SUPREME COURT OF FLORIDA
CASE NO. SC04-1828

DADELAND STATION ASSOCIATES, LTD.,
and DADELAND DEPOT, INC.,

Plaintiffs/Appellants,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY
and AMERICAN HOME ASSURANCE COMPANY,

Defendants/Appellees.

On Appeal From The United States Court of Appeals for the Eleventh Circuit

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ANSWER BRIEF ON THE MERITS OF ST. PAUL FIRE AND MARINE INSURANCE COMPANY and AMERICAN HOME ASSURANCE COMPANY, APPELLEES

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STATEMENT OF THE CASE AND FACTS

The undisputed facts giving rise to the questions certified to this Court are substantially set forth in the Eleventh Circuit's decision. To summarize, Dadeland Station Associates, Ltd. ("Dadeland"), as owner, and Walbridge Contracting, Inc. ("Walbridge"), as contractor, entered into a $26.5 million contract for the construction of a shopping center in Dade County, Florida (the "Contract"). (Eleventh Circuit opinion, "A"-2) St. Paul Fire and Marine Insurance Company and American Home Assurance Company (collectively, "St. Paul"), as sureties, issued a performance bond in the full amount of the Contract (the "Bond"). (Record, "R"137-2) The Bond is the commonly-used form "A312" performance bond promulgated by the American Institute of Architects ("AIA"), which incorporates by reference all of the terms of the Contract and painstakingly spells out all of the parties' rights and remedies in the event of an alleged default. (R137-2-3) Walbridge started work on the Contract in the Fall of 1995; the Project was completed, opened and occupied in November, 1996; and Dadeland made final payment to Walbridge in July, 1997. (R137-3-4)

Shortly thereafter, Dadeland made demand upon Walbridge for the performance of extensive corrective work. (A3) Walbridge agreed to perform certain corrective work, but, consistent with its rights under the Contract, refused to perform additional work that it believed was attributable to design defects by Dadeland's structural

engineer and/or architect or otherwise not its responsibility. (A3-4) With the parties at an impasse with regard to the scope of the corrective work required of Walbridge, on September 24, 1997, Dadeland's attorney advised St. Paul that Dadeland was considering declaring a Contractor Default and, pursuant to paragraph 3.1 of the Bond, requested a conference to discuss the repair issues. (A4)

Following the October, 1997 conference duly attended by St. Paul, the parties remained at an impasse with regard to the scope of Walbridge's responsibility for corrective work. (A4) As a result, Dadeland's attorney advised Walbridge and St. Paul that Dadeland intended to "proceed with arbitration and to make arrangements to have another contractor make the necessary repairs." (A4) At that time, on March 20, 1998, Dadeland commenced an arbitration against Walbridge seeking to recover alleged damages in excess of $4.4 million (increased later to $8 million) caused by the claimed default of Walbridge (the "Arbitration"). (R71, Tab 3 at 80) Dadeland also joined St. Paul as a respondent in the Arbitration seeking the same damages from St. Paul under the Bond. (R137-6)

Dadeland, in the Arbitration, alleged that Walbridge had failed and refused to perform needed repairs and that St. Paul had failed to take any action to correct the deficiencies. (R137-6) Because Dadeland had not terminated Walbridge and complied with the other conditions precedent of the Bond, St. Paul was not yet required to take

any action. (R137-23-26) Moreover, it had become apparent that the parties' contractual dispute was not susceptible to resolution without a full and fair adjudication of the competing claims in accordance with the dispute resolution provisions of the Contract, which were incorporated into the Bond by reference. (A4-6) (R71, Tab 2)

During the pendency of the Arbitration, and after it had commenced performance of the repair work itself, by letter dated December 14, 1998, Dadeland belatedly undertook to comply with the conditions precedent of the Bond. (R137-7)(R71, Tab 17) On or about January 18, 1999, St. Paul advised Dadeland's counsel that it was St. Paul's position that Walbridge had performed, or was performing, its obligations under the Contract and that Walbridge was not responsible for the numerous design defects on the project. (R137-8) St. Paul denied liability under the Bond, thereby electing the option expressly granted to it at paragraph 4.4.2. (R137-8) This election was made at a time when Dadeland and Walbridge had already submitted their complex dispute to arbitration, and any contrary election on the part of St. Paul would have preempted its principal's right to arbitrate its dispute. (A4-5)

On February 17, 1999, during the Arbitration, Dadeland filed a civil remedy notice of insurer violation with the Department of Insurance (the "Department"). (A8) St. Paul promptly responded to the Department on March 3, 1999, advising: (a) that

it had investigated the matter and determined that the project covered by the Bond was complete and occupied; (b) that its principal, Walbridge, disputed responsibility for corrective work which appeared to be the result of design problems or which was otherwise the responsibility of Dadeland; and (c) that this dispute was currently the subject of an arbitration proceeding pursuant to the terms of the Contract. (A8-9)

The Arbitration ended in April 2000 after thirty-five days of hearings, involving the testimony of twenty-five witnesses and the introduction of over one thousand exhibits. (A-6) Following conclusion of the hearings, the arbitration panel denied the bulk of Dadeland's $8 million damages claim, finding fault with the conduct of each of Dadeland, its architect, its engineer and Walbridge.[1] (R1, Exhibit 1-G)(R137-9)

The arbitrators entered an award stating that Walbridge owed Dadeland $1,417,842 for defective workmanship and other costs, and that Dadeland owed Walbridge $261,039 for contract balances and extra work, so that Walbridge's liability was less than $1.2 million. (R1, Exhibit 1-G) The award also provided that St. Paul "is bound to this award to the extent that its principal is obligated under the award and

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[1] Dadeland sued its engineer and settled that case for approximately $900,000, which came from the policy limits of the engineer's liability insurance carrier. Dadeland did not sue the architect who did not have any insurance coverage. (R137-8)

its defenses are denied." *Id.* Walbridge paid the entire net amount of the award against it with interest. (R137-10) On February 28, 2001, Dadeland filed this action, alleging that St. Paul acted in "bad faith" and "totally ignored" its "duties under the terms of the performance bond" and seeking" (1) Costs of repairing inadequate work on the Project; (2) Costs and attorneys' fees incurred in the arbitration proceedings; (3) Loss of use of monies; and (4) Loss of business opportunities. (R1-Exhibit 1)

Thus, Dadeland seeks from St. Paul the same damages that it sought or could have sought from Walbridge and St. Paul in the Arbitration. (R70-19-24) Those damages, to the extent they were the responsibility of Walbridge as the primary obligor, were paid by it; the balance was determined by the arbitration panel to not be attributable to Walbridge or St. Paul. (R70-19-24) Notably, there was no finding by the arbitration panel that St. Paul breached the terms of the Bond. (R137-19)

SUMMARY OF ARGUMENT

At the outset, there is an important jurisdictional matter. None of the questions certified to this Court are determinative of the cause on appeal to the Eleventh Circuit and, therefore, these questions need not be decided by this Court.

That being said, if this Court should determine that it has jurisdiction to decide these questions, it need only decide the first, threshold question in the negative in order to bring finality to this litigation and avoid similarly unfounded, successive litigations

in the future. The civil remedy statute was designed and intended to protect insureds under insurance policies, which bear indicia of contracts of adhesion and which sometimes give rise to a fiduciary duty between an insurance company and its insured. No such fiduciary duty ever exists between a surety and an obligee; nor are surety bonds contracts of adhesion. To the contrary, it is the obligee who chooses the bond form and freely negotiates the terms of the underlying bonded contract. In these and other significant ways, surety bonds and insurance policies are so fundamentally distinct that neither the principal nor the obligee on a surety bond are analogous to an insured on an insurance policy. The mere fact that the Florida legislature has determined to regulate insurance companies issuing surety bonds as insurers, and has crafted a section of the Insurance Code specifically governing surety bonds, does not mandate application of all of the rules governing insurance policies to surety bonds. To the contrary, the legislature's treatment of an obligee as an insured under §672.756(1) for purposes of that section only evidences an intent not to treat obligees as insureds under the Code's other provisions, including the civil remedy statute – which makes no mention of sureties, bonds or obligees. The first question should be answered in the negative, and all other questions become moot.

