Dadeland Depot, Inc. v. St. Paul Fire & Marine Insurance Co.

MARSHAL: HEAR YE. HEAR YE.HEAR YE. THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW SESSION.ALL WHO HA VE CAUSE T O PLEA , DRAW NEAR, GIVE ATTENTIONAND 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 JUSTIC E: GOOD MORNING , LADIES ANDGENTLEMEN, AND WELCOME TO THE FLORIDA SUPREME COURT. THE FIRST CASE ON THIS MORNING'S DOCK ET IS DADELAND DEPOT , INC. , VERSUS ST. P AUL , AND JUSTICE CANTERO IS RECUSED ON THIS CASE . I UNDERSTAND WE HAVE GOT MR . BURLINGTON , YOU MAY PROCEED.

MAY IT PLEASE THE COURT. I AM PHILLIP BURLINGTON HERE ON BEHALF OF THE APPELLANT , DADELAND ASSOCIATES AND DADELAND DEP OT. WE ARE HERE ON FIVE QUESTIONS CERTIF IED BY THEELEVENTH CIRCUIT COURT OF APPEALS INVOLVING CLAIMS OF BAD FAITH AGAINST A SURETY , ARISING FROM A PERFORMANCE B OND . THE UNDERL YING CASE -- MR. CHIEF JUSTICE

JUST BEFORE YOU, JUST EXPLAIN , ASSUMING THERE WAS A BADEAUX FAITH CAUSE OF ACTION , WHATIS THE BAD FAITH? W HAT IS THE -- A BAD FAITHCAUSE OF ACTION, WHAT IS THE BAD FAITH? WHAT IS THE UNDERLYING IS SUE AND SOMEHOW JUST SET IT O UT. I KNOW IT HAPPENED , BU T I AM TRYING TO UNDERSTAND HO W IT HAPPENED.

RIGH T. THE BAD FAITH THAT WE CLAIM IS, ONCE WE NOTIFIED THESURETY AND THE CONTRACTOR OF THE FAIL URE TO PERFORM , THE SURETY DID NOT CONDUCT A REASONABLE INVESTIGATION. THEY WENT TO , BASICALLY , T WO MEETINGS. THAT WAS ALL. THEY BASICALLY SIDED WITH THE CONTRACTOR . THEY DID NOT MAK E ANY ATTEMPT TO RESOLVE OR TO STIMULATE , SHALL WE SA Y , PERFORMANCE OF THE CONTRACT. THAT WAS P L ACED ENTIRELY ON US, AND MY CLIENTS HAD THE FINANCIAL OBLIGATIONS OF AN ONGOING PROJECT THAT WERE DIFFICULTIES WITH TENANTSWHO WERE IN AND SO FORTH.

BUT IT WENT TO ARBITRATION , RIGHT?

YES, IT D.

AND THE PARTIES TO THE ARBITRATION , WERE THE CONTRACTOR .

YES .

AND DADELAND AND THE SURETY.

YES.

AND THERE WAS A DETERMINATION MADE AS TO THEAMOUNT OF MONEY O WED, AND THAT NET WAS DETERMINED BY THE ARBI TRATION.

CORRECT.

AND THAT AMOUNT WAS PAID BY THE CONT RACTOR.

YES.

NOW, IN A SURETY RELATIONSHIP, IN A CONTRACT SURETY CONSTR UCTION RELATIONSHIP , DIDN'T JU DG E H URLEY HAVE IT R IGHT IN THAT , WHAT IS GOING ON , IS THAT YOU HAVE THE PRINCIPAL IS THE CONTRACTOR , AND THE CONTRACTOR IS THE PRI MARY ONLY GORE IN THAT SITUATION. -- OBLIGOR , IN THAT SITUATION. YOU HAVE AN OBLIGEE , WHO IS DADELAND IN THIS I N STANCE , AND YOU HAVE A SURETY WHO IS GUARANTEEING FROM A FINANCIAL STANDPOINT AND PERFORMANCE STANDPOINT, THAT THE CONTRACTOR IS G OING TO PERFORM , BUT THE CONTRACTOR IS PRIMAR ILY RESPONSIBLE.

CORR ECT.

AND THE SURETY HAS A RIGHT OF INDEMNIFICATION FROM THE PRINCIPLE.

COR RECT.

AND THAT MAKES IT ENTIRELY DIFFERENT FROM AN INSURANCE CONTRACT, IN T ERMS O F HOW THIS WHOLE OPERATION, THIS WHOLE RELATIONSHIP OF SURETY SHIP IS SET UP, I S N'T I T?

NOT UNDER THE FL ORIDA INSURANCE CODE, WHICH THIS COURT HAS SPECIFICALLY NOTED TWICE , SURETIES ARE CL EARLY INSURERS. FURTHERMORE, THE DEFINITION OF INSURANCE UNDER THE F LORIDA INSURANCE CODE , IS B ROAD EN OUGH TO ENCOMPASS SURETIES.

CHIEF JUST ICE: BUT MY THOUGHT ABOUT THIS , AND MAYBE IT IS JUST FROM LOOKING AT TRADITIONAL BADFAITH , IS THAT THE ESSENCE , AT LEAST OF COMMON LAW BADFAITH , IS THAT THERE IS A FIDUCIARY RELATIONSHIP THAT THE DEFENSE G IVES CONTROL OF THE DEFE NSE IN OR DER TO A LLOW THE INSURER TO CONDUCT THE DEFENSE , AND THERE IS NO F ED YOU SHALL AREA -- FIDUCIARY RELATIONSHIP IN AN INSURANCE RELATIONSHIP, IS THERE?

THERE IS A PRIMARY DUTY TO PROTECT THE OBLI GEE , AND THE BOD IS -- THE BOND IS TO PROTECT THE OBLIGEE , AND THE OBLIGEE IS NOT IN A POSITION TO PROTECT WH ERE IT CANNOT PERFORM , AND THE SURETY IS THERE SI MPLY TO ENSURE THAT THE OBLIGEE CAN OB TAIN PERFORMANCE FROM THECON TRACTOR . IT IS A PER FORMANCE BOND , AND IF YOU L OOK IN TERMS OF THE BOND, THEY ARE TO E ITHER CAUSE THE CONTRACTOR TO PERFORM OR G O OUT AND OBTAIN OTHER CONTRACTORS TO PERFORM. IT ISN 'T JUST TO MAKE SURE THAT WE HAVE A SATISFIED JUDGMENT AT THE CONCLUSION OF TWO AND-A-HALF YEARS OF LITIGATION.

WHY ISN'T THAT JUST A SIMPLE BREACH OF CONTRACT ON THE SURETY'S PART AS OPPOSED TO BAD FAITH?

BECAUSE THE BOND ONLY PROVIDES FOR THEM TO ASSURE PERFORMANCE AND , IF NECESSARY , PAY FOR THAT PERFORMANCE, BUT THE OBLIGATION TO THE OBLIGEE, IS TO PRO TECT US FROM THE LOSSES THAT WOULD AR ISE FROM THE FAILURE TO P ERFORM THECONTRACT, AND IN THIS CASE WE HAD AN ON GOING DEVELOPMENT.WE HAD TENANTS. WE HAD BUSINESS LO SSES WHICH W OULD NOT FALL WITHIN THE PERFORMANCE OF THE CONTRACT DAMAGES , MEANING THE CONTRACTOR 'S CONTRACT. WE HAD DA MAGES RESULTINGFROM THE DELAY OF THE SURETY , TO CONDUCT A GOOD FAITH INVESTIGATION AND MAKE AGOOD FAITH E FFORT TO --

BUT WHAT , THE WHOLE THING REVOLVES AR OUND WHETHER THE CONTRACT IS PERF ORMED I N ACCORDANCE WITH THE PLANS AND SPECIFICATIONS SET FORTH IN THE CONTRACT , IS IT NOT?

CORRECT.

OK AY. NOW , IN THIS SITUATION , THE SURETY IS , REALLY , STAN DING BEHIND THE CONTRACTOR , BUT IF THE SURETY ST EPS OUT IN FRONT AND VOLUNTEERS AND M AKES A PA

YMENT , BEFORE THE CONTRACTOR IS IN DEF AULT , OR IN AN INS TANCE BEFORE THERE IS AN ADJUDICATION OF THOSE RIGHTS, THE SU RETY IS A VOLUNTEER, ISN'T THAT RIGHT?

IT DEPENDS ON THE FA CTS .

