHAL: PLEASE RISE. HEAR YE. HEAR YE. HEAR YE. THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW SESSION. ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR, GIVE ATTENTION AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA AND THIS HONORABLE COURT. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

CHIEF JUSTICE: GOOD MORNING AND WELCOME TO THE FLORIDA SUPREME COURT. WE APPRECIATE COUNSEL BEING READY TO GO AS WE COME OUT HERE ON THE BENCH, AND WITHOUT FURTHER ADO, WE WILL CALL THE FIRST CASE, AMERICAN HOME INSURANCE COMPANY VERSUS PLAZA MATERIALS ET AL.. IF COUNSEL IS READY, YOU MAY PROCEED.

THANK YOU, YOUR HONOR. MY NAME IS BOB MORRIS FROM TAMPA AND I REPRESENT AMERICAN HOME ASSURANCE COMPANY, ALONG WITH MY CO-COUNSEL SEATED AT THE TABLE. WE ARE HERE FROM THE SECOND DISTRICT COURT OF APPEAL IN THIS PARTICULAR CASE, AND I SAY THIS PARTICULAR CASE BECAUSE THERE ARE RELATED CASES HERE AT THE FLORIDA SUPREME COURT, ALSO. IF THE STATUTE DOES NOT CONTAIN NOTICE OF TIME LIMIT PROVISIONS IN SECTION 25505, AS REQUIRED IN SECTION 25505 SUBSECTION 6, ARE THOSE NOTICE AND TIME LIMITATIONS INFERS ENFORCEABLE BY THE SURETY OR IS THE CLAIMANT ENTITLED TO RELY UPON THE NOTICE AND TIME LIMITATIONS APPLICABLE UNDER COMMON LAW?

AND YOU WOULD HAVE US ANSWER THAT QUESTION THAT THEY ARE STILL ENFORCEABLE, IS THAT CORRECT?

THAT'S CORRECT. AND THE REASON FOR THAT, BASICALLY, IS SUBSECTION 4. IN 1980, THE FLORIDA LEGISLATURE REVISED FLORIDA STATUTE 25505, IN LIGHT OF CONFLICTING DECISIONS THAT HAD TAKEN PLACE IN THE COURTS OF APPEAL. THE TWO PRIMARY THAT EVERYONE CITES IS THE HUDAI, OUT CASE, OUT OF FIFTH DISTRICT COURT OF APPEAL, THAT CONFLICTED WITH THE SWIFT MUD MILLER CONSTRUCTION CASE. AND ONE OF THOSE CASES SAID THAT IT IS NOT NECESSARY TO GIVE NOTICE OF THE TIME OF NOTICE LIMITATIONS WITHIN THESE, BOND FORUM, AND -- BOND FORM, AND THE OTHER ONE SAID IT IS AND IT BECAME A COMMON LAW BOND ISSUE. THE COMMON LAW BOND --

YOU SAID THERE WAS A CONFLICT AND THEN THEY PUT IN SUBSECTIONS 4 AND 6, SAYING THAT THE NOTICE REQUIREMENT HAS TO BE IN THE BOND?

SUBSECTION 6 DOES, IN FACT, SAY THAT THE NOTICE REQUIREMENT DOES HAVE TO BE IN THE BOND.

AGAIN, SO YOU ARE SAYING AFTER THAT CONFLICT, THAT THE LEGISLATURE SAYS IT NEEDED TO BE IN THE BOND.

THAT'S CORRECT.

AND IS IT YOUR, IS IT YOUR INTERPRETATION, OR ARE YOU AGREEING WITH THE VIEW OF THE FIFTH DISTRICT, OR ARE YOU SAYING THAT IF IT IS NOT IN THE BOND, IT ABSOLUTELY DOES NOT MATTER AND IT STILL IS ENFORCEABLE?

BASICALLY AMERICAN HOME WOULD TAKE TWO POSITIONS. NUMBER ONE, IT DOESN'T MAKE ANY DIFFERENCE, IF IT IS NOT IN THE BOND OR NOT, AND SECONDLY THERE IS THE PREJUDICE STANDARD THAT WAS ENUNCIATED IN THE FIFTH DISTRICT COURT OF APPEAL.

I JUST WANTED TO MAKE SURE, BECAUSE THERE IS REALLY THREE DIFFERENT VIEWS THAT YOU COULD TAKE, ONE THE SECOND DISTRICT SAID THAT IF IT IS NOT IN THERE, THE NOTICE REQUIREMENTS ARE NOT, ARE ALSO, IF THEY HAVE BEEN TIMELY FILED, IT DOESN'T MATTER, CORRECT? THAT IS NUMBER ONE. NUMBER TWO WOULD BE THAT IT DOESN'T MAKE ANY DIFFERENCE OR THREE WOULD BE WHAT JUDGE HARRIS HAS SAID, WHICH IS THAT IT --

THE PREJUDICE STANDARD. THERE ARE FOUR BASIC GROUPS THAT ARE IMPACTED BY FLORIDA STATUTE 255.05, AND FOR SOME REASON, THE COURTS HAVE SEEMED TO THINK THAT THE SURETY INDUSTRY OUGHT TO BE THE WHIPPING BOY OUT OF THOSE FOUR GROUPS, WHEN IN FACT, THEY SHOULD NOT BE. THE FIRST GROUP THAT IS HE INTERESTED IN 2 A 5.05 ARE THE OWNERS, ONLY GEESE, STATE OF FLORIDA, THE OWNER, DEPARTMENT OF TRANSPORTATION, CITY OF TALLAHASSEE, ET CETERA, AND THE SECOND INTERESTED GROUP ARE THE CONTRACTORS AND DON'T FORGET THE BOND IS SIGNED BY THE CONTRACTOR. WHEN YOU SAY THE SURETY DIDN'T COMPLY OR THE COURT SAYS THE SURETY DIDN'T COMPLY WITH THE STATUTE, THAT GOES TO THE CONTRACTOR, ALSO, THE CONTRACTOR IS, QUOTE, IN VIOLATION, END QUOTE, AND THE THIRD GROUP THAT IS INTERESTED IN 255.50 ARE THE PAYMENT BOND CLAIMANTS THAT ARE INVOLVED IN IT AND THE FOURTH INTERESTED PARTIES ARE THE INSUREDS, LIMITORS TO THE CONTRACTOR, ET CETERA, OR GUARANTORS OF THE SURETY.

WHEN YOU SAY IT DOESN'T MATTER IF IT IS NOT THERE, IT IS STILL STATUTORY BOND, WHAT DO YOU CLAIM TO BE THE PURPOSE OF SUBSECTION 6?

THE PURPOSE OF THE LEGISLATURE IN ENACTING THAT IS TO TELL THE ONLY GEES WHO WROTE THE -- THE OBLIGEES WHO WROTE THE BONN, NOT THE SURETY, THE HANED WRITING OF THE -- THE HANDWRITING OF THE ONE THAT WROTE IT, AND THEY TELL MR. OBLIGEE THAT YOU NEED TO INCLUDE A REFERENCE IN THERE TO THE LIMITATIONS CONTAINED IN THE STATUTE.

IF YOU DON'T, THEN WHAT?

GOOD QUESTION, AND WHAT JUDGE HARRIS SAYS IS NO HARM, NO FOUL. THERE IS NO PREJUDICE. IN THIS PARTICULAR CASE, AND PLAZA MATERIALS, IT WOULDN'T HAVE MATTERED IF THEY HAD PRINTED THE ENTIRE STATUTE WORD FOR WORD, IN THE BOND, PLAZA MATERIALS DIDN'T COMPLY WITH IT.

HOW DO WE KNOW THAT THAT WOULD NOT HAVE MADE A DIFFERENCE, IF, IN FACT, THE NOTICE REQUIREMENT WOULD HAVE BEEN IN THE BONN, HOW DO WE KNOW THAT IT WOULDN'T HAVE MADE ANY DIFFERENCE?

