IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
COURT OF APPEALS

ST. PAUL FIRE AND MARINE INSURANCE COMPANY; TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA; FIDELITY AND GUARANTY INSURANCE COMPANY; AND THE UNITED STATES FIDELITY AND GUARANTYCOMPANY — APPELLANTS

v. — CAUSE NO. 2009-CA-01248

ED MORGAN, CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION

CONSOLIDATED WITH

FIDELITY & GUARANTY INSURANCE COMPANY — APPELLANT

v. — CAUSE NO. 2008-CA-1931

JOSEPH L. BLOUNT, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE MISSISSIPPI STATE TAX COMMISSION — APPELLEE

ON APPEAL FROM THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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I. *DE NOVO* STANDARD OF REVIEW APPLIES

As it did in the proceedings below, the MTC argues that a deferential standard of review should apply. Specifically, the MTC states that this Court may only determine "whether or not the action of the administrative agency (1) was supported by substantial evidence, (2) was arbitrary or capricious, (3) was beyond the power of the administrative agency to make, or (4) violated some statutory or constitutional right of the complaining party." *See MTC's Brief at pp. 4-5.* In support of this position, the MTC cites *Mississippi State Tax Commission v. Vicksburg Terminal, Inc.*, 592 So. 2d 959 (Miss. 1991) and *Mississippi State Tax Commission v. Mask*, 667 So. 2d 1313 (Miss. 1995).

Unlike the present action, both of the cases relied upon by the MTC involved the appeal of a decision of the administrative agency by actual parties to the initial administrative proceeding. *See*, *Vicksburg Terminal*, 592 So. 2d at 960-61; *Mask*, 667 So. 2d at 1314. Conversely, this case involves the claims of parties ***excluded from*** the administrative process by the MTC. Indeed, a central issue in these cases is the MTC's failure to notify the Sureties of any administrative proceedings requested by any Principal and/or the MTC's refusal of the Sureties' requests for their own hearing before the MTC – all contrary to the constitutional requirement of due process.

The Commission fails to recognize that ***no*** deference is warranted where "the agency action is ***contrary to the statutory language***"; is "[i]n excess of statutory authority or jurisdiction of the commission"; "[m]ade upon ***unlawful procedure***"; "[u]nsupported by any evidence"; or "arbitrary or capricious or ***otherwise not in accordance with law.***" *Bay St. Louis Community Ass'n v. Commission on Marine Resources*, 808 So. 2d 885, 888 (Miss. 2001)(citing *Casino*

Magic Corp. v. Ladner, 666 So. 2d 452, 459 (Miss.1995))(emphasis added). Accordingly, the deferential standard cited by the MTC is inapplicable.

As noted in the Sureties' initial brief, this appeal involves the grant of summary judgment and the grant of a motion to dismiss. Grant or denial of either type of motion is reviewed pursuant to the *de novo* standard of review. *Harris v. Miss. Valley State Univ.,* 873 So. 2d 970, 988 (Miss. 2004); *Brown ex rel. Ford v. J.J. Ferguson Sand & Gravel Co.,* 858 So. 2d 129, 130 (Miss. 2003).

II. SUMMARY OF THE ARGUMENT

The Sureties filed these consolidated actions because they were deprived of their property contrary to the requirements of Mississippi law and deprived of their constitutional right to substantive and procedural due process. Accordingly, the Sureties sought the legal remedies available under applicable law as a result of this illegal deprivation. The overall complaint raised by the Sureties in the proceedings below was that they have been treated unfairly by the government. ***All*** of the Sureties' claims in these cases relate to that central issue. As in the proceedings below, the MTC's brief does not squarely address this central issue.

Rather, the MTC's brief all but ignores the constitutional issues and claims raised by the Sureties in this consolidated appeal. Additionally, the MTC's brief ignores the long-established precedents from this Court and from the United States Supreme Court regarding the right to due process, the payment of interest by sureties and the narrow construction of penalties. The MTC further selectively picks and chooses what Mississippi law should be read into contractual terms, ignoring important precedent from this Court in the process.

MTC argues that the Sureties do not and should not have any opportunity to challenge the accuracy and appropriateness of any amount demanded by it under the Riders. Furthermore, MTC argues that the courthouse should be closed to the Sureties for the purpose of challenging

the constitutionality of the MTC's actions. The MTC makes these arguments in spite of an admitted record of inaccuracies and a policy not refunding any overpayment made by the Surety to the Surety.