If there is a need to reach the second question at all, it should be answered in the negative because there is no basis upon which to eliminate the legislative

requirement that an action under §624.155(1)(a) is permitted only where the insurer has engaged in a "general business practice" in violation of the statute. The provision relied upon by Dadeland plainly is included within, and relates to §624.155(1)(b).

The third question arises out of the inherent difficulty in applying rules designed for the liability insurance context to claims against surety bonds. Unlike a liability insurance company, the surety on a bond is only a secondary obligor. Where, as here, its principal satisfies its obligations as determined by the parties' chosen arbiters, in the absence of any determination of a breach by the surety, there is no adjudication of liability under the surety bond sufficient to satisfy the condition precedent to a later bad faith action. Certainly, Dadeland, on a different factual record, could have obtained a ruling that the surety breached the Bond, but that did not occur here. Question III should be answered in the negative.

With respect to Question IV, St. Paul does not contend that Dadeland could have pursued that bad faith action in the Arbitration. Rather, because Dadeland elected to pursue its claims against Walbridge and St. Paul in the Arbitration, Dadeland is bound by the determination in that Arbitration of the extent of the principal's and surety's liability. It cannot re-litigate the same damage claims that were, or could have been, pursued in that Arbitration.

Finally, St. Paul is not seeking to re-litigate the affirmative defenses presented in the Arbitration. Rather, if it is required to defend itself in a bad faith action, it must be free to assert its good faith belief in those defenses. Collateral estoppel does not bar the presentation of those affirmative defenses for that purpose.

ARGUMENT

JURISDICTIONAL MATTER: THIS COURT DOES NOT HAVE JURISDICTION TO CONSIDER CERTIFIED QUESTIONS PRESENTED WHEN SUCH QUESTIONS WOULD NOT BE "DETERMINATIVE OF THE CAUSE."

As a preliminary matter, St. Paul feels compelled to bring to this Court's attention a jurisdictional matter. It is established that this Court does not have jurisdiction to consider questions, the answers to which would not be "determinative of the cause." Under Florida law, such questions are incapable of consideration by this Court. *Art. V, §3(b)(6), Fla. Const.; §25.031, Fla. Stat. (2003); Fla. R. App. P. 9.510.*

In the instant case, the questions certified by the Eleventh Circuit will not be determinative of the cause. This is because the fundamental grounds for the District Court's decision were that, based on the undisputed facts of record, St. Paul did not breach the Bond, or violate §624.155, as a matter of law even if such section may be

deemed applicable to surety bonds. (R137-23-26) And those grounds were not challenged by Dadeland in the Eleventh Circuit.

In reaching the merits of the "bad faith" case, the District Court assumed, for purposes of the summary judgment motion, "that an owner-obligee can state a claim against a surety under Section 624.155(1)(b)(1) for failing to act promptly to fulfill its obligations under a performance bond." (R137-18) The District Court nonetheless concluded that Dadeland's assertion that St. Paul breached any obligations under the Bond was "belied by the facts in the record." (R137-23)

> Here, the record indicates that the sureties performed all that they were required to do under the bond .... Under paragraph 4.4 and 5. the sureties were only required to act with "reasonable promptness" in exercising their options under paragraph 4. Given that the sureties declared their denial of liability just over one month after Dadeland declared a contractor default, in the midst of the holiday season, it cannot be said that the sureties failed to act with 'reasonable promptness' under the circumstances.

Id. The Bond set forth the procedure to be followed, and the record evidence demonstrated the sureties followed that procedure.

Dadeland did not challenge this part of the District Court's decision in the Eleventh Circuit. On appeal, Dadeland identified five purported errors of the District Court, but did not ascribe error to the District Court's fundamental holding - that,

based on the undisputed facts, St. Paul did not commit "bad faith," or even breach the Bond, as a matter of law. (A2-8) That ruling is uncontested and undisturbed.

It seems, then, with the utmost respect to the Eleventh Circuit, that this case does not turn "on important questions of state law for which there is no controlling precedent." Regardless of what answers this Court may give to the certified questions, and regardless of what action the Eleventh Circuit might take with the benefit of those answers, the underlying order granting summary judgment on the merits should remain in place and compel a final judgment in favor of St. Paul.

Because the response to the questions certified to the Supreme Court of Florida would not be "determinative of the cause," this Court does not have jurisdiction to consider them. *Green v. Massey,* 384 So. 2d 24 (Fla. 1980). Should the Court address such questions, however, St. Paul respectfully submits that they should be answered as set forth below.

QUESTION I: IS THE OBLIGEE OF A SURETY CONTRACT CONSIDERED AN "INSURED" SUCH THAT THE OBLIGEE HAS THE RIGHT TO SUE THE SURETY FOR BAD-FAITH REFUSAL TO SETTLE CLAIMS UNDER §624.155(1)(b)(1)?

As the United States Supreme Court has succinctly stated, "suretyship is not insurance." *Pearlman v. Reliance Ins. Co.,* 371 U.S. 132, 140 n. 19 (1962). Although insurance companies issue contracts of suretyship, that fact does not

convert obligees under surety bonds into insureds. Indeed, the "distinctions between a general liability insurance policy and a statutory penal bond are obvious." *Western World Ins. Co. v. Travelers Indemnity Co.,* 358 So. 2d 602, 604 (Fla. 1st DCA 1978). Fundamentally, a surety bond, unlike an insurance policy, is a tripartite agreement among the surety, the principal and the obligee. *See* 74 AM.JUR.2D *Suretyship* §3 (1974). Under this arrangement, the surety and principal are liable to the obligee to the extent of their contract promise; but, as between the surety and the principal, the surety is only secondarily liable. *Id.* The principal retains the primary obligation to perform the contract. If the surety is required to perform, it has a right of indemnity from the principal. *Id.*[2]

> The surety on a bond is lending its credit to make certain, if the conditions of the bond are violated, that the aggrieved party will be protected in the event the principal is financially unable to comply with the conditions of the bond. If the principal can satisfy the obligation, the surety need not respond. The surety, unlike the liability insurer, however, is entitled to be indemnified by the one who should have performed the obligation.

[2] In the construction context, the intent of a surety bond "is to have the financial responsibility of the surety standing behind the general contractor's completion obligations." *Federal Ins. Co. v. Southwest Fla. Retirement Ctr. Inc.,* 708 So.2d 1119, 1121 (Fla. 1998). *See generally, Restatement Third, Surety and Guaranty* §1-16 (1996)(discussing rights and obligations of a surety as a secondary obligor).

Western World, supra, 358 So. 2d at 604. Nonetheless, Dadeland urges this Court to extend to obligees the extraordinary civil remedy created by the Florida legislature to protect "insureds" at §624.155. Dadeland's argument ignores the practical, legal and commercial differences between surety bonds and insurance policies that render such a civil remedy unnecessary and inherently problematic in the surety context. In crafting this remedial statute for the benefit of "insureds," the legislature did not provide, nor did it intend, that it would cover surety bond obligees.

A. Obligees Are Not Considered Insureds Under 624.155(1)(b)(1)

Section 624.155(1)(b)(1) of Florida's civil remedy statute provides that:

> (1) Any person may bring a civil action against an insurer when such person is damaged:
>
> * * *
>
> (b) By the commission of any of the following acts by the insurer:
>
> 1. Not 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 <u>insured</u> and with due regard for her or his interests; ...

