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ON APPEAL Judge ordered insurer to pay \$8.6 million

BAD FAITH LAWSUIT MAY BE FIRST TO GO TO TRIAL



Steve Siegfried of Siegfried Rivera Lerner de la Torre & Sobel

by **Billy Shields**

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A bad faith lawsuit against a construction bond issuer is back in play again and could become the first — and only — lawsuit of its kind in the state to go to trial.

The 3rd District Court of Appeal affirmed a 2007 judgment in favor of developer 200 Ocean Drive against contractors hired by construction performance bond company Great American Alliance Insurance to complete the project as well as the bond company. Following the judgment, 200 Ocean Drive filed a bad faith suit against the surety company, which was stayed when Great American appealed.

The bad faith alleged by 200 Ocean dates back to 2000, and Florida law was changed in 2005 to eliminate the possibility of bad faith litigation over construction bonds. The dispute over the bond on the eight-story, 20-unit upscale South Beach condo building was one of only a couple of statutory bad faith surety claims in Florida. Since state law now prohibits such claims, it may be the last.

“There aren’t many cases, and they’re usually difficult,” said Steve Siegfried of Siegfried Rivera Lerner de la Torre & Sobel in Coral Gables. He represents 200 Ocean in its case against Great American. Eugene Stearns, partner with Stearns Weaver Miller Weissler Alhadeff & Sitterson, filed the bad faith claim on 200 Ocean’s behalf.

Great American, a surety bond unit of Cincinnati-based American Financial Group, issued a \$3.78 million construction performance bond to 200 Ocean, a venture led by South Miami developer Scott Greenwald.

In 2007, Miami-Dade Circuit Judge Mary Barzee

ordered Great American to pay \$8.6 million to indemnify 200 Ocean, ruling Great American's contractors "performed shoddy repair work, causing extensive damage, additional damage to the project, including damage to much of the otherwise satisfactory work in place."

Her order was affirmed by the 3rd DCA last month, restoring the stayed bad faith claim. The damage award ballooned from the original bond amount with attorney fees and interest.

Great American attorney Bruce King, a Carlton Fields shareholder in Miami, conceded the appellate decision handed his side a defeat on the construction performance case, but he believes the bond company will prevail in the trial court on the bad faith question, which may end up being the only one ever brought to trial in Florida.

"Their cause of action for bad faith is suspect," he said.

Surety companies like Great American issue performance bonds to ensure the proper completion of construction projects in case a general contractor defaults due to events ranging from defective work to job actions by workers.

A surety company's options in a contractor default can include paying the bond amount to the developer, repairing defective work and finishing the construction itself.

Siegfried also represented Dadeland Station in a similar bad faith case against St. Paul Fire and Marine Insurance, which is considered the state's first bad faith claim against a surety company.

In 1995, St. Paul issued a \$26.5 million performance bond to Walbridge Contracting as construction began on the Dadeland Station shopping center. As the first tenants entered in late 1996, they began to complain about

CHRONOLOGY 2001

Dadeland Depot files a bad faith law suit against St. Paul Fire and Marine Insurance.

2005

With the Dadeland case on appeal, the Florida Legislature amends state law so a surety company cannot be sued for bad faith.

2007

The 11th U.S. Circuit Court of Appeals revives the bad faith claim in the Dadeland case.

2008

Developer 200 Ocean Drive sues surety company Great American Alliance Insurance for bad faith.

2009

The 3rd District Court of Appeal affirms a judgment against a construction performance bond company in the 200 Ocean case, reviving the bad faith claim against Great American.

construction defects, and county building officials threatened to rescind its certificate of occupancy.

Dadeland sued St. Paul for bad faith in 2001 in Palm Beach Circuit Court. The case was removed to federal court and went through an appeals process that lasted almost seven years.

The two parties resolved their differences out of court, according to Jeff Liggio, a shareholder with Liggio Benrubi & Williams in West Palm Beach, who also represented Dadeland Station.

But while the Dadeland case was on appeal, the Florida Legislature amended state law to erase bad faith claims against surety companies.

"The proponents of the bill were fearful that the Dadeland case would come down with the rule of law that surety companies could be sued for bad faith," said Larry Leiby, a name partner with Leiby Stearns & Roberts in Fort Lauderdale who teaches construction law at Florida International University.

Supporters of the bill argued bad faith suits would have a chilling effect on future construction. He represented Pompano Masonry, a subcontractor involved in the Dadeland case.

Up until the Dadeland case, "the bad faith statute had never been tested concerning a surety company," Leiby said. Under the old statute, a surety company was liable beyond the sum of the bonds it issued, which made the bill's supporters nervous as they watched the Dadeland case make its way through the appellate courts.

"We developed a line of law, and they took it away," Liggio said. "What it affected was business in the future. We were very proud of the fact that this was the first case of its kind, and we thought that this was emblematic of conduct by the industry. We were hoping that people would come to us" as future clients.

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