The positions and arguments of the MTC are not consistent with Mississippi law or the United States Constitution. The lower courts erred in accepting these arguments and positions. As such, this Court should reverse.

III. ARGUMENT

A. The Sureties Are Entitled to Due Process

As anticipated, the MTC argues that this Court should not consider the Sureties constitutional claims. Rather, the MTC argues that the Sureties due process arguments amount to nothing more than a red herring intended to distract this Court from the substantive contractual issues of the case. *See MTC's Brief at p. 5.* The pleadings and record in this case undermine this argument. The Sureties did not ask for damages for breach of contract, specific performance or any other contract-based relief. (Rec02. 22-25)(Rec09. 1-23) Further, this argument utterly ignores that the MTC's demand letters to the Sureties do not simply make a contractual claim. Rather, the demand letters threaten statutory liens and the issuance of tax warrants against the Sureties by a state actor. (Rec. Ex. Tab 5) Further, pursuant to the policy of the MTC, the Sureties were not entitled to any pre-deprivation or post-deprivation hearing to challenge the accuracy of the demand. The Sureties alleged facts describing violations of their constitutional rights and sought relief based upon these facts. Rather than meet the substance of the Sureties' due process argument, the MTC amazingly argues that the Sureties are simply not entitled to due process. This argument is not surprising given the admitted errors contained in many of the assessments at issue in these consolidated cases. While not surprising, the argument is utterly without merit.

1. Where state action may deprive a citizen of a property interest, due process is required.

The United States Constitution and the Mississippi Constitution provide that citizens cannot be deprived of their property without due process of law. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Lemon v. Miss. Transp. Commn.*, 735 So. 2d 1013 (Miss. 1990). Where the acts of the state ("state action") work such a deprivation, the citizen is entitled to both substantive and procedural due process. This issue was briefed extensively in the Sureties' brief and will not unnecessarily be repeated.

In its brief, the MTC does not dispute that the Sureties' right to keep their property is fundamental. The MTC does not offer any argument or authority that strict scrutiny does not apply. Likewise, the MTC does not dispute that the Sureties had no notice and no opportunity to be heard at a meaningful time and in a meaningful manner. Further, the MTC admits that that the contracts at issue, the language included therein and the Commission's actions taken pursuant to those contracts are all a function of state action. *See MTC's brief at pp. 13-14.* As such, the MTC has failed to refute the arguments raised by the Sureties in their brief.

Instead of meeting and addressing the Sureties' constitutional claims, the MTC merely argues that the constitution does not apply and, amazingly, that the Sureties are not entitled to due process. In so doing, the MTC relies upon, *Mississippi Farm Bureau Insurance Co. v. Britt*, 826 So. 2d 1261 (Miss. 2002) and an excerpt from a legal encyclopedia both addressing the rights of ***private parties*** to an insurance contract and/or a bond. Neither of these authorities, in any way, addresses the additional notice and process requirements mandated by due process where state action is involved. *See, Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 485 (1988)(distinguishing right to due process where state action is involved versus strictly private transactions); *Barrera v. Security Bldg. & Inv. Corp.*, 519 F. 2d 1166, 1169 (5th

Cir. 1975)("[t]he Fourteenth Amendment prohibits the state from depriving any person of life, liberty, or property, without due process of law; but it adds nothing to the rights of one citizen as against another.")(citing *United States v. Cruikshank*, 92 U.S. 542, (1875)); *McComb Equipment Co., Inc. v. Cooper*, 370 So. 2d 1367, 1368 (Miss. 1979)(recognizing that due process rights are triggered by state action, not by contractual agreements between private parties).

There is no question as to the role state action played in the creation of the Riders at issue, the language included in them, the threat of statutory liens and the exaction of money from the Sureties by the MTC were all exercises of state action. Indeed, the MTC points out that the Riders were ***mandated*** by Miss. Code Ann. § 27-65-21 and that the penalties assessed against the Sureties provided for by Code Ann. § 27-65-39. *See MTC's brief at pp. 1-2.* The MTC further points out that that it is authorized to promulgate rules and regulations and that Regulation 41 ***requires*** that all section 27-65-21 tax bonds ***be approved by the Commissioner***. *Id.* Indeed, the MTC has also admitted that it is responsible for the language included in the Riders. (Rec02. 339-340) Additionally, it cannot be denied that the MTC made its demand and threatened the imposition of statutory liens and tax warrants in its demands letters. (Rec. Ex. Tab 5) It is clear that the very existence of the Riders and the language employed in them is a product of state action necessarily invoking constitutional rights.