(emphasis added) *§624.155(1)(b)(1), Fla. Stat. (2003).* A cause of action for "bad faith" by a first-party insured against its insurer did not exist in Florida before adoption of the civil remedy statute. Thus, this civil remedy statute is in derogation of the

common law and, as such, it must be construed strictly. *Talat Enterprises, Inc. v. Aetna Casualty & Surety Co.,* 753 So. 2d 1278, 1283 (Fla. 2000).

The civil remedy statute does not define "insured" and does not suggest in any way that obligees, project owners or principals named in surety bonds were intended to be considered "insureds" under §624.155. In the absence of any such encompassing definition or other such guidance within the civil remedy statute, Dadeland relies instead on §627.756(1), which provides that:

> section 627.428[3] applies to suits brought by owners, subcontractors, laborers, and materialmen against a surety insurer under payment or performance bonds written by the insurer under the laws of this state to indemnify against pecuniary loss by breach of a building or construction contract. <u>Owners, subcontractors, laborers, and materialmen shall be deemed to be insureds or beneficiaries for the purposes of this section</u>.

(emphasis added) *§627.756(1), Fla. Stat. (2003).* Dadeland argues that the highlighted portion of this section demonstrates that the legislature considered an obligee to be an "insured." This provision, however, demonstrates just the opposite.

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[3] Section 627.428 provides that: "(1) Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court ... shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which recovery is had."

First, it is expressly limited by the phrase "for the purposes of this section." Thus it does not apply to the provisions of §624.155 at issue in this case. Moreover, there would have been no need for the legislature to provide that owners shall be "deemed to be insureds" for the purposes of §627.428 if an owner/surety bond obligee already was an insured under the whole Insurance Code, as Dadeland contends.

The inclusion of this provision thus demonstrates that owners under performance bonds were not considered to be insureds for purposes of other sections of the statute; and the lack of a corresponding provision in the civil remedy statute demonstrates a lack of legislative intent to extend the statute to sureties. It is a well-established tenet of statutory construction that "when a law expressly described the particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded." *Gay v. Singletary,* 700 So.2d 1220, 1221 (Fla. 1997).

Dadeland's attempt to extend the civil remedy statute to surety bonds is entirely inconsistent with the thorough analysis of this statute in *State Farm Fire & Casualty Co. v. Zebrowski,* 706 So. 2d 275 (Fla. 1997), where this Court described the enactment of this section as having "the effect of codifying *Thompson v. Commercial Union Insurance Co.*, 250 So. 2d 259 (Fla. 1971) and *Fidelity and Casualty Co. v. Cope,* 462 So. 2d 459 (Fla. 1985)." *Id.* at 277. Those two cases recognized the

common law right of a third-party claimant to pursue a claim against an insurer where the insurer unfairly refuses to settle a claim within the policy limit. In *Zebrowski,* this Court held that such a claimant could not bring an action under §624.155(1)(b)(1) unless it had recovered a judgment in excess of the policy limit, because it is only then that the insurer would have breached its duty to its insured. *Id.*

There is no similar duty or right in the surety context. A surety's refusal to settle a claim within its penal sum does not alter the rights of the parties to the tripartite surety arrangement in the way it impacts an insured on an insurance policy, i.e., potentially exposing that insured to damages not covered by the policy. Indeed, a bond principal often urges the surety not to settle a performance bond claim based upon the principal's defenses to the underlying contract action because the principal must indemnify the surety with respect to any loss or claim paid by the surety. *See Restatement (Third) of Suretyship & Guaranty §22 (1996); Fidelity & Deposit Company of Maryland v. Bristol Steel & Iron Works, Inc.,* 722 F.2d 1160, 1163 (4th Cir. 1983). The penal sum of a surety bond (which is set by the obligee) serves to limit only the surety's liability. A principal is always exposed to damages above the penal sum where the claim exceeds that amount, with no responsibility retained by the surety as secondary obligor for such excess damages.

The Court in *Zebrowski* explained that the legislature could not have intended this section to protect both claimants and insureds, because:

> To interpret section 624.155(1)(b)(1) as advocated by the [plaintiffs] would place a liability insurance company in the dilemma of having a good-faith obligation to a third-party claimant as well as to its insured when the best interest of one would not necessarily be in the best interest of the other. We are confident that in enacting this section, the legislature did not intend this result.

Zebrowski, supra, 706 So. 2d at 277. Likewise, the legislature did not intend this section to apply to sureties who inherently face that same dilemma. Namely, a surety - which does not have a fiduciary obligation to either its principal or the obligee[4] – must instead balance the interests of both parties. Upon receipt of a disputed claim against a performance bond, the surety finds itself in the middle of that dispute, asserting its principal's defenses and its own defenses against the obligee and, at the same time, looking to the principal to indemnify it against any claim or loss.

To permit an obligee to assert a bad faith claim against a surety would exacerbate the surety's dilemma. In this case, under Dadeland's reading of the statute, St. Paul could have avoided Dadeland's bad faith lawsuit only by paying Dadeland's grossly-inflated demand (which began at $4.4 million and grew to over $8 million) or performing all of the corrective work improperly demanded by Dadeland. That would

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[4] *See Cates Construction, Inc. v. Talbot Partners,* 980 P.2d 407, 424 (Cal. 1999); *Great American Ins. Co. v. General Builders, Inc.,* 113 Nev. 346, 355 (Nev. 1997). *Great American Ins. Co. v. North Austin Municipal Utility District No. 1*, 908 S.W. 2d 415, 420 (Tex. 1995).

have required St. Paul to disregard Walbridge's defenses and preempt Walbridge's contractual right to arbitrate such defenses. Ultimately, the arbitrators chosen by the parties found Walbridge's defenses sufficient to deny liability for the bulk of the claims asserted by Dadeland, thus validating St. Paul's declination of its right to perform.

Walbridge promptly satisfied its obligation (by payment of the $1.2 million net arbitration award, plus interest and attorneys' fees) without Dadeland ever having to look to St. Paul as the secondary obligor. Had St. Paul preempted Walbridge's contractual right to arbitrate its dispute and paid Dadeland's entire claim, Dadeland would have recovered a windfall and St. Paul would have been forced to litigate with Walbridge for indemnity with respect to a claim that, according to the arbitration panel, was largely invalid.

B. <u>The Legislature Did Not Intend to Create a Bad Faith Action Against Sureties</u>

While the Eleventh Circuit framed the certified question in terms of the specific language of §624.155(1)(b)(1), that language is consistent with the entire civil remedy statute which contains no references to sureties, bonds or obligees. In codifying the rights of insureds, the legislature did not intend to disregard the fundamental

distinctions between surety bonds and insurance policies and create a “bad faith” action for bond obligees.

Dadeland reads too broadly this Court’s decisions in *Nichols v. Preferred Nat’l Ins. Co.,* 704 So. 2d 1371 (Fla. 1997) and *David Boland, Inc. v. Trans Coastal Roofing Co.,* 851 So. 2d 724 (Fla. 2003), which Dadeland cites for the unfounded proposition that Florida’s Insurance Code expressly contemplates that sureties will be subject to all of its provisions. While those two cases correctly note that sureties are included within the general statutory definition of “insurer,” both of those cases were interpreting §627.428, which, as discussed above, was expressly made applicable to certain surety bonds pursuant to §627.756(1).[5] Indeed, in *David Boland*, this Court suggested that the legislature reexamine whether a surety should even be covered by §627.428, recognizing that the “role of such a contract surety is sufficiently distinct from the role of insurers that issue insurance policies...” *Id.* at 727 (Wells, J., concurring).

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[5] Dadeland also contends that the definition of “insurance” at §624.02 includes surety bonds. In fact, "surety insurance" is defined separately at §624.606(1)(a) and neither term -- "insurance" or "surety insurance" -- is used in the text of the section at issue here. The question here is whether the civil remedy statute applies to surety bonds and not whether sureties are generally subject to regulation as insurers.