BECAUSE THE RECORD ON APPEAL REQUIRED THAT, AS SOON AS MR. LONGIER PROVIDED NOTICE, THAT HE HAD A CLAIM, EVEN THOUGH IT WAS LATE, AND THE STATUTORY NOTICE REQUIREMENT WAS NOT IN THE BOND, AND THIS IS THE MISCONCEPTION THAT A LOT OF PREVIOUS COURTS HAVE HAD WITH REGARD TO THE 255.05 BOND. THIS IS NOT A SURETY CREATION. PUBLIC WORKS PROJECTS GO OUT TO BID. BECAUSE OF COMPETITIVE BIDDING, AND THEY GO OUT TO BID, AND YOU HAVE GOT THE BOND IS SPECIFIED BY THE PUBLIC AUTHORITY THAT SAYS MR. CONTRACTOR, BID ON THIS PROJECT, AND HERE IS THE BOND FORM THAT YOU HAVE GOT TO SIGN. THAT IS WHAT HAPPENED IN THIS PROJECT HE GOT. IT IS A D.O.T. BOND FORM, SO THE SURETY HASN'T EVEN SEE WHAT THE CONTRACTOR IS BIDDING ON, THE CONTRACTOR BIDS ON IT AND NOW IS AWARDED THE CONTRACT AND NOW THE BOND IS SIGNED. THE SURETY IS NOT THE AUTHOR AND CREATOR OF THIS BOND FORM. IF YOU ASK --

BUT THE SURETY HAS THE, IS, THE BOND INVOLVES THE SURETY, AND WE WOULD, WE CAN

ASSUME THAT THE SURETY READ THE BOND, KNOWS WHAT THE CONDITIONS ARE THAT ARE LISTED IN THE BOND.

ABSOLUTELY, AND EVERY SURETY IN THE NATION THOUGHT THAT IT WAS A 255.05 BOND. THAT IS THE EXACT PROBLEM. WE HAVE GOT A JUDICIAL INTERPRETATION THAT IS CONTRARY TO WHAT THE ENTIRE INDUSTRY UNDERSTOOD. IF YOU ASK ANY CONTRACTOR IN THE STATE OF FLORIDA THAT DOES DOT WORK, WHAT IS YOUR STATUTE OF LIMITATIONS ON A D.O.T. JOB, THEY ARE GOING TO TELL YOU ONE YEAR!

DON'T WE HAVE A CASE THAT JUDGE GRIFFIN WROTE THAT TALKS ABOUT THE PROBLEMS THAT ARE INHERENT IN THIS KIND OF BOND LANGUAGE AND THAT IT DID NOT CONTAIN THE INFORMATION CONCERNING SUBSECTION 2 ?

ARE YOU REFERRING TO THE MARTIN PAVING CASE?

YEAH.

JUDGE GRIFFIN'S DECISION IN MARTIN PAVING IS BASED ON THE FACT THAT THE BOND WAS NOT RECORDED IN THE PUBLIC RECORDS SAYING THAT THE WORK WAS COMPLETED AND THERE WAS NO WAY THAT THE CLAIMANT COULD KNOW WHO THE SURETY IS BECAUSE IT WASN'T RECORDED. THAT IS NOT THE CASE HERE. JUDGE GRIFFIN'S DECISION EVEN GOES ON TO SAY, HAD THE BOND BEEN RECORDED, THE FORM, EVEN THOUGH IT MAY NOT HAVE COMPLIED WITH THE STATUTE, STILL, BECAUSE OF SUBSECTION 4 THAT WAS ENACTED BY THE FLORIDA LEGISLATURE, STILL WOULD HAVE BEEN A STATUTORY BOND FOR PURPOSES OF CONSTRUCTION OF SUBSECTION 2! THE TERMS AND CONDITIONS WITH REGARD TO THE NOTICE REQUIREMENTS CONTAINED IN SUBSECTION 2, WOULD HAVE STILL BEEN APPLICABLE BECAUSE OF SUBSECTION 4.

I AM STILL NOT SURE I UNDERSTAND. WHAT IS YOUR VIEW, THEN, OF WHAT THE LEGISLATIVE PURPOSE WAS IN ENACTING 255.056 THAT REQUIRES THAT THE NOTICE REQUIREMENTS BE IN THE BOND?

THE PURPOSE WAS TO TELL THE OWNERS, OBLIGEES, THE FLORIDA DEPARTMENT OF TRANSPORTATION, THAT YOU NEED TO CALL ATTENTION TO THE FACT IN YOUR BOND FORMS, THAT ARE THERE ARE TIME AND NOTICE LIMITATIONS UNDER SUBSECTION 2. THAT IS WHAT THE PURPOSE WAS, AND IN ENACTING SUBSECTION 4, IT SAYS EVEN IF THERE IS AN OMISSION IF YOU WILL, WITH REGARD TO THAT, ANY STATUTORY BOND, ANY BOND THAT IS GIVEN FOR A PUBLIC WORKS JOB, SHALL BE DEEMED TO INCLUDE THE TIME AND NOTICE PROVISIONS CONTAINED WITHIN SUBSECTION 2.

I AM STILL HAVING A PROBLEM SQUARING THOSE TWO SUBSECTIONS, SUBSECTION 4, WHICH TALKS ABOUT DESPITE THE FORM, IT IS GOING TO BE A STATUTORY BOND, BUT SUBSECTION 6, WHICH USES THE MANDATORY LANGUAGE OF "SHALL INCLUDE", HOW DO YOU HARMONIZE THOSE TWO SECTIONS AND GIVE EFFECT TO BOTH OF THEM?

THAT IS AN EXCELLENT QUESTION, AND THE QUESTION BECOMES WHAT IS THE PENALTY AND WHO SHOULD BE PENALIZED, IF THERE IS A VIOLATION OF EITHER SUBSECTION 4 OR SUBSECTION 6. SUBSECTION 4 USES THE WORD "SHALL" ALSO, AND IT SAYS THAT ANY BOND PROVIDED FOR A PUBLIC WORKS JOB, SHALL, REGARDLESS OF FORM, BE DEEMED AND CONSTRUED TO BE A STATUTORY BOND, SUBJECT TO THE TIME AND NOTICE REQUIREMENTS AS SET FORTH IN SUBSECTION 6.

SINCE WE ARE TALKING ABOUT SPECIFICALLY THE NOTICE REQUIREMENT, AND SUBSECTION 6 DEALS SPECIFICALLY WITH THE NOTICE REQUIREMENT, SHOULDN'T THAT TRUMP THE MORE GENERAL REQUIREMENT UNDER SUBSECTION 4?

NO, IT SHOULD NOT, BECAUSE THE MILLER ACT AND LITTLE MILLER ACT HAVE BEEN AROUND FOR YEARS. KEEP IN MIND THIS IS A REMOTE CLAIMANT, KOHN CONSTRUCTORS HAD NO PRIVITY. SURETY HAD NO PRIVITY. HOW IN THE WORLD IS A CONTRACTOR SUPPOSED TO KNOW WHO TO PAY, IF PLAZA MATERIALS, WHO WAS NOT IN PRIVITY WITH KOHN CONSTRUCTORS, DOESN'T GIVE TIMELY NOTICE? IT IS A COMMONSENSE ARGUMENT. THE ONLY POSSIBLE WAY, IF PLAZA MATERIAL WANTS SOMEONE TO PAY THEM THAT THEY ARE NOT IN PRIVITY WITH, THEY NEED TO LET THEM KNOW THAT THEY EXIST. THAT IS EXACTLY WHAT SUBSECTION 2 SAYS. THIS ISN'T A SCENARIO WHERE PLAZA MATERIALS IS OUT ON THE -- IS NOT ON THE JOB. IT IS NOT WHERE KOHN, THE IMPURITY TRANSFERS TO THE CLAIMANT. THIS SHOWS THEY DIDN'T KNOW ABOUT IT BECAUSE THEY DIDN'T PROVIDE THE STATUTORY NOTICE. CAN YOU IMAGINE THE CATASTROPHE OF SAYING, AND THIS IS EFFECTIVELY WHAT THE DCA HAS SAID, FIVE YEARS FROM NOW, A CLAIMANT THAT THE CONTRACTOR NEVER KNEW ABOUT ON THIS DOT JOB, CAN COME IN AND FILE A LAWSUIT AND THAT IS FAIR.