2. MTC failed to adequately address *Matthews v. Eldridge*.

The MTC made no attempt whatsoever to address the Sureties' arguments that the requirements of the United States Supreme Court's decision in *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976) are applicable and have not been met with regard to procedural due process. Rather, the MTC sought to explain that it was prohibited from providing notice and an opportunity for hearing by certain confidentiality statutes. The Sureties fully addressed why the confidentiality statutes relied upon do not absolve the MTC from complying with the

requirements of due process. Sureties have also pointed out that the statutes relied upon did not prevent the MTC from affording the Sureties due process required under both the United States and Mississippi constitutions in the initial brief. These arguments will not needlessly be repeated.[1]

The closest MTC came to addressing the *Matthews* balancing analysis was to argue that its Rule 30(b)(6) designee "misspoke" when she testified that she knew of nothing that would prevent the MTC from providing the surety with notice that an assessment had been and/or notice of any hearing regarding an assessment. *See MTC's brief at p. 10.* The MTC cites to the testimony it claims was a misstatement but has not pointed to anything in the record establishing the MTC's Rule 30(b)(6) designee "misspoke" as alleged. As such, this Court should disregard the argument as unsupported by the record.

Further, the MTC argued that it would have "no way of knowing to which project the payments were related until the contractor was audited." (*See MTC's brief at p. 9.*) Here again, the MTC cites to the argument of counsel and not to any evidence in the record. This is not surprising as the record demonstrates that MTC maintains records of all sureties for any given contractor on active projects through the issuance of a Material Purchase Certificate ("MPC") that allows the contractor to buy materials at a reduced 3½ percent sales tax rate. (Rec02. 56-58) In order to obtain an MPC, the contractor must file a tax rider for the project. (Rec02. 58) The auditor conducts a tax audit with reference to the various projects for which the MTC keeps MPC numbers on file. (Rec02. 176-177) This documentation includes that name and address of

[1] In addition to these arguments, the Sureties point out that, even if the confidentiality statutes applied prior to the demand letters, they clearly would not preclude the MTC from allowing the Sureties a hearing once demand had been made under the Riders. The Sureties do not think such a delay is warranted nor adequate to meet the requirements of *Matthews* but the MTC's refusal to grant the Sureties a hearing even ***after*** demand had been made and liens threatened is inexplicable and clearly unconstitutional.

the surety for each project. (Rec02. 57) The MTC's argument is simply not supported by the record.

More importantly, the MTC completely ignores the risk of erroneous deprivation to the Sureties as a result of their inability to challenge the accuracy of assessments they are called upon to pay. The Sureties delineated instance after instance of mistakes made by the MTC in the assessments at issue in this case in their initial brief. These mistakes were in the hundreds of thousands of dollars. The Sureties also pointed out that, under the MTC's policy, any overpayment by a Surety as a result an error of would not be refunded to the Surety but to the Principal. The risk of erroneous deprivation is exceedingly high. The MTC clearly has no answer for why the refusal to provide the Sureties any opportunity to challenge the accuracy of assessments it is called upon to pay does not violate of the Sureties' right to due process.

3. This Court is capable of considering due process.

In its brief, the MTC refers to the concept of "due process" as "an unprecedented constitutional standard" and claims that this Court's recognition and enforcement of the Sureties constitutional right to due process will "upset well established law . . ." *See MTC's Brief at p. 5.* The MTC appears to argue that the constitutional right to substantive and procedural due process is too difficult a concept for this, or any other Court, to understand. Such is clearly not the case.

On numerous occasions, this Court has analyzed and enforced the right to substantive due process. *See generally, Grand Casino Biloxi v. Hallmark,* 823 So. 2d 1185, 1188 (Miss. 2002); *American Investors, Inc. v. King*, 733 So. 2d 830, 832 (Miss. 1999); *Petition of Carpenter v. City of Petal*, 699 So. 2d 928, 933 (Miss. 1997). Likewise, this Court has repeatedly considered and enforced the right to procedural due process. *See generally, In re Williamson,* 838 So. 2d 226, 238 (Miss. 2002); *Lemon v. Mississippi Transp. Com'n,* 735 So. 2d 1013, 1019 -1020 (Miss. 1999)("[i]t is then hornbook law that our state and federal constitutions prohibit laws which