There is no dispute that an insurance company acting as a surety may be regulated in certain contexts as an insurer under the Insurance Code. However, that fact does not demonstrate that the legislature intended that surety bonds would be governed by all of the rules applicable to insurance policies; or that it intended to grant surety bond obligees all the same rights specifically granted to insureds.

The civil remedy statute does not mention owners, subcontractors, laborers, or materialmen; nor does it mention sureties, suretyship, or bonds.[6] Rather, §624.155 begins with a list of statutory violations or infractions that will give rise to a cause of action by any person against an insurer that violates obligations owed by it to an "insured." A review of those sub-subsections 624.155(1)(a)1-6 leads to the unmistakable conclusion that those provisions apply only to claims made under insurance policies. Sub-section (a)1 incorporates specific provisions from §626 that make no mention of sureties, principals, obligees, bonds or any other nomenclature

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[6] The legislative history of §624.155 similarly demonstrates that it was not intended to apply to surety bonds. Rather, the legislature was concerned about claims handling practices in common insurance contexts. There is no mention of any fiscal impact of the Bill on contractors, developers, sureties, bonds or anything else in the context of suretyship. House Bill 4-F, concerning "Florida Insurance Code And Related Laws" and including §624.155, was introduced during the 1982 session and the Staff Report includes a Bill Analysis that examines the "fiscal impact" of the bill. (R11, Exhibit 1)

of suretyship; rather they address "insureds and insurance policies" exclusively. Sub-section (a)2 incorporates a provision prohibiting the coercion of a borrower to buy an "insurance policy" from a lender; sub-sections (a)3, (a)4 and (a)5 incorporate a provision that concerns discriminatory dealings in "life and disability insurance"; and sub-section (a)6 incorporates a provision regarding cancellation of "motor vehicle insurance."

It is also significant that the Florida Legislature made clear when it intended §624.155 to apply. For example, §624.488 provides that §624.155 is applicable to self insurance funds; §624.123 makes §624.155 applicable to international health insurance policies; §627.7283 makes §624.155 applicable when an insurance company fails to return unearned motor vehicle insurance premiums; and §628.6016 makes §624.155 applicable to assessable mutual insurers.

Thus, the Florida Legislature consistently incorporated §624.155 when it intended to extend the reach of the civil remedy section to unique types of insurance policies. Yet, in the sections relating to surety bonds – namely, §§627.751-759[7] –

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[7] Sections 627.751 through 759 of the Insurance Code govern "surety insurers." Those sections contain the specific grant of authority for surety insurers to issue surety bonds, judicial bonds, official bonds, traffic arrest bonds and bail bonds (§§627.751-753 and 785); make the attorneys' fees provisions applicable to sureties (§627.756); and estop sureties from denying issuance of a bond (§627.759).

there is no reference at all to the civil remedy statute. In contrast, the legislature utilized one of those sections (§627.756(1)) to incorporate §627.428 and render sureties liable for attorneys' fees of prevailing claimants. The lack of any comparable incorporation of §624.155 by reference in the surety part of the Insurance Code creates an inference that the legislature did not intend that §624.155 would apply to sureties.[8] *See Gay, supra,* 700 So. 2d at 1221.

In *Zebrowski*, *supra*, this Court looked to the Supreme Court of California - - which was at the forefront of the common law cause of action against insurers for bad faith claims handling - - for guidance in the interpretation of the statute at issue here. The Supreme Court of California has subsequently undertaken the most detailed analysis regarding whether a surety bond obligee ought to be permitted to assert a claim against a surety for "bad faith" in resolving claims under a performance bond. Specifically, in *Cates Construction, Inc. v. Talbot Partners*, 980 P.2d 407 (Cal. 1999), the Supreme Court of California refused to extend California's insurance "bad faith" cause of action to sureties. In *Cates*, that Court soundly rejected the primary argument pressed by Dadeland, holding that the similar inclusion of sureties within California's

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[8] Of note, the Florida Department of Insurance created a mandatory form for the required civil remedy notice and that form uses the terminology of insurance exclusively and does not list surety bonds as a type of insurance policy. *§624.155(3), Fla. Stat. (2003).*

general regulatory scheme applicable to insurance companies did not evidence an intention by the legislature that sureties should be treated as insurers for all purposes; and it criticized holdings in other jurisdictions that had put undue emphasis upon the inclusion of sureties within general regulations applicable to insurance companies. *Id.* at 418-421.

In *Cates,* the Court properly focused on crucial differences between surety bonds and insurance policies and found that surety bonds do not share the unique aspects of liability insurance policies, which trigger the policy considerations underlying tort recovery against insurers for bad faith. *Id.* Insurance policies are drafted by insurers and characterized by elements of adhesion and unequal bargaining power, whereas surety bonds generally are chosen by the obligee. Indeed, the commonly-used bond chosen by Dadeland in the present case, and at issue in *Cates,* is a form promulgated by the American Institute of Architects, which clearly is not an insurance organization.

A second important factor present in the insurance context, but totally absent in the surety context, is the existence of a fiduciary duty running from an insurer to its insured. *Id.* at 424. In the insurance context, upon assertion of a third-party claim against a policy, an insurer has a fiduciary obligation to protect its insured from a judgment exceeding the policy limits. *See Boston Old Colony Ins. Co. v. Gutierrez,*

386 So.2d 783, 785 (Fla. 1980). This fiduciary obligation arises because an insurance policy requires that the insured surrender to the insurer control over settlement of the claim. *Id.*

In contrast, a surety does not undertake such a duty to either the obligee or the principal when it issues a performance bond. *Cates, supra,* 980 P.2d at 424. The conditional nature of the surety's obligations to the obligee, coupled with a surety's right to assert the defenses of its principal, demonstrate that a surety can have no special obligation to act for the benefit of an obligee at the expense of its principal.[9] A surety has no obligation to defend either its principal or the obligee against third-party claims; nor does the surety have the right to represent the obligee's interests. Likewise, an insurer has no right of subrogation against the insured for covered losses; whereas, a surety is entitled to repayment from the principal for sums paid upon the principal's default, and is entitled to assert, as subrogee, the claims of its principal

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[9] A principal also owes a common law duty to exonerate its surety, i.e., it has an obligation to perform the duties of its contract in a fashion to avoid a loss to the surety. *See Restatement (Third) of Suretyship & Guaranty* §21 (1996); *Admiral Oriental Line v. United States,* 86 F.2d 201, 204 (2d Cir. 1936). As a result, if a surety is subjected to a statutory duty of good faith to an obligee, that obligation is transferred to the principal. Clearly, the legislature did not intend to impose such a dramatic change upon the relationship of private contracting parties, simply because a surety bond was to be used to guarantee one of those parties' obligations.

against the obligee. *Id.*; *See also, Transamerica Ins. Co. v. Barnett Bank*, 540 So. 2d 113, 115-116 (Fla. 1989).

The practical and legal distinctions between surety bonds and insurance policies are apparent and justify the legislature's decision to treat them distinctly: (1) In an insurance policy, the undertaking is to indemnify the insured from the consequences of its own negligence or to protect it against fortuitous events. In contrast, under surety bonds, the risk of loss remains with the principal, and the surety merely lends its credit to guarantee payment or performance in the event that the principal defaults; (2) Insureds seek protection from calamities rather than economic advantages, while obligees and principals on performance bonds seek the commercial advantage of obtaining a contract with each other, with the obligee obtaining financial security; (3) An insured, upon the denial of its claim, is left without any other source of recovery for its loss while it pursues its insurer. In contrast, the obligee has all of its contractual rights and remedies against the principal upon default, including its right to utilize remaining contract funds to retain a new contractor (*See Cates*, 980 P. 2d at 423-425); (4) An insurance premium is paid by the insured and represents the insured's proportionate share of the risk of an entire class of insureds and, when a claim is paid by the insurer, the insured is not required to indemnify the insurer. In contrast, the premiums charged by the surety are not based upon an actuarial computation of loss,

but instead are fees based upon the credit-worthiness of the principal named in the bond (*See National Shawmut Bank v. New Amsterdam Casualty Co.,* 411 F.2d 843, 845 (1st Cir. 1969); and (5) It is the principal, and not the obligee, which makes the application for the surety bond and typically is obligated for the cost of the bond.