TAKE US BACK, IF YOU WILL, THROUGH THE STEPS OF HOW THIS SITUATION CAME INTO BEING FROM THE ISSUANCE OF THE CONTRACT, THE FORM OF THE CONTRACT, THE DEVELOPMENT OF THAT.

YOU ARE TALKING ABOUT THE MAJOR CONSTRUCTION CONTRACT WITH FDOT?

RIGHT. RIGHT.

FDOT, FLORIDA DEPARTMENT OF TRANSPORTATION, PUT OUT SPECIFICATIONS TO BUILD THE POLK PARKWAY THAT SAID THAT WE ARE GOING TO BUILD THIS PARTICULAR PARKWAY, INTERSTATE TYPE OF HIGHWAY. IN THE SPECIFICATIONS AND DOT STANDARD SPECS, IT INCLUDES A BOND FORM, AND IT IS CALLED CONTRACT BOND. IT IS NOT CALLED PERFORMANCE BOND. IT IS NOT CALLED PAYMENT BOND. IT IS CALLED CONTRACT BOND. IN ADDITION TO THE PAYMENT PROVISIONS OF THAT BOND, JUSTICE WELLS, IT HAS OTHER PROVISIONS THAT SAYS YOU HAVE GOT TO PROVIDE FOR WORKERS COMP, IF YOU COMMIT FRAUD, THE PENALTY IS DOUBLED AND SO FORTH AND SO ON, BUT THE PAYMENT PROVISIONS ARE IN ACCORDANCE WITH 255 OF THE FLORIDA STATUTES. KOHN AND ANDERSON AND SMITH AND COMPANY AND OTHER MULTIPLE COMPANIES BID ON THE FLORIDA PARKWAY. DOT ACCEPTS THE BID OF THE MOST COMPETITIVE AND RESPONSIVE BIDDER, WHICH HAPPENS TO BE KOHN CONSTRUCTORS.

IN THE BID DOCUMENTS, DID DOT PROVIDE A FORM BOND THAT ANY OF THE BIDDERS NEEDED TO USE?

ABSOLUTELY.

AND DID THAT BOND CONTAIN THE SUBSECTION 6 REQUIREMENT?

IT DOESN'T. THAT IS THE EXACT PROBLEM. THE BOND FORM FROM DOT DOES NOT INCLUDE THE WORDS FROM SUBSECTION 6.

AND IS THERE ANY INDICATION OF WHETHER HAD, A CONTRACTOR SUBMITTED A RESPONSE OF, TO THE BID, WITH A DIFFERENT BOND, WHETHER THAT WOULD HAVE BEEN CONSIDERED RESPONSIVE OR NOT?

THAT IT WOULD NOT BE RESPONSIVE. IT IS NOT IN THE RECORD, BUT LITERALLY THE SURETIES HAVE ATTEMPTED TO GET DOT TO TAKE A BOND THAT USES THOSE WORDS AND THEY WON'T DO IT. THAT IS NOT IN THE RECORD AND IT IS OUTSIDE THE RECORD, BUT THAT WOULD BE A NONCONFORMING BID, BECAUSE THE D.O.T. SAYS BID ON IT THIS PARTICULAR WAY, AND WE PREYOU MEAN THAT BID WOULD -- WE PRESUME THAT BID WOULD BE REJECTED, BECAUSE WE HAVE EXPERIENCED THAT WITHIN THE SURETY INDUSTRY.

IS THERE ANY INDICATION IN THIS RECORD OF WHY, PERHAPS RESPECT THE MAJOR CONTRACTOR FOR THE STATE, FDOT, DID NOT HAVE THIS IN THEIR BOND FORM? IN OTHER WORDS IS THERE ANY IN SIGHT IN THIS RECORD AS TO WHETHER, OF WHY DOT HASN'T CAUGHT UP WITH THAT STATUTORY REQUIREMENT?

IN THE RECORD, I DON'T BELIEVE SO, JUSTICE ANSTEAD. THE, IF YOU WILL NOTE THE BOND FORM IN THE RECORD, DOWN AT THE BOTTOM, THEY DO HAVE A FOOTNOTE EFFECTIVELY AT THE VERY BOTTOM IN FINE PRINT THAT, SAYS THIS BOND MUST BE RECORDED IN THE PUBLIC RECORDS OF THE COUNTY IN WHICH THE PROJECT IS LOCATED, WHICH IS IN RESPONSE TO JUDGE JACQUELINE GRIFFIN'S DECISION TO RECORD IT, BECAUSE UNTIL THAT DECISION WHAT COURT -- CAME OUT, THE BOND WAS NEVER RECORDED IN THE PUBLIC RECORDS. WHEN YOU HAVE GOT AN INTERSTATE PROJECT IN TWO OR THREE COUNTIES, THE SUNSHINE PARKWAY IN HILLSBOROUGH, PASCO AND HERNANDO, WHERE DO YOU GO FIRST AND WHAT HAPPENS WHEN THE CLERK LOSES IT AND WHAT ABOUT THE LAG TIME AND HORRENDOUS RECORD PROBLEMS, BUT THE RECORD DOES NOT SAY WHY DID DOT NOT USE THOSE WORDS, AND SUBSECTION 6 DOES NOT TELL YOU WHAT WORDS TO USE. IS IT OKAY TO JUST SAY --

DOES THE STATUTE HAVE A BOND FORM?

THE STATUTE HAS A BOND FORM.

AND IT DOES NOT CONTAIN THE LANGUAGE, EITHER, DOES IT?

IT DOES NOT. THAT WAS APPROVED BY THE LEGISLATURE IN 1980 AND CONTINUED UP THROUGH PRESENT, AND IT DOES NOT HAVE THE LANGUAGE CONTAINED IN SUBSECTION 6.

SO WE HAVE A SUBSECTION 6 THAT SAYS YOU HAVE TO AND THEN AN APPROVED FORM THAT DOESN'T CONTAIN IT.

THAT IS EXACTLY CORRECT.

CHIEF JUSTICE: THE MARSHAL HAS REMINDED YOU THAT YOU ARE IN YOUR REBUTTAL TIME, IF YOU WANT TO PAUSE AT THIS TIME.

LET ME HIT ONE QUICK POINT. THANK YOU VERY MUCH. ONE QUICK POINT, THERE ARE FLEE H THREE OTHER AREAS THAT THE SECOND DISTRICT SAID -- THERE ARE THREE OTHER AREAS THAT THE SECOND DISTRICT SAID WAS NOT PARTICULARLY SIGNIFICANT, ONE THE BOND SURETY, AND SECOND WITH THE DESCRIPTION WITH REGARD TO THE CONSTRUCTION PROJECT AND THIRD WAS MORE EXPANSIVE TERMS THE THE SECOND DCA DEALT WITH THOSE AND SAID THEY WEREN'T TOO SIGNIFICANT IN THIS PARTICULAR CASE. IRONICALLY PLAZA MATERIALS SAID YOU OUGHT TO GIVE A LEGAL DESCRIPTION OF THE PROJECT THAT IS UNDER CONSTRUCTION. THIS COURT HAS BEEN AROUND LONG ENOUGH TO UNDERSTAND WHAT A LEGAL DESCRIPTION WOULD LOOK LIKE ON AN INTERSTATE HIGHWAY WITH METES AND BOUNDS. I WILL RESERVE THE REST OF MY TIME.

GOOD MORNING. MY NAME IS JAMIE BILOTTE MOSES FROM ORLANDO AND I REPRESENT PLAZA MATERIALS. I REPRESENT IN THE SECOND DISTRICT COURT OF APPEAL AND HERE TODAY. I AM HOPING THIS IS WHERE IT WILL END.