permit deprivation of property without prior notice or hearing.")(citing *Donovan v. Mayor & Council of Vicksburg,* 29 Miss. 247 (1855)). *See also, Pulliam v. Chandler,* 872 So. 2d 752, 754 (Miss. Ct. App. 2004). Indeed, contrary to the assertions of the MTC, the United States Supreme Court has succinctly identified the requirements of procedure due process as "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L. Ed. 2d 18 (1976) (quoting) *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965). *See also Fahle v. Cornyn,* 231 F. 3d 193, 196 (5th Cir. 2000); *Crowe v. Smith,* 151 F. 3d 217, 230-31 (5th Cir. 1998). Further this Court has clearly identified and set forth that: "[A]n administrative board must afford minimum procedural due process under the Fourteenth Amendment to the United States Constitution and under Art. 3, § 14 of the Mississippi Constitution consisting of (1) notice and (2) opportunity to be heard." *Mississippi Gaming Comm'n v. Freeman,* 747 So. 2d 231, 246 (Miss.1999).

In the proceedings below, the Sureties demonstrated that they were deprived of a fundamental property right by the state action of the MTC. The Sureties further demonstrated that the MTC's actions were not narrowly tailored to serve any sort of state interest. Finally, the Sureties demonstrated that, although the MTC knew the Sureties rights would be adversely affected, it failed to give the Sureties adequate notice and the opportunity to be heard at a meaningful time and in a meaningful manner. Indeed, the MTC refused the Sureties' direct requests for a hearing. Accordingly, the Sureties have successfully demonstrated that the MTC's actions violated their right to due process.

4. The MTC cannot delegate its duty to provide due process.

It is axiomatic that the government cannot do indirectly that which it cannot do directly. *Clark v. Miller,* 105 So. 502, 505 (Miss. 1925). It has long been the law in this state that "[t]he

constitution is the paramount law-the supreme rule-to which all others must yield, and it operates with equal force on the different departments of government. *Campbell v. Mississippi Union Bank*, 1842 WL 3050, 33 (Miss. Err. App 1842). Generally speaking, due process rights owed by the government are non-delegable. *See e.g., Tysons, Inc. v. Mississippi State Highway Commn'* 367 So. 2d 939, 941(Miss. 1979); *Sarphie v. Mississippi State Highway Commn,'* 275 So. 2d 381, 383 (Miss. 1973). *See also, Broadhead v. Monaghan*, 117 So. 2d 881 (Miss. 1960). The concept of notice lies at the very heart of the due process guaranty. The United States Supreme Court has discussed this concept at length:

> ***Engrained in our concept of due process is the requirement of notice***. Notice is sometimes essential so that the citizen has the chance to defend charges. ***Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed***. Notice is required in a ***myriad of situations where a penalty or forfeiture might be suffered for mere failure to act***. Recent cases illustrating the point are *Mullane v. Central Hanover Bank & Trust* Co., 339 U.S. 306, 70 S.Ct. 652, 94 L. Ed. 865; *Covey v. Town of Somers*, 351 U.S. 141, 76 S.Ct. 724, 100 L. Ed. 1021; *Walker v. City of Hutchinson*, 352 U.S. 112, 77 S.Ct. 200, 1 L. Ed. 2d 178.

Lambert v. People of the State of California, 355 U.S. 225, 228 (1957)(emphasis added).

The MTC argues that Sureties "had an implied obligation" to monitor and know whether their principals were paying their taxes.[2] The MTC takes the position that the Sureties should have kept a closer eye on the Principals to insure that that they would know of any potential claim by the MTC.[3] In essence, the MTC attempts to delegate to the Sureties its constitutional

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[2] MTC cites to the record at TR1, 29-30 and TR2, 34-36. These citations reference arguments of MTC's counsel made to the trial court without reference to any evidence submitted in the record.

[3] The suggestion that the Sureties could have made even greater demands upon the Principals to provide notice of a tax dispute and/or potential claim is particularly unsatisfactory in this case as Sureties can "face possible tort liability for meddling in the affairs of their principals." *L & A Contracting Co. v. Southern Concrete Services, Inc.* 17 F. 3d 106, 111 (5th Cir. 1994)(citing *Gerstner Elec., Inc. v. American Ins. Co.*, 520 F. 2d 790 (8th Cir. 1975); *Cox v. Process Eng'g, Inc.*, 472 S.W. 2d 585, 587 (Tex. Civ. App. 1971); Restatement (Second) of Torts §§ 766, 766A (1979); Robert F. Cushman, et al., *Representing the Performance Bond Surety, in* Construction Defaults, *supra* note 11, § 5.2, at 106.

responsibility for adhering to the notice requirements embodied in the concept of due process. This argument is not consistent with the law.

