Lumbermens Mutual Casualty Co. v. Ryan Incorporated Eastern
SC05-1816 | SC05-1935

OKAY.,,
THE NEXT CASE THIS MORNING
IS, LUMBER MAN'S MUTUAL,
VERSUS RYAN.
AND CONTINENTAL CASUALTY
VERSUS RYAN.,,
>> GOOD MORNING, MAY IT
PLEASE THE COURT I'M
JONATHAN GAINS ON BEHALF OF
CONTINENTAL CASUALTY
COMPANY.
THIS CASE, PRESENTS A MUCH
SIMPLER ISSUE THAN THE LAST
ONE.
THIS IS THE CASE CONCERNING
WHETHER, 627.428, THE
INSURANCE ATTORNEY'S FEE
STATUTE CAN BE EXTENDED TO
PROVIDE ATTORNEYS FEES TO A
SURETY, IN THIS CASE
HARTFORD, WHO HAS PERFORMED
ON BEHALF OF ITS PRINCIPAL,
THEN IS SEEKING IN IT A
DECLARATORY ACTION ALONG
WITH ITS PRINCIPAL TO
ESTABLISH COVERAGE UNDER A
CGL POLICY.
>> IF WE QUASH.
J.S.U.B. THIS BECOMES MUTE.
>> THAT'S ABSOLUTELY RIGHT
IF JSUB IS QUASHED THIS IS
MOOT.
>> IF THERE IS ASSIGNMENT OF
RIGHTS YOU AGREE YOU CAN GET
ATTORNEY'S FEES UNDER 627?
>> IF THERE WAS ACTUAL
ASSIGNMENT UNDER ROBERTS
VERSUS CARTER ALL THOSE
CASES WE HAVE NO CONFLICT.
>> WHAT YOU HAVE HERE REALLY
THE INSURED AND THE SURETY
ARE BOTH SUING IN THE
DECLARATORY JUDGMENT ACTION.
>> THAT'S CORRECT.
>> AND THERE IS, WAS NO
QUESTION ABOUT GIVING FEES

TO THE, TO THE INSURED IN
THIS CASE?
>> TO THE INSURED, RYAN.
>> CORRECT.
>> WELL, THERE WAS A, A
MOTION FOR FEES FILED ON
BEHALF OF BOTH THE INSURED
AND THE SURETY IN THE CASE.
>> I THOUGHT RYAN ISN'T
APPEARING HERE AT LEAST
NOT --
>> THAT'S CORRECT.
>> AND THERE'S NO,
CONTROVERSY INSURED WOULD BE
ENTITLED TO FEES UNDER THAT
STATUTE IF IT PREVAILED ON A
COVERAGE QUESTION.
>> BUT AS A PRACTICAL MATTER
SINCE THE INSURED, IN THE,
SITUATION WHERE THERE IS A
SURETY IS GOING TO BE ON THE
HOOK IT, WOULD BE, DIFFICULT
FOR THE INSURED TO, JUST AS
SIGN AWAY ALL OF ITS RIGHTS.
SO WHY ISN'T THE CONCEPT OF
SUB ROW GAGS, WHICH IS
YOU'RE STANDING IN THE SHOES,
THE VEHICLE BY WHICH YOU GOT
GET ATTORNEYS FEES?
IN THAT I LIKE YOU TO
ADDRESS THE ALWAYS CASE
WHICH SEEMS TO' QUITE ALMOST
ASSIGNMENT AND SUBROGATION
OF BECAUSE ALWAYS DIDN'T
HAVE A FORMAL ASSIGNMENT.
>> THEY HAD AN ASSIGNMENT BY
IMPLICATION OF THE
CIRCUMSTANCES IN THAT CASE.
AND I THINK THE, MAIN
DIFFERENCE BETWEEN, BETWEEN
THAT CASE AND THIS CASE IS
THAT HERE, A STATUTE THAT
SAYS, A POLICY IS ASSIGNABLE
OR NOT ACCORDING TO ITS
TERMS.
WE HAVE A POLICY HERE THAT
SAYS, CANNOT BE ASSIGNED
UNLESS THERE IS WRITTEN
CONSENT.
WE HAVE HERE NO ALLEGATION
OF SUCH AN ASSIGNMENT OF
SUCH CONSENT.
NO EVIDENCE, NO, ALLEGATION
OTHER THAN THAT WE'RE A SU

SUBROGATION.
>> THERE IS NO PROHIBITION UNDER THAT ANTI-ASSIGNMENT CLAUSE TO ASSIGNMENT AFTER THE LOSS OCCURS?
>> NO THERE ISN'T.
>> OKAY.
>> WE HAVE HERE A VERY LATE ARGUMENT IN THE BRIEFING AND ARGUMENTS GOING BACK AND FORTH WHAT WE'RE REALLY TALKING ABOUT HERE IS AN ASSIGNMENT AND NOT SUBROGATION.
BUT I DON'T THINK THE RECORD BEARS THAT OUT.
THERE IS REALLY NO ASSIGNMENT IN THE RECORD.
AND WHAT YOU HAVE IS, AN ATTEMPT TO USE THE CONCEPT OF SUBROGATION TO SHOEHORN INTO THIS ATTORNEYS FEE STATUTE --
>> FROM A PRACTICAL POINT OF VIEW IF YOU HAD BOTH OF THEM IN THERE, AND, SO IT'S REALLY A QUESTION WHO IS REALLY GOING TO CARRY THE BALL.
IF THERE IS AN AGREEMENT THAT THE, INSURED'S WILLING TO USE THE SURETY'S LAWYER SO TO SPEAK, YOU GET THE SAME, DOESN'T, DON'T WE HAVE THE SAME OUTCOME?
>> WELL I MEAN THERE HAS BEEN A LOT OF TALK IN THE CASE ABOUT THE CARRYING OF THE BALL AND HOW THAT DECISION WAS MADE.
AND FRANKLY I DON'T KNOW HOW THAT DECISION WAS MADE BUT, HOWEVER IT WAS MADE, AT THE TIME IT WAS MADE ALL OF THESE STATUTES AND CASE LAW WERE IN EFFECT AND, APPLICABLE HERE AND --
>> LET ME MAKE SURE I UNDERSTAND WHAT THE UNDERLYING, THE UNDERLYING CLAIM AND THE HOLDING OF THE SECOND DISTRICT WAS THAT, THE, THERE HADN'T -- SHOULDN'T HAVE BEEN A

SUMMARY JUDGMENT ON THE
UNDERLYING CLAIM AS TO
WHETHER THIS DEFECT OCCURRED
BEFORE OR AFTER THE PROJECT
WAS COMPLETED, CORRECT?
>> WELL THE SECOND DISTRICT --
THE UNDERLYING CLAIM IN THE
TRIAL COURT, SUMMARY
JUDGMENT WAS BASED UPON
LAMARSH WHOLE LINE OF CASES
PREJESA.
IN THE INTERIM THAT WENT UP
ON APPEAL.
IN THE INTERIM THE SECOND
DISTRICT DECIDED.
JASUP CASE.
THEREFORE WHEN THIS CASE
CAME UP BEFORE THE SECOND
DISTRICT THEY DETERMINED
WE'RE BOUND BY THE PRIOR
PANEL DECISION IN JESA --
>> WHAT I'M TRYING TO GET
STRAIGHT IN MY MIND WHERE
THE SUBROGATION, IF THERE
WAS A SUBROGATION CLAIM, THE
SURETY WOULD HAVE HAD TO,
HAVE, PAID AND, ON, THE,
THERE WOULD HAVE BEEN A
CLAIM AGAINST THE SURETY,
FOR FAILURE TO PERFORM THE
CONTRACT.
THE BASIC CONSTRUCTION
CONTRACT, CORRECT?
>> THAT'S CORRECT.
>> AND THE SURETY WOULD HAVE
HAD TO BE MAKING A CLAIM
AGAINST RYAN TO, RECOVER FOR
THE BREACH OF THE
CONSTRUCTION CONTRACT?
>> TO RECOVER UNDER ITS
INDEMMIFICATION, RIGHT.
>> THAT WOULD BE PRIOR TO
THE PROJECT BEING COMPLETED?
>> WELL THAT'S CERTAINLY OUR
POSITION AND THAT'S THE
ISSUE THAT IS BACK BEFORE
THE TRIAL COURT NOW.
THEY DETERMINED, SECOND
DISTRICT TERMED THAT THERE
WAS ISSUE OF FACT WHETHER
THIS WAS A COMPLETED
OPERATION OR NOT AT THE TIME
THAT THIS DEFECTIVE, IT WAS
DEFECTIVE GRASS ON A GOLF