CAN YOU ADDRESS THE ISSUE OF THE FACT THAT, NUMBER ONE, THESE NOTICE PROVISION REQUIREMENT 6 OF SUBSECTION 6 WAS NOT CONTAINED IN THE D.O.T. FORM BOND AND IT IS ALSO NOT CONTAINED IN THE STATUTE, PARTICULARLY WHEN PEOPLE RELY ON FORMS THAT ARE IN A STATUTE OR FORMS THAT ARE ATTACHED TO OUR RULES, I THINK THEY, THERE IS ALMOST AN ENTITLEMENT THAT, IF THEY HAVE THAT FORM, THAT THEY WILL BE IN COMPLIANCE WITH THE LAW. AND HERE WE HAVE A FORM THAT IS, ITSELF NOT IN COMPLIANCE WITH THE LAW, BUT

PEOPLE RELY ON IT AND SHOULDN'T PEOPLE BE ENTITLED TO RELY ON THAT FORM, AND I UNDERSTAND THAT THIS PARTICULAR BOND WAS NOT EXACTLY WHAT THE STATUTORY FORM WAS, BUT NEITHER THE FORM NOR THE DOT FORM HAD THAT REQUIREMENT.

YES, SIR. JUSTICE CANTERO, IN RESPONSE TO WHY THIS BOND FORM DIDN'T HAVE IT, I CAN'T SPEAK TO WHY IT DIDN'T, EXCEPT THAT I HAVE INCLUDED IN MY APPENDIX THAT THESE BOND FORMS HAVE BEEN PROMULGATED BEFORE IN HISTORY, WITH THE APPROPRIATE LANGUAGE IN IT. THE D.O.T. IS AWARE OF THE LEGISLATURE'S REQUIREMENT SINCE 1980, THAT SUBSECTION 6 REQUIRED THE MANDATORY LANGUAGE, AND SOMETIMES THEY HAVE PROMULGATED BOND FORMS THAT HAD IT. SOMETIMES THEY HAVEN'T.

BUT DO YOU AGREE THAT, HAD ONE OF THE BIDDERS NOT INCLUDED THE FORM THAT DOT REQUIRED, THAT THERE WAS AT LEAST A RISK THAT THAT COMPANY WOULD BE DEEMED NONRESPONSIVE AND WOULD NOT EVEN BE CONSIDERED FOR THE CONTRACT? AT LEAST THAT RISK.

I CAN'T SPEAK FOR THE DOT, I AM NOT GOING TO SAY WHAT THEY WOULD DO, BUT I WOULD ACKNOWLEDGE THERE MIGHT BE A RISK. THERE MIGHT BE. HOWEVER, THE D.O.T. KNOWS THAT LANGUAGE HAS TO BE IN THERE. THE REASON WHY THIS BOND FORM IS PROBABLY INCLUDED IS BECAUSE OF ALL OF THE EXTRA REQUIREMENTS THAT THIS BOND FORM PLACES UPON THE SURETY. THE MINIMUM REQUIREMENTS OF 255.051 ARE JUST THAT YOU HAVE TO COMPLETE THE JOB AND YOU HAVE GOT TO PAY THE PEOPLE DEFINED IN 713.01. THIS BOND FORM IS NOT JUST COMPLETING THE JOB. YOU NEED TO PAY EVERYONE IN 7-1301, AND YOU NEED TO PAY BASICALLY ANYONE CONNECTED WITH THIS PROJECT, SO YOU CAN GET ALL THE WAY DOWN TO A MATERIAL SUPPLIER TO A THIRD TIER SUBAND THEY CAN FULL UNDER THIS BOND, WHICH IS A VERY SIGNIFICANT DISTINCTION, AND NOT TO GO OFF ON ANOTHER TANGENT, BUT THAT IS WHY WE SAY SUBSECTION 4 DOES NOT APPLY, BECAUSE SUBSECTION 4 SAYS ONLY BONDS DESCRIBED IN SUBSECTION 1. THE COURTS OF THIS STATE HAVE SAID FOUR YEARS -- HAVE SAID, FOR YEARS, IF YOU PROVIDE COVERAGE UNDER THE BOND, THEN THE MINIMUM REQUIREMENTS OF SUBSECTION 1 IS A MORE EXPANSIVE BOND. NOW, COMMON LAW BOND HAS BEEN THROWN AROUND. I DON'T CARE WHAT YOU GUYS CALL IT TODAY. ALL I CARE IS THAT YOU DETERMINE IT IS A NONCONFORMING BOND TO 255.05, COMMON LAW OR NOT.

WHY WOULD IT NOT BE A BETTER APPROACH? YOU HAVE A STATUTORY SCHEME WITH REGARD TO PUBLIC CONSTRUCTION, AND IT PROVIDES FOR THE BONDING BECAUSE WE DON'T HAVE A MECHANICS LIEN THAT WE CAN APPLY UNDER THOSE CIRCUMSTANCES, AND WE DO HAVE SUBSECTION 4 IS PRETTY PRECISE. WHY WOULD IT NOT BE A BETTER APPROACH TO ACKNOWLEDGE AND APPLY THOSE, BUT IF A PARTY IS HARMED, PREJUDICED OR MISLED WITH FAILURE TO COMPLY WITH SUBSECTION 6 THE PREJUDICE PRONG, THEN THERE WOULD BE SOME RELIEF.

THE PROBLEM IS THIS, YOUR HONOR, AND I CAN SEE WHY THE SURETY ASSOCIATION THAT FILED AN AMICUS BRIEF ON BEHALF OF THE APPELLANT DIDN'T EVEN AGREE WITH THEM, IS THE CHAOS THAT PREJUDICE WOULD CREATE IN THIS STATUTE. IF YOU ARE GOING TO APPLY IT TO SUBSECTION 6 AND A CLAIMANT CAN GET AROUND SUBSECTION 2 BY SHOWING PREJUDICE, THE SURETY ASSOCIATION IS NEVER GOING TO GET A SUMMARY JUDGMENT, IS NEVER GOING TO BE ABLE TO WRITE A LETTER BACK THAT SAYS SORRY. ANOTHER ISSUE, JUSTICE LEWIS.

LET ME ASK YOU ONE OTHER QUESTION. YOUR ARGUMENT IS PREDICATED ON THIS BOND IS BIGGER THAN REQUIRED BY SUBSECTION 1. IF THE BOND IS ONE THAT COMPLIES WITH SUBSECTION 1, IS YOUR ARGUMENT THE SAME?

YES, MY ARGUMENT IS STILL THE SAME BECAUSE IT DOESN'T COMPLY WITH SUBSECTION 6. FOUR AND SIX WERE ADDED WHEN THE LEGISLATURE WANTED TO CREATE THE MANDATORY BOND

FORM THAT JUSTICE CANTERO IS TALKING ABOUT, AND I APOLOGIZE THAT I AM JUST NOW GETTING BACK TO YOUR QUESTION. THEY WANTED SUBSECTION 3, A BOND FORM, TO BE BASICALLY SOMETHING THAT PEOPLE COULD SCAN OUT, PRINTOUT, ANYTHING. THERE WAS RESISTANCE TO THAT. COMPANIES DIDN'T WANT MANDATORY BOND FORMS SO THE LEGISLATURE SAID, FINE, YOU DRAFT YOUR OWN BONDS BUT YOU BETTER HAVE THE SPECIFIC NOTICE AND TIME LIMITATION REQUIREMENTS OF SUBSECTION 2 IN THAT BOND.

BUT THAT IS NOT WHAT HAPPENED HERE. I MEAN, WE CANNOT GET AROUND THE FACT THAT THE BOTTOM LINE OF WHAT HAPPENED HERE IS THIS IS A PUBLIC WORKS CONTRACT IN THE REAL WORLD. THIS IS A PUBLIC WORKS CONTRACT. RIGHT?

YES, SIR.