The United States Supreme Court has reiterated that "'a party's ability to take steps to safeguard its own interests does ***not*** relieve the State of its constitutional obligation'" *Jones v. Flowers*, 547 U.S. 220, 232 (2006)(citing *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799 (1983)). The Court's opinion in *Mennonite* demonstrates the fallacy of the MTC's argument:

> Personal service or mailed notice is required even though sophisticated creditors have means at their disposal to discover whether property taxes have not been paid and whether tax sale proceedings are therefore likely to be initiated. In the first place, a mortgage need not involve a complex commercial transaction among knowledgeable parties, and it may well be the least sophisticated creditor whose security interest is threatened by a tax sale. ***More importantly, a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation.*** It is true that particularly extensive efforts to provide notice may often be required when the State is aware of a party's inexperience or incompetence. . . . But ***it does not follow that the State may forego even the relatively modest administrative burden of providing notice by mail to parties who are particularly resourceful.*** . . . Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of ***any*** party, whether unlettered or well versed in commercial practice, ***if its name and address are reasonably ascertainable***.

Mennonite, 462 U.S. at 799 (emphasis added and in original).

The right to notice under due process was non-delegable and certainly not subject to the Principal's approval. The MTC clearly failed to meet the requirements of due process and, as such, the courts below erred in their rulings.

B. MTC's Arguments Are Not Consistent With Applicable Law

1. Mississippi Law Must Be Read Into the Riders.

The MTC agrees that "the 'law in force at the time that a contract is made forms a part of it and is written into the contract as much as if expressly incorporated therein.'" *Ivison v. Ivison*,

762 So. 2d 329, 335 (Miss. 2000)(citing *Mississippi Valley Gas Co. v. Boydstun*, 230 Miss. 11, 31, 92 So. 2d 334, 340 (1957)). However, the MTC wants to pick and choose which laws are read into the Riders and completely ignore the constitution and rulings of this Court in its interpretation of the Riders. Specifically, the MTC asks this Court to ignore its own precedent holding that a surety is not responsible for the payment of a penalty incurred due to its principal's negligence nor is it responsible for interest accrued prior to being put on notice of the claim.

a. Sureties cannot be penalized for the negligence of the principals.

The MTC freely ***admits*** that the purpose of exacting penalties is to ensure prompt payment of taxes and that the penalties at issue in these cases resulted from the Principals' – not the Sureties' – failure to pay. *See MTC's brief at p. 14.* However, the MTC made no attempt to address the relevant and binding authorities cited in the Sureties' brief prohibiting the imposition of a punishment on one for the misdeeds of another. The MTC cites no Mississippi or United States Supreme Court case authority to support its position. Rather, the MTC relies upon a 1973 California Court of Appeals case that has only been cited in one other opinion and ***that*** case was overturned. *See T.M. Cobb Co. v. Los Angeles County*, 46 Cal.App. 3d 315, 315 (Cal. App. 1975). The California case relied upon by MTC makes no attempt to analyze the case under a constitutional framework. It is poorly reasoned and inconsistent with applicable Mississippi and United States Supreme Court precedent and should, therefore, not be considered by this Court.

Conversely, this Court has long recognized that statutory penalties are to be "narrowly" and "strictly" construed. *Midsouth Rail Corp. v. Citizens Bank & Trust Co., Inc.,* 697 So. 2d 451, 458 (Miss.1997)("[i]t is a general rule of statutory construction that penal statutes are to be strictly construed.")(citing *Mississippi Insurance Commission v. Savery,* 204 So. 2d 278 (Miss.1967)). It has long been the law in Mississippi that "[p]enalties ***are not to be imposed by implication***. They ***must be*** provide [sic] for in plain language." *Winter v. Hardester,* 98 So. 2d

629, 631 (Miss.1957). *See also, Attala Loans, Inc. v. Standard Discount Corp.*, 161 So. 2d 631, 638 (Miss.1964)("[p]enal statutes are not to be extended in their operation to persons, things, or acts not within their descriptive terms, or the fair and clear import of the language used.").