WELL , UNDER THESE FACTS, WOULDN'T THAT HAVE BEEN THESITUATION?

WELL , WHETHER OR NOT THEY VOLUNTEER IS A FACT UAL QUESTION. AND THE PO INT IS , PART OF THE SPECIF ICATIONS OF THE CONTRACT IS THE TIME TABLE U NDER WHICH THE CONTRACT IS TO BE PERFO RMED , SO THEIR OBLIGATION, AND AS I SAID , IF YOU LO OK AT THE TERMS OF THE BOND --

DID YOU RE COVER DELAY DAMAGES?

EXCUSE ME?

DID YOU RECOVERCAL I DAMAGES UNDER THE -- DID YOU RECOVER DELAY DAMAGES UNDER THE CONTRACT?

WE RECEIVED IN TEREST.

THAT WAS PRESUMABLY TO COVER THE DELAY I N THE PERFORMANCE, IN THE PAYMENT , WAS IT N OT?

THE INTEREST WAS SIMPLY INTEREST ON THE MO NIES DUE FOR WHAT S HOULD HAVE BEEN DONE. THE BOND , MONEY THAT WE HADTO PAY TO GET THIN GS D ONE, IN ORDER TO GET THE CONTRACT COMPLETED, BUT THAT DID NOTGET US TI MELY COMPLETION OF THE CONTRACT, WHICH HAD BUSINESS CONSEQUE NCES , THAT WERE NOT --

WAS PROVISION IN THE CONSTRUCTION CONTRACT , TO COVERDELL I?

THERE IS A -- TO COVER DELAY?

THERE IS A PROVISION, NO, NOT IN THE CONSTRUCTION CONTRACT. THE RE IS A PROV ISION IN THE B OND THAT HAS TO DO WITH COSTS OF DELAY , BUT AS THIS COURT NOTED , IN JUSTICE McDONALD'S OP INION , THERE IS A DIFFERENCE BETWEEN DELAY DAMAGES RESULTING FROM THE CONTRACTOR AND DELAY DAMAGES RESULTING FROM THE SURETY'S OBLIGATION TO PERFOR M, ANDTHE SURETY'S OBLIGATION IS NOT SIMPLY TO STAND BEHIND THE CONTRACTOR . THEY HAVE THE OBLIGATION AND THE RI GHT TO G O OUT AND E ITHER OBTAIN OTHER CONTRACTORS OR TO PURSUE THE OTHER PE OPLE INVOLVED IN THE PROJECT, BEC AUSE THEY ARE SUBROGATED TO OUR RIGHTS,FOR THE ARCHITECT AND SO FORTH , AND WE WERE THE ONES THAT HAD TO DO ALL OF THAT , AND WE OBTAINED NOTHINGOTHER THAN AN ADDITIONAL ADVERSARY FROM THE SURETY.

WAS THE CONSTRUCTION CONTRACT INCORPORATED IN THE SURETY BOND?

YES.

AND THAT WAS WHAT WAS GUARANTEED BY THE SURETY , WOULD BE PERFORMED. CORRECT?

WAS TO BE PERFORMED.

AND THEN THERE WERE CERTAIN PROVISIONS AS TO WHAT WOULD HAPPEN , IN , THERE WERE CERTAIN PROVISIONS IN THE BOND, THAT WHAT WOULD O CCUR UP ON THERE BEING A DEFAULT.

CORRECT .

AND AL L OF THAT WAS WRAPPED UP AND PUT BEFORE THE ARBITRATION PANEL, WAS IT NOT?

WE WERE NOT ENTITLED TO BRING A CL AIM FOR BAD FAITH , UNTIL WE ESTABLISHED THAT WE HAD A VALID CLAIM UNDER THE CONTRACT.

BUT YOU PRESENTED ALL OF THE IS SUES HAVING TO DO WITH THE CONTRACT . THE SURETY.

YES, BUT WE WERE NOT ALLOWED TO SE EK CE RTAIN DAMAGES , AND WE WERE NOT ALLOWED TO CLAIM THAT THEY DIDN'T DO A VA LID INVESTIGATION OR A GOOD FAITH EFFORT TO SETTL E OR PERFORM THE CONTRACT , BECAUSE THAT IS A SEPARATE CAUSE OF ACTION THAT DO ESN'T ACCRUE UNTIL WE OBTAIN THE ARB ITRATION AWARD AND HAVE ESTABLISHED A VALID CLAI M.

CHIEF JUSTICE: THE CERTIFIED QU ESTION UNDER , IS A STATUTORY CONSTRUCTION QUESTION AS TO WHETHER A SURETY IS CONSIDERED AN INSURER.

YES . MR. CHIEF JUSTICE

AS OF TODAY WITH THE NEW LEGISLATION, THAT QUESTIONHAS BEEN ANSWERED , AT L EAST FOR THE FUTURE.

YES , WITH RES PECT SOLELY TO PERFORMANCE AND PAYMENTBONDS FOR CONSTRUCTION MAINTENANCE OF BUILDINGS OR ROADWAYS AND NOT ANY OTHERSURETY, BUT, YES, AND IF YOU LOOK , OF CO URSE , FIRST OF ALL THAT IS A SUBSTANTIVE CHANGE, AND WHILE IT PRETENDS TO BE A CLARIFICATION , IT IS 23 YEARS AFTER THE IN ITIAL ACT.

CHIEF JUSTICE: SO YOU ARE S AYING IT WO ULDN'T , THAT CHANGE WOULDN 'T, IF THIS CASE WAS BROUGHT AFTER THAT CHANGE, IT AM WOULDN'T A FFECT THIS CASE?

IT , WHAT , IT WOULD BE THE DATE OF THE CONTRACT. THE SPONSOR OF THE BILL--

CHIEF JUSTICE: THE SURETY, Y OU ARE SA YING , IT DOESN'T A PPLY TO ALL SURETIES?

IT IS LIMITED IN ITS APPLICATION TO PERFORMANCE AND PAYMENT BONDS ON CONSTRUCTION OR MAINTENANCE OF BUILDI NGS AND ROADWAY PROJECTS, NO OTHER SURETIES , WAS A V ERY SPEC IFIC -- MR. CHIEF JUSTICE

SO, A GAIN , YOUR SURETY - -

OUR SURETY WOULD FALL WITHIN THAT , BUT OUR CONTRACT WAS EXECUTED IN 1995. NOW --

LET ME ASK YOU THIS , IS WHETHER OR NOT YOU CAN, IN FACT, PROVE THAT THERE IS A BAD FAITH, THAT Q UESTION IS NOT REALLY BEFO RE US , IS IT? I ME AN, AREN'T YOU HERE TO TRY , T RYING TO DETERMINEWHETHER OR NOT YOU HAVE THERIGHT TO ACT UALLY BRING THIS BAD FAITH ACTION?

CORRECT.

AND SO I , REALLY , WOULDLIKE TO HEAR YOUR ARGUMENT ON WHY YOU BELIEVE THAT THIS IS, YOUR CLIENT IS AN INSURED UNDER THIS PERFORMANCE BOND.

BECAUSE THIS COURT HAS HELD THAT THE PURPOSE OF A SURETY BOND IS TO PROTECT THE OBLIGEE. THE FLORIDA LEGISLATURE HASCLEARLY DEFINED SURETIES WITHIN INSURER S , FOR PURPOSES OF THE FLORIDAINSURANCE CODE. IT IS DEFINED IN INSURANCE CONTRACTS OFFICIALLY BR OADLY , TO ENCOMPASS THIS TYPE OF INSURANCE.

IS IT ACTUALLY DEFINED IN THE SECTION THAT YOU ARE BRINGING THIS ACTION UNDER , THE BAD FAITH ACTION?

THERE IS NOT A SPECIFIC DEFINITIONAL SECTION IN THAT STATUTE. THESE ARE DEFINITION THAT IS ARE GIVE N AT THE , 624. 02 AND .03 , WHICH ARE AT THEBEGINNING OF THE INSURANCE CODE.

SO YOU ARE BO RROW ING FROM THAT GENE RAL STAT UTE, TO MAKE THE ARGUMENT THAT YOUR CLIENT IS INSURED UNDER THIS PREMISE.