AND IN THE WHOLE WORLD, THAT IS IN THIS BUSINESS, KNOWS THAT 2 R5 5.05 IS -- THAT 255.05 IS GOING TO CONTROL PUBLIC WORKS BONDS IN THE STATE OF FLORIDA. RIGHT? I MEAN, ISN'T THAT THE BOTTOM LINE OF THIS, AND WHAT FOUR MEANS? FOUR MEANS THAT THIS IS, IF IT IS A PUBLIC WORKS CONTRACT, REGARDLESS OF THE FORM, IT IS GOING TO BE CONSTRUED AND DEEMED TO HAVE THE STATUTORY BOND PROVISIONS. ISN'T THAT A FAIR READING OF FOUR?

I DISAGREE WITH YOU, WITH ALL DUE RESPECT, JUSTICE. THE WAY I READ IT, BECAUSE THERE IS ALSO THIS HUGE BODY OF CASE LAW THAT SAYS IF YOU GO BEYOND 255.051, YOU HAVE GOT A BOND THAT IS DIFFERENT THAT IS CONTEMPLATED IN THIS STATUTE. YES, IT IS A BOND ISSUED ON A PUBLIC WORKS BUT THAT IS NOT THE END OF THE QUESTION. WE HAVE GOT OVER 30 YEARS OF CASE LAW THAT HAS GRANTED CLAIMANTS RELIEF OR MADE A DIFFERENT DECISION THAN 255.05 OR 2, BECAUSE THE BOND IS DIFFERENT THAN CONTEMPLATED. WE HAVE GOT CASES THAT SAY JUST BECAUSE IT IS A BOND ISSUED ON A PUBLIC WORKS, IT IS NOT A STATUTORY BOND PROTECTED BY SUBSECTION 2.

LET ME, AGAIN, SO YOUR ARGUMENT ABOUT WHY YOU WOULD RESIST A PREJUDICE PRONG, AND I ASSUME YOU WOULD RATHER HAVE THAT PRONG, OR IS YOUR POSITION THAT IT JUST WOULD BE BETTER TO GO AND SAY THAT SECTION 6 MEANS NOTHING AND THAT, IF THEY DON'T COMPLY WITH THE NOTICE REQUIREMENT, THEY ARE OUT OF COURT? ARE YOU TAKING THAT ABSOLUTE POSITION THAT, BECAUSE I REALLY, AGAIN, I HAVE GOT A REAL PROBLEM WITH UNDERSTANDING THE PRACTICAL EFFECT OF A BOND NOT CONTAINING THIS NOTICE REQUIREMENT, IF IT IS IN THE STATUTE, AND IF THE CLAIMANT CAN'T ESTABLISH THAT THEY WERE HARMED IN ANY WAY BY THE, YOU KNOW, THEY RELIED ON THE BOND NOT HAVING THAT IN THERE FOR NOT FILING IT ON TIME. JUST FROM AN EQUITY AND A REAL WORLD POINT OF VIEW.

YES, JUSTICE PARIENTE. THE PROBLEM HERE IS, AND I RESPECTFULLY, I SAY THIS WITH ALL DUE RESPECT, BUT I DON'T BELIEVE MR. MORRIS HAS ACCURATELY DEMONSTRATED THE RECORD TO THIS COURT. I DON'T KNOW THE COMPLETE RECORD IN FLORIDA CRUSHED STONE OUT OF THE FIFTH BUT I KNOW PLAZA, AND OUR PRINCIPLE DID TESTIFY AS TO THE PROBLEMS HE HAD WITH THIS BOND, AND NAMELY IT WAS THE REPEATED ASKING FOR THIS BOND AND BEING ASSURED YOU WILL GET IT, YOU WILL GET IT, YOU WILL GET IT, AND HE NEVER DID.

BUT ISN'T THAT THE PURPOSE OF THE RECORDING? WASN'T THIS ONE RECORDED?

YES, IT WAS.

THAT IS THE WAY WE HAVE ALWAYS DONE LIEN LAWS IS THE NOTICE OF COMMENCEMENTS ARE RECORDED AND YOU FILE AND YOU DO RECORDINGS AND THAT IS HOW WE GET PAST THOSE ISSUES.

YES, JUSTICE LEWIS BUT IT KIND OF GOES BACK TO WHAT JUSTICE WELLS SAID AND THAT EVERYBODY IN THIS STATE KNOWS IT IS A PUBLIC WORKS BOND AND WE HAVE 255.05. MY

CLIENTS, PLAZA MATERIALS, WERE FROM NEW YORK AND NEW YORK SUPPLIERS, AND THE RECORD DEMONSTRATED THAT THEY HAD, DID NOT HAVE THE UNDERSTANDING THAT JUSTICE WELLS SAYS EVERYBODY KNOWS IN THE STATE OF FLORIDA, XYZ, SO IT IS A LITTLE BIT DIFFERENT THAN THE FLORIDA CRUSHED STONE CASE, BUT THE REASON I DON'T WANT THE PREJUDICE STANDARD AND I DON'T THINK THE FLORIDA SURETY ASSOCIATION WANTS IT, IS IF YOU CAN GET UNDER SUBSECTION 6, WHICH SAYS "SHALL" AND IS CLEARLY, IF YOU LOOK AT LEGISLATIVE HISTORY, THE LEGISLATURE WANTED THAT LANGUAGE IN THERE, WHY CAN'T YOU GET PREJUDICE UNDER SUBSECTION 2, WHICH IS MANDATORY, BUT IS THE SURETY NOW GOING TO HAVE TO PROVE, YOU KNOW WHAT? I WAS PREJUDICED BY GETTING NOTICE ON THE 46th DAY. RIGHT NOW THEY CAN JUST SAY 46th DAY IT IS TOO LATE. 91st DAY, IT IS TOO LATE. WILL A SURETY NOW HAVE TO PROVE I WAS PREJUDICED BY GETTING IT ON THE 46th DAY? WILL A SURETY NOW HAVE TO PROVE, BECAUSE YOU DIDN'T SAY IN YOUR NOTICE, I INTEND TO RELY ON THE BOND. WHAT IF THE NOTICE JUST SAID HEY, I AM A SUPPLIER. I AM COMMENCED WORK. ARE THEY GOING TO HAVE TO PROVE THAT THE SURETY UNDERSTOOD THAT TO BE MAKING A CLAIM. I DON'T THINK ANY OF US, AND THIS IS FAR GREATER THAN THIS CASE AND MY $30,000 CLAIM, BUT I DON'T THINK ANY OF US ON EITHER SIDE OF THE TABLE WANT A PREJUDICE STANDARD READ INTO THIS. THE LEGISLATURE KNEW HOW TO DRAFT LEGISLATION WITH PREJUDICE. THE MECHANICS LIEN LAW UNDER CHAPTER 713, SAYS YOU MUST DO X, YOU MUST DO Y, YOU MUST DO Z, BUT EVEN IF YOU DON'T DO IT, YOU ARE NOT HARMED. YOU DON'T HAVE ANY RELIEF. THEY DRAFTED THIS AND KNEW WHAT THEY WERE DOING, AND WE ARE READING INTO THE STATUTE LANGUAGE THAT IS NOT EVEN THERE!

LET ME ASK YOU WHAT HAPPENS IF A BOND COMPLIES WITH THE STATUTORY FORM EXACTLY, WHICH ITSELF DOES NOT CONTAIN THE NOTICE REQUIREMENT, WHAT HAPPENS THEN?

I WOULD SUBMIT THAT SUBSECTION 6 TRUMPS SUBSECTION 3 FOR SEVERAL REASONS. NUMBER ONE, STATUTORY INTERPRETATION AND THE LAST IN TIME PREVAILS. SUBSECTION 6 CAME AFTER THE LEGISLATURE KNEW THEY HAD SUBSECTION 3, AND ALTHOUGH I WASN'T THERE WHEN THE DRAFTING WAS DONE, I WOULD THINK THAT THEY GAVE UP ON TRYING TO AMEND 3, BECAUSE THEY KNEW THEY WERE NEVER GOING TO GET A MANDATORY BOND FORM SO THEY PUT IT AT THE END OF THE STATUTE. ALL WE ARE ASKING YOU TO DO IS COMPLY AND PUT IN THE NOTICE AND TIMETABLE SECTIONS OF SUBSECTION 2.

