Motor Vehicle Dealer Bonds: Florida's Fourth District Court of Appeal Punts on Attorneys' Fees Issue

Posted in Articles, Legal Alerts by Matthew G. Davis on Wed Feb 15, 2017

By way of background, Florida law requires motor vehicle dealers to post a $25,000 bond or letter of credit as a condition of licensure. Fla. Stat. § 320.27(10) (2016). The purpose the statute is to "establish a very modest fund of $25,000 from which consumers could recover damages when car dealers went out of business and defaulted on their obligations." *Hubbel v. Aetna Cas. & Surety Co.*, 758 So. 2d 94 (Fla. 2000). "Attorneys' fees are not included under the statutory scheme set forth in section 320.27(10)." *Id.*

Because section 320.27(10) does not provide for a claimant's attorneys' fees, claimants have turned to section 627.428 as a means for recovering their attorneys' fees when asserting claims against a motor vehicle dealer bond. Section 627.428 provides in relevant part, "upon rendition of a judgment…against an insurer and in favor of any…named or omnibus insured or the named beneficiary under a policy…the trial court…shall adjudge…in favor of the…beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit… ." Fla. Stat. § 627.428 (2016). Florida courts have held that section 627.428, although it expressly mentions only insurers, applies to sureties issuing motor vehicle dealer bonds.

Given that attorneys' fees are recoverable pursuant to section 627.428 upon successfully obtaining a judgment on a motor vehicle dealer bond claim, the issue is whether the bond and/or section 320.27(10) caps the fees at $25,000, the bond's penal sum. Claimants' attorneys argue the bond's penal sum does not cap recovery of attorneys' fees and in support cite *David Boland, Inc. v. Trans Coastal Roofing Co.*, 851 So. 2d 724 (Fla. 2003) (holding attorneys' fees in excess of the penal sum of a construction performance bond recoverable under section 627.428). We, however, have argued *Boland* is distinguishable and not applicable to motor vehicle dealer bonds because *Boland* relied upon the fact that "no other statute limits the attorneys' fees liability of sureties under a performance bond." *Id*. at 726. Section 320.27(10), applicable specifically to motor vehicle dealer bonds, expressly provides that the "aggregate liability of the surety in any one year shall in no event exceed the sum of the bond." Fla. Stat. § 320.27(10)(b). Unlike construction performance bonds, there is a statute expressly limiting the liability of motor vehicle dealer bond sureties. Thus, the battle lines are drawn.

As mentioned above, no Florida appellate court has ruled directly on the issue. In 2010, a trial court in Orlando analyzed this issue and ruled in the surety's favor finding the penal sum capped attorneys' fees under section 627.428. In its Order, the Court wrote: "[s]imply, auto dealer sureties are not cash cows to be milked by attorneys…Therefore, [the surety's] total exposure in this case cannot exceed $25,000, inclusive of fees pursuant to section 627.428." *Hakes v. Orlando Auto Specialists et al*, Case No. 2009-CA-09887-O (Fla. 9th. Cir. Ct.). The plaintiff in *Hakes* appealed this decision, but the appellate court affirmed the decision by per curiam affirmance without opinion meaning it has no precedential value.

Because there remains no controlling precedent on this important issue, both surety and plaintiff's attorneys were anxiously awaiting the Fourth District Court's decision in *Gustafsson v. Aid Auto Brokers, Inc.*, 2017 Fla. App. LEXIS 767 (Fla. 4th DCA 2017). There, the plaintiffs appealed a number of the trial court's orders, including one limiting the surety's liability for fees to the penal sum of the bond. Thus, the attorneys' fees issue was once again before a Florida appellate court which had a opportunity to provide much needed clarity.

Gustafsson involved a lawsuit against a dealership and motor vehicle dealer bond surety claiming the dealership concealed facts regarding the vehicle's condition prior to the sale. The parties eventually entered a mediated settlement agreement which provided, among other things, that: "Plaintiff is entitled to reasonable attorneys' fees **pursuant to § 501, Fla. Stat. only**…If agreement cannot be reached regarding the amount of fees the Court will determine the fees." *Gustafsson*, 2017 Fla. App. LEXIS 767, *3 (emphasis added). The parties could not agree on the amount of fees and submitted the dispute to the trial court. The trial court determined the reasonable amount of fees and entered judgment against the dealership in the amount of $70,150.00.

The dealership subsequently went out of business and the plaintiff sought to enforce the attorneys' fees provision of the mediated settlement agreement against the surety. The trial court found the surety was liable for attorneys' fees under the mediated settlement agreement, but

granted the surety's motion to limit its liability to the $25,000 penal sum of the bond. Both parties appealed. Plaintiff argued the penal sum of the bond did not limit the surety's liability for attorneys' fees. Meanwhile, the surety argued it was not liable for attorneys' fees at all because the mediated settlement agreement expressly provided that the plaintiff was only entitled to attorneys' fees pursuant to chapter 501, the Florida Deceptive and Unfair Trade Practices Act, which does not apply to sureties.

The Fourth District Court of Appeal agreed with the surety finding that chapter 501 does not apply to sureties. *Gustafsson*, 2017 Fla. App. LEXIS 767, *6. Therefore, the court found that the express language of the mediated settlement agreement – providing for attorneys' fees under chapter 501, only – "necessarily excluded [the surety] from any obligation to pay the attorneys' fees." *Id*., *7. The court found this issue dispositive, and therefore dismissed plaintiff's appeal on whether the penal sum caps the surety's liability for attorneys' fees as moot. Thus, the court missed an opportunity to resolve this issue.

If this cloud has a silver lining, it's that at least another trial court in the state of Florida agreed that the penal sum of a motor vehicle dealer bond limits the surety's exposure for attorneys' fees. Nonetheless, we expect to see more demands from plaintiff's lawyers seeking attorneys' fees in excess of the penal sum of the bond until we receive a definitive ruling on this issue.