BEAR IN MIND THERE IS NO S PECIFIC DEFINITION IN THECODE FOR INSURED, WE ARE GOING FROM THE PREMISE THAT A SURETY CONTRACT IS DEEMED TO IT BE AN INSURANCE CONTRACT UNDER THE CODE, ASURETY IS DEEMED TO BE AN INSURER, AND IN THE RELATIONSHIP , THE PART Y TO BE PROTECTED IS THE OBLIGEE , AND WE HAVE CITED CASES FROM OTHER JURISDICTIONS THAT SAY THAT THE OBLIGEE IS THE EQUIVALENT O F THE INSURED. OBVIOUSLY IT IS NOT THE PRINCIPLE , BECAUSE THEY ARE NOT PROTECTED FROM THE LO SS.

SO UNDER YOUR ANALYSIS, BOTH THE PRI NCIPLE AND THE OBLIGEE ARE INSURED.

NO. ONLY THE OBLIGEE , AND IN FACT, THERE IS THE SHANNON G LENN CASE, WHICH IS A FEDERAL DISTRICT COURT ACTION WHICH DETERMINES THE PRINCIPLE WOULD NOT BE AN INSURED , AND IRONICALLY , IT WAS WRITTEN BY THE SAME DISTRICT JUDGE IN THIS CASE , SPECIFICALLY SAID THAT THE OBLIGEE WOULD BE THE ONE WHO WOULD BE ABLE TO BRING A BADEAUX FAITH ACTION, BUT IT IS -- A BAD FAITH ACTION,BUT IT IS --

AS WE GO TH ROUGH , ISN'T IT TRUE , IN MA NY CASES, CERTAINLY HAVI NG TO DO WITH COMMON LAW ACTIONS , WHICH WE ARE NOT CONCERNED WITH A T ALL. S ELF -- SOME OF THE CASESH AVE SPECIFIC STATE STATUTORY PROVISIONS BUT DO NOT HAVE A PRIVATE CAUSE OF ACTION UNDER THE STATUTETHAT THEY DISCUSS. I WOULD LI KE FOR YOU AND YOUR OPPOSITION , TO PLEASE DIRECT OUR ATTENTION TO WHAT YOU BELIEVE T O BE THE CASE FROM OUT-OF-STATE THAT MAYINVOLVE A STATUTORY ACTION INVOLVES THE PRIVATE CAUSEOF ACTION THAT WOULD BE THE LEADING CASE IN THIS AREA. IF THERE IS SUCH A CASE.

ALL RIGHT . IF I CAN ADDRESS THAT ON REBUTTAL.

THAT IS FINE . AND GOING THROUGH IT , THEREASON FOR MY QUESTION IS THAT, IN GOING THROUGH AND READING ALL THESE CASES , WE FIND IT DIFFICULT TO FI ND A LEA DING CASE ON THIS,BECAUSE THE CO MMON LAW PRINCIP LES THAT WE ARE DISCUSSING IS NOT WHAT THIS CASE IS A B OUT. WE ARE STATUTORY CONSTRUCTION.

CORRECT.

AND I THINK ALL OF US WOULD LIKE TO KNOW HOW AN IDENTICAL STATUTE HAS BEEN INTERPRETED , SOMEPLACE E LSE , TO APPLY FOR US TO TAKE A LOOK AT FOR GU IDANCE.

WELL , I WOULD NOTE GENERALLY, AND I WILL TR Y TO G IVE YOU A MORE SPECIFIC ANSWER ON MY REBUTTAL TLCHT IS A CASE OUT OF MONDAY -- REBUTTAL. THERE IS A CASE OUT OF MONTANA, WHICH HAS THE PRE CISE DEFINITION OF INSURANCE AND INSURED THAT WE HAVE IN OUR CODE. I DON'T BELIEVE THEY HAVE, AND I BE LIEVE IT I S A COM MON L AW CASE , BUT THEY RELY ON THE LEGISLATURE'S DEFINITION OF INSURER AS INCLUDING SURETY AND THE BROAD DEFINITION OF INSURANCE CONTRACT THAT ACTUALLY ENCOMPASSES SURETY CONTRACTS, AND THEY GO FROM THERE TO THE PREMIS E, BUT IT IS NOT EXACTLY WHAT --

BUT THEY USE THE STATUTETO SUPP ORT A COMMON LAW ACTION RATHER THAN THE PURE STATUTORY --

CORRECT, BUT THEY HAVE THE SAME DEFINITIONAL STANDARDS THAT WE HAVE HERE.

I THINK YOU SHOULD SEEWHAT IS GOING ON THIS MORNING.THERE IS A CONCERN THAT THIS RELATIONSHIP AND THE INDEMNIFICATION AS PECTS , JUST DON'T FIT THE TRADITIONAL MOLD THAT ALL OFUS HAVE BEEN ACCUSTOMED TO FOR THE LAST 50 YE ARS HERE, IN FLORIDA, WITH THE A D VENT OF BAD FAITH AND THOSE KINDS OF WOULD YOU PLEASE DIRECT US AS DIRECTLY AS YOU CAN , WHYTHAT IS NOT A CONCERN AS YOU T AKE INTO ACCOUNT TODAY.

YOU MEAN THE CONCERN ABOUT --

THIS RELATIONSHIP. THE WHOLE RELATIONSHIP DOES NOT FIT THE WHOLE TRADITIONAL BAD - FAITH KIND OF CONCE PT, WHICH IS THE TENET OF THE QUESTION THAT WE HAVE BEEN TALKING ABOUT.

WELL THERE, ARE MANY CASES FROM OTHER JURISDICTIONS AND MOST OF THEM ARE ONES THAT RECOGNIZE A COMMON LAW CLAIM THATY IS THAT THIS FITS PERFECTLYINTO THE SAME MO DEL AS INSURANCE , FOR PURPOSES OF THIS KIND OF CLAIM , BECAUSE WHAT IS HE LP HAPPENING IS THE OBLIGEE IS THE ONE WHO IS TO BE PROTECTED. THE OBLIGEE IS THE ONE WHO IS ESSENTIALLY AT THE MERCYOF THE SU RETY , WHEN THE CONTRACT IS NOT PERFORMED, VERY SIM ILAR TO AN INSURED

HOW DOES THIS INDEMNIFICATION WORK, THOUGH, BECAUSE IN THE THIRD PARTY BAD FAITH THERE , IS NO INDEMNIFICATION IN THIS BAD-FAITH CONTEXT. IN THE UM , AS WE KNOW , THERE IS NO COMABLE INDEMNIFICATION -- COMPARABLE INDEMNIFICATION, AS JUST TEST WELLS HAS VOICED CONCERN WITH. SO HOW DO YOU INTEND TO INCLUDE YOUR PARTY AND HOWDO YOU EVALUATE THIS WHOLE PROCESS.

WELL , THEY ARE ALLOWED TO GO AFTER THE PRIN CIPLE , OBVIOUSLY , FOR WHAT IS DETERMINED TO BE THE DAMAGES FOR FAILURE TO PERFORM. ALL WE ARE SA YING IS THEYHAVE THE OBLIGATION TO CONDUCT A REASONABLE INVESTIGATION, AND IF IT IS REASONABLE UNDER THE CIRCUMSTANCES , ATTEMPT TO RESOLVE T MANY OF THE OUT-OF-STATE CASES AC -- RESOLVE IT. M ANY OF THE OUT- OF-STATE C ASES ACKNOWLEDGE THAT, IF YOU ARE LIMITED T O CONTRACT DAMAGES , THE SURETY HAS NO MOTIVATION TO PAY TIMELY OR PURSUE ANY INTEREST OF THE OBLIGEE , BECAUSE THE LO NGER THEY WAIT , THEY HAVE NO ADDITIONAL EXPOSURE OTHER THAN INTEREST , AND THE LONGER THEY WAY , THE OBLIGEE WILL HAVE TO CAVE IN DUE TO BUSINESS CONCERNS, AND SO THE EQU ITIES OF THE SITUATION ARE NO DIFFERENT , AND IN FACT , ONE OF THEM SAYS THAT THIS IS ESSENTIALLY IDENTICAL TO THE MODEL FOR INSURANCE AND WHY BAD FAITH CLAIMS IN THE INSURANCE CONTEXT WERE DEVELOPED, BECAUSE THE PERSON OTHERWISE HAS NO LEVERAGE, BECAUSE THE SURETY HAS TOTAL CONTROL , THE INSURER HAS TOTAL CONTROL OVER THE DECISION TO EITHER PAY THE CLAIM OR --

MY CONCERN , QUITE FRANKLY , IS WH EN YOU HAVE A SO LVENT CONTRACTOR LI KE YOU HAVE IN THIS CASE , THE BA TTLE ANDTHE DISAGREEMENT, IS, REALLY , BETWEEN THE OWNER AND THE CONTRACTOR , AND WHAT THESURETY IS DOING , IS STANDING IN SEC OND PL ACE, TO BE THEREIN THE EVENT THAT THERE IS NOT A PERFORMANCE , BUT IT ALL COMES BACK TO THE OBLIGATION OF THE CONTRACTOR U NDER THE CONTRACT , WHEREYOU HAVE GOT A SOL ID, BECAUSE IN THE END , IF YOU COLLECT AGAINST THE SURETY , THEN THE SURETY HAS A RIGHT TO GET EVERYTHING BACK FROM THE CONTRACTOR , AND THAT JUST DOESN'T FIT IN THE NORMAL INSURANCE CONTEXT .