SO WE ARE GOING TO HAVE A FORM CONTAINED IN A -- WE ARE GOING TO HAVE A JURY THAT RELIES ON A FORM NOT CONTAINED IN THE STATUTE.

THE FORM HAS TO BE IN SUBSTANTIAL COMPLIANCE. THE BOND FORM THAT WE HAVE, IN QUESTION, IS NOT EVEN IN SUBSTANTIAL COMPLIANCE.

I UNDERSTAND, BUT A BOND FORM THAT IS INCOMPLETE COMPLIANCE, BUT THE FORM DOESN'T HAVE THAT NOTICE REQUIREMENT, AND YOU ARE SAYING THAT NOW THE LAW IN FLORIDA IS GOING TO BE THAT, EVEN IF YOU COMPLY COMPLETELY WITH A FORM IN A STATUTE, YOU CAN STILL BE HELD IN DEROGATION OF ANOTHER STATUTE.

WELL, I DON'T THINK THAT THIS COURT IS GOING TO SAY THAT IS, NUMBER ONE, AND I DON'T THINK THAT IS HOW YOU CAN READ THIS, AND IN FACT IN MARTIN PAVING, JUDGE GRIFFIN SAID I DON'T KNOW WHY THEY DIDN'T AMEND SECTION 3 BUT IT DOESN'T COMPLY, AND ALL OF THE OTHER CASES HAVE SAID YOUR RELIEF IS WITH THE LEGISLATURE NOT THE COURTS, AND EVERYONE IS SAYING FEEL SORRY FOR THE SURETIES HERE. THE CLAIMANT IS THE ONE BEING PUNISHED HERE, AND THE CLAIMANT IS THE ONE THAT THIS STATUTE WAS INTENDED TO PROTECT, BECAUSE THEY CAN'T GET A LIEN ON PUBLIC WORKS!

ISN'T THE PROBLEM HERE THAT REALLY THE FAULT LIES WITH NEITHER PLAZA NOR WITH THE SURETY BUT WITH DOT, WHICH IS, ITSELF, THE ONE WHO REQUIRED THIS BOND TO BE USED?

I DISAGREE BECAUSE THE SURETY PARTICIPATED SIGNIFICANTLY WITH THIS LEGISLATION. PROBABLY LESS THAN THE D.O.T. DID. I MEAN, THE SURETY ASSOCIATION --

YOU ARE SAYING THAT, REGARDLESS OF THE LEGISLATION, REGARDLESS OF WHAT THE FORM OF THE STATUTE SAYS, PEOPLE NEED TO PUT THIS STATUTORY NOTICE PROVISION IN THEIR BOND AND DOT'S BOND DIDN'T CONTAIN THIS NOTICE PROVISION, BUT THEY WERE REQUIRING ALL THE BIDDERS TO USE IT!

YOU ARE CORRECT, BUT I STILL GO BACK TO THE SURETY PARTICIPATED SIGNIFICANTLY IN THESE BONDS. THE D.O.T. USES THE BONDS THAT NOW THE LEGISLATURE SAYS THEY CAN USE AND THOSE BONDS ARE THE ONES THEY SAY YOU CAN USE. YOU NEED TO COMPLY WITH THE STATUTE BUT YOU CAN USE THESE BONDS. THE SURETY ASSOCIATION WAS INTIMATELY INVOLVED WITH THE DRAFTING OF 255.05 AND THE ADDITIONS OF 4 AND 6.

THERE ARE TWO NOTICE REQUIREMENTS, IN SUBSECTION 2. ONE IS THE NOTICE, WHEN YOU FIRST START, WORKING ON THE PROJECT, AND THEN THE OTHER NOTE CYST A NOTICE YOU GET WHEN YOU HAVE NOT BEEN PAID, BASICALLY. SO DID YOUR CLIENT COMPLY WITH ANY OF NOTICE REQUIREMENT?

NOT THE 45 OR THE 90 DAYS, BUT WE DID BRING SUIT WITHIN A YEAR. YOUR HONORS, I HAD INTENDED TO BREAK UP MY TIME WITH MR. TOOL AND I AM THREE MINUTES INTO HIS TIME, SO MAY I SIT DOWN, OR WOULD YOU LIKE ME TO ANSWER MORE QUESTIONS?

YOU MAY SIT DOWN.

GOOD MORNING. I REPRESENT THE FLORIDA TRANSPORTATION BUILDERS ASSOCIATION APAC FLORIDA. APAC IS A PARTY ON ONE OF THE CASES THAT IS NOT HERE WITH US TODAY BUT IS BEFORE YOUR HONORS, AND THERE ARE SEVERAL POINTS I WOULD LIKE TO ADDRESS IN MR. MORRIS'S ARGUMENT. HE HAS NOT MENTIONED THE CHAPTER ONE AMENDMENTS TO 255. HE TALKED ABOUT THE CASE, AND I THINK IT WAS CALAMITY THAT, IF YOUR HONORS FOUND CORRECTLY, I WOULD SUBMIT, THAT SUBSECTION 6 DOES INCLUDE AN ABSOLUTE REQUIREMENT AND IS NOT A NULLITY AS THEY SUGGEST. IT IS NOT A, I THINK THE WORD THAT THEY USED WAS A COURTESY NOTIFICATION. IT IS A STATUTORY REQUIREMENT. THE 2001 AMENDMENTS WERE ENACTED WHEN THE LEGISLATURE LEARNED THAT THEY HAD LEFT A HOLE IN THE STATUTE, WHEN THEY DID THE 1980 AMENDMENTS. THEY SAID, IN 2001, REGARDLESS OF WHAT KIND OF BOND IT IS, FOR PUBLIC OR PRIVATE WORKS, IT IS GOING TO BE A ONE-YEAR STATUTE, SO THIS SPECTER OF CALAMITY IS ILL-FOUNDED AND IS NOT SUPPORTED BY THE RECORD N THAT SAME REGARD, THE SURETY SAYS THAT THERE WOULD BE A CALAMITY, ALSO, IF THEY, IF THE SUGGESTION WAS MADE THAT WE WERE GOING TO PROCEED ON THE BASIS THAT THIS WOULD OPEN UP THE FLOODGATES FOR SOMETHING. IT IS NOT GOING TO OPEN UP THE FLOODGATES. THIS ISSUE HAS BEEN SOLVED BY THE LEGISLATURE. THE LEGISLATURE SAID IT HAS GOT TO BE IN 6. IF YOU DON'T PUT IT IN SIX, THEN YOU ARE NOT IN COMPLIANCE WITH THE STATUTE. THIS IS NOT --

YOU ARE IGNORING SUBSECTION 4, WHICH SAYS SPECIFICALLY, THE 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. SO WE HAVE TO, I MEAN, WE CAN'T JUST IGNORE, THAT IS REALLY VERY, VERY CLEAR.