COURSE.
IT WAS NOT JENETTE I CANLY PURE AND, THAT WAS THE DAMAGE IN THIS CASE.
IT WAS ISSUE RECORD WASN'T CLEAR ON TIMING OF THAT DAMAGE MANIFESTING ITSELF.
>> COMING BACK TO THE NONASSIGNABILITY CLAUSE AND THE POLICY UNDERLYING THAT, IS THAT POLICY, REALLY SERVED BY, NOT ALLOWING REALLY, SOMEBODY THAT STEPS IN THE SHOES OF THE RESPONSIBLE PARTY, AND SAYS WE'LL GO AHEAD AND PAY IT AND WE'LL GO AND CHALLENGE THE INSURANCE CARRIER HERE?
IT SEEMS TO ME, NONAS SIGNABILITY CLAUSE, CLEARLY WAS INTENDED FOR OTHER REASONS NOT FOR A SITUATION LIKE THIS WHERE IN ESSENCE YOU'VE GOT SORT OF A, FOR USE AND BENEFIT KIND OF THING OF THE OLD PRACTICE WHERE, YOU FILED THE SUIT AND THE NAME OF THE INSURED, AFTER YOU PAID THE CLAIM FOR THEM AND SAID, WE'LL GO AHEAD AND PAY IT AND THEN, WE'LL GO AHEAD AND PROSECUTE THIS CLAIM.
JUST HAVING A LOT OF DIFFICULTY WITH ANY POLICY REASONS THAT ARE SET OUT IN ALL THE CASE LAW AND, STATUTES NONAS SIGNABILITY BEING APPLICABLE TO A SITUATION LIKE THIS.
>> THAT MIGHT BE THE CASE.
THE REASON I SAY THIS IS A SIMPLE ARGUMENT BECAUSE WE HAVE THE ATTORNEYS FEE STATUTE AND LEGION OF CASES SAY IT HAS TO BE STRICTLY CONSTRUED.
AND, IF ACQUIRING RIGHTS BY SUBROGATION TO THE EXTENT THIS IS A VALID SUBROGATION RIGHT THAT'S NOT WITHIN THE TERMS OF THE STATUTE.
EVERYTHING WITHIN THE REALM OF THE STATUTE THAT HAS EVER

BEEN HELD TO BE COVERED IS
IN THE REALM OF CONTRACT --
>> WOULD THERE BE ANYTHING,
ANYTHING TO PREVENT THE
INSURED, THE PERSON THAT YOU
INSURED THOUGH, FROM
PROSECUTING AN ACTION EVEN
THOUGH THEY HAD BEEN PAID BY
THE SURETY AND COLLECTING,
OBVIOUSLY, ASSUMING THAT
THEY PREVAIL, WHICH IS, SORT
OF THE UNUSUAL POSTURE WE
FIND OURSELVES IN TERMS
OF -- ANYTHING TO PREVENT
THE INSURED FROM DOING THAT
AND THEREFORE, TRIGGERING
THE, FEES, STATUTE AND, EVEN
THOUGH THEY HAVE BEEN PAID
BY A SURETY?
>> WELL, THE PERSON WHO WAS
PAID BY THE SURETY WAS NOT
THE INSURED.
IT WAS THE OBLIGEE THE
PRINCIPAL.
TO ANSWER YOUR QUESTION
THERE IS NOTHING TO PREVENT
PRINCIPAL HERE RYAN, HAVING
PURSUED THIS CLAIM AGAINST
THE INSURANCE COMPANY.
>> THEY DID.
>> I MEAN ON ITS OWN I MEAN.
>> THEY DID AND, I JUST WANT
TO MAKE CLEAR BECAUSE, WHAT
JUSTICE ANSTEAD SAID, YOU
HAVE AGREED THERE IS NOTHING
IN THE ANTI-AS SIGNABILITY
PROVISIONS WOULD HAVE HE
PREVENTED RYAN ITS RIGHTS TO
PURSUE A COVERAGE QUESTION
TO, HARTFORD.
>> THE ONLY THING THAT WOULD
PREVENT RYAN FROM ASSIGNING
RIGHTS UNDER THE POLICY IS
LACK OF CONSENT.
>> I THOUGHT AFTER A LOSS
YOU DIDN'T NEED CON --
CONSENT?
>> BELIEVE UNDER THE POLICY
IT MAY NOT BE AS SIGNABLE
WITHOUT WITHOUT CONSENT.
IS NOT ASSIGNABLE WITHOUT
CONSENT.
I DON'T KNOW THAT IT WOULD
HAVE BEEN CONSENTED TO BUT

THERE IS NOTHING HERE THAT
WOULD HAVE PREHAVEN'TED RYAN,
AS THEY SAY CARRYING BALL
ALONE AND BASED ON THE FACT
TO LIABLE TO INDEMNIFY THE
SURETY THE AMOUNT PAID TO
THEABLELY GEE ALREADY.
IF YOU PAY ON THAT.
INSURED COULD COLLECT ITS
ATTORNEYS FEES DIRECTLY.
THERE IS NO REASON THE
SURETY HAD TO COME IN AND
CARRY THE BALL FOR THE
INSURED.
AND THERE'S NO BASIS UNDER
THE ATTORNEYS FEE STATUTE
FOR THOSE FEES TO BE PAID --
>> BUT WHEN YOU HAVE A CLEAR
OBLIGATION TO THE PRINCIPAL,
THAT IS, THAT YOU NOBODY
DISPUTES IT, JUST, YOU KNOW,
THE LOSS HE OCCURS AND
THAT'S IT, YOU'RE ON THE
HOOK, AND, REALLY PUTTING
FORM OVER SUBSTANCE?
>> WELL, I DON'T KNOW IF
IT'S FORM OVER SUBSTANCE BUT
IT IS DEFINITELY CONSTRUING
THE STATUTE ONLY WITHIN THE
BOUNDARIES WHAT THE
LEGISLATURE HAS ENACTED.
PEOPLE ARE ALWAYS DIRECTING
THEIR ACTIVITIES TO COMPLY
WITH, COME WITHIN THE TERMS
OF STATUTES OR NOT.
AND --
>> BUT ISN'T THE UNDERLYING
POLICY THERE TO, THAT OF
PUTTING INSURANCE COMPANIES
ON NOTICE, THAT IF THEY'RE
GOING TO DENY COVERAGE,
THEY'RE FACING THE RISK AND
THE RISK IS NOT ONLY,
EVENTUALLY HAVING TO PAY THE
LOSS, BUT ALSO, IN ESSENCE,
FINANCING THE, SUIT THAT
FORCED THEM TO RECOGNIZE
THEIR RESPONSIBILITY?
>> TO THEIR INSURED, YES.
I THINK EVERYONE'S ON NOTICE
OF THE BOUNT DRIES OF
STATUTE.
I SEE MY TIME IS UP.
>> YOU'VE BEEN VERY CANDID.