BUT AS NOT ED IN THE UNITED BONDING CASE OUT OF THE FI FTH CIRCUIT, A SURETY IS NOT SIM PLY A GUARANTEE THAT YOUR JUDGMENT WILL BE SATISFIED AFTER PROLONGED LITIGATION. IT IS A BUSINESSMAN 'S ASSURANCE THAT HIS BUS INESS V ENTURE CAN GO ON , THE CONTRACT WILL BE PERFORMED TIMELY. IT IS NOT SIMPLY COM PLETION OF THE CONTRACT. IT IS TI MELY

PERFORMANCE , AND THAT IS WHY THE SURETY HAS THE OBLIGATION NOT SIMPLY TO STAND BACK AND SUPPORT FINA NCIALLY THE CONTRACTOR, BUT U PON PRO PER NOTICE, COME IN AND INSURE THAT THAT CONTRACT IS PERFORMED , E ITHER WITH THAT CONTRACTOR OR OTHER CONTRACTORS , AND I F THEY SIMPLY SIT BACK AND PERFORM NO INVESTIGATION -- MR. CHIEF JUSTICE

I WANT TO REMIND EVERYBODY YOU ARE SUBSTANTIALLY IN YOUR REBUTTAL.

IF HE WANTS TO SAVE TIME --

I WOULD LIKE TO RESERVE A LITTLE TIME.THANK YOU.

CHIEF JUSTICE: O KAY . MR . C RAIG , NOW , THEDEFENDANT , THE APPELLEES , THEY ARE GO ING TO BE DIVIDING THEIR TIME. YOU ARE TAKING 17 MINUTES AND THEN MR . MI LLS THREE MINUTES.

THAT'S CORR ECT.

CHIEF JUSTICE: THE Y E LLOW LIGHT WILL COME ON A T 17 MINUTES.

THAN K YOU FOR THAT GUIDANCE. MAY IT PLEASE THE COURT. WHEN A DISPUTE AR ISES O N A BOND -- MR. CHIEF JUSTICE

IF YOU CAN STATE YOUR APPEARANCE FOR THE RECORD.

MY NAME IS LEE CRAIG , YOUR HONOR, AND I A M HERE FOR THE APPELLEES IN THIS CASE. WHEN A DISPUTE ARI SES ON A BONDED PROJ ECT, WHA T YOU HAVE IS THE OBLIGEE , THE O WNER ON ONE SIDE , SAYING, LOOK, THE PROJECT IS NOT BEING CONSTRUCTED PROPERLY. I WANT THE SURETY TO COME IN AND PAY TO FIX T BUT ON THE OTHER SIDE, YOU HAVE GOT THE PRINCIPAL , THE CONTRACTOR SAYING, NO, NO , NO , THE PROJECT IS BEING CONSTRUCTED PROPERLY, AND DON'T GO I N AND ELBOW ME OUT OF THE WAYTO FIX IT , BECAUSE IF YOU DO THAT, YOU ARE GOING TO BE EXPENDING MY MONEY BECAUSE OF THE GE NERAL INDEMNITY OBLIGATION IN THE CONTEXT OF A BOND , SO THE SURETY IS STUCK IN THE MI DDLE OF THIS CONTROVERSY OF THIS DISPUTE , AND IT WOULD BE PATENTLY UNFAIR, IT IS NOT UNLIKE JUSTICE WELLS 'S CONCURRENCEIN THE ZABRASKY CASE, WHICH IS RECOGNIZED THAT THE UNFAIRNESS OF AN INSURANCE COMPANY TO WE IGH COMP ETING OBLIGATIONS IT TO PART IES. THIS CASE, THIS CASE THAT WE ARE HERE ON TODAY , IS THE P OSTER CHILD OR IS THE PERFECT EXAMPL E OF THE POTENTIAL IN JUSTICE THAT WOULD RESULT FROM THE LAW REQUIRING A SURETY TO FAVOR THE INTERE ST OF THE OBLIGEE OVER THE INTEREST O F THE PRINCIPAL

CHIEF JUSTICE: I KNOW W E T ALK A LOT ABOUT THE GENERAL POLICY, BUT YOU AGREE WE ARE HERE TODAY AS TO WHAT THE FLORIDA LEGISLATURE INTEND AS TO WHETHER THE CONTRACT OF A SURETY IS TO BE CONSIDERED UNDER 621.4155, CORRECT?

YES, YOUR HO NOR.I BELIEVE THAT, WHEN THE LEGISLATURE, WHEN THE ELEVENTH CIRC UIT CERTIFIED THE FIRST QUESTION HERE TODAY , WHICH IS ESSENTIALLY WHETHER AN OBLIGEE IS INSURED UNDER THE CI VIL REMEDY STATUTE, NINE MONTHS LATER I BELIEVE THAT THE LEGISLATURE ANSWERED THAT QUESTION. NOW, THEY ANSWERED IT IN A BROADWAY, B Y T ELLING US THAT SURETIES ARE NOT INSURED S UNDER THE CIVIL REMEDIES STATUTE.

CHIEF JUSTICE: BUT YOUUNDERSTAND THAT NO NE OF OUR CASE LAW WOULD SAY THAT THE LEGISLATURE CAN ANSWER A QUESTION BY AM ENDING A STATUTE, A STATUTE THAT WAS PUT INTO PLACE SOME 20 YEARS BEFORE, SO THAT IS N ICE FOR THE FUTURE, BUT IT DOESN'T, IT COULD BE JUST AS MUCH TO SAY , MY GOODNESS , THEY DECIDED THAT THEY DIDN'T WANT TO HAVE IT AS BROAD, SO THEY WE NT AND NARROWED IT, SO WE CAN'T REALLY TAKE THAT THEY

ANSW ERED THE ELEVENTH C IRCUIT QUESTION FOR THE P AST.

WELL , I WOULD SAY THAT,YOUR HONOR, THIS CASE DI DN'T ARISE 20 YEARS AGO. THIS CASE AR OSE TODAY , AND THE CERT IFIED QUESTION CAME O UT IN THIS CASE LAST SEPTEMBER AND THEN THE LEGISLATURE ACTED , AND WE CAN SPECUL ATE ABOUT WHAT WAS IN THE MI ND OF THE LEGISLATURE IN 1982, WHEN THE CIVIL REMEDY STATUTE CAME INTO BEING , BUT WE KNOW ONE THING FOR ABSOLUTE CERTAIN. WE KNOW WHAT THE LEGISLATURETHINKS THAT STATUTE MEANS TODAY, AND WE KNOW THE PUBLIC POL ICY.

WELL , LET'S GO BACK TO WHEN THE LEGI SLATION WAS ENA CTED.

YE S, YOUR HONOR.

IT IS UNFORTUNATE , BUT ALL TOO OFTEN , THE LEGISLATURE ACTS FROM,REALLY, A SIMPLE MODEL . JUSTICE LE WIS HAS ADD DEC EMBER DOCTORED IT - - HAS ADDRESSED IT TO SOME EXTENT , AND THAT IS MAYBE THE PE OPLE , MAYBE BE CAUSE ONE OF THEIR RELATIVES HAD A BAD EXPERIENCE WITH A N INSURANCE COMPANY , WHAT EVER THE SITUATION MAY BE, SO THEY SEE THAT, PERHAPS THERE HAVE BEEN UNFAIR CLAIMS PRAC TICES, YOU KNOW, THAT WE ALL HAVE INSURANCE , BECAUSE HOPEFULLY , IF OUR R OOF IS DAMAGED OR OUR AUTOMOBILE IS DAMAGED OR WHATEVER THE SITUATION IS , OUR INSURANCE COMP ANY, WHEN WE FILE A CLAIM , THE TIME THAT THEY GIVE US AND ALL OF THAT KIND OF THING LIKE THAT , THAT THEY WILL EVALUATE IT , AND THEY WILL PAY IT , YOU KNOW, AND THE LEGISLATURESEES THAT SIMPLE MODEL , AND THEN THEY SAY , WELL , IF THE INSURANCE COMPANY IS GOING TO HAS SLE FLORIDA INSUREDS, AND IF THEY REALLY HASSLE THE M TO A G REAT DEGREE, WE ARE GOING TO GIVE INSUREDS THE RIGHT TO, A LSO , SUE FOR BAD FAIT H.