YOU ARE ASKING THE ASSOCIATION TODAY, AND WHAT THE AMERICAN ASSOCIATION OF SURETY IS ASKING YOU TO DO IS READ LANGUAGE THAT IS NOT THERE. NOW, I HAVEN'T SEEN ANY CASE LAW THAT SUPPORTS SUCH A PROPOSITION FORM THE PREJUDICE STANDARD ISN'T IN THE STATUTE. WHAT IS BEFORE YOUR HONOR AND WHAT HAS BEEN BEFORE ALL OF US FROM THE DAYS THAT WE WERE IN LAW SCHOOL, IS TIME-SETTLED RULES OF STATUTORY CONSTRUCTION,

WHICH HAVE TO BE FOLLOWED. THE FIRST ONE IS THAT YOU RULE AND YOU FIND A WAY OF HARM NOOIINGS SECTIONS F YOU RULE WITH THE SURETY ASSOCIATION AND WITH AMERICAN HOME, YOU ARE FINDING THAT SUBSECTION 6 IS A NULLITY. THE SECTION RULE OF STATUTORY CONSTRUCTION IS THAT YOU DON'T MAKE A DECISION, WHICH MAKES LEGISLATIVE ACTION A NULLITY. THE THIRD SECTION THAT IS TIME-HONORED AND IN WHICH WE WOULD NOT BE CREATING NEW LAW ON TODAY, IS THAT IF THERE IS AN AMBIGUITY BETWEEN THE TWO, YOU LOOK AT THE LEGISLATIVE HISTORY. THE LEGISLATIVE HISTORY SHOWS SUBSECTION 6 WAS INTENDED AS A SPECIFICS ON FOUR, AND FINALLY -- AS A QUALIFICATION ON FOUR, AND FINALLY IF IT COMES DOWN TO IT YOU SEE WHICH IS LAST IN TIME. SUBSECTION 6 CAME AFTER SUBSECTION 4. SUBSECTION 6 CAME AFTER SUBSECTION 3. ORDER OF ARRANGEMENT.

LET ME ASK YOU SOMETHING, YOUR ARGUMENT IS THAT IT IS CLEAR FROM THE LEGISLATIVE HISTORY, THAT SUBSECTION 6 SHOULD TAKE PRECEDENCE OVER SUBSECTION 4.

ABSOLUTELY.

YOU ARE SAYING THAT IS HISTORY.

ABSOLUTELY. AND HERE IS THE POINT THAT I CAN -- THAT I THINK CAN'T BE DRIVEN HOME MORE THAN NEEDS TO BE. THE SURETY ASSOCIATION LOBBIED, BECAUSE THEY DIDN'T WANT TO HAVE A STANDARD BOND FORM. AT THE TIME THEY LAID THAT LOB -- THEY MADE THAT LOBBYING EFFORT, THEY KNEW ABOUT THE LAW THAT SAID IF YOU DON'T COMPLY, YOU ARE AT-RISK. THEY WANTED TO HAVE A NONSTANDARD BOND FORM AND TO RESPOND TO WHAT JUSTICE CANTERO SAID, JUST BECAUSE IT IS IN THE STATUTE, DOESN'T MEAN THAT YOU ARE OFF THE HOOK IF YOU DON'T COMPLY WITH THE REST OF THE STATUTE. TAKING, FOR EXAMPLE, MS. MOSES'S CLIENT IN NEW YORK. MR. MORRIS SAYS THAT ANYBODY IN THE COUNTRY, ANYBODY IN THE STATE KNOWS THAT 255 BROND IS A ONE-YEAR -- THAT THE 255 BOND IS A ONE-YEAR STATUTE. GUESS WHAT? IF I AM COUNSELING A CLIENT AND I HAVE GOT THAT BOND FORM AND THAT 255 STATUTE IN FRONT OF ME, I AM IN NEW YORK AND I SAY I DON'T CARE WHAT BOB MORRIS KNOWS. I DON'T CARE OR KNOW WHAT DANA TOOLE KNOWS, I KNOW THAT THE BOND FORM DOESN'T INCLUDE THE WARNING THAT IS REQUIRED --

LET ME GO BACK TO WHAT YOU HAD SAID ABOUT, WHAT, POINT US TO SPECIFICALLY TO WHAT IS IN THE LEGISLATIVE HISTORY -- POINT US SPECIFICALLY TO WHAT IS IN THE LEGISLATIVE HISTORY.

TO SUGGEST THAT THE LEGISLATIVE HISTORY IS UNIDENTIFIABLE SCRIBBLINGS IS MOOT, BUT THE LEGISLATION PARTICULARLY SAYS THAT COMPANIES DON'T WANT MANDATORY FORMS, AND I AM PARAPHRASING, WOULDN'T MIND IF THE REQUIREMENT OF SUBSECTION 4 HAD SUBSECTION 6 IN IT, AND THAT IS IN THE APPENDIX, WHICH WE HAVE FILED WITH THE COURT, WITH OUR PAPERS, AND IN FACT IT SAYS COMPANIES DON'T LIKE FORMS. COMPANIES WOULDN'T LIKE TO SOMETHING MANDATED FORM. REQUIRE REFERENCE AND TIME LIMITATIONS, SURETIES WOULDN'T MIND THIS SO MUCH.

I AM NOT SURE WHAT YOU ARE READING FROM THERE.

I AM READING FROM APPENDIX PAGE 146.

WHAT IS IT FROM?

THE HANDWRITING OF WHERE IT SAYS THAT MR. McCUE WAS TALKING TO THE PERSON WHO WAS DOING THE COMMITTEE AND STAFF ANALYSIS, WHICH IS AT PAGE 1.35.

COMMITTEE AND STAFF ANALYSIS FOR WHICH COMMITTEE?

GOVERNMENTAL OPERATIONS.

OKAY.

TO ME, THE PROBLEM I HAVE WITH THAT LEGISLATIVE HISTORY IS, AT MOST, IT TELLS YOU WHAT ONE REPRESENTATIVE OR SENATOR NKTS BNKS A BILL-- SENATOR THINKS ABOUT A BILL. IT DOESN'T TELL YOU WHAT EVERYONE WHO VOTED FOR THE BILL THINKS ABOUT IT, AND I AM ONLY ONE VOTE HERE, BUT I AM RELUCTANT TO RELY ON WHAT ONE PERSON THINKS AS THE LEGISLATIVE HISTORY FOR THE ENTIRE LEGISLATURE.

GRANTED I CAN SEE YOUR POINT, YOUR HONOR, BUT WHEN THAT IS ALL WE HAVE GOT, IT HAS TO BE GIVEN DEFERENCE. AT THIS POINT, WHAT YOU ARE LEFT WITH, IF YOU DON'T GO INTO LEGISLATIVE HISTORY, IS THE RULES OF STATUTORY CONSTRUCTION, THE PLAIN LANGUAGE OF THE STATUTE, MR. MORRIS'S OPINION, MY OPINION, AND MS. MOSES'S OPINION. ABOUT.

BUT WE DO HAVE A SNAF ANALYSIS, DO WE NOT, IN -- A STAFF ANALYSIS, DO WE NOT, IN LEGISLATIVE HISTORY?

AND THE STAFF ANALYSIS SAID THAT THE ALLEGED CHANGE WOULD PROVIDE PUBLIC WORKS PROJECT TO BE CONSTRUED AT STATUTORY BOND PROVISIONS AND WITH TIME LIMITATIONS IN THE STATUTE. THIS IS THE NEXT KEY PART. WOULD ALSO REQUIRE THE BONDS TO REFER TO THE STATUTE AND TO REFER TO THE NOTICE AND TIME LIMITATIONS. THERE IS NO QUESTION THAT THIS LEGISLATIVE HISTORY SHOWS THAT SIX WAS INTENDED AS A QUALIFICATION UPON FOUR. THERE IS NO QUESTION ABOUT IT.

CHIEF JUSTICE: WE ARE GOING TO HAVE TO END ON THAT NOTE BECAUSE OF THE TIME SITUATION.

THANK, YOUR HONOR, VERY MUCH FOR ALLOWING ME TO SPEAK.

CHIEF JUSTICE: HOW MUCH TIME IS LEFT? OKAY. COUNSEL.

THANK YOU, YOUR HONOR. FIRST OF ALL, I WOULD LIKE TO EMPHASIZE THAT WHAT MRS. MOSES SAYS IS CORRECT THAT, THIS DECISION IS FAR BEYOND THE $38,000 CLAIM INVOLVED. THERE IS THE APAC CASES PENDING BEFORE THE FLORIDA SUPREME COURT CURRENTLY, THE FLORIDA CRUSHED STONE FROM THE FIFTH DCA THAT IS CERTIFIED AS AN ISSUE OF GREAT PUBLIC IMPORTANCE, ALSO.