In the absence of any direction in the civil remedy statute extending this statute to sureties, Dadeland relies instead upon dicta in *Ginn Construction Co. v. Reliance Insurance Co.,* 51 F. Supp.2d 1347 (S.D. Fla. 1999), in which a bond principal sued the surety under §624.155. The issue on summary judgment was whether the principal was an "insured," and the Court properly held that "under the performance bond at issue, Ginn is not an 'insured' and therefore cannot sue [the surety] for bad faith ... ." *Id.* at 1353. In the course of reaching that correct conclusion, however, the Court observed that "if any party has a claim for bad faith failure to settle . . . it would be the . . . obligee under the bond." *Id.* at 1352.

The *Ginn* court was not required to – and did not – decide "if any party" can assert a bad faith claim under a surety bond, and it assumed incorrectly that somebody has to be an "insured" under a bond. The flaw in that assumption is obvious. Merely because the obligee resembles an insured more so than the principal does not suggest that the obligee must necessarily be the "insured." In truth, because a surety bond is

not an insurance policy, the concept of "bad faith" should not be more applicable there than in any other contractual setting.

This Court often has recognized that a bond is a contract and is therefore subject to the general law of contracts and should be enforced as written. *See American Home Assurance Co. v. Larkin General Hospital, Ltd.,* 593 So. 2d 195, 197 (Fla. 1992). As this Court held in *Larkin*, a surety "has the right to stand upon the strict terms of the obligation as to his liability thereon." *Id.* St. Paul's undertaking expressed in the Bond chosen by Dadeland included the right to deny liability and allow its principal to proceed to arbitrate the disputed scope of its obligation to correct deficiencies in the work in accordance with the dispute resolution provisions of the bonded contract incorporated by reference into the Bond. Nothing in Florida's Insurance Code reflects any legislative intent to mandate a change in these contractual arrangements.

C. The Cases Cited by Dadeland Permitting Bad Faith Actions Against Sureties Do Not Represent the "Majority Rule"

Dadeland ignores *Cates*, and the growing number of decisions from states in accord with *Cates*, and urges this Court to instead follow the handful of decisions from other states that have created a "bad faith" cause of action against sureties. However, all but one of those decisions pre-date the Supreme Court of California's

thorough analysis of this issue in *Cates*, and that one exception is an unpublished decision from a lower court in Delaware.

The cases cited by Dadeland are countered by a comparable number of cases to the contrary; and the trend - exemplified by Supreme Court of California – is to hold that insurer bad faith should not be extended to sureties. The *Cates* Court noted that subjecting a surety to tort liability is not necessary to deter bad faith, because obligees may require, as Dadeland did here, a liquidated damages provision to discourage nonperformance by sureties. *Cates*, *supra,* 980 P.2d at 425. Subjecting the surety to such liability might encourage obligees to allege a principal's default more readily and would provide obligees with additional leverage against sureties – and ultimately against principals who owe indemnity obligations to sureties – in construction disputes in derogation of the parties' contractual rights. *Id.* at 425-427.

California is joined by a number of states in rejecting attempts to extend insurance bad faith claims to sureties. For example, in *Great American Insurance Company v. North Austin Municipal Utility District No. 1,* 908 S.W. 2d 415 (Tex. 1995), the Texas Supreme Court held that there is no common law duty of good faith between the surety and the bond obligee comparable to that between an insurer and its insured. It noted that the derivative nature of a surety's liability and its right to rely upon the defenses of its principal compel the conclusion that a surety, like its principal,

should be entitled to test the merits of an obligee's claim without the imposition of extra-contractual duties to the bond obligee. *Id.* at 419.

The Court further held that sureties are not subject to statutory claims under the Texas equivalent of the statute at issue here, citing "the unique character, rights and obligations of suretyship and the complexities that would result by the imposition of liability under [the statute]" in rejecting the notion that the legislature intended to include a surety as engaging in the "business of insurance" for purposes of that section, notwithstanding the fact that suretyship was included in the definition of that term within other sections of the Insurance Code. *Id.* at 420-24. *See also Masterclean, Inc. v. Star Insurance Co.,* 347 S.C. 405 (S.C. 2001)(South Carolina Supreme Court held that bond principal could not sue surety for bad faith refusal to settle obligee's claim, distinguishing suretyship from insurance); *Institute of Mission Helpers of Baltimore City v. Reliance Ins. Co.,* 812 F. Supp. 72 (D.Md. 1992)(obligee could not sue surety for bad faith under Maryland law and was instead limited to its contractual remedies); *Great American Insurance Company v. General Builders, Inc.,* 113 Nev. 346, 934 P.2d 257 (Nev. 1997)(in suit by a surety bond principal, the Nevada Supreme Court held that the public policy concerns implicated where an insurance company refuses to compensate a policyholder for losses covered by the policy are not present in surety context and refused to recognize a bad faith claim against surety); *Cincinnati*

Ins. Co. v. Centech Bldg. Corp., 286 F. Supp.2d 669, 689 (M.D. N.C. 2003) (court concluded that North Carolina Supreme Court would not recognize a cause of action for bad faith by a bond obligee against a surety); *Superior Precast, Inc. v. Safeco Ins. Co. of America,* 71 F. Supp.2d 328, 448-454 (E.D. Pa. 1999)(court discussed differences between suretyship and insurance and concluded that legislature did not intend for its insurance "bad faith" statute to apply to sureties).

D. Permitting Bad Faith Actions by Obligees is Bad Public Policy

The facts of this case demonstrate that construction disputes are not at all like insurance claims and highlight the inherent danger of attempting to treat them as one and the same. Dadeland asserted that Walbridge was in default of its contract and responsible for the entire cost of corrective work on the bonded project. Walbridge, on the other hand, correctly contended that the defects were not mainly its responsibility and refused to perform all the corrective work demanded by Dadeland. When Dadeland called upon St. Paul to complete the corrective work under the Bond, St. Paul was presented with these diametrically opposed views of the operative facts. As a result, and having determined after an investigation that there was merit to Walbridge's position, St. Paul exercised its contractual right under the Bond to deny liability pending the outcome of the Arbitration to which the principal and obligee had agreed under the bonded contract. After thirty-five days of hearings, the arbitrators

determined that Walbridge was liable for less than twenty percent of Dadeland's claimed damages.

Walbridge satisfied the entire portion of the award entered against it, plus interest and attorneys' fees, so that Dadeland did not have to look to St. Paul as secondary obligor. Thus, the parties' contract and Bond worked exactly as they were intended to work. The owner and contractor submitted their dispute to the contractually agreed dispute resolution process; and St. Paul stood ready to satisfy any judgment entered against it in the event its principal, Walbridge, as primary obligor, was unable to fulfill its obligations.

There is nothing unusual about this case and no legitimate purpose is served by granting an obligee rights greater than those set forth in the contract or bond. Indeed, to do so would tilt the contractual playing field inevitably and unfairly in favor of the obligee/owner to the principal/contractor's detriment. Often, as in this case, the surety must weigh competing claims by the principal and obligee and must choose, within a short time frame, to exercise one of its bond options. Under the AIA A312 bond form used in this case – and commonly used in the construction industry – those options include the rights to perform the contract or deny liability. In the event the surety denies liability, it is exposed to damages flowing from the principal's default if the obligee prevails on its claim and the principal is unable to meet its obligations,

including liquidated and consequential damages. Thus, a surety may lose its ability to mitigate its losses if it improvidently elects to deny liability.