THAT'S RIGHT.

THE PROBLEM COMES, THOUGH, IN THE FACT THAT THEY MAY HAVE HAD THAT IS SUE IN THEIR MINDS WHEN THEY DRAFTED THE LEGISLATION , BUT WHEN THEY USE TERMS LIKE INSURED AND INSURE R AND THE OTHER TERMS HERE, THEY W RITE THOSE TERMS R ATHER BROADLY, AND WE SEE IN OTHER ASPECTSOF THE INSURANCE CODE OR OTHER PROV ISIONS IN THE STATUTE , THAT SEEM T O INCLUDE SURETIES, YOU KNOW , W ITHIN THAT , SO THAT SORT O F , I WOULD PO SI T THAT AS THE DEL I AM A THAT -- DILE MMA THAT WE FA CE , YOU KNOW , TODAY. OBVIOUSLY THERE ARE DIFFERENCES IN ALL OF THE CIRCUMSTANCES THAT MI GHT BE F ACED, BUT HOW DO WE OVERCOME THESE RATHER BROAD DEFINITIONS THAT SEEM TO BE IN PLACE IN DEFINING AN INSURER A S INCLUDING A SURETY ? THAT IS SORT OF, WHAT WE ARE INITIALLY CONFRONTED WITH, AND, OF CO URSE , THAT IS THE FLAG THAT YOUR OPPONENT IS CARRYING, IS ALL OF THESE OTHER PLACES THE INSURANCE CODE SEEMS TO SUG GEST THAT ASURETY IS, ALSO , AN INSURER , FOR PURPOSES OF THIS LEGISLATION . COULD YOU HELP U S WITH THAT SORT OF HEAD ON , RECOGNIZING , AS WE, YOU KNOW , THAT THERE ARE ALWAYS SORT OF A SIMPLE SCENARIO THAT THE LEGISLATURE IS FACING TO BEGIN , WITH THEN THEQUESTION, YOU KNOW, BEC OMES WHEN THESE OTHER SI TUATIONS OCCUR , HAD THEY W RITTEN IT SO BROADLY , TO INCLUDE THAT. CAN YOU HELP ME WITH THAT. ISN'T THAT THE ISS UE THAT WE , REALLY, F ACE?

WELL , I WILL D O MY BEST TO ANSWER THAT, JUSTICE ANSTEAD. I THINK THAT WHAT YOU HAVE JUST SAID IS TRUE. THAT THE LEGISLATURE WAS DEALING WITH A SIMPLE MODEL IN 19 82, AND JUST AS YOU H AVE OUTLINED, AND DID NOTHAVE IN MIND , THE RAMIFICATIONS THAT THAT WOULD HAVE ON CONTRACTS, ON BONDED CONTRACTS, ON PU BLIC PROJECTS, ON SURETIES, O N OWNERS, O N CONTRACTORS , ANDYOU KNOW, THE HISTORY THAT WE HAVE , THE BILL ANALYSIS THAT IS IN THE RECO RD , IS VERY SKET CHY , BUT IT CERTAINLY MA KES NO MENTION OF AN Y OF THOSE THINGS.IT IS CONSISTENT WITH WHAT YOU JUST SAID. ANOTHER PROBLEM THAT WE HAVE , IS WE ALWAYS START WITH THAT IT IS FUNDAMENT AL , THAT IS THE LANGUAGE THAT THE LEGISLATURE USES, IT THAT WE ARE GEN ERALLY BOUND BY , SO IF THEY USE A TERM THAT

IS OTHERWISE BROADLY DEFINED IN OTHER PLACES IN THE STATUTORY SCH EME , THAT ORDINARILY WE ARE STUCK WITH THAT, YOU KNOW , AND WE STOP RIGHT THERE AND SAY THAT IS, YOU KNOW , UN LESS IT WOULD ACHIEVE , REALLY, A N IRRATIONAL OUT COME.

WELL , LET ME OFFER THIS AS WHAT I THINK S HOULD PRO VIDE SOME GUIDANCE TO THECOURT IN THAT REGARD. I DON'T DISPUTE, OF COURSE, THE DEFINITION OF INSURER THAT INCL UDES SURETIES . AND SO IT IS CLEAR THAT THE LEGISLATURE DID INTEND SURETIES TO BE ENCOMPASSED B Y THE INSURANCE CODE TO SOME EXTENT , BUT I WOULD OFFER THAT , NOT IN EV ERY INSTANCE IS AN INSURER , IS ASURETY AN INSURER UNDER THECODE, AND LE T ME GI VE YOU AN EXAMPLE. WHEN THE LEGISLATURE WANTED TO MAKE IT EXPLICIT THAT SURETIES WERE BEING ADDRESSED AND ENCOMPASSED IN THE INSURANCE CODE, THEY SAID SO. IN SE CTION 627.752 THROUGH SECTION 627.759 , THE CODE SPECIFICALLY APPLIES TO SURETIES. IT IS THERE, THA T THE RIGHT TO ISSUE BONDS IS SET FORTH IN THE STATUTE, AND I WOULDPOINT OUT THAT ONE OF THOSE SECTIONS 627.756 , SPECIFICALLY INCORPORATES OWNERS, OBLIGEES , INTO THE ATTORNEY FEE SHIFTING PROVISION OF THE CODE. IT SAYS O WNERS , SUBCONTRACTORS AND SO ON , SHALL BE DE EMED TO BE INSURED S UNDER THE FEE SHIFTING STATUTE. AND I WOULD SAY THAT, IF THE LEGISLATURE, IN DEFINING INSURER , INTENDED FOR SURETY SHIFT TO BE ENCOMPASSED BY THE WHOLE INSURANCE CODE , THERE WOULD HAVE BEEN NO NEED FOR THAT CLARIFI CATIONTHAT I JUST QU OTED YOU FROM THE ATTO RNEY FEE STATUTE.

DID WE HAVE , PRIOR TO THEADOPTION OF 624.155 , ANY CASE WHICH YOU ARE A WARE OUT OF THIS COURT OR THE DISTRICT COURTS , THAT HAD H ELD THAT THERE WAS A BAD-FAITH CAUSE OF ACTION AGAINST A CONTRACT SURETY?

PART OF THE ADOPTION -- PRIOR TO THE ADOPTION OF THESTATUTE?

THAT'S RIGHT.

I AM NOT AWARE OF ANY SUCH CASE , YOUR HONO R.

ARE YOU AWARE OF ANY CASE IN WHIC H THAT HAS ACTUALLY BEEN DEBATED?

I JUST STAT ED, NO , YOURHONOR , I AM NOT . I THINKTHIS IS T RULY A A CASE OF F IRST IMPRESSION.

THERE HAD BEEN ADOPTED , PRIOR TO 624.155 , KRR CONSIDERABLE -- CONSIDERABLE LITIGATION OVER THIRD PARTY LIABILITY BAD FAITH.

OF COURSE.

AND THERE HAD BEEN A DEBATE CONCERN ING FI RST P ARTY LIABILITY UNDER UNINSURED MO TORIST CLAIMS UNDER BA XTER VERSUS ROYAL INDEMNITY , CORRECT?

CORRE CT.

SO THOSE ARE ALL MA TTERS WHICH WERE IN THE FLORIDA COURT SYSTEM, PRIOR TO THE ADOPTION OF THE STATUTE.

THAT'S RIGH T, AND I BELIEVE THAT THE STATUTE WAS ATTEMPTED TO ADDRESS THAT DEBATE , AND ESTABLISH THE L AW THAT WOULD GO VERN .