The above-cited law was thoroughly established when the relevant Riders in this case were issued. Accordingly, the language relied upon by the MTC ***must*** be read in light of this law. As such, the "penalties" referenced in the language of the Riders can ***only*** be collected from the surety if directly authorized by Miss. Code Ann. § 27-65-39. The language of this statute specifically requires a finding of negligence and fails to expressly authorize collection of the penalty from a negligent party's surety. Accordingly, the language of the Riders, read in light of applicable law, can ***only*** be interpreted to mean that ***only*** the principal/contractor is responsible for the payment of any penalty assessed for its negligence and the surety can ***only*** be required to pay a penalty for its own negligence. Any other interpretation fails to fully incorporate Mississippi law into the terms of the Riders.

b. Sureties are only chargeable with interest after notification.

Likewise, it has long been the law in Mississippi that a surety is ***only*** obligated to pay for interest assessed ***after*** it is notified of a claim on the bond. *See State v. Moody*, 198 So. 2d 586, 591-92 (Miss. 1967). This law is, likewise, written into the language of the Riders.

The MTC's attempt to address this Court's ruling in *State v. Moody*, 198 So. 2d 586, 591 (Miss. 1967) in its brief fails. In *Moody*, this Court held that "***a surety company is chargeable with interest only when it has failed to make good after the defalcation has been called to its attention***. . . ." *See, State v. Moody*, 198 So. 2d 586, 591 (Miss. 1967)(emphasis added). In an attempt to side-step the clear mandate of *Moody*, the MTC argues that the penal amount of the bonds involved in *Moody* were established by statute and that the Riders at issue in the present action include any interest and penalties owed by the Principals. Thus, states the MTC, *Moody*

"merely stands for the proposition that interest beyond the penal sum can be collected from a surety on account of the surety's default only after notice to the surety; not that interest can never be included in the penal sum." *See MTC's brief at pp. 11-12.* The Commission is simply wrong in this assessment.

Contrary to the MTC's argument, the relevant holding in *Moody* had nothing to do with the "penal sums." Indeed, this Court's discussion regarding the penal sum involved in the bond at issue in *Moody* was in the context of examining the appellant's argument that statutory language setting forth the bond requirement and the penal amount of the bond governed over a contradictory lesser amount designated on the face of the bond. *See Moody*, 198 So. 2d at 588-90. The discussion of the penal amount of the bond had absolutely nothing to do with the appellant's argument that the surety should be equally liable with the principal for interest dating back to the date of misappropriation. *Id.* at 591-92.

Moody involved claims against two public official bonds. *Id.* at 587. The penal amount set forth on the face of both bonds was $12,000.00. *Id.* The claim made against the first bond[4] was for the amount of $6,931.00, the full amount misappropriated by the principal public official. *Id.* Additionally, the state sought to recover interest from both sureties dating back to the date the principal misappropriated the funds. *Id.* at 587. With regard to interest on the $6,931.00 claim against the first bond, the primary claim plus interest would not have exceeded the $12,000.00 penal amount and certainly would not have exceeded the statutory penal amount. This fact was, however, irrelevant to this Court's analysis which turned on the issue of fairness. *Id.* at 591-92.

[4] The amount of the penal sum was ***only*** an issue with regard to the second bond as the relevant misappropriated funds far exceeded the $12,000.00 penal amount set forth on the face of the second bond. *Moody*, 198 So. 2d at 587.

In affirming the trial court's ruling that the surety could ***only*** be held liable for interest accruing after the date of demand, this Court looked to case authority decided in other states. *Id.* at 591-92. The following language from *In re Perelstine*, 44 F.2d 62, 64 (W.D. Pa. 1930) as persuasive in adopting the same rule of law in Mississippi:

> We come next to the charge of interest against Frederick. Is the surety liable for that? There is no doubt about Frederick's liability to pay interest, but ***a surety company is chargeable with interest only when it has failed to make good after the defalcation has been called to its attention***. . . .

Id. at 591 (emphasis added). Additionally, this Court cited the following language from *Cunningham v. Cunningham*, 157 F. 2d 859, 861 (1946):

> ***Nothing is due from the surety until he is notified of his principal's delinquency***; if he then unjustly withholds payment, he is liable for interest because of his unjustifiable detention of the money. ***He is not required to take the initiative*** in making payment, and stands only as security until a claimant makes actual demand; ***then only does interest begin to accrue***.

Id. at 592 (emphasis added).