In other instances, absent reasonable proof that its principal is in fact in breach and responsible for the alleged incomplete, deficient or improper work and that the obligee's termination of the principal is proper, the surety's most prudent and appropriate action may be a denial of liability, allowing the parties to arbitrate their dispute as is provided typically in construction contracts. If the parties' negotiated playing field is altered by arming obligees with extra-contractual remedies against the surety any time that the surety exercises its contractual right to deny liability pending resort by the principal to the bonded contract's dispute resolution procedure, a surety may suffer undue pressure to side with an obligee, to the unfair detriment of its principal. Indeed, such a result would have been disastrous in this case, because most of the obligee's claim was found by the arbitration panel to be invalid.

Principals and obligees on large construction projects like this one are typically sophisticated parties. The competing rights of the principal and obligee are often the subject of complex agreements, usually drafted by the obligee. There is simply no legitimate public policy to be served by granting an obligee the unique protection afforded insureds who are not similarly situated, thereby effectively providing the obligee with additional leverage in any dispute with the contractor and its surety. In

suretyship, the relative economics and bargaining power are unlike that in the classic insured/insurer relationship, which has caused legislatures and courts to protect insureds from the "uneven playing filed" often present in insurance disputes and litigation.

The potential impact of the result urged by Dadeland will be felt more dramatically by contractors than by sureties. An insurer, unlike a surety, upon the occurrence of the contingency must bear the ultimate loss. But a surety is entitled to indemnity when it is compelled to perform its principal's obligation. If a surety is threatened with the prospect of successive lawsuits arising out of performance claims – i.e., a bad faith lawsuit following the litigation of the underlying dispute – it will invariably be motivated to exert pressure on the principal to accede to the obligee's demands. The instant case is a classic example in which the obligee's claim was largely invalid and was properly submitted to arbitration, rather than paid by the surety over the principal's objection.

A finding that an obligee may not sue a surety for bad faith refusal to settle its claim does not leave an obligee without recourse, because it retains all of its bargained-for contractual remedies. Indeed, those contractual remedies in this case were sufficient to fully compensate Dadeland for the legitimate portion of its entire loss, including interest and attorneys' fees.

Nor would such a finding lessen a surety's incentive to fairly address performance bond claims; a surety remains motivated to promptly resolve such claims. Often a surety can limit its damages if it determines that an obligee's termination was proper and it is then able to promptly arrange for completion of the project. On the other hand, where a surety waives its right to complete or denies liability, it ultimately might be faced with a claim for liquidated damages and completion costs far in excess of the cost for which it could have completed the work.

Finally, allowing a private remedy in favor of an obligee in the performance bond context would inevitably open the door to successive litigation, like in the instant case.

QUESTION II: IF SO, DOES THE LANGUAGE IN §624.155(1)(b)(3) ELIMINATE §626.9541(1)'S REQUIREMENT OF PROOF OF A GENERAL BUSINESS PRACTICE WHEN THE PLAINTIFF IS PURSUING A §626.9541(1)(i)(3) CLAIM THROUGH THE RIGHT OF ACTION PROVIDED IN §624.155?

In certifying this question, the Eleventh Circuit states: "[T]he district court also found that the bad-faith claim [for violations of §626.9541(1)(i) brought pursuant to §624.155(1)(a)] failed because Florida law required evidence that the Sureties' unfair claims settlement practices were frequent enough to be considered their general business practice." (A7) Respectfully, the Eleventh Circuit misread the order of the District Court.

The District Court's order was not based on the requirement of a "general business practice." Rather, the District Court held that:

> Dadeland did not raise a claim of unfair claim settlement practices in the arbitration proceeding. In any case, plaintiffs have failed to present any evidence with respect to this claim in response to the defendants' motion for summary judgment. Accordingly, the court deems this claim to be waived.

(R137-27) Thus, the District Court properly held that Dadeland *waived* any claim under §626.9541(1)(i) because it did not present *any evidence* of the acts proscribed by the statute.[10] (R137-27) Therefore, the question certified by the Eleventh Circuit is not determinative of the cause, and need not be reached.

This issue also need not be reached because it rests upon a fundamentally flawed assumption that §624.155 was intended to apply to sureties. Because the Eleventh Circuit began this question with the phrase, "IF SO," this Court need not reach this second question if it determines that an obligee is not an insured in response to question one. In addition, as discussed in the preceding Point, there is no basis

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[10] In the one-count complaint, Dadeland alleged St. Paul violated §626.9541(1)(i), by "completely ignor[ing] their duties under the bond." (R1- Exhibit 1) Dadeland's Response to Defendants' Motion for Judgment on the Pleadings and for Summary Judgment contained nothing in support of this claim. (R137-27)

upon which to conclude that the legislature intended the civil remedy statute would or should apply to sureties.

Should this Court decide that it is necessary to reach this issue, St. Paul submits that §624.155(1)(b)(3) does not eliminate the "general business practice" component of §626.9541(1)(i)(3). The whole of Chapter 626 constitutes the "Unfair Insurance Trade Practices Act," (the "UITPA"). The UITPA prohibits, *inter alia,* committing any one of a list of enumerated acts with such frequency as to indicate a general business practice. *§626.9541(1)(i)(3)(a)-(h), Fla. Stat. (2003).*

Florida law does not define "general business practice." However, based on generally accepted meanings of the word, a practice would entail a showing that the insurer acted in the proscribed manner habitually or customarily and certainly on more than one claim. *See Ginn,* 51 F. Supp.2d at 1353.

The private cause of action for violation of the UITPA is through §624.155. *See Auto-Owners Inc. Co. v. Conquest,* 658 So. 2d 928, 929 (Fla. 1995). With respect to actions brought by insureds, §624.155(1)(b)(3) provides, in pertinent part, that:

> Notwithstanding the provisions of the above to the contrary, a person pursuing a remedy under this section need not prove that such act was committed or performed with such frequency as to indicate a general business practice.

Dadeland argues that this language dispenses with the requirement of proof of a general business practice incorporated into the provisions of §624.155(1)(a), because that is the only place such language is used in the statute. However, Dadeland does not cite any authority in support of this interpretation.[11] And, Dadeland ignores the plain interpretation that the legislature intended to clarify that its repeated use of multiples and plurals in §624.155(1)(b)1., 2. and 3. – i.e., "settle claims," "insureds," "beneficiaries," "coverages," etc. – was not intended to create the requirement of proof that the proscribed act was "performed with such frequency as to indicate a general business practice" as is required in §624.155(1)(a) for violations of the UIPTA. Thus, the language at the end of §624.155(1)(b)(3) was intended to exempt claims under §624.155(1)(b) from §624.155(1)(a)'s requirement of proof of a general business practice.

The federal district courts have routinely interpreted the Florida statute to require proof of a general business practice in cases brought through §624.155(1)(a) for violations of the UIPTA. For example, in *Ticor Title Insurance Company v.*

[11] In its Amicus Curiae Brief for Appellants, the Academy of Florida Trial Lawyers argues that the so-called "flush-left clause" in §624.155(1)(b)(3) eliminates the requirement of proving a general business practice. St. Paul does not contend that this provision is only applicable to §624.155(1)(b)(3); rather, it is "flush left" to make it applicable to the entirety of §624.155(1)(b), but not to the separate section (1)(a).

University Creek, Inc., 767 F. Supp. 1127 (M.D. Fla. 1991), the insurer sought a declaratory judgment that it did not violate the UIPTA.[12] The Court determined there was no justiciable controversy because the insured had not alleged violations of §626.9541(1)(i)(3) with such frequency as to indicate a general business practice.

Similarly, in *Ginn*, in granting the surety's motion for summary judgment on the UITPA claim, the Court determined that the plaintiff must establish that the insurer committed unfair acts with such frequency as to indicate a general business practice. *Ginn,* 51 F. Supp.2d at 1353.