WOULD YOU GO BACK AND , A LSO , RESPOND TO THE QUESTION I PROPOUNDED TO YOUR OPPONENTS, WITH REGARD TO OTHER STATES. AS I HAVE GONE THROUGH AND READ EVERY ONE OF THESE CASES, I CAN'T FIND ONE THAT, REALLY, ANSWERS THE QUESTION BEFORE US TO DAY , BUT WHAT I DO FIND IS THAT EVEN STATES THAT R E FUSE TO DO A COMMON LAW ACTION, THAT

THEY SAY WE CANNOT, BECAUSE OUR STATUTE DOES NOT PROVIDE A PRIVATECAUSE OF ACTION , OR THEY USE THAT AS YOUR OPPOSITION AS SUGGESTED TO SU PPORT ACOMMON LAW. DO YOU HAVE A CASE YOU CANPOINT TO FOR US , WHERE THERE IS A PRIVATE CAUSE OF ACTION UNDER A STATE STATUTE THAT HAS BEEN INTERPRETED AS THIS O NE, BECAUSE I CANNOT.

I DON'T THINK THERE IS ACASE THAT FITS EXACTLY IN THAT PIGEON HOLE , YOUR HONOR.

WHAT I S THE ONE THAT YOU S AY WE SH OULD FO LLOW THE BEST.

THE CASE CONSTRUCTION CASE OUT OF CALIFORNIA.

I AG REE IT IS COMMON LA W AND THE DISSENT IS QU ITE STRONG AND QUITE PERSUASIVE ON THAT CASE , DON' T YOU AGREE?

I THINK THERE ARE GOOD ARGUMENTS ON BOTH SIDES , BUT CALIFORNIA AND TEXAS AND THE LEADINGS STATES IN THECOUNTRY , HAVE GONE THE CORRECT BAY WEIGH ON THE ISSUE.

WOULD YOU SHARE -- CORRECT WAY ON THE ISSUE.

WOULD YOU SHARE WITH ME WHY YOU BEL IEVE THAT THE COMMON LAW ANAL YSIS IS THE CORRECT ANALYSIS FOR THIS STATUTORY CONSTRUCTION THATWE HAVE TO DEAL WITH.

I WOULD SA Y THAT THE COMMON LAW ANALYSIS IS A BROADER ANALYSIS.WHEN I POINT TO THE CASE DECISION, I AM TALKING ABOUT THE RATIONALE FOR THE SORT OF DISTIN CTIONS THAT JUSTICE WELLS SPO KE OF , BETWEEN INSURANCE AND SURETY SHIP, AND THE SORT OF RAMIFICATIONS THAT I HOPE I MADE CLEAR EARLIER, FOR ATTEMPTING TO FIT WHAT IS ESSENTIALLY A S QUARE PEG INTO A ROUND HO LE . IT JUST DOESN'T FIT, SO THE RATIONALE IN CASE S IS WHAT I HOPE THE COURT WOULD ACCEPT AND PAY AT TENTION TO. I DON'T - -

WELL, COULD YOU SPEAKJUST TO THE ISSUE OF THE DIFFERENCE IN THE N ATURE OF THE FORMATION OF THE CONTRACT BETWEEN THE TYPICAL INSURANCE CASE AND THE SURETY CASE. IN THE CASE HERE , WE HAVE AN INDUSTRY A IA FORM , THAT , IT IS MY UNDERSTANDING IT IS T O BALANCE THE INTEREST OF ALL THREE PARTIES INVOLVED. COULD YOU JUST SPEAK TO THAT ISSUE.

WELL , I DON'T KNOW IF I CAN ANSWER YOUR QUE STION , JUSTICE BELL. ONE OF THE DIST INCTIONS , I WILL ANSWER IT THIS WAY , O NEOF THE DISTINCTIONS BETWEEN AN INSURANCE POLICY AND A BOND, IS THAT AN INSURANCE POLICY TYPI CALLY IS A CONTRACT OF ADHESION.IT IS A FORM THAT IS APPROVED BY THE DEPARTMENT OF FINANCIAL SERVICES ON FILE. IT IS OF FERED TO THE INSURED , THE P O TENTIAL POLICYHOLDER ON A TAKE IT OR LEAVE IT BASIS. A BOND IS COMPLETELY DIFFERENT FROM THAT.FIRST OF ALL , IT INCORPORATES A CONTRACT THAT WAS NEGO TIATED BETWEEN THE OWNER, THE OBLIGEE AND THE CONTRACTOR, THE PRINCIPLE , BUT MORE IMPORTANTLY IT IS THE BOND , THE FORM OF THEBOND IS E ITHER SELECTED BY OR DRAFTED BY THE OBLIGEE AND CONTAINS THE RIGHT T O CONTRACTUAL RIGHTS AND DEMREMEDIES THAT THE OBLIGEEP UTS IN THERE AND IS -- REMEDIES THAT THE OBLIGEE PUTS IN THERE AND IS ON A TAKE IT OR LEAVE IT T YPE OF BASIS , AND TO PERFORM --

IT IS IN THE FILING WITH THE STATE?

THAT'S CORR ECT, YOUR HONOR, AND THERE ARE MULTI, AS OPPOSED TO INSURANCE POLICY FORMS, THERE ARE TREMENDOUS NUMBER OF BOND INSURANCE FORMS US ED IN THESTATE OF FLORIDA.

CHIEF JUSTICE: WHAT ABOUT , A GAIN , WHEN THE LEGISLATURE WAS SEEKING T O ENACT 624.155 , AS JUSTICE ANSTEAD SAID , WE MIGHT NOT KNOW WHAT THEY INTENDED, BUT DON'T YOU HAVE

A SITUATIO N THAT , IF, THIS ISN'T RECOGNIZED AS A CAUSE, A STATUTORY CAUSE OF ACTION THAT YOU CAN HAVE SURETY THAT DOES NOT PERFORM DILIGENT INVESTIGAT IONS AND HAVE NO MOTIVATION TO PAY THEIR OBLIGATION IN A TIM ELY MANNER?

NO, YOUR HONOR. I THINK THAT THERE ARE SUFFICIENT DETERRENTS IN PLACE , WITHOUT RECOGNIZING ACAUSE OF ACTION UNDER THESTATUTE, FOR SURETI ES TO PERFORM THEIR OBLIGATIONS. I WOULD POI NT OUT , FIRST OF ALL , THAT AS WE KNOW FROM THE D AVID BO LAND CASE H AD, THAT THE, AND FROM THESTATUTE , THAT THE SURETY ISEXPOSED TO ATTORNEY FE ES, AND THAT THEY CAN, IF THERE IS A SE PARATE FAULT ON THE PART OF THE SURETY , EXCEED THE PE NAL SU M OF THE BOND. I WOULD SAY , ALSO, THAT THEY ARE LI ABLE FOR INTEREST AS THEY WERE IN THIS CASE. ATTORNEY FEES WERE PAID THIS THIS CASE IN EXCESS OF $700,000. I WOULD SAY THAT , THIS IS, AS I MENTIONE D A MOMENT AGO, AN AR M' S LE NGTH TRANSACTION, IN WHICH THE OBLIGEE IS FREE TO PUT WHAT EVER CONTRACTUAL REM EDIES THE OBLIGEE THINKS IT NE EDS INTO THE AGREEMENT, TO PRO TECT ITSELF , AND I WOULD SAY FRANKLY, I N GENERAL , IT WOULD BE BAD FOR BUSINESS , FOR SURETIES TO SIMPLY DISREGARD THEIR OBLIGATIONS UP UNDER THEIRBOND, AND THEY WOULD QUICKLY BE BLACKLISTED , AND YOUWOULD HAVE OBLIGEE S REFUSING TO ACCEPT THE SURETY'S BOND. OF COUR SE THERE IS, ALSO , REGULATION BY THE DEPARTMENT OF FINA NCIAL SERVICES, SO ALL OF THOSE THIN GS ARE DETERRENTS TO SURETIES RUNNING WILLY-NILLY OVER THEIR OBLIGATIONS UNDER A BOND. I DON'T THINK IT I S NECESSARY TO PUT INTO E FFECT , A CAUSE OF ACTION UNDER THE STATUTE THAT WOULD , AS I S AID, PL ACE THE SURETY IN A POSITION OF HAVING TO F A VOR THE OBLIGEE OVER THE PRINCIPLE IN ITS EVALUATION , AND BA UFT FEAR OF BAD FAITH -- BECAUSE OF THE FEA R OF A BAD-FAITH ACTION COMING DO WN AND THE BALANCE D RELATIONSHIP BETWEEN THESETWO PARTIES.