WE'RE ALL VERY APPRECIATIVE.
>> THANK YOU.,,
>> CANDID, DOESN'T MEAN BY THE WAY CONCEDING YOUR --
>> MAY IT PLEASE THE COURT. I'M PAT MALONEY I'M REPRESENTING LUMBER MENS MUTUAL CASUALTY.
>> YOU'RE FROM CHICAGO BUT I HAVE A FLORIDA QUESTION TO ASK YOU, I'VE KIND OF LOOKED AND SIDE WHY WASN'T THERE ASSIGNMENTS.
I'M LOOK AT, I HAVE IT IN FONT OF FRONT OF ME I HAVE TO QUOTE.
WELL SETTLED RULE ANTI-ASSIGNMENT PROVISIONS DO NOT PROVIDE ASSIGNMENT AFTER LAW.
WEST LAW, GROCERY, VERSUS TUTONIA FIRE, FROM 1917.
IS IT YOUR POSITION THERE COULDN'T HAVE BEEN ASSIGNMENT OF THE, RYAN'S CAUSE OF ACTION TO, HARTFORD BECAUSE OF, THE ANTI-ASSIGNMENT CLAUSE?
>> I THINK THE WAY THE FACTS IN THIS CASE ARE PRESENTED TO THIS COURT, THAT IS CORRECT.
>> IT COULD NOT HAVE?
>> JUDGE ANSTEAD TO YOUR EARLIER QUESTION --
>> WEST FLORIDA GROCERY WAS A DIFFERENT SITUATION?
>> WHAT WE HAVE TO DO IS DEAL WITH WHAT THE FACTS ARE IN THIS CASE, YOUR HONOR.
IN THIS CASE THERE IS AN A NONASSIGNMENT CLAUSE IN THE POLICY.
THE INSURED HAS NOT ASKED FOR CONSENT FROM THE CARRIER TO WAIVE THAT ANTI-ASSIGNMENT CLAUSE.
AND THIS COURT HAS FOUND, JUDGE ANSTEAD, THAT THOSE, ANTI-ASSIGNMENT CLAUSES ARE DISPOSITIVE.
>> WE HAVE A POSTURE OF AN INSURER DENYING ANY RESPONSIBILITY OR LIABILITY

AND THEN SAYING BY THE WAY,
YOU HAVE TO ASK US FIRST
WHETHER OR NOT YOU CAN AS
SIGN THIS AFTER, A LOSS HAS
OCCURRED?
ISN'T THAT A RATHER INCON
GREWOUS POSITION TO TAKE?
IT'S HEADS I WIN OR TAILS
YOU LOSE PROPOSITION.
>> I DON'T SEE IT AT ALL
THAT WAY.
I THINK WHAT WE'RE WE'RE
LOOKING AT LOSS MAY BE --
>> HOW CAN INSURER DENYING
ANY RESPONSIBILITY THEN
DEMAND THAT THE OTHER SIDE
COMPLY WITH SOME CONDITION
ARE IN A POLICY?
>> WE'RE NOT DENYING THAT
THE INSURED IN THIS CASE HAS
A RIGHT UNDER 627.428.
THAT'S NOT THE ISSUE.
THE ISSUE IS THAT HARTFORD,
AN INSURANCE CARRIER, HAS
NOT OBTAINED AN ASSIGNMENT
OF THOSE RIGHTS, AND, IS NOT
A PARTY THAT'S ENTITLED TO
RECOVER.
>> WHAT ARE THE POLICY
REASONS BEHIND HAVING A
NONAS SIGNABILITY CLAUSE.
WHAT DOES IT SAY ABOUT ALL
THAT.
>> TO PROTECT INSUREDS FROM
INSURANCE CARRIERS THAT'S
THE POLICY THERE IS NO
QUESTION ABOUT THAT.
WE ALSO HAVE TO LOOK AT WHAT
IS, HOW IS THIS COURT
INTERPRETED THAT STATUTE.
AND FIRST OF ALL I THINK THE
CRUX OF THIS CASE, IF I
COULD GO ON FOR JUST ONE OR
TWO MINUTES, IS THAT THE
ANTI-, I'M SORRY THE, FEE
TRANSFER TYPE OF STATUTE IS
AGAINST THE COMMON LAW AND
IS PENAL IN NATURE.
THIS COURT, AND OTHER COURTS
IN THIS STATE HAVE HELD WE
HAVE TO STRICTLY CONSTRUE
SUCH A STATUTE.
AND THE STATUTE HERE VERY
CLEARLY SAYS, THAT THE ONLY

PEOPLE ENTITLED TO RECOVER ARE THE NAMED INSURED UNDER THE INSURANCE POLICY, OR A NAMED BENEFICIARY UNDER THE INSURANCE POLICY.
>> AREN'T WE ALMOST ENCOURAGING FRAUDULENT CONDUCT OR OTHER SUCH CONDUCT IF WE ENFORCE THAT IN THE SENSE THAT, IT'S ALMOST LIKE THE SURETY AND THE INSURED THEN, THE PRINCIPAL, SAY, WELL, BECAUSE THE ATTORNEYS FEES WON'T BE RECOVERABLE, IF YOU GO AHEAD AND PAY US, AND THEN YOU GO AFTER THE INSURANCE COMPANY, THEN, LET'S DELAY THE PAYMENT OR MAKE IT SOMEHOW CONTINUING ANTI-AND THEN WE'LL GO AFTER THE INSURANCE COMPANY AND RECOVER FEES, YOU KNOW THAT ARE NECESSARY TO FORCE, AREN'T WE REALLY COMPLICATING A SITUATION THAT, GOOD SENSE WOULD CALL FOR, NOT COMPLY INDICATING?
-- COMPLICATING?
>> I DON'T THINK SO.
WHAT MY CO-COUNSEL POINTED OUT THE PAYMENT DOESN'T GO TO THE PRINCIPAL.
THE PAYMENT GOES TO THE OBLIGEE.
IN TERMS OF FORM OVER SUBSTANCE THIS IS NOT A FORM OVER SUBSTANCE ISSUE.
THE FACT OF THE MATTER THINK ABOUT THIS FOR A SECOND, THIS VERY CASE, HARTFORD PAID THE OBLIGEE IN THIS CASE.
HARTFORD HAS A COMPLETE RIGHT UNDER THEIR SURETY POLICY TO PURSUE 100% OF THEIR RECOVERY AGAINST THE INSURED.
THEIR INSURED BEING RYAN.
THEY ELECTED NOT TO DO THAT.
I DON'T FLOW WHY BECAUSE, THEY GET 100% OF THEIR RECOVERY IF THEY DO THAT.
NEVER HAVE TO FILE AND

PARTICIPATE IN THIS
DECLARATORY JUDGMENT.
NEVER HAVE TO INCUR
ATTORNEYS FEES.
ONLY REASON WE COULD
POSSIBLY SPECULATE WHY THAT
HAPPENED IS THAT RYAN MAY
NOT BE COLLECTABLE.
MAYBE THEY COULDN'T GET IT
FROM RYAN.
>> THAT IS LEGITIMATE -- NOW
STILL GET THIS ISSUE FROM
THE LAST CASE WHICH WHETHER
THIS KIND OF POLICY WOULD
EVEN, YOU KNOW PAY OFF ON
THIS LOSS.
SO, BURKES IF WE GET BACK TO
IT, IT'S ALWAYS APPROPRIATE,
IT'S NOT LIKE COLLUSION, TO
SAY, JEEZ, EAR IT'S IN
RYAN'S INTEREST AND
HARTFORD'S INTEREST TO GET
COULD HAVEAGE -- COVERAGE
UNDER THE POLICY IF SUCH
COVERAGE EXISTS.
I DON'T SEE WHAT THE PROBLEM
IS?
>> THE PROBLEM IS, JUDGE,
WHEN YOU GET AHEAD OF
YOURSELF SAYING IT'S FORM
OVER SUBSTANCE, IF HARTFORD
NEVER COULD COLLECT IT FROM
RYAN, THEN, IT'S NOT A
MATTER OF WELL, GEE WHIZ,
AREN'T WE FORM OVER
SUBSTANCE REALLY HERE IF WE
DON'T GIVE IT TO RYAN THEY
COULD HAVE DONE IT, HARTFORD
WILL GO GET IT BACK LATER
ON.
THAT'S NOT THE FACT IF
THEY'RE NOT CHECKABLE.
INSURANCE COMPANIES, I'VE
BEEN REPRESENTING INSURANCE
COMPANIES FOR 35 YEARS.
THE INSURANCE COMPANIES
DON'T FILE THE LITIGATION
FOR SAKE OF GETTING FEES
THEY WILL GET IN FILING
LITIGATION ONLY.
>> DID HARTFORD RESPOND TO
THE OBLIGEE IN ATTORNEYS
FEES UNDER 428?
OR DID IT RESPOND --

>> OH, NO.
HARTFORD HASN'T, HARTFORD IS SEEKING RECOVERY UNDER 428.
>> I UNDERSTAND THAT.
BUT WAS THERE A CLAIM MADE BY THE OBLIGEE?
>> YES.
OH THE OBLIGEE, NO.
OBLIGEE IS NOT PART OF THE CLAIM.
CLAIM WAS MADE BY RYAN PRINCIPAL IN THIS CASE AS WELL AS HARTFORD.
>> HARTFORD HAS NOT PAID OUT, THERE L JUST SEEKING ATTORNEYS FEES?
>> CORRECT.
>> FOR GOING ON YOUR POLICY?
>> THEY'RE SEEKING ATTORNEYS FEES THEY'RE DECLARING IN THE DECLARATORY JUDGMENT ACTION.
>> WHEN THEY PAID OUT THEY PAID OUT 4 1/2 MILLION DOLLARS.
>> HE IS THAT THE UNDERLYING ACTION, JUDGE.
WE'RE NOT TALKING ABOUT THAT AT ALL.
THAT HAS NOTHING TO DO WITH THIS CASE.
WE'RE STRICTLY TALKING ABOUT ATTORNEYS FEES GENERATED BY HARTFORD IN THE DECLARATORY JUDGMENT CASE.
THOSE FEES IT'S NOT DISPUTED THE FEES INCURRED IN THE UNDERLYING CASE ARE COVERED BY THE CONTINENTAL POLICY.
>> THERE IS NO QUESTION HERE THAT, HARTFORD HAS AN ABSOLUTE RIGHT TO PURSUE, CONTINENTAL AND LUMBERMENS FOR COVERAGE BECAUSE THEY STOOD IN THE SHOES BY PAYING OUT 4 1/2 MILLION DOLLARS?
>> THE ONLY THING I WOULD DISAGREE WITH THE STANDING IN THE SHOES.
THEY'RE A SUB ROW GEE.
AS A SUBROGEE THEY HAVE RIGHT TO ROOFER EVERRECOVER THE ACTION UNTIL 426.
THEY HAVE NO RIGHT TO

RECOVER THE ATTORNEYS FEES.
>> I FORM OVER SUBSTANCE COMES THIS WAY.
RYAN AND HARTFORD IN THE CASE.
NOW THEY KNOW NEXT TIME HARTFORD CAN'T GET THEIR ATTORNEY FEES.
INSTEAD OF HARTFORD TAKING BY HARTFORD'S THEIR ATTORNEY THEY GO NOW, RYAN'S ATTORNEY DOES TWICE AS MUCH, AND YOU'RE STILL ON THE HOOK FOR FEES.
IN OTHER WORDS UNDER ANY SITUATION, THERE CAN'T BE I WOULD THINK JUST BECAUSE HARTFORD AND RYAN ARE IN THERE THEY CAN BOTH RECOVER FOR DUPLICATIVE TIME FOR PROSECUTING A CASE.
I DON'T SEE HOW IN THE END ONCE YOU GET BY THE STATUTE THERE IS REALLY ANYTHING, QUOTE, OF A PROBLEMATIC NATURE ESPECIALLY IF YOU DON'T ALLOW THE ASSIGNMENT TO BEGIN WITH.
AND HAVING BOTH SUB ROGEE AND INSURED ENTITLED TO RECOVER THEIR ATTORNEYS FEES.
>> I WOULD RESPOND IN THIS RESPECT.
THAT,,
HARTFORD EVEN AS AS SIGN EIN THIS CASE.
IS STILL INSURED.
NO COURT IN THIS CASE ALLOWED INSURANCE CARRIER TO RECOVER FEES UNDER 428.
NO COURT IN THIS STATE ALLOWED SURETY AS SUB ROW DEOR OTHER BUYS WISE TO RECOVER A FEES UNDER THAT STATUTE.
THIS COURT WOULD HAVE TO OVERTURN A BODY OF LAW, THIS STATE AND OTHER APPELLATE COURTS IN THE STATE HAVE FOUND CARRIERS ARE NOT ALLOWED TO RECOVER UNDER THE STATUTE AND INSUREDS, AND SURETIES ARE INSURERS.

>> BUT THOSE CASES DEAL WITH DISTINCTLY DIFFERENT SITUATIONS ALTHOUGH HARTFORD IS AN INSURER, IN THIS SITUATION IT'S NOT SEEKING FEES BASED ON ITS STATUS AS AN INSURER.
IT'S SEEKING FEES AS STATUS AS SOMEBODY WHO SUBROGATED TO THE RIGHTS OF RYAN.
>> CORRECT N WESTERN WORLD AND CITY OF OPA LOCKA ADDRESSED THAT ISSUE.
SAYING A MERE SUBROGEE DOES NOT QUALIFY AS A PERSON WHO CAN OBTAIN FEES UNDER THE STATUTE.
THE STATUTE COULD EASILY BE AMENDED.
STATUTE DOESN'T SAY A NAMED INSURED, NAMED BENEFICIARY OR A SUBROGEE.
>> BUT IT DOESN'T SAY AN AS SIGNEE EITHER.
>> ASSIGNEE IS DIRECT RELATIONSHIP.
SUBROGEE IS NOT.
DID I SAVE ANY TIME?
>> YOU'VE SAVED 11 SECONDS.
>> THAT'S NOT ENOUGH EXCEPT FOR ME TO SAY THANK YOU TO THIS COURT.
I APPRECIATE THE OPPORTUNITY.
PRIVILEGE TO ADDRESS YOU AND I APPRECIATE YOU GRANTING MY MOTION TO BE ADMITTED PRO HOC.
>> THANK YOU.
>> MAY IT PLEASE THE COURT, STEVE.
SHEMBER.
REPRESENT THE SURETY HARTFORD.
MY PARTNER DUANE, DIKERT IS WITH ME.
KEY POINT TRYING TO GET TO THE NUB OF IT, IS THE FACT THAT THE NAMED INSURED UNDER THEIR INSURANCE POLICIES IS RYAN.
THAT NAMED INSURED, RYAN, IS LIABLE IN THIS CASE, IN THE TRIAL COURT, IN THE SECOND

DISTRICT AND WHEN WE GO BACK DOWN TO THE TRIAL COURT ON REMAND FOR EVERY PENNY OF THE LEGAL FEES THAT'S GENERATED IN THIS CASE.
>> THAT'S A POLICY ARGUMENT. BUT WE GOT A STATUTE THAT DOESN'T GIVE YOU AS, A, SURETY WHO IS SUBROGATED, RIGHTS. WHERE IN THE CASE LAW, YOU LOOK AT, YOU KNOW THE ROBERTS VERSUS CARTER IT SAYS THERE HAS TO BE AN ASSIGNMENT.
I'M HAVING TROUBLE GETTING, WHETHER IT'S A GOOD IDEA OR NOT, GETTING PAST THE PLAIN LANGUAGE OF THE STATUTE ABSENT AN ASSIGNMENT.
NOW, I, I WASN'T AWARE, NOT SURE I AGREE WITH IT, THAT YOU COULDN'T HAVE GOTTEN AS ASSIGNMENT WITHOUT THEIR CONSENT.
ADDRESS THE ISSUE DIFFERENCE BETWEEN A WRITTEN ASSIGNMENT WHERE YOU'VE GOTTEN THE RIGHTS ASSIGNED AND SUBROGATION AS TO WHY, THE ATTORNEYS FEES STATUTE WOULD GIVE YOU THOSE RIGHTS IF WE'VE SAID IT HAS TO BE STRICTLY CONSTRUED?
>> WELL, I THINK THERE ARE A COUPLE OF ANSWERS TO THAT. FIRST OF ALL, I THINK, IF, AS, JUDGE WALLACE HAS POINTED OUT, WE DO IN FACT STAND IN THE SHOES OF RYAN --
>> THEY'RE IN THE SAME -- BUT THEY'RE STILL IN THE SHOES.
UNLIKE A TRUE SUBROGATION SITUATION WHERE, THE PERSON WHO IS IN THE SHOES BEFORE STEPS OUT OF THE SHOES, RYAN STAYED IN THE SHOES.
THERE IS TWO PEOPLE IN RYAN'S SHOES.
>> THAT'S CORRECT.
THAT'S A PROBLEM BECAUSE, RYAN HAS PAID SOME OF THE DAMAGES IN THIS CASE AND

RYAN HAS ALSO INCURRED SOME ATTORNEYS FEES IN THIS CASE. AND SO, THE, THE PROBLEM WITH AN ASSIGNMENT UNDER THOSE CIRCUMSTANCES IS THAT IF RYAN ASSIGNS ALL ITS RIGHTS THEN IT'S GIVING UP ITS RIGHTS TO RECOUP THE DAMAGES IT HAS PAID AND THE ATTORNEYS FEES IT HAS INCURRED WHICH IS TOTALLY INEQUITY!!IABLE.
>> STOP RIGHT THERE, JUST FOR MY BENEFIT, SEPARATE OUT WHAT WE'RE TALKING ABOUT AS FAR AS RYAN HAS PAID OUT. RYAN PAID OUT TO THE OBLIGEE?
>> YES, SIR.
I'M SORRY.
LET ME MAKE THAT CLEAR.
>> AND THESE ARE ATTORNEYS FEES THAT RYAN INCURRED IN DEFENDING AGAINST THE CLAIM OF THE OBLIGEE THAT YOU'RE TALKING ABOUT THAT RYAN INCURRED?
>> NO, SIR -- YES, THEY HAVE INCURRED THOSE FEES BUT NOBODY IS DISPUTING --
>> DID RYAN OWE ANY FEES UNDER THE CONSTRUCTION CONTRACT TO THE OBLIGEE?
>> YES.
WELL --
>> NO OR ONLY THE BONDING COMPANY OWED AN ATTORNEYS FEES ON THE CLAIM OF THE OBLIGEE?
>> CORRECT.
>> UNDER 428.
CORRECT?
>> YES.
RYAN DID NOT PAY ATTORNEYS FEES TO THE OBLIGEE IN THE UNDERLYING ACTION.
>> YOU AGREE ONLY ATTORNEYS FEES WE'RE TALKING ABOUT IS AS CORRECTLY STATED BY YOUR OPPONENT, THAT IS THE ATTORNEYS FEES IN THE DEC ACTION?
>> YES, SIR.
THAT'S CORRECT EXACTLY

RIGHT.
>> COME BACK AND ADDRESS PIECE BY PIECE, YOU KNOW WE HAVE ENOUGH DIFFICULTY WITH AMBIGUOUS LEGISLATION.
>> I'M SORRY, LET ME -- RYAN HAS INCURRED ATTORNEYS FEES IN THIS CASE.
>> IN THIS CASE, RIGHT.
>> THEY OCCURRED THEM IN THE UNDERLYING CASE BUT --
>> THIS CASE.
>> THIS CASE RIGHT BEFORE YOU RIGHT NOW.
>> COMING BACK TO PIECE BY PIECE, AS I WAS SAYING WE HAVE ENOUGH DIFFICULTY, WITH AMBIGUOUS LEGISLATION.
ALL RIGHT?
THE LEGISLATURE HAS MADE IT VERY CLEAR HERE WHO IS ENTITLED TO ATTORNEYS FEES.
AND WE'VE THEN BACKED THAT UP, AND SAID, SINCE THAT'S NOT THE ORDINARY RULE, THAT WE'RE GOING TO CONSTRUE STATUTES LIKE THAT, OR PROVISIONS LIKE, VERY, STRICTLY.
SO, WE'VE GOT, AN EXPRESS PROVISION IN A STATUTE SAYS ONLY, THE, INSURED AND WE HAVE THAT BACKED UP, BY, CASE LAW, THAT SAYS, WE'RE GOING TO STRICTLY CONSTRUE THAT.
HOW DO YOU GET OVER THOSE HURDLES AS NICE A GUY AS YOU ARE AND YOUR CLIENT, AND THE FACTS AND CIRCUMSTANCES OF THE CASE AND ALL THE EQUITIES AND ALL THAT?
THIS IS STRICTLY A LEGAL ISSUE.
SO HOW DO WE GET OVER THOSE HURDLES?.
>> WITH RESPECT, JUDGE, FIRST OF ALL I THINK AGAIN, THIS COURT HAS RECOGNIZED THAT, AN AS SIGNEOF RIGHTS UNDER THE POLICY EVEN THOUGH THE STATUTE SAYS NOTHING ABOUT ASSIGNEES.
THAT THEY GET TO ASSERT TO

SAME RIGHTS UNDER THE STATUTE.
>> YOU'RE NOT AN ASSIGN E.
>> I THINK WE ARE BUT I DON'T SEE A DISCERNIBLE, DIFFERENCE OTHER THAN EXALTING FORM OVER SUBSTANCE BETWEEN AN ASSIGNEE AND BROAD FORM OF EQUITIABLE SUBROGEE THAT THE SURETY HAS.
NOT INSURANCE WHERE INSURANCE COMPANY GETS TO GO AFTER THE WRONGDOER, A SURETY HAS ALL RIGHTS OF THE INSURED UNDER INSURANCE POLICIES, RECEIVEABLES, CONTRACTS, OF ANY SORT WHATSOEVER.
WE STEP INTO THE SHOES OF OUR PRINCIPAL FOR PURPOSES OF ASSERTING THAT PRINCIPAL'S RIGHTS.
I WOULD ASSERT THAT THAT LEGALLY THERE'S, THERE'S NO DIFFERENCE BETWEEN AN ASSIGNMENT AND THAT BROAD FORM OF SUBROGATION THAT THE SURETY HAS.
NOW IN ADDITION TO THAT, JUDGE, AS WE POINTED OUT IN OUR BRIEF WE HAVE AN ASSIGNMENT, A WRITTEN ASSIGNMENT FROM THE INSURED, RYAN, OF ALL RIGHTS ARISING OUT OF OR RELATED TO THE BONDED CONTRACT.
>> NOW YOU'RE TALKING ABOUT THE WRITTEN INDEMNITY AGREEMENT?
>> YES, THAT IS THE GIA.
YES, MA'AM..
>> BUT ISN'T THAT AN ASSIGNMENT IN THERE, FIRST OF ALL THAT'S WHERE THE ANTI-ASSIGNMENT STATUTE COMES INTO EFFECT AND THEY COULDN'T AS SIGN AHEAD OF TIME WHATEVER THEIR RIGHTS WOULD BE IN TERMS OF --
>> WITH RESPECT, JUDGE, THE ASSIGNMENT IS SIGNED AHEAD OF TIME BUT IT DOESN'T GO INTO EFFECT UNTIL THERE'S

BEEN A CLAIM MADE OR A DEFAULT.
IN OTHER WORDS, WE DON'T, WE DON'T, THAT ASSIGNMENT DOESN'T BELONG TO US SO LONG AS THERE, AS LONG AS THE CONTRACTOR'S NOT IN DEFAULT, THERE ARE NO CLAIMS MADE AGAINST THE BOND, WE DON'T OWN ANY OF THOSE CONTRACTUAL RIGHTS.
OUR RIGHTS, OUR ASSIGNMENT RIGHTS KICK IN AT THE TIME THE CLAIM WAS MADE.
SO WE WOULD SAY THAT'S, I MEAN THE CLAIM HAS BEEN MADE AND THEREFORE, THE ASSIGNMENT IS POST-THE CLAIM.
>> I GUESS WHAT I'M SAYING -- COULD YOU GO BACK TO ONE THING I WANT TO MAKE SURE ABOUT IN THE RECORD.
I HAVE THAT YOU PAID OUT APPROXIMATELY $4.7 MILLION IN CLAIMS FEES AND EXPENSES?.
>> THE SURETY AND RYAN COME BIND PAID OUT.
>> AS COMBINED.
DOES THE RECORD REFLECT HOW MUCH RYAN PAID OF 4.7 MILLION?
>> THE RECORD DOES NOT REFLECT THAT.
>> BUT IT DOES REFLECT THAT THEY BOTH PAID, BOTH HARTFORD AND RYAN PAID?
>> YES THE SETTLEMENT AGREEMENT SHOWS THAT THEY BOTH PAID.
IT'S A CONFIDENTIAL SETTLEMENT AGREEMENT BUT --
>> ONE SEALED, WERE YOU ON THE FIRST CASE?
>> I HEARD ALL THAT, JUDGE.
I WAS TOTALLY CONFUSED.
>> OKAY, BUT SO ON ONE HAND YOU SAID IT WOULDN'T BE FAIR TO HAVE AN ASSIGNMENT BECAUSE RYAN STILL HAS A RIGHT TO PURSUE ITS PORTION OF WHATEVER IT CONFIDENTIALLY PAID OUT.

AND ON THE OTHER HAND,
YOU'RE SAYING, BUT THERE WAS
AN ASSIGNMENT.
SO I'M HAVING A LITTLE
TROUBLE WITH SAYING THOSE
TWO THINGS AND, RECONCILING
THEM.
>> FRANKLY, JUDGE, IT'S AN
EITHER OR SITUATION.
OUR BASIC ARGUMENT HERE IS
THAT THE SURETY, BECAUSE OF
ITS UNIQUE AND DUANE STATUS
AS A SURETY AND, EQUITIABLE
SUBROGATION RIGHTS IT HOLDS
SHOULD BE ENTITLED TO STAND
IN THE SHOES OF ITS
PRINCIPAL WITH RESPECT TO
ASSERTING ALL CLAIMS UNDER
AN INSURANCE POLICY, NOT
JUST CLAIMS FOR THE DAMAGES
UNDER THE POLICY --
>> BUT YOU'RE MAKING THIS
CLAIM AS A SUBROGEE.
YOU'RE NOT MAKING IT AS A
ASSIGNEE.
AT LEAST THAT'S WHERE THE
SECOND DISTRICT CAME DOWN.
THE SECOND DISTRICT
RECOGNIZED A RIGHT OF
SUBROGATION HERE.
>> THAT'S EXACTLY WHAT THE
SECOND DISTRICT SAID, JUDGE.
THAT'S OUR FUNDAMENTAL
POSITION IN THIS CASE, IS
THAT BECAUSE WE ARE A
SUBROGEE, WE ARE ENTITLED TO
ASSERT THE SAME RIGHTS AS
OUR PRINCIPAL WHO IS THE
NAMED INSURED UNDER THESE
POLICIES.
AND THAT MEANS ALL RIGHTS,
NOT JUST SOME OF THE RIGHTS,
ALL RIGHTS WHICH INCLUDES
THE RIGHT TO ASSERT A CLAIM
FOR ATTORNEY'S FEES.
AND OUR POSITION IS, IT
WOULD BE INEQUITY!!IABLE NOT TO
ALLOW THAT BECAUSE IN THE
END IT'S THE NAMED INSURED
UNDER THE POLICY WHO IS
GOING TO END UP PAYING IT IN
THE END.
>> OKAY.
>> DOES THE CONCEPT OF

SUBROGATION FLOW EXCLUSIVELY
BECAUSE THE CONTRACTUAL
RELATIONSHIP THAT YOU, YOUR
CLIENT HAS, WITH RYAN?
OR IS THE CONCEPT OF
SUBROGATION OR EQUITIABLE
SUBROGATION MUCH BROADER
THAN THAT?
>> IT'S MUCH BROADER THAN
THAT, JUDGE LEWIS.
>> WHERE DOES THAT TAKE US?
TELL ME YOUR UNDERSTANDING
OF WHERE SUBROGATION OR
EQUITIABLE SUBROGATION GOES.
IS IT A SITUATION WHERE
THERE THERE ISING THAT ONE
PERSON OUGHT TO PAY BUT
SOMEONE ELSE PAYS IT AND
THEN YOU CAN THEREFORE,
EXERCISE THE RIGHTS OF THE
PERSON WHO OUGHT TO HAVE
PAID?
IS THAT WHERE WE GO INTO?
>> WELL THE, SEMINAL CASES,
RELIANCE VERSUS PEARL MAN
YOU CITED THAT IN THE DADELAND
DECISION I KNOW YOU KNOW
THAT CASE.
FEW THINGS ARE MORE
WELL-SETTLED IN THE LAW FOR
RIGHT OF SURETY TO BE
SUBROGATED.
>> RIGHT.
>> TO THE EXTENT IT'S MADE
PAYMENT.
>> YOU'RE SAYING SURETY
ONLY?
THERE IS NOTHING ELSE TO
OPEN THIS UP TO ANY AREA OF
THE LAW SURETY ONLY?
>> STRICTLY SURETIES.
BECAUSE OF THEIR UNIQUE
STATUS AS GUARANTORS OF
THESE OBLIGATIONS.
THAT'S WHY PEARLMAN FOR
EXAMPLE GIVES SURETY RIGHTS
AHEAD OF THE IRS SO THEY ARE
VERY BROAD RIGHTS.
>> THAT'S WHERE I AM
STUMBLING ON, TRYING TO,
BREAK THIS DOWN INTO WHAT
WE'RE ACTUALLY DEALING WITH,
BECAUSE SEEMS TO ME, THAT
THERE IS A DIFFERENCE

BETWEEN, WHAT THE SURETY IS SUBROGATED TO AS TO WHAT THE PRINCIPAL HAS RESPONSIBILITY TO THEABLELY GEE TO PAY.
-- ON LA GEE.
AND WHAT THE SURETY IS TRYING TO COME FROM A THIRD PARTY INSURER.
AND, AND THAT, WHERE DOES THE INTEREST OF -- HOW DOES SUBROGATION, FIT WITHIN THE STATUTE FOR ATTORNEYS FEES WHEN YOU'RE DEALING WITH IN IT THAT CONCEPT?
>> IF THE ANSWER, IF YOU UNDERSTAND YOUR QUESTION, THE ANSWER IS, IN THE END, THE STATUTE, THE POLICY BEHIND THE STATUTE AS MR. MALONEY SAID, IS TO COMPENSATE INSUREDS WHEN THEY HAVE TO SUE THEIR INSURERS.
AND IN THIS CASE, RYAN BECAUSE, THE NAMED INSURED BECAUSE THEY'RE GOING TO BE ULTIMATELY LIABLE FOR THE FEES, SHOULD BE ENTITLED TO BE COMPENSATED UNDER THE ATTORNEYS FEE STATUTE.
>> WOULD THEY BE OBLIGATED FOR THE FEES YOU TAKING OFF AND, CHASING ON BEHALF OF HARTFORD SOME TYPE OF INSURANCE CLAIM TO COLLECT FOR HARTFORD?
>> OH, YES, SIR.
RYAN IS ABSOLUTELY LIABLE TO HARTFORD FOR ALL THE FEES HARTFORD INCURS IN PURSUING REMEDIES IN THIS CASE.
>> UNDER THE CONTRACT?
>> UNDER THE CONTRACT AND AT COMMON LAW.
>> UNDER COMMON LAW.
>> THEY WOULD BE HAPPIER TO GET, I MEAN IT STILL BENEFITS THE, PRINCIPAL BECAUSE IF YOU CAN RECOVER, SAY YOU PAID MOST OF THE 4 1/2 MILLION DOLLARS, FOR THEM TO OH, BUT THEY HAVE TO PAY THE FEES, IT'S BETTER, YOU STILL BENEFITED THEM

FROM, GOING AFTER LUMBER MEN'S AND CONTINENTAL BEFORE YOU TRY TO GET THE --
>> ABSOLUTELY.
>> BEFORE AS WE'RE GOING TO START CRYING --
>> KRE WE CAN PURSUE REMEDIES, IN FACT WE ARE PURSUING REMEDIES AGAINST RYAN BUT WE'RE ALSO PURSUING THESE REMEDIES HERE AND OBVIOUSLY WE'RE NOT GOING TO COLLECT TWICE.
BUT WE FEEL WE'RE GOING TO PURSUE THESE REMEDIES --
>> OF COURSE IF YOU TAKE THE LAST SET OF ARGUMENTS A SURETY WOULD NEVER EVER BE IN A POSITION OF PURSUING A UNDER A GENERAL LIABILITY POLICY.
SO I GUESS HARTFORD, AT LEAST HARTFORD FIRE THINKS THERE ARE SITUATIONS WHERE THERE CAN BE COVERAGE UNDER THESE, THESE GENERAL LIABILITY POLICIES WE'RE TALKING ABOUT HERE?
>> THIS CASE, WHAT THE, SECOND DCA HELD THIS CASE FALLS WITHIN THE SUBCONTRACTOR EXCEPTION OF J.S.U.B. SO THAT'S WHERE WE ARE.
>> YOU'VE, HERE AS HARTFORD FIRE ASSURETY BUT HARTFORD I'M ASSUMING, WRITE GENERAL LIABILITY POLICIES?
>> YES, SIR.
I MEAN, YES, MA'AM..
>> SO IF WE, I ISSUE WHETHER A SURETY, IF WE DECIDE IN J.S.U.B. THERE IS NO SUCH THING AS COVERAGE FOR SOMETHING THAT IS UNDER A CONTRACT, THEN YOU DON'T HAVE TO WORRY ABOUT IT AT ALL.
I MEAN THAT'S WHY WE PUT THAT CASE FIRST.
>> THERE'S AN INTERESTING QUESTION, JUDGE BECAUSE THE, THE, ISSUE OF COVERAGE IN THIS CASE, HAS BEEN FINALLY

DETERMINED.
I MEAN WE'RE GOING FAR AFIELD HERE.
I DON'T, IT MAY, THAT, THE ISSUE OF COVERAGE IN THIS CASE MAY BE FINAL.
AND --
>> WE WON'T HAVE TO WORRY -- YOU'RE RIGHT.
>> THAT'S A WHOLE OTHER ISSUE.
>> THE CASE CITES J.S.U.B. SO IT HAS TO HINGE ON WHAT WE DO.
IT SEEMS TO ME THAT THE ARGUEMENT YOU'RE MAKING THAT SURETIES WHO ARE SUBROGATED, UNLIKE OTHER SUBROGATION SITUATIONS IT'S A GOOD POLICY FOR THEM TO GET THEIR ATTORNEYS FEES STRIKES ME AS SOMETHING THAT THE LEGISLATURE SHOULD CONSIDER, NOT THIS COURT BECAUSE IT SEEMS THAT YOU'RE MAKING A, PUBLIC POLICY ARGUMENT ABOUT ALLOCATION OF RISK AND FEES AS OPPOSED TO A, STATUTORY CONSTRUCTION ARGUMENT.
>> WELL, WITH RESPECT, I THINK THE LEGISLATURE'S ALREADY MADE THAT POLICY DECISION WHEN THEY ENACTED 627.428.
BECAUSE THEY SAY, INSUREDS SHOULD BE ABLE TO RECOVER THEIR FEES FROM INSURERS.
AND IN THIS CASE, IF, IF HARTFORD'S FEES ARE NOT AWARDED IN THIS CASE, THE INSURED, RYAN, IS GOING TO END UP STUCK WITH ATTORNEYS FEES FOR PURSUING THIS CLAIM AGAINST THE INSURANCE COMPANY.
THE POLICY BEHIND THE STATUTE IS COMPLETELY FRUSTRATED.
IN FACT NO POLICY IS, IS FOLLOWED BY THAT.
>> YOU MENTIONED A REASON THAT THERE COULDN'T BE, THAT AN ASSIGNMENT WOULD MEAN RYAN COULDN'T PURE SUE THEIR

PORTION OF THE RECOVERY.
DO YOU TAKE THE POSITION YOU COULDN'T HAVE GOTTEN ASSIGNMENT WITHOUT THE CONSENT OF LUMBERMENS AND CONTINENTAL?
>> I AGREE WITH MR. MALONEY'S BRIEF, AND I BELIEVE I THINK YOU'VE STATED THE LAW, THAT THAT ONLY APPLIES PRIOR TO THE TIME THAT THE CLAIM AROSE.
>> SO NOTHING, OTHER THAN THE FACT THAT, RYAN EITHER, AGAIN BECAUSE THEY'RE GOING TO BE ON THE HOOK SO THEY CERTAINLY HAVE AN INTEREST IN PURSUING IT AND BEING PAID OUT WOULD HAVE PREVENTED YOU FROM GETTING AN ASSIGNMENT?
>> FRANKLY JUDGE, THIS WHOLE ISSUE OF ASSIGNMENT DIDN'T COME UP UNTIL WE GOT IN FRONT OF THIS COURT.
>> YOU HAD WESTERN WORLD WAS OUT THERE.
IT'S NOT LIKE IT IS A SURPRISE UNTIL WESTERN WORLD WAS HOW MANY YEARS AGO?
>> WE KNEW WESTERN WORLD WAS THERE.
BUT WESTERN WORLD DOESN'T SAY ANYTHING ABOUT ASSIGNMENTS.
IT JUST SAYS THAT THE SURETY CAN RECOVER FOR DAMAGES.
>> AND IT CAN'T RECOVER FOR ITS ATTORNEYS FEES.
>> CAN'T RECOVER THE FEES.
WE KNEW THAT AND JUDGE WALLACE KNEW THAT.
HE SAID I DISAGREE WITH WESTERN WORLD WHICH IS WHY WE'RE HERE.
BUT THE ISSUE OF THE ASSIGNMENT, HAVING TO GET A WRITTEN ASSIGNMENT, WASN'T RAISED UNTIL WE GOT UP HERE.
>> EXCEPT THAT ROBERTS VERSUS CARTER SAYS THAT, ABSENT AN ASSIGNMENT YOU CAN'T GET ATTORNEYS FEES.
>> I GUESS MY QUESTION, IN

THAT'S WHAT THIS CASE IS ABOUT, ALL WE NEED TO DO GO BACK GIVE RYAN A WRITTEN ASSIGNMENT AGAIN WE'RE ELEVATING FORM OVER SUBSTANCE.
THE IDEA SHOULD BE THAT THE SURETY BECAUSE OF THE BROAD RIGHTS IT ALREADY HAS, SHOULD BE ALLOWED TO STAND IN THE SHOES OF ITS INSURED BECAUSE, BECAUSE OF THE VERY IMPORTANT FACT THAT THE IT'S THE INSURED THAT IS GOING TO END UP PAYING THE FEES IN THE END.
THAT'S THE KEY DIFFERENCE BETWEEN THIS CASE AND OPA LOCKA, WHICH IS JUST AN INSURANCE COMPANY CASE THERE.
WAS NO INDEMNITY OBLIGATION IN THE OPA LOCKA CASE.
SO ALL OF THE CASES THEY CITE THAT INVOLVE INSURANCE CARRIERS DON'T APPLY BECAUSE THERE HAVE IS NO INDEMNITY AGREEMENT BETWEEN THE PRINCIPAL AND THE, THE INSURED AND THE INSURER AS THERE IS IN THIS CASE.
ONE REAL, LAST QUICK COMMENT.
THE FINAL REMARK WAS THIS IS JUST A, ARGUMENT BETWEEN TWO INSURERS.
WITH ALL DUE RESPECT WE BEG TO DIFFER.
THIS COURT HAS HELD VERY RECENTLY, IT'S AWKWARD TO TELL YOU WHAT YOU'VE HELD IN A VERY RECENT DECISION BUT THAT, CERTAINLY FOR MANY, MANY PURPOSES UNDER THE INSURANCE CODE, SURETIES ARE CONSIDERED TO BE INSURERS.
HOWEVER THE COURT ALSO SAID, THE SURETY RELATIONSHIP POSSESSES CHARACTERISTICS THAT ARE UNIQUE AND DISTINCT FROM THE TRADITIONAL LIABILITY INSURANCE RELATIONSHIP AND THEREFORE, OUR ANALYSIS DOES NOT END

HERE.
AND AS I READ YOUR OPINION YOU WENT ON TO SAY, BECAUSE OF THE UNIQUE AND DISTINCT DIFFERENCES BETWEEN SURETISHIP AND TRADITIONAL INSURANCE IN MANY INSTANCES THOSE DIFFERENCES HAVE TO BE ANALYZED.
IN FACT YOU SAY, AN ASSESSMENT OF THE ACTUAL NATURE OF THE SURETY RELATIONSHIP AND ITS CLASSIFICATION IN OUR STATUTORY PROVISION THAT'S REQUIRED.
AND SO, I WOULD SUBMIT TO YOU, FOLLOWING YOUR DECISION IN DADE LAND, IF YOU ANALYZE THE UNIQUE AND DISTINCT CHARACTERISTICS OF SURETISHIP IN THIS CASE.
CARL: IE, THE INDEMNITY OBLIGATION OF THE PRINCIPAL TO PAY BACK THE SURETY YOU IN LIGHT OF THE POLICY IN LIGHT OF 627.428 TO COMPENSATE INSUREDS WHEN THEY HAVE TO SUE INSURERS, THAT DISTINCT RELATIONSHIP MANDATES THAT YOU AFFIRM JUDGE WALLACE IN THIS CASE.
>> MY CONCERN IS RYAN'S IN TERMS OF THAT ARGUMENT SEEMS TO BE ONE THAT RYAN SHOULD BE HERE MAKING, NOT HARTFORD SINCE, AGAIN, YOU WILL ASSUMING THEY'RE SOLVENT GET YOUR ATTORNEYS FEES BACK FROM RYAN.
THEY'RE JUST NOT HERE BECAUSE, DO WE KNOW WHY IN THE RECORD WHY THEY'RE NOT UP HERE AS AN INTERESTED PARTY?
>> MR. WOODSON'S THOUGHT WE COULD CARRY THE BALL.
>> SO NO ATTORNEYS FEES FOR THEM ON APPEAL, HUH?
>> THINK THEY'RE TRYING TO SAVE SOME, JUDGE.
UNLESS THE COURT HAS FURTHER QUESTIONS, THANK YOU VERY MUCH.

>> THANK YOU.
LET'S SEE WE HAVE A LITTLE BIT OF REBUTTAL TIME LEFT, MR. MARSHALL.
YES.
>> JUST VERY BRIEFLY, A COUPLE OF QUICK POINTS.
FIRST OF ALL, WHETHER RYAN MUST REIMBURSE HARTFORD FOR THESE FEES IS, AT LEAST QUESTIONABLE.
AS WE CITED IN OUR BRIEF.
WHETHER, THE ISSUE IS WHETHER IT'S A NECESSARY ADJUNCT TO HARTFORD'S SURETISHIP FUNCTIONS PURSUING THESE FEES ON THEIR OWN BEHALF AGAINST A THIRD PARTY, TGL CARRIER WE ARGUE IT'S NOT.
THAT IT'S A FIGHT BETWEEN HARTFORD AND RYAN.
UNDER THE BARNETT CASE WE CITED IN OUR REPLY BRIEF IT HAS TO BE A NECESSARY ADJUNCT OR IT WOULD NOT BE RECOVERABLE.
AND THE OTHER POINT IS, WHETHER RYAN IS LEFT HOLDING THE BAG, IS ALSO QUESTIONABLE.
HARTFORD'S OWN BRIEF ARGUES, THAT, ANY FEES RYAN HAD TO PAY HARTFORD, ANY FEES THAT, THAT RYAN HAD TO REIMBURSE HARTFORD FOR, WOULD BE, CONSIDERED, PART OF THEIR PROPERTY LOSS UNDER THIS CGL CARRIER, UNDER THE CGL POLICY SO THEY WOULD BE REIMBURSED BY THE POLICY THIS WAS THEIR THIRD PARTY CLAIMANT THEORY OF RECOVERY, NUMBER THREE, IN THEIR BRIEF.
SO UNDER THAT CIRCUMSTANCE RYAN WOULD NOT BE LEFT HOLDING THE BAG AND THERE IS NO REASON HERE TO CONTORT THE ATTORNEYS FEES STATUTE BEYOND RECOGNITION TO TRY TO SERVE THAT POLICY WHICH ISN'T REALLY PRESENT THIS DAY.

THANK YOU.
>> THANK YOU VERY MUCH.
WE APPRECIATE THE
ARGUEMENTS.
WE'LL TAKE THE CASE UNDER
ADVISEMENT.
THE COURT WILL STAND IN
RECESS UNTIL WEDNESDAY
MORNING.
>> PLEASE RISE.,,
>> THE COURT IS NOW
ADJOURNED.,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,