Additionally, this conclusion is consistent with the way the statute is laid out. The sentence in §624.155(1)(b)(3) that eradicates the general business practice requirement is not designated by a letter. Thus, it is encompassed by, and limited to, the previously designated provision of the statute. That means the sentence applies only to civil actions based on the acts enumerated in §624.155(1)(b). The Eleventh Circuit itself recognized this when it cited the italicized language under §624.155(1)(b)(3).

As set forth herein, this issue need not be reached by this Court. However, if Question II is reached, §624.155(1)(a) must be interpreted to require proof of a general

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[12] The insured had served notice of its intent to file an action pursuant to §624.155(1)(a).

business practice, as specifically provided in §626.9541(1)(i)(3), which is incorporated by reference in §624.155(1)(a), and should be answered in the negative.

QUESTION III: IS AN ARBITRATOR'S FINDING THAT A SURETY'S PRINCIPAL HAS BREACHED ITS DUTY TO THE OBLIGEE, AND THAT THE SURETY IS BOUND TO THE ARBITRATION AWARD TO THE EXTENT THAT ITS PRINCIPAL IS BOUND, SUFFICIENT TO SATISFY THE CONDITION PRECEDENT TO A LATER BAD FAITH REFUSAL TO SETTLE CLAIM THAT THERE BE A PRIOR ADJUDICATION THAT THE PLAINTIFFS WERE ENTITLED TO A PAYMENT OF A CLAIM FROM THE SURETIES?

The Eleventh Circuit stated the question more succinctly in the text of its opinion: **"Did the arbitration proceeding satisfy Dadeland's condition precedent to filing a bad faith refusal to settle claim pursuant to §624.155, *Fla. Stat.?"*** If the preceding certified questions are answered as St. Paul contends they must be, it will not be necessary for the Court to reach Question III. However, if the Court reaches the instant question, it must be answered in the negative.

There are three conditions precedent to bringing a civil remedy action under §624.155. First, plaintiff must give 60 days written notice of the statutory violation to the Department and to the insurer. *Section 624.155(2)(a), Fla. Stat. (2003).* Second, there must be a determination, by way of judgment or settlement, that the insurer breached the insurance contract. *Blanchard v. State Farm Mutual Auto Ins. Co.,* 575 So. 2d 1289, 1291 (Fla. 1991). Third, there must be an adjudication of damage, or a settlement, in favor of the insured and against the insurer. *Vest v. Travelers Ins. Co.,* 753 So.2d 1270 (Fla. 2000).

In *Vest,* this Court clarified the condition and reaffirmed the rule in *Blanchard* that "a cause of action in court for violation of section 624.155 is premature until there is a determination of liability and extent of damages owed on the first-party insurance contract." 753 So. 2d at 1276. *See also Talat Enterprises, Inc. v. Aetna Casualty and Surety Co.,* 753 So. 2d 1278 (Fla. 2000). A condition precedent to a statutory cause of action is an essential element. *Ferry Morse Seed Company v. Hitchcock,* 426 So.2d 958 (Fla. 1983).

Dadeland argues that it satisfied the second and third conditions precedent when the arbitrators determined that Dadeland had a valid claim against Walbridge under the construction contract and awarded damages. This argument ignores the fact that the arbitration panel made no finding that St. Paul failed to perform its obligations under the Bond; indeed, to the contrary, St. Paul acted properly under the Bond and was not ruled to have breached the Bond in any respect.

The insurance concepts which lend themselves to application of the provisions of the civil remedy statute simply do not exist in the surety context. Unlike a typical insurance claim, a performance bond claim arises out of disputes between the parties to an often complex commercial contract. The AIA A312 bond form utilized in this case is carefully crafted to afford the surety an opportunity to investigate such a claim and avail itself of any one of a number of options depending upon the facts of the

case. Specifically, at paragraph 4, St. Paul had the following options upon assertion of the Dadeland claim:

> 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: ...
>
> .2 Deny liability in whole or in part and notify the Owner citing the reasons therefor ...

(R71-Tab2) In this case, the Contract incorporated into the Bond contained an arbitration provision and, by the time that, according to Dadeland, it had complied with the conditions precedent of paragraph 3 of the Bond, the parties were already engaged in the Arbitration. The crux of the dispute was a sharp disagreement over the extent of Walbridge's responsibility for corrective work. Given the fact that Walbridge contended – and was ultimately determined to be correct – that a substantial portion of that corrective work was the responsibility of Dadeland and others, St. Paul had no

obligation to undertake any of the first three options and complete work for which neither it nor Walbridge was responsible under the Contract or Bond.

St. Paul's proper course of action under these facts was to waive its right to complete the project and deny liability pending the outcome of the parties' Arbitration as it was expressly authorized to do under Paragraph 4.4.2 of the Bond. On the facts presented to St. Paul, and ultimately to the arbitrators, Walbridge had only a fractional liability and St. Paul had no obligation to perform corrective work for which its principal was largely not responsible. St. Paul guaranteed only Walbridge's obligations, not those of Dadeland, its agents, the engineer and architect or third parties. Thus, St. Paul had no basis to perform all of the corrective work demanded, and it properly denied liability until the dispute could be arbitrated and Walbridge's fractional liability was quantified pursuant to the parties' contractually agreed upon dispute resolution process. St. Paul would still have no responsibility to pay unless and until Walbridge failed to satisfy such liability itself.

The Bond, at paragraph 5, defines a surety default as follows:

> If the Surety does not proceed as provided in Paragraph 4 with reasonable promptness, the Surety shall be deemed to be in default on this Bond fifteen days after receipt of an additional written notice from the Owner to the Surety demanding that the Surety perform its obligations under this Bond, . . .

(R71, Tab 2) Dadeland joined St. Paul in the Arbitration and thus had the opportunity to seek a ruling from the arbitration panel that St. Paul defaulted under the Bond. It obtained no such ruling from the arbitration panel and, in fact, as found by the District Court, St. Paul promptly denied liability under the Bond as permitted under Paragraph 4.4.2. The arbitrators could have determined – on a different set of facts – that St. Paul failed to perform promptly and properly its obligations to Dadeland. However, no such finding was made or supported by the record. The arbitrators merely confirmed that St. Paul would be bound to Dadeland only to the extent of its principal's obligation – an accurate statement in general of the liability of a secondary obligor, rather than a finding of fault.

Against this backdrop, the District Court properly determined that the arbitration award was not an adjudication of breach of the Bond or an adjudication of damages against St. Paul for such breach, and properly ruled that plaintiffs could not demonstrate that the conditions precedent to a bad-faith refusal to settle claim have been satisfied. (R137-20).

Dadeland tries to refute the District Court's conclusion by making a forced comparison of Florida cases under §624.155 involving uninsured motorist insurance policies, and other typical insurance policies, to the construction contract Arbitration in the instant case. But the comparison of a bond to an uninsured motorist insurance

policy, or any other two-party insurance contract, is inapposite. The criteria set forth in the cited case law cannot be applied easily, if at all, to sureties.

It is important to keep in mind that a surety has not breached the bond merely because the contractor has breached the construction contract. *See, e.g. L&A Contracting Company v. Southern Concrete Services, Inc.,* 17 F.3d 106, 100 (fn. 11)(5th Cir. 1994). This case provides a perfect illustration. Here, the Bond specifically required Dadeland to take additional steps – after the alleged default of the contractor – to trigger St. Paul's obligations under the Bond. Only after Dadeland had done those things, and St. Paul had failed to respond, as dictated by the Bond, would St. Paul be in default of the Bond. There was no such determination in this case because it never happened.