CHIEF JUSTICE: BECAUSE THE STATUTORY CHANGE DOES EXTEND TO THIS TYPE OF PERFORMANCE BOND, DOES IT , IS IT INCLUDING OR EXCLUDING EVERY TYPE OF SURETY RELATIONSHIP, EV ERY TYPE OF BOND IN THE AMENDMENT TO THESTATUTE?

WELL , THE AMENDMENT TO THE STATUTE DOES NOT ENCOMPASS EVERY TYPE OF BOND , BUT I WOULD ARGUE THAT THE C IVIL RE MEDY STATUTE WAS NOT , WAS NOT INTEND AND DOES NOT ENCOMPASS SURETY RELATIONSHIPS AT ALL.

CHIEF JUSTICE: BUT ISN'T THAT, REALLY, A PROBLEM, AGAIN, IF WE WERE TO LOOK TO THE FUTURE, THAT IS TO WHAT HAPPENED, THE FA CT IS THAT THEY COULD HAVE JUST MADE A STATEMENT FOR THE FU TURE THAT A SURETY IS NOT AN INSURER FOR ANY PU RPOSE UNDER THIS STATUTE. THEY DIDN'T DO THAT.

NO. BUT I THINK THAT THIS COURTNEED ONLY ANSWER THE CERTIFIED QUESTION.

CHIEF JUSTICE: BUT IN DOING SO, AG AIN, YOU POINTEDAND YOU SAID , W ELL , WE S HOULD REALLY LOOK TO WHAT THEY INTENDED . WELL , THIS SOUNDS LIKE NO W THEY ARE SAY ING, LI STEN , WE WERE REALLY S LICING IT HALFWAY.WE WERE GOING TO INCLUDE CERTAIN BONDS AND EXCL UDE CERTAIN BONDS , IF YOU WERE TO LOOK RETROSPECTIVELY. S O I AM NOT SURE THAT REALLY HELPS AGAIN , HELPS US VERY MUCH, IN LOOKING BACK 23 YEARS , BUT , NOW , 23 YEARS LATER , THEY ELIMINATE CERTAIN TYPES OF SURETY RELATIONSHIPS FROM THE STATUTE BUT NOT ALL OF THEM.

WELL , THE ONE THING THAT I THINK DOES HELP , IS THELANGUAGE OF THE STATUTE THAT SPECIFICALLY DE EMS OBLIGEES TO BE COVERED BY THE FEE STATUTE, BUT THE FEE-SHIFTING STATUTE, BECAUSE AS I SAID , IT WOULD NOT HAVE BEEN NECESSARY TO DO THAT , IF THE LEGISLATURE INTENDED SURETIES TO BE IN FOR ALL PURPOSES.WITH THE COURT 'S PERMISSION, I WANT TO C EDE MY REM AINING TIME TO THE AM ICUS ON THESIDE OF THE SURETY , THA NK YOU .

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS SETH MILLS REPRESENTING THE SURETY ASSOCIATION OF AME RICA AND ITS 500-MEMBER COMP ANIES WHOWRITE MO ST OF THE BONDS IN THIS COMPANY PARTICULARLY IN FLORIDA.I WOULD LIKE TO ADDRESS AFEW OF THE QUESTIONS, IF I MAY , THAT HAVE ALREADY BEEN ASKED HERE TODAY. WITH RE GARD TO JUSTICE ANSTEAD'S QUESTION RE LATING TO THE DEFINITION OF A TERM , WE ARE HERE ON A CERTIFIED QUESTION ON A TE RM THAT IS NOT DEFINED IN THE STATUTE, THAT IS WHETHER OR NOT THE OBLIGEE IS THE INSURED. IT IS TRUE THAT THE CODE IS DEFINED , THE SURETY FOR REGULATORY PURPOSES AS AN INSURER. THAT HAS ALREADY BEEN ADDRESSED BY OTHER COUNSELHERE TODAY , BUT THERE IS N O DEFINITION AS TO INSURE D.I WOULD SUBMIT TO THE COURTTHAT IF THERE IS NO POLICY OF INSURANCE AND I WOULD SUBMIT HERE FROM ALL OF THE DISTINCTIONS ALREADY BROUGHTOUT , THERE CAN BE NO INSURED.WE ARE ATTACHED IF YOU WILL, TO THE DEPARTMENT OF FINANCIAL SERV ICES, FOR REGULATORY MATTERS , BUT NOT AS A MA TTER OF BAD FAIT H. I WOULD, ALSO, LIKE --

IT SE EMS AS THO UGH COUNSEL I N THE PREVAILING AUTHORITY, EVEN FOR COMMON LAW ACTIONS , THEY TREAT THAT AS A SUFFICIENT RELATIONSHIP , THOUGH , EVEN IN THE ABSENCE OF THE STATUTE. THEY MAY LOOK TO THE STATUTE FOR SOME GUIDANCE AS IF , AS SURETYSHIP REGULATED , BUTISN'T THERE A CASE THAT APPROACHED THIS ON THE BASIS THAT THERE IS NO INSURANCECONTRACT, NO INSURANCE INSTRUMENT TO SUPPORT ACAUSE OF ACTION ? I DIDN'T SEE ONE OF THOSE , I DON'T BELIEVE.

YOUR HO NOR, I BELIEVETHAT, IF , AT LEAST WE READ THE MASTERCLEAN DECISION OUT OF SOUTH CAROLINA THAT IS CITED IN OUR BRIEF, AND, ALSO, THE GREAT AME RICAN CASE OUT OF THE TEXASSUPREME COURT. MASTERCLEAN WAS OU T OF THE SOUTH CAR OLINA SUP REME COURT.

TEXAS CASE G HOST OP POSITE WAY. THEY GO WITH THE STATUTE, DID THEY NOT?

THEY DID G O THE OPPOSITE WAY , YOUR HONOR, HOWEVER THEY HAD STATUTORY REGULATION THAT DEFINED SURETY AS AN INSURER THAT HELD THAT THERE WAS NO CAUSE OF ACTION FOR BAD FAITH UNDER COMMON LAW , IN BOTH MASTER KLEIN AND IN THE -- MASTERCLEAN AND IN THE GREAT AMERICAN CASE OUT OF TEXAS.

WAS THAT A CASE WHERETHERE WAS NO INSURANCE INVOLVED?

NO.

THAT IS WHY I AM ASKING , BECAUSE YOU TO OK THE POSITION, THE LEGAL POSITION THAT THERE IS NO INSURANCE EVIDENCE UPON WHICH YOU CAN PREDICATE THE CL AIM . MASTERCLEAN SAYS THAT?

NO , AND I MIGHT HAVE SPOKEN TOO BROA DLY. THE MERE FACT THAT WE ARE REGULATED BY THE DEPARTMENT OF FINANCE SERVICES AS AN INSURER , DOES NOT AUTOMATICALLY LEND ITS ELF TO THE CONCLUSION ON AN UNDEFINED TERM IN THIS STATUTE , THAT AN OBLIGEE IS AN INSURED. I WOULD, ALSO, LIKE TO ADDRESS , JUST ADD V ERY BRIEFLY -- MR. CHIEF JUSTICE

YOUR THREE MIN UTES GO VERY QUICKLY.

THANK, YOUR HONOR.

CHIEF JUSTICE: THANK YOUVERY MUCH .

IN MY BRIEF TIME , I WOULD L IKE TO ADDRESS , J EWS SKOOUS ME, JUSTICE -- TO ADDR ESS, EXCUSE ME , JUS TICE LE WIS 'S INQUIRY.THE MONT ANA CASE WAS AN ISSUE THAT ADDRESSED WHETHER A N ATIONAL SURETY IS AN INSURED WITHIN THE MEANINGOF A PARTICULAR STATUTE

AND THEREFORE SUBJECT TO SUIT UNDER THAT STATUTE FOR BAD-FAITH INSURANCE PRACTICES.THE SPARCOWSKY CASE OUT OF NORTH DA KOTA IN VOLVED A CASE THAT THE SURETY WAS IN SURED FOR THE PURPOSES OF THE UNFAIR INSURANCE PRACTICESACT.I COULD NOT TELL WHETHER IT WAS A SP ECIFIC CIVIL CAUSEOF ACTION, BUT THE MAJORITY OF CASES AS CITED IN OURBRIEF , HOLDS THAT THERE IS A DUTY ANY THIS CASE THAT IS HE NOT FORCIBLE , SE PARATEAND APART FROM THE CONTRACT. THE JURISDICTION THAT IS HAVE FOUND N O SU CH D UTY ARE ONES WHERE THEY LOOKED AT THE LEGISLATION AND SURETIES ARE EXEMPTED FOR WHAT EVER REASON, SEPARATELY REGULATEDOR NOT DEFINED. IT WAS SUGGESTED HERE THATYOU HAVE TO HAVE A POLICY OF INSURANCE TO HAVE AN INSURED, BUT WHAT WAS OVERLOOKED WAS 624.02 DEFINES INSURANCECONTRACT IN OUR F LORIDA INSURANCE CODE , BROADLY ENOUGH TO IN CLUDE SURETY, AND DEFINES SURETY AS AN INSURER , SO HOW , THE OBLIGEE , WHO IS CONSISTENT LY RECOGNIZED AS THE MOST SIMILAR TO AN INS URED , A NDTHAT THAT IS THE PER SON TO BE PROTECTED BY THE BOND .