HOW WOULD YOU RESPOND IF WE WERE TO READ PREJUDICE INTO THE FACT THAT WHY DIDN'T WE READ PREJUDICE INTO SECTION 2 AS WELL?

I HAVEN'T GIVEN THAT ANY THOUGHT WITH REGARD TO WHY NOT READ PREJUDICE IN, WITH REGARD TO THE EXACT WORDS OF THE STATUTE AS TO WHAT IT SAYS. THE ENTIRE PURPOSE WAS TO BRING UNIFORMITY IN, BECAUSE OF THE CLAIMS OF COMMON LAW BOND THAT WERE ORIGINATED BY JUDGES THAT SAY THIS IS A COMMON LAW BOND. THE LEGISLATURE HAS SAID WE DON'T CARE IF YOU CALL IT A COMMON LAW BOND. WE DON'T CARE IF YOU CALL IT A HYBRID BOND OR A STATUTORY BOND. ANY BOND ISSUED FOR A PUBLIC WORKS PROJECT SHALL BE CONSTRUED TO HAVE THE STATUTORY PROVISIONS FOR PAYMENT PURPOSES, AND THIS IS WHAT IS CRITICAL.

I GUESS, AGAIN, AND THE ONLY, THE BIG QUESTION HERE IS, AS LONG AS THE NOTICE PROVISIONS ARE IN THE BOND, AND I GUESS I AM HAVING, ALTHOUGH I UNDERSTAND THE FRUSTRATION OF THIS CASE AND WHERE IS DOT AND TO KNOW -- WHERE IS DO THE AND WHY NOT -- WHERE IS THE D.O.T. AND TO TALK TO THE INSURANCE INDUSTRY AND THE D.O.T., TO FIND OUT WHY THEY ARE NOT PUTTING THEM IN THEIR BONDS.

WE AGREE 100 PERCENT. THE PROBLEM THAT THE DO AT WHICH TIME WON'T DO IT. THE INSURANCE INDUSTRY HAS, IN FACT, GONE TO DOT AND SAID WE WANT TO ADD THIS PROVISION COMPLYING WITH SUBSECTION 6 AND THE D.O.T. HAS SAID NO! WHY THEY DO THAT, I DON'T KNOW!

LET ME ASK YOU THIS, YOU DON'T EVEN AGREE WITH, YOUR FIRST POSITION IS THAT WE SHOULDN'T EVEN ADOPT THE FIFTH DISTRICT'S POSITION ABOUT PREJUDICE, RIGHT?

THAT'S CORRECT BECAUSE OF THE LANGUAGE OF SUBSECTION 4 AND SUBSECTION 6 BEING DIRECTED AT THE OBLIGEES, BEING DIRECTED AT THE AUTHORS OF THE BOND.

SO MY QUESTION IS, IF WE DON'T ADOPT THE FIFTH DISTRICT'S POSITION, WHAT EFFECT DO WE GIVE TO NONCOMPLIANCE WITH SUBSECTION 6? WHAT IS THE REMEDY?

IT MAY GIVE A REMOTE CLAIMANT A CAUSE OF ACTION AGAINST DOT AS A POSSIBILITY. DOT WROTE THE BOND FORM. THEY DIDN'T INCLUDE WHATEVER SUBSECTION 6 REQUIRED. DO. IT IS THE ONE THAT CREATED THE PROBLEM. NOT THE CONTRACTOR. NOT THE SURETY. NOT THE INDIVIDUAL IN DEMTORES OF THE SURETY. THE D.O.T. IS THE ONE THAT CREATED THE PROBLEM.

WHY WOULDN'T YOU HAVE A CLAIM AGAINST THE D.O.T.?

SAY AGAIN?

WHY WOULDN'T YOU HAVE A CLAIM AGAINST DOT?

THAT IS A POSSIBILITY THAT THE SURETY MAY VERY WELL HAVE ON MISREPRESENTATION AND VIOLATION OF STATUTE AND ET CETERA AND ET CETERA. OBVIOUSLY THE INSURANCE INDUSTRY DOESN'T WANT TO GO HEAD TO HEAD WITH DOT. BOND FORM AND LOGIC DEFINES COMMON SENSE. IT IS LIKE SAYING YOU CAN WALK UP TO THE AVIS AND THE HERTZ COUNTERAND RENEGOTIATE YOUR RENTAL CAR TERMS WHEN YOU ARE THERE AT THE AIRPORT. IT IS ALREADY THERE.

WHAT ABOUT THE STATUTORY INTERPRETATION RULES, THOUGH, THAT WE ORDINARILY APPLY THAT, THE LAST PROVISION, THAT IS THAT WE HAVE ALL THESE PROVISIONS THAT HAVE BEEN AROUND A LONG TIME AND YOU HAVE GOT A FORM? I AM HAVING DIFFICULTY, SURELY IF, LET'S SAY, THAT WE WERE TALKING ABOUT USE OTHER OR SOMETHING, AND THERE WAS -- ABOUT USERY OR SOMETHING AND THERE WAS A PROVISION HERE IN THIS SAME SUBSECTION THAT SAID THAT NOT ONLY SHALL YOU PUT THAT LANGUAGE IN THERE BUT IT WILL BE IN BOLD, CAPITAL LETTERS, ONE INCH HIGH OR WHATEVER WOULDN'T THAT BE AN EXPRESS REQUIREMENT THAT IS IMPOSSIBLE TO OVERLOOK, WHEN YOU FUTURE IN THOSE TERMS, AND IT WOULD BE A REQUIREMENT OF THE LEGISLATIVE SCHEME?

SUBSECTION 6 AND SUBSECTION 4 ARE TOGETHER. CONTRARY TO WHAT MR. TOOLE SAYS, I DON'T THINK THE LEGISLATIVE HISTORY IS AS CLEAR AS HE MAKES IT LOOK. THE CLEAR PURPOSE WAS TO BRING UNIFORMITY AND READ THE STAFF COMMENTS AND TO ELIMINATE LAWSUITS JUST LIKE WE HAD BY PLAZA MATERIALS FOR PEOPLE THAT DIDN'T COMPLY. THAT WAS THE PURPOSE OF SUBSECTION 4. ALL BONDS, REGARDLESS OF FORM, SHALL BE DEEMED AND CONSTRUED TO BE STATUTORY BONDS, FOR THE PURPOSES OF THE PAYMENT PROVISIONS. FOR PURPOSES OF PAYMENT PROVISIONS. MRS. MOSES IS ALSO INCORRECT, WHEN SHE THINKS SUBSECTION 4 DESCRIBES A BOND REFERRED TO IN SUBSECTION 1. SUBSECTION 4 DOESN'T TALK ABOUT A BOND REFERRED TO IN SUBSECTION 1. IT REFERS TO A PROJECT REFERRED TO IN SUBSECTION 1 OF THE STATUTE, WHICH IS A PUBLIC WORKS PROJECT HE.

SO IS THERE TESTIMONY IN THE RECORD AS TO AFTER THE BONDS THERE, THAT THE, WHEN THE

SURETY ASSUMES THE OBLIGATION, YOU HAVE GOT THE BOND IN FRONT OF YOU, IN OTHER WORDS THE SURETY CAN MAKE A DECISION TO SAY THIS DOESN'T HAVE THE STATUTORY NOTICE. I AM NOT GOING TO --

NOT GOING TO SIGN IT. ABSOLUTELY. THAT DEFIES ECONOMIC REALITY TO SAY THAT THE SURETY IS GOING TO DO. THAT THAT ABSOLUTELY DEFIES COMMON SENSE AND ECONOMIC REALITY, TO SAY THAT A SURETY IS GOING TO WALK AWAY.

ALL RIGHT. OUR TIME IS UP AND YOU ALL ARE VERY RESPONSIVE TO OUR QUESTIONS AND WE APPRECIATE THAT VERY MUCH.