Dadeland attempts to pass over this inescapable fact. It would prefer to assert that St. Paul was liable automatically for breach of the Bond because St. Paul is bound by the determination as to Walbridge's liability. But that is incorrect. First, as set forth above, the Bond itself defines the default of the surety, and St. Paul did not default. Second, also as set forth in Section I above, a surety is but a "secondary obligor," liable to the obligee only when the "principal obligor" fails to perform the underlying obligation. *See generally, Restatement (Third) of Suretyship & Guaranty*

§§1 - 16 (1996). Because Walbridge timely paid the arbitration award with interest, St. Paul never was required to pay damages under its Bond.

To put it another way, even though St. Paul was bound by the determination of the extent of Walbridge's liability in the arbitration award, there was no award against St. Paul and no determination of liability and extent of damages owed on an insurance contract. *See, e.g. Vest, supra.* The arbitrators determined only that Walbridge partially breached the construction contract and that St. Paul was bound by the determination. The construction contract undisputedly is not an insurance policy. Accordingly, Dadeland could not, and did not, demonstrate the essential elements of a cause of action under §624.155, and Question III should be answered in the negative.

QUESTION IV: IS THE ARBITRATORS' DECISION RES JUDICATA BARRING DADELAND'S LATER CLAIM AGAINST THE SURETIES FOR BAD FAITH REFUSAL TO SETTLE?

St. Paul agrees that Dadeland's §624.155 claim could not have been submitted in the Arbitration and is not barred by *res judicata.* Rather, Dadeland is barred by *res judicata* from re-litigating whether it is entitled to recover a second time for the same underlying claims and the same compensatory damages. Dadeland has already been determined to be only partially entitled to recover those damages from Walbridge and it has been paid in full by Walbridge in the amount adjudicated as owing by the arbitrators. The mere fact that Dadeland is now pursuing recovery against St. Paul for

its alleged bad faith failure to perform under the Bond does not permit Dadeland to re-litigate the same damage claims decided in the Arbitration or obtain a double recovery.

The following conditions must be met for *res judicata* to apply: 1) identity of things sued for; 2) identity of cause of action; 3) identity of persons and parties to the action; and 4) identity of the quality or capacity for whom or against whom a claim is made. *ICC Chemical Corporation v. Freeman,* 640 So.2d 92 (Fla. 3d DCA 1994). *Res judicata* applies to all matters actually raised and determined in the first proceeding, as well as to matters that could properly have been raised and determined there. *State v. McBride,* 848 So.2d 287 (Fla. 2003).

All of the elements of *res judicata* are present here. In the Arbitration, Dadeland put St. Paul's liability at issue. (R1, Exhibit 1-C) In order to determine the secondary obligation, the primary obligation must first be determined. That is precisely what occurred in the Arbitration. The arbitration panel then found that St. Paul was bound by that determination and quantified the amount of damages, which were paid in full by Walbridge, as primary obligor. Dadeland cannot now re-litigate these issues, which is exactly the point made by the District Court. After determining that Dadeland failed to satisfy the conditions precedent to filing a claim pursuant to §624.155, the District Court stated:

> Dadeland's claim in this case *is probably more appropriately framed as a claim for breach of contract* against the sureties for failure to perform their duties under the bond with reasonable promptness.

(R137-20). The District Court held, correctly, that Dadeland brought a breach of contract claim against St. Paul in the Arbitration. But the arbitrators made no finding that St. Paul breached its duties under the Bond. (R137-22-23) The arbitrators did not find any wrongdoing on the part of the sureties or assess damages against the sureties.

Dadeland is seeking the same damages in this action under §624.155 that were either denied in the Arbitration, or were awarded and paid; specifically: (1) costs of repairing inadequate work on the project; (2) loss of use of monies; and (3) costs and attorneys' fees incurred in the Arbitration.[13]

It is incontrovertible that Dadeland had a full and fair opportunity to present its case on the exact items of damages it is trying to collect in this litigation. All those items were adjudicated by the arbitrators. They were denied for the most part because they were not the fault of Walbridge. The damages that were the fault of Walbridge were paid with interest. Dadeland is not entitled to litigate damages for breach of

[13] No evidence of the fourth class of damages claimed (loss of business opportunities) was presented by Dadeland in opposition to the motion for summary judgment and, in any event, if Dadeland were entitled to such damages, they would have been recoverable in the Arbitration on its breach of contract claim.

contract in an Arbitration and, later, under a separate statutory cause of action, seek a duplicative or inconsistent recovery. *See Ticor Title Insurance Co. v. University Creek, Inc.,* 767 F. Supp. 1127, 1139 (M.D. Fla. 1991). Question IV should be answered in the affirmative.

QUESTION V: WILL AN ARBITRATOR'S DENIAL OF THE DEFENDANTS' AFFIRMATIVE DEFENSES IN A BREACH OF CONTRACT CLAIM COLLATERALLY ESTOP THE SAME DEFENDANTS FROM RAISING THE SAME DEFENSES IN A SUBSEQUENT BAD FAITH REFUSAL TO SETTLE CLAIM AGAINST THE SAME PLAINTIFF?

This question must be answered in the negative. In the civil action pursuant to §624.155, St. Paul raised, *inter alia,* two affirmative defenses: (1) Dadeland failed to comply with the provisions of the performance bond; and (2) St. Paul is discharged from liability under the performance bond to the extent that Dadeland made payments to Walbridge for the work improperly performed under the construction contract. (R36) Dadeland filed a motion for partial summary judgment claiming St. Paul was estopped from raising these defenses. The District Court denied the motion because, in light of its other rulings, the motion was moot. Those are the defenses referenced in the certified question from the Eleventh Circuit.

The doctrine of collateral estoppel prevents identical parties from re-litigating issues that have been decided previously. *GLA and Associates, Inc. v. City of Boca*

Raton, 855 So.2d 278 (Fla. 4th DCA 2003). The essential elements of collateral estoppel are: 1) that the parties and issues be identical, and 2) that the particular matter be fully litigated and determined in a proceeding that results in a final decision of a court of competent jurisdiction. *Id.*

St. Paul does not dispute that it is precluded from re-litigating defenses raised in the Arbitration. St. Paul is not, however, collaterally estopped, in the civil action under §624.155, from demonstrating the factual basis for the affirmative defenses quoted above, because the issues are not identical to the Arbitration. In the Arbitration, the issue was whether St. Paul was, in fact, excused from performance under the Bond. In the instant civil action under §624.155, the issue is whether St. Paul *reasonably believed* it was excused from performance under the Bond and, therefore, under the "totality of the circumstances," St. Paul acted in good faith. *See, Talat Enterprises, Inc. v. Aetna Casualty and Surety Co.,* 753 So. 2d 1278 (Fla. 2000). St. Paul might have been incorrect in its conclusion that the subject defenses would bar recovery in the Arbitration, but that does not mean that those defenses were not asserted in good faith. Because this statutory action rests upon the allegation that St. Paul "ignored [its] duties" under the Bond, the legal issues and the elements of proof raised by the subject affirmative defenses in this action are different from those raised by the same defenses in the Arbitration.

It must be said that these matters need not have been framed as "affirmative defenses" in the statutory action. As stated, they are part of the substantive law of §624.155. Under that statute, it is Dadeland's burden to prove, under the "totality of the circumstances," that St. Paul did not act in good faith. St. Paul is entitled to rebut that case. And, such rebuttal necessarily would involve demonstrating the factual basis for the reasonable belief held by St. Paul in the validity of the affirmative defenses raised in the Arbitration. St. Paul ought not be, and cannot be, estopped from defending itself as to the separate claim for alleged breach under the civil remedy statute. Therefore, Question V must be answered in the negative.

CONCLUSION

This Court need not reach the certified questions presented by the Eleventh Circuit because they are not "determinative of the cause." However, if the questions are answered, all except for Question IV should be answered in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Appellees certify that the type, size, and style utilized in this Brief is 14 point Times New Roman, which is 10 characters per inch.

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