CHIEF JUSTICE: BUT IS THIS THE PROBLEM , AND , AGAIN W HEN WE SWITCH IT AROUND, THE QUESTION IS NOT HADWHETHER THE SURETY IS AN INSURED BUT WHETHER THE OBLIGEE IS AN INSURED, ANDTHE FACT THAT THEY ARE RECOGNIZED SPECIFICALLY FOR THE ATTORNEYS FEES , FOR THAT P URPOSE , SEEMS T O SUGGEST THAT , WHEN THE LEGISLATURE WANTED TO INCLUDE THEM AS INSUREDS, THEY SPECIFICALLY MENTIONED IT, AND UNDER OUR THEORY OF STATUTORY CONSTRUCTION, THAT WOULD MEAN THE AB SENCE OF INCLUDING THEM IN THIS STATUTE WOULD SAY THAT THEY COULDN'T BE QUALIFIED AS AN INSURED.

NO , YOUR HONOR. THE REASON WHY THEY ARE SPECIFIED IN THAT STATUTE IS TO EXCL UDE PRINCIPLE S FROM OBTAINING ATTORNEYS FEES BECAUSE THE PRINCIPLE IS NOT INSURED UNDER ANYBODY'S ANALYSIS. WHAT THAT STATUTE DOES IS SPECIFIES MATERIALMEN, OWNERS, THE PE OPLE WH O ARE THE OBLIGEES , AND THE REASON THEY DID THAT IS BECAUSE OTHERWISE, IF YOU SIMPLY S AID ANYBODY WITH A BENEFICIARY , UND ER A BROADER TERM UNDER A N INSURANCE CONTRACT, IF YOU CONS TRUE THAT TO INCLUDE SURETIES,THAT WOULD BE A PRINCIPLE , WHICH N O JURISDICTION, UNDER THE MASTER CLEAN CASE THAT THE AM ICUS CITED , W AS A PRINCIPLE TRYING TO SUE FOR BAD FAITH. THAT COURT NEVER ADDRES SED OBLIGEE, BUT THE REAS ON IT IS IN THE ATTORNEYS FEES STATUTE IS TO MAKE A DISTINCTION BETWEEN THOSETHAT ARE DEEMED TO BE PROTECTED BY THE BOND AND THE PRINCIPLE, WHO IS NOT IN THE SAME RELATIONSHIP WITH THE SURETY AND SHOULD NOT HAVE A RIGHT TO ATTORNEYS F EES, BECAUSE UNDER NO ANALYSIS CAN THEY BE ANALOGIZE ED TO INSURE .

LET ME ASK YOU ONEQUESTION. WHAT ARE THE DAMAGE THAT I S YOU ARE CONCERNED ABOUT THAT COULD NOT HAVE BEEN INCORPORATED IN THE CONTRACT AT THE OUTSET , EITHER IN THE PERFORMANCE BOND OR IN THE CONSTRUCTION CONTRACT, AS JUSTICE WELLS WAS ASKING , THE DELA YED DAMAGES OR FEES THAT YOU MAY HAVE HAD TO PAYTO THE TE NANTS THAT WERE SUPPOSED TO COME IN ANDTHOSE THINGS. WHICH OF THOSE ELEMENTS OF DAMAGE INS THIS AR M'S LEN GTH TRANSACTION COULD NOT HAVE BEEN INCORPORATED AS A D AMAGE WITHIN YOUR CONTRACTS?

WELL, THEORETICALLY, I SUPPOSE YOU COULD SAY WE COULD DRAFT A CONTRACT TO PROVIDE FOR ANY CONCEIVABLE DAMAGES. BUT WE DIDN'T HAVE THAT DUTY. WE HAD A STANDARD SURETY CONTRACT, AND IF THEY HAD PERFORMED IT PROPERLY , THERE W OULD HAVE BEEN N O NEED FOR ADDITIONAL ELEMENTS OF DAM AGE, BUT YOU CAN SAY THE SAME THING ABOUT OTHER CONTRACTS THAT ARE ENFORCEABLE , E XCUSE M E , WERE INSURERS ARE OBLIGATED UNDER BAD FAITH. YOU CAN IS SAY THE INSURANCE COUNTERED WOULD -- YOU CAN SAY THE INSURANCE CONTRACT WOULD PROVIDE IT .

WOULD YOU AS DIG DEGREE -- -- WOULD YOU DISAGREE WITH THE S HD STANDARD INSURANCE CARRIER POLICY AS O PPOSED TO THIS ARM'S LENGTH COMMERCIAL TRANSACTION?

THERE IS NOTHING IN THIS RECORD AND I DON'T THINK WE CAN TAKE JUDICIAL NOTICE THAT SURETY BONDS ARE NEGOTIATED AT ARM 'S LENGTH. THEY ARE FORMS. THEY ARE REGULATED. THERE IS CERTAINLY NO E VIDENCE THAT ANYB ODY AUTHORIZES DEVI ATION FROM THE STANDARDS THEY USE, SO THAT IS SIMPLY SPEC ULATION .

WHAT WE HAVE HERE, THIS IS NOT AN INSURANCE INDUSTRY FORM. THIS IS AN AMERICAN INSTITUTE OF ARCHITECTS FORM , RIGHT?

IT IS A FORM USED BY THESE SURETIES.WHETHER OR NOT THEY WOULD HAVE NEGO TIATED IN ANY WAYON THAT CONTRACT IS NOT IN THE RE CORD AND IS S H EER SPECULATION. SIMPLY BECAUSE I DON'T REPRESENT A LITTLE INSURED DOESN'T MEAN THAT MY C LIENT COULDN'T BE ENTITLED TO GOOD FAITH UNDER THE CONTRACT AS THE MAJORITY O F JURISDICTION RECOGNIZE THE SURETY HA S THE DUTY, SO THEREFORE , THERE IS REALLY, IF THEY HAD PUT ON EVIDENCE OF THAT OR SOMETHING , MAY BE THEY HAVE A STRONGER EQUITABLE CASE , BUTUNDER THE STATUTES THAT WE ARE DEALING WITH, THAT IS NOT A CONSIDERAT ION.WE HAVE THE DEFINITIONS ANDTHE PARTY WHO IS MOST ANALOGOUS TO AN INSURED IS THE OBLIGEE , AND WE ARE THE ONE TO BE PRO TECTED BY THE CONTRACT.

HOW SHOULD WE INTERPRET THIS STATUTE? S HOULD IT BE DISTRICTLY CONSTRUED AS DER -- SHOULD IT BE ST RICTLY CONSTRUED AS DEROGATION OF THE CONTRACTOR WHAT IS YOUR POSITION ON THAT?

624.12 5 IS A STATUTE THAT CREATED A CAUSE OF ACTION. CERTAINLY THE CA USE OF ACTION IS SEPARATE FROM THE COMMON LAW, BUT IT WASDESIGNED TO C REATE A RE MEDY , AND IT, REALLY , DOESN'T REQUIRE AN EXTENSIVE JU MP IN L OGIC , TO SAY THE OBLIGEE IS INSURED AS A MAJORITY OF JURISDICTIONS HAVE HELD , AND THERE IS NO SHOWING THAT THE SURETY INDUSTRIES IN MOST STATES COLLAP SE. I THINK I AM OVER.

CHIEF JUSTICE: Y ES. YOU ARE. THANK YOU VERY MUCH. THANKS TO BOTH SI DES , FOR AN INFORMATIVE ORAL ARGUMENT AND FOR BEING RESPONSIVE T O OUR QUESTIONS AND VERY WELL PREPARED .