The MTC also cites a legal treatise that expressly recognizes that Mississippi does ***not*** hold a surety liable for interest accrued prior to the surety's notification of a claim. *See, MTC's brief at p. 12,* (Rec02. 310, 313, 318) Indeed, the treatise cites *Moody* as providing the reasoning behind the decision of some jurisdictions to ***limit*** a surety's liability for interest to that interest which accrues ***after*** notification. (Rec02. 313, 318)

All of the interest paid by the Sureties in the instant case accrued prior to notice of the claims. Accordingly, the language of the Riders, read in light of applicable law, can only be interpreted to mean that the Sureties are not responsible for the payment of any interest assessed prior to notification of the claims. Any other interpretation fails to incorporate Mississippi law into the terms of the Riders.

2. The Sureties have standing

In these consolidated cases the MTC takes the position that the Sureties had no right to notice and a hearing prior to having to pay any amounts assessed against the Principals. The MTC further asserts that the Sureties have no standing challenge the assessments in Court. It is the functional equivalent of saying "shut up and do as you are told." If this Court accepts the MTC's argument then there are is absolutely no avenue available to the Sureties to challenge an inaccurate and/or improper assessment. This simply cannot be the law. Certainly, the MTC has failed to establish that it is the law.

As an initial matter, it bears noting that the MTC failed to even address the legal analysis to determine standing set forth in the Sureties' initial brief. As noted by the Sureties standing simply requires that: (1) the plaintiff has suffered an injury that is "actual and concrete"; (2) there is "a causal connection between the injury and the conduct complained of . . . 'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court'" and (3) a likelihood that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). All three factors are clearly met in this case: (1) the Sureties have been forced to pay amounts under threat of statutory liens and/or warrants without being afforded due process; (2) this injury occurred as a direct result of the actions, policies and/or procedures of the MTC and (3) the relief requested (refund, declaratory and injunctive relief) will provide direct redress to the specific injuries alleged and prevent future injuries. Satisfaction of these three elements is all that is needed in order to satisfy the requirements of standing regardless of how the word "taxpayer" is defined. Notwithstanding, the MTC's arguments regarding the meaning of the word "taxpayer" is inconsistent with the statutory definition and should be rejected.

First, the MTC seems to argue that even though Miss. Code Ann. § 27-65-3(e) defines a "taxpayer" as "any person ***liable for or having paid any tax*** to the State of Mississippi under the provisions of this chapter," the Sureties cannot be considered "taxpayers" without a tax identification number under the statute. This argument is nonsensical in light of statutory language which provides for and recognizes contractors who fail to obtain a tax identification number. See, Miss. Code Ann. § 27-65-3(e). With or without a tax identification number, the statute clearly recognizes that "***any person liable for or having paid any tax . . .***" under the sales tax chapter is, by definition, a "taxpayer."

Second, the MTC attempts to distinguish various cases cited in the Sureties' initial brief. Specifically, the MTC argues that the cases cited do not stand for the proposition that the Surety "stands in the shoes" of the Principals in this case. *See MTC's brief at p. 16.* None of these attempts were successful. The MTC devotes its attention primarily to a Tennessee Supreme Court case, *Exchange Mutual Ins. Co. v. Olsen*, 667 S.W. 2d 62 (Tenn. 1984), cited as persuasive authority by the Sureties. The MTC argues that a provision in the bond at issue in *Exchange Mutual* specifically placing the surety in the position of the principal makes this case distinguishable from the present case. The MTC forgets that the Riders at issue in this case are attached to performance bonds. (Rec02. 71-72)(Rec09. 24-429) ("Bonds") issued by the Sureties. As such, the terms of the Riders must be read together with the terms of the bonds to which they were attached. *See generally, Webster v. U. S. Fidelity & Guaranty Co.*, 153 So. 159 (Miss. 1934). MTC admits that a Surety stands in the shoes of the Principal in the case of a performance bond. *See MTC's brief at pp. 17-18.* As such, its argument is without merit.[5]

[5] This also negates the MTC's attempt to distinguish this Court's decision in *Hanberry Corp. v. State Bldg. Commission*, 390 So. 2d 277 (Miss. 1980) and the Fifth Circuit's decision in *Cooper Industries, Inc. v. Tarmac Roofing Systems, Inc.*, 276 F. 3d 704 (5th Cir. 2002) also cited by the Sureties in their initial brief for the proposition that the Sureties stand in the shoes of the Principals.

Further, the MTC insinuates that the Tennessee Supreme Court decision in *Exchange Mutual Ins. Co. v. Olsen*, 667 S.W.2d 62 (Tenn. 1984) has been statutorily overruled. The Tennessee Court of Appeals does not appear to agree as it cited *Exchange Mutual* in a 2006 opinion. *See Tennessee Farmers Assur. Co. v. Chumley*, 197 S.W. 3d 767, 779 (Tenn. Ct. App. 2006).

Finally, the MTC accuses the Sureties of failing to cite any cases to support that a surety is entitled to due process from a governmental entity for the default of a principal. This is simply not true. The *Moody* case, cited at length in the Sureties' initial brief certainly supports the proposition that the Sureties are entitled to due process although not couched in those terms specifically. Additionally, the Sureties cited cases from sister jurisdictions that have expressly found that sureties (in the context of bail bonds) are entitled to pre and post deprivation hearings on bonds issued by them where the governmental authority makes a claim for the principals' default. *See, State v. Polanca*, 753 A. 2d 1170, 1173-74 (N.J.Super 2000) ("There can be no dispute here that a corporate surety, like IFI, is entitled to both a pre-deprivation hearing and post-deprivation hearing . . ."); *State v. Mitchell*, 337 So. 2d 1186, 1188 (La. 1976) *See also*, *Edmonson v. County of Van Zandt* 1994 WL 24921 at *2 (5th Cir. 1994)("[w]e need not determine what process was due to agree with the district court that a due process violation occurred. Sheriff Jordan's policies provided no process either pre- or post-deprivation.").

The MTC cannot escape from the fact that it threatened to impose statutory liens and tax warrants on the Sureties if they did not promptly pay the assessments, penalties and interests charged against the Principals. The MTC cannot escape from the fact that it provided ***no*** notice and ***no*** opportunity to be heard on the validity and/or accuracy of the assessments, penalties and interest. That the MTC also takes the position that the Sureties have no ability to challenge the constitutionality of these action in court is egregious. The Sureties clearly had standing to bring

the present action. This Court should reject the MTC's arguments to the contrary and reverse the lower courts' rulings on this issue.

V. CONCLUSION

One of the primary objectives of due process is to prevent government from arbitrary or erroneously depriving citizens of their liberty or property. The record of errors by MTC in the assessments at issue in these consolidated cases makes abundantly clear the importance of due process in these cases. It is telling that in its reply brief the MTC completely ignored its errors and the very high risk of erroneous deprivation to the Sureties absent the protections afforded by due process.

Understandably, the MTC would like this Court to simply ignore the merits of the Sureties' constitutional claims by finding the present dispute to be nothing more than a contract dispute. However, this is a constitutional rights case, ***not*** a contract dispute, and the courts below erred in failing to address the constitutional claims presented.

Well known and fondly remembered lawyer, judge and law professor Noah S. "Soggy" Sweat used to admonish his students, including counsel for the Sureties, that the law was ultimately just a series of "do right rules." The law, according to Judge Sweat, was there simply to make people "do right," *i.e.* to be fair and to expect fairness.

In this case, the MTC has taken the position that the Sureties are: a) not entitled to ***any*** notice that an assessment that they are ultimately responsible for has been made; b) that Sureties have no right to contest the assessment even though, as the facts of this case show, the MTC can and does make egregious errors amounting to hundreds of thousands of dollars and c) that the Sureties lack standing to even sue the MTC to challenge the seizure of their assets. As the Sureties have noted, MTC contends that the Sureties must simply "shut up and pay." The Sureties submit that Judge Sweat would find this position offensive to the concept of fairness.

Setting aside for the moment all of the technical arguments concerning violations of statutes and fundamental due process, the actions of the MTC violate the "do right rules" in a very real and fundamental way.

All the Sureties in this case expect, and what they strongly believe the law requires, is meaningful notice of their potential financial exposure, a right to participate in the process to ensure the accuracy of the assessments and an ability to contest a wrongful assessment. They expect all of this before receiving a demand that their assets are about to be seized. So little, and so fair a request, but so opposed by the MTC. The Sureties urge this Court to "do right."

For all of the reasons set forth above, the judgments of the lower courts must be reversed and this case remanded for further proceedings on the Sureties constitutional claims.

This the 30th day of August, 2010.

Respectfully Submitted:

ST. PAUL FIRE AND MARINE INSURANCE COMPANY; TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA; FIDELITY AND GUARANTY INSURANCE COMPANY; AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY

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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have this date, served a true and correct copy of the above foregoing document via United States Mail, postage prepaid upon the following attorneys, as follows, to-wit:

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Honorable Judge Patricia Wise
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This the 30th day of August, 2010.

Lisa A. Reppeto