

1993

James Constructors, Inc. v. Salt Lake City
Corporation : Salt Lake City Corporation v. James
Constructors Inc., et al. : Industrial Indemnity
Compnay v. Hood Corporation : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JAMES CONSTRUCTORS, INC.

930452 CA

Plaintiff,

vs.

SALT LAKE CITY CORPORATION,

Defendant.

SALT LAKE CITY CORPORATION,

Plaintiff,

Case No. 930452-CA

vs.

JAMES CONSTRUCTORS, INC., et al.,

Defendants.

FILED

Utah Court of Appeals

INDUSTRIAL INDEMNITY COMPANY,

JAN 31 1994

Cross-Claimant, Third Party
Plaintiff and Appellee

vs.

Mary T. Noonan
Mary T. Noonan
Clerk of the Court

HOOD CORPORATION,

Cross Defendant and Appellant

APPELLEE'S BRIEF

Appeal from the Third Judicial District Court,
Salt Lake County, State of Utah
Honorable David S. Young, District Judge, Presiding

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vs.

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Industrial Indemnity Company

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II. JURISDICTION

This case was transferred from the Utah Supreme Court under Rule 42, Utah Rules of Appellate Procedure. This Court has jurisdiction pursuant to § 78-2a-3(2)(k), Utah Code Annot.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellant Hood's statement of issues on appeal (particularly statements 1 and 2) suggest errors based on assumptions which are foreign to the record. Appellee specifically objects to those statements as follows:

1. Appellant's first proffered statement suggests that the trial court afforded Industrial Indemnity a presumption of reasonableness on the issue of its attorneys fees and costs and then challenges that presumption. Importantly, however, there is nothing in the record, including the Court's findings and conclusions, to suggest that any such presumption was afforded. There can thus be no basis to argue any error. The sole issue for review on the matter of the reasonableness of the fees and costs awarded against appellant Hood is whether or not there was "clear error" in the findings of fact supporting the Court's conclusions and the judgment awarded.

2. Similarly, appellant's second proffered statement assumes that the trial court found redundancy and duplication in legal representation reflected in the fee award. That assumption actually runs contrary to express findings and conclusions. The issue again is strictly a factual one, addressing only whether or

not there was clear error in the Court's findings of fact supporting its conclusions that the fees incurred by Industrial were reasonable and necessary.

3. Appellee has no objection to the appellant's formulation of the third issue proffered.

IV. STANDARD OF APPELLATE REVIEW

Appellee believes that issues 1 and 2, as described by appellant ultimately relate to the trial court's findings of fact and are therefore subject only to the clear error/abuse of discretion standard under Rule 52(b), U.R.C.P. and Baldwin v. Burton, 850 P.2d 1188, 1199 (Utah 1993). Issue 3, relating to the award of prejudgment interest as part of the reasonable fee award, involves mixed issues of law and fact. To the extent that this Court considers the trial court's rationale as based entirely on a legal entitlement, it is subject to review under a correction-of-error standard. Andreason v. Aetna Casualty & Surety Co., 848 P.2d 171, 177 (Utah App. 1993). To the extent that the award of prejudgment interest is deemed a proper element of repayment of reasonable attorneys fees incurred and paid over a period of several years, the ruling and award is factual in nature and therefore subject to the deference afforded the trial court's factual findings under a clear error standard.

V. DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

There are no determinative provisions applicable to this case.

VI. STATEMENT OF THE CASE

A. Nature of the Case:

This appeal offers a variation of the all-too-common circumstance of a contractor trying to avoