

**FIFTEENTH ANNUAL
NORTHEAST SURETY AND FIDELITY
CLAIMS CONFERENCE**

SEPTEMBER 30 - OCTOBER 1, 2004

**SUING A SURETY FOR BAD FAITH IN FLORIDA? NOT SO
FAST...**

Dadeland Station Assoc., Ltd. v. St. Paul Fire & Marine Ins. Co.

PRESENTED BY:

**DUANE A. DAIKER & TAMMY N. GIROUX
SHUMAKER LOOP & KENDRICK, LLP**

Bank of America Plaza
101 East Kennedy Boulevard
Tampa, Florida 33602

(813) 229-7600

(813) 229-1660

Suing a Surety for Bad Faith in Florida? Not so Fast...

Dadeland Station Assoc., Ltd. v. St. Paul Fire & Marine Ins. Co.

In *Dadeland Station Assoc., Ltd. and Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co. and American Home Assurance Co.*, 2003 U.S. Dist. LEXIS 21527, 16 Fla. L. Weekly Fed. D497 (S.D. Fla. 2003) (copy attached as Appendix A), the District Court for the Southern District of Florida addressed several key issues surrounding a surety's liability for statutory bad faith. In addition to establishing a favorable and well-reasoned precedent for sureties, the District Court also touched on a myriad of issues relevant to surety claims handling. *Dadeland Station* will be a useful authority for surety counsel on any number of issues in Florida, and a detailed examination is worthwhile.

The Parties, the Facts, and the Procedural Background of *Dadeland Station*

The Plaintiff, Dadeland Station Associates, Ltd., is a limited partnership that leased and managed commercial property in Florida, and Dadeland Depot, Inc. was its corporate general partner. *Id.* at 3. The two entities will be referred to collectively as "Dadeland." In August 1995, Dadeland contracted with Walbridge Contracting, Inc. ("Walbridge"), as general contractor, to construct Dadeland Station, a large retail shopping center and parking garage in Miami, Florida. *Id.* The defendant sureties, St. Paul Fire and Marine Insurance Company and American Home Assurance Company, jointly issued a performance bond for the project with a penal sum of \$26.5 million. *Id.* at 3-4.

The performance bond was the standard American Institute of Architects ("AIA") A312 form, and stated, in relevant part:

1. ... the Construction Contract ... is incorporated herein by reference.

...
3. If there is no Owner Default, the Surety's obligation under this Bond shall arise after:
 - 3.1. The Owner has notified the Contractor and the Surety ... that the Owner is considering declaring a Contractor Default and has requested and attempted to arrange a conference with the Contractor and the Surety to be held not later than fifteen days after receipt of such notice to discuss methods of performing the Construction Contract ... and
 - 3.2. The Owner has declared a Contractor Default and formally terminated the Contractor's right to complete the contract ... and
 - 3.3. The Owner has agreed to pay the Balance of the Contract Price to the Surety ...

4. When the Owner has satisfied the conditions of Paragraph 3, the Surety shall promptly and at the Surety's expense take one of the following actions:

4.1. Arrange for the Contractor, with consent of the Owner, to perform and complete the Construction Contract: or

4.2. Undertake to perform and complete the Construction Contract itself ... or

4.3 Obtain bids or negotiated proposals from qualified contractors acceptable to the Owner for a contract for performance and completion of the Construction Contract ...; or

4.4 Waive its right to perform and complete, arrange for completion, or obtain a new contractor and with reasonable promptness under the circumstances:

...

4.4.2. Deny liability in whole or in part and notify the Owner citing the reasons therefor.

Id. at 4-5; see also Appendix B attached.

Walbridge, the general contractor, started work in October 1995 and the facility was opened and leased to commercial tenants in November 1996. *Id.* at 5-6. In mid-1997, Dadeland raised some issues regarding defects in part of the construction, but an amicable resolution was reached, and Dadeland made its final payment in July. *Id.* at 6. Shortly thereafter, in August 1997, the county building department identified numerous building code violations, including violations relating to hurricane resistance. *Id.* at 7. Dadeland reached an agreement with Dade County officials, but then requested that Walbridge remedy the code violations. *Id.* Walbridge, however, denied liability for the code violations, and placed the blame on Dadeland's structural engineer and architect. *Id.* at 7-8.

In September 1997, Dadeland's attorney notified Walbridge and the sureties that Walbridge was in breach of its obligations, and that Dadeland was considering declaring a default, and requested a conference to discuss repair issues. *Id.* at 8. St. Paul, as lead surety, participated in the meeting, and it was agreed that Walbridge would make certain repairs. *Id.* In March 1998, Dadeland commenced arbitration against Walbridge and the sureties before the American Arbitration Association,¹ as required by the construction contract, and sought \$4.4 million in damages. *Id.* at 8-9.

On December 14, 1998, Dadeland's attorney wrote to Walbridge and St. Paul

¹ Walbridge and the sureties filed suit in the Eleventh Judicial Circuit Court of Florida in and for Dade County, seeking to enjoin the arbitration in favor of state court litigation. *Id.* at 13. On April 15, 1999, the injunction was denied and the matter was ordered to arbitration. *Id.* at 13-14.

formally declaring Walbridge in default and terminating the contractor's right to complete the contract or perform corrective work on the project. *Id.* at 11. Dadeland demanded that the sureties "immediately take action in accordance with paragraph 4 of the Bond within five (5) business days of the date of this letter," but also made it clear that Dadeland would not permit the continued use of Walbridge as the contractor. *Id.* St. Paul responded four days later, on December 18, stating that the sureties were conducting an investigation. *Id.* Four days after that, on December 22, Dadeland's attorney made an additional demand upon the sureties to take action or advise of their intended action. *Id.* at 11-12. On January 18, 1999 (just over one month after the formal declaration of default), St. Paul advised Dadeland that Walbridge had performed as required by the contract and was "not responsible for the numerous design defects" on the project.² *Id.* at 12.

On February 19, 1999, during the pendency of the arbitration, Dadeland filed its civil remedy notice of insurer violation with the Florida Department of Insurance,³ alleging claim delay and unfair trade practices. *Id.* Specifically, the notice alleged that the sureties made no investigation, and refused to perform their obligations under the bond. *Id.* at 13. The sureties responded to the Department of Insurance by stating that Walbridge had complied with its contractual responsibilities, and that arbitration was still pending. *Id.*

The arbitration hearing lasted for 35 days and included the testimony of 25 witnesses and over 1,000 exhibits. *Id.* at 14. The arbitration panel made a plethora of findings, allocating the blame for the construction problems among Walbridge, the engineer, the architect, and the county. *Id.* at 15. The arbitration award found a net judgment owed to Dadeland of \$1,156,803.⁴ *Id.* The arbitration award also contained the following curious provision:

5. The Surety is bound to this award to the extent that its principal is obligated under the award and its defenses are denied.

Id.; see also Appendix D attached. The award was specifically deemed to be "in full settlement of all claims and counterclaims submitted to this arbitration." *Id.* Walbridge timely and fully paid the award, including post-judgment interest. *Id.*

Nine months after the award, Dadeland filed the instant suit against the sureties in the Eleventh Judicial Circuit in Florida,⁵ alleging statutory bad faith for refusal to perform their duties under the performance bond. *Id.* at 15-16. The sureties promptly removed the

² Dadeland did file suit against its engineer, Richard Klein, and settled that case with Mr. Klein's liability carrier for \$900,000. *Id.* at 12.

³ Florida Statutes §624.155(3)(a) requires, as a condition precedent to a statutory bad faith action, the filing of such a notice and the expiration of 60 days.

⁴ Specifically, the award stated that Walbridge owed Dadeland the sum of \$1,417,842 for defective workmanship and costs, but that Dadeland owed Walbridge the sum of \$261,039 for contract balances and extra work. *Id.* at 15. Interestingly, Dadeland's damage claims presented at arbitration exceeded \$8 million.

⁵ In its opinion, the *Dadeland Station* Court noted that the instant dispute was likely also subject to the arbitration provision in the construction contract, since the bond incorporated the construction contract by reference. *Id.* at 21. However, since the sureties did not seek to compel arbitration, the Court declined to address this issue. *Id.* at 21-22.

action to Federal District Court for the Southern District of Florida.⁶ *Id.* at 16. The sureties moved to dismiss the action, arguing that Dadeland could not state a claim for bad faith against the sureties under Florida’s insurer civil remedy statute, Florida Statutes §624.155, but the motion was denied. *Id.*

The *Dadeland Station* Court’s Ruling on the Sureties’ Motion for Judgment on the Pleadings or for Summary Judgment

The defendant sureties moved for judgment on the pleadings or for summary judgment as to plaintiff’s bad faith claims.⁷ *Id.* at 20-21. The District Court’s analysis considered three separate issues that merit an in-depth discussion.

Availability of a Statutory Bad Faith Claim Against a Surety in Florida

The District Court questioned whether a performance bond surety’s alleged failure to perform under the bond could conceivably be characterized as a bad faith refusal to settle claims pursuant to the civil remedy provisions of Florida Statutes §624.155(1)(b)(1) (copy attached as Exhibit C). *Id.* at 22. The statute provides that an insurer can be liable for “[n]ot attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests.” FLA. STAT. §624.155(1)(b)(1). Dadeland’s claim against a performance bond surety is clearly not in the nature of a “classic” bad faith scenario.⁸ Although Florida law regulates sureties under the general category of “insurance,” the Court noted there are important distinctions between insurance and suretyship – even if many companies do provide both types of products.⁹ *Id.* at 23-24. Ultimately, the Court phrased the issue as “whether an owner-obligee may sue a surety under the bad-faith insurer provision for its alleged refusal to perform its contractual duties.” *Id.* at 27.

The Southern District of Florida had previously ruled that a principal in a surety relationship was not an “insured” within the meaning of Florida Statutes §624.155(1)(b)(1), but did not decide whether an obligee would be an insured, permitting it to sue a surety for bad-faith claims handling. See *Shannon R. Ginn Constr. Co. v. Reliance Ins. Co.*, 51 F. Supp. 2d 1347, 1352-53 (S.D. Fla. 1999). The *Dadeland Station* court noted that there was nothing in the statutes or current case law to indicate that an obligee’s contractual rights under a performance bond qualify as “claims” within the meaning of the Florida bad faith statute. 2003 U.S. Dist. LEXIS 21527, at 28. Unfortunately, however, the Court declined to address this issue and merely assumed, for the purposes of this opinion, that an owner-obligee can bring such a claim. *Id.* Given the ultimate holding, which was adverse to the owner-obligee’s bad faith claim, the Court did not need to reach this issue, and has

⁶ Diversity jurisdiction was proper pursuant to 28 U.S.C. §1332 because Plaintiff is a citizen of Florida, St. Paul Fire & Marine Insurance Company is a citizen of Minnesota, and American Home Assurance Company is a citizen of Minnesota. *Id.* at 16-17.

⁷ Plaintiff Dadeland also moved for summary judgment in its favor, which was denied. *Id.* at 44-45.

⁸ The Court describes the “classic scenario” as one in which a person injured in a car accident seeks coverage for injuries, but is denied, and ultimately recovers for such injuries pursuant to the policy. *Id.* at 22.

⁹ The *Dadeland Station* opinion contains a few paragraphs of interesting “background” discussion of suretyship and the distinction between suretyship and insurance. *Id.* at 23-28.

therefore left it for future determination.

*Conditions Precedent to a Bad Faith Action Against a Surety
for Refusal to Settle Claims*

The defendant sureties also argued that Dadeland's claim was barred for failure to comply with the required conditions precedent.¹⁰ *Id.* at 28-29. In particular, there must be a judicial determination that the defendant sureties breached the underlying contract and an adjudication of damages in favor of the plaintiff. See, e.g., *Fishkin v. Guardian Life Ins. Co. of Am.*, 22 F. Supp. 2d 1365, 1367 (S.D. Fla. 1998) (holding that plaintiff cannot assert a bad faith claim against his disability insurer until liability and damages have been resolved in the underlying case).

Plaintiffs argued that there had been a finding of liability against the sureties in the underlying arbitration, citing to the rather curious language of the arbitration decision finding the sureties "bound to [the] award" and its surety defenses denied. *Id.* at 30. However, the *Dadeland Station* Court found this to be a misunderstanding of the arbitration panel's decision, meaning only that the sureties would be liable for damages only if Walbridge was unable or unwilling to pay the monetary award. *Id.* In essence, the arbitration award did not impose any liability on the surety that did not already exist under the clear terms of the performance bond. Ultimately, since the arbitration award did not make any finding of liability against the sureties, there was no underlying judicial determination that the sureties had failed to perform, and Dadeland could not demonstrate the condition precedent to have been satisfied.

*Res Judicata as Applied to Dadeland's Arbitration Claim
for Failure to Perform Under Bond*

The Court also considered the defense of res judicata, or claim preclusion, as it related to the previous arbitration. *Id.* at 31-41. The affirmative defense of res judicata, both under federal and Florida law, states that a final judgment on the merits in a previous action is conclusive, and bars any subsequent suit on the same matters. *In re: Piper Aircraft Corp.*, 244 F.3d 1289, 1296 (11th Cir. 2001); *ICC Chem. Corp. v. Freeman*, 640 So. 2d 92, 93 (Fla. 3d DCA 1994) (citing *McGregor v. Provident Trust Co.*, 162 So. 323 (Fla. 1935)). Federal courts have applied the principals of res judicata to arbitrations as well as litigation. See *Greenblatt v. Drexel Burnham Lambert*, 763 F.2d 1352, 1360 (11th Cir. 1985) (holding that an arbitration proceeding that affords the basic elements of an adjudicatory procedure has a res judicata effect).

In the arbitration complaint, Dadeland named the sureties as defendants and clearly alleged the sureties failed to perform their obligations under the performance bonds. *Dadeland Station*, 2003 U.S. Dist. LEXIS 21527, at 28. The facts necessary to maintain an action against the sureties were raised in the arbitration, and relief could have been granted. *Id.* at 36. Nevertheless, the arbitration panel did not find any wrongdoing on the part of the sureties. *Id.* Having had a full opportunity to arbitrate their claims against the

¹⁰ There was no dispute that Dadeland complied with the statutory pre-requisite of sixty days notice of the alleged violation to the Florida Department of Insurance pursuant to Florida Statutes §624.155(2)(a).

surety, Dadeland cannot subsequently assert the same claims in the instant proceeding. *Id.* Therefore, the *Dadeland Station* Court held Dadeland's claims to be barred by the doctrine of res judicata as a result of the previous arbitration. *Id.* at 36-37.

Summary of Holding

The *Dadeland Station* Court held that Dadeland's claim for bad faith refusal to settle pursuant to Florida Statutes §624.155(1)(b)(1) had to fail, as a matter of law, because Dadeland failed to plead or prove a required condition precedent—a judicial determination that the sureties were liable for breach of the performance bond. *Id.* at 44. Furthermore, Dadeland's attempt to assert claims for failure to timely perform their contractual obligations under the performance bond was barred by the doctrine of res judicata since such claims were raised, or could have been raised, in the preceding arbitration. *Id.* Dadeland's motion for summary judgment was denied, the sureties' motion for summary judgment was granted, and final judgment was entered in favor of the sureties. *Id.* at 44-45.

The Lessons of *Dadeland Station*

Although *Dadeland Station* is a federal trial court decision, it provides some guidance on as of yet undetermined issues in Florida in a thoughtful, well-written, and surety-friendly opinion. *Dadeland Station* leaves open the question of whether an owner-obligee may pursue a bad faith claim against a surety for refusal to settle pursuant to Florida Statutes §624.155(1)(b)(1). The Florida Legislature has clearly tried to fit a round peg into a square hole by lumping sureties into the same civil remedies statute with other "insurance" companies. Under Florida law, a surety is an "insurer."¹¹ As such, the civil remedy for "bad faith" provided in Florida Statutes §624.155 seemingly applies equally to sureties as well as other, more traditional, insurers. The problem is that surety bonds are of themselves enforceable contracts that create their own contractual rights,¹² which are much different than a typical property and casualty insurance relationship.

As an example, the common AIA A312 bond form, as used in the *Dadeland Station* project, specifically permits the surety to exercise several options upon the Contractor's default, including: complete with the existing contractor, self-perform the completion, arrange for completion with a new contractor, or *deny liability*. See Appendix B for an example of an AIA A312 performance bond. In essence, the surety has a right to deny liability and *do nothing*, so long as the surety stands ready to pay any liability ultimately found on the part of the contractor principal. This is very different from a typical property and casualty policy, which generally contains a duty to defend the insured. The surety has a contractual right to take no action under a typical A312 bond, so long as it does so clearly and communicates the reasons to the owner in accordance with the bond terms.

This course of action is endorsed by *Dadeland Station*, which confirms that there must be an adjudication against the principal and surety that goes unsatisfied, prior to the

¹¹ Specifically, Florida Statutes §624.03 defines an "insurer" as "every person engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance or of annuity."

¹² Under Florida law, a performance bond is a contract, and the relationship between the parties to the bond is contractual in nature. *American Home Assurance Co. v. Larkin Gen. Hosp.*, 593 So. 2d 195, 198 (Fla. 1992).

accrual of a bad faith claim. This is a contractual right the sureties enjoy that is difficult for plaintiff's lawyers to grasp, coming from a traditional insurance mindset, and further evidence of the strange fit that sureties have in the Florida "bad faith" civil remedy scheme. The *Dadeland Station* opinion should be very beneficial in helping to convince aggressive plaintiffs' attorneys, and other Florida courts, that the options set forth in the bond are truly available to the surety. The *Dadeland Station* plaintiffs believed the surety had an absolute obligation to perform under the bond and to correct the work or tender the money for correction—and that is clearly not the case. Sureties, of course, have a duty to investigate and to communicate with the obligee-owner. And, as a practical matter, a surety should be certain of the correctness of a denial of liability, because the cost to complete will skyrocket if the owner completes the project with an open checkbook looking to pin the total cost on the surety at a later time. However, in the proper situation, a denial of liability, in whole or in part, can be undertaken, with the surety cognizant of the risk, and should not subject the surety to liability for bad faith or to liability beyond the penal sum of the bond.

The surety should also pay close attention to any underlying civil litigation or arbitration to identify a *res judicata* defense. If the surety is a party to, and participates in, an adjudicatory proceeding in which the surety's alleged bad faith could have been raised, a *res judicata* defense may bar the relitigation of such claims in a subsequent action. However, although not addressed by the *Dadeland Station* Court, it appears that the bad faith claim was premature at the time of the arbitration, and was moot before the bad faith action commenced—because it was paid. Participation in an underlying action will not likely give rise to a *res judicata* defense if the claim is premature, or if the surety fails in its obligations following any adjudication of damages against the contractor-principal. The application of a *res judicata* defense as applied in *Dadeland Station* is probably of very limited application.¹³

Conclusion

Aggressive plaintiffs' attorneys are flocking to statutory "bad faith" actions against sureties, in an attempt to treat sureties as a typical insurer, despite the obvious differences. A typical approach to litigating bad faith claims does not fit well within the surety relationship. As always, the advice to the surety counsel remains to "read the bond" and operate reasonably within the contractual framework. A surety has a right to deny liability when appropriate, and should not be found liable for bad faith unless the surety refuses to pay any award ultimately rendered. This is nearly unfathomable to many plaintiffs' lawyers, but is a fair reading of Florida law, as confirmed by *Dadeland Station*. Unfortunately, the question of whether an owner-obligee even has standing to even bring a claim for bad faith refusal to settle under Florida Statutes §624.155 remains unanswered. Hopefully the Florida courts will eventually resolve this issue, or the Florida Legislature will amend the civil remedy provisions to reflect a better understanding of the inherent differences between insurance and suretyship.

¹³ The defendant sureties had actually argued collateral estoppel (not *res judicata*) at summary judgment in the context of issue preclusion – i.e., that the owner-obligee could not claim categories of damages against the surety that were already submitted to, and decided by, the arbitration panel, including damages for repairs and loss of use of monies. *Id.* at 41.

About the Authors

DUANE A. DAIKER is a partner in the Surety & Fidelity practice group of Shumaker, Loop & Kendrick, LLP in Tampa, Florida. Mr. Daiker is a graduate of the University of Florida (B.A., 1991) and the University of Florida College of Law (J.D., 1994). His areas of specialty include surety and fidelity litigation, alternative dispute resolution, and appellate practice. Mr. Daiker is a member of the Florida Bar and the American Bar Association and is admitted to practice in all Federal Courts in Florida. Mr. Daiker can be reached by e-mail at DDaiker@slk-law.com.

TAMMY N. GIROUX is Counsel in the Tampa office of Shumaker, Loop & Kendrick, LLP. Ms. Giroux received a B.S. degree in Finance from Florida State University in 1991, and her J.D. degree from Stetson University College of Law in 1993. Ms. Giroux conducts a broad practice in general commercial litigation, focusing on fidelity and surety litigation, noncompete and trade secret litigation, and other business tort litigation. Ms. Giroux is a member of The Florida Bar, The Colorado Bar, the American Bar Association, and all Federal District Courts in Florida and Colorado. Ms. Giroux can be reached by e-mail at tgiroux@slk-law.com.

SHUMAKER, LOOP & KENDRICK, LLP

101 East Kennedy Blvd., Suite 2800

Tampa, Florida 33602

(813) 227-2329

(813) 229-1660 Facsimile

(800) 677-7661 Toll-Free

www.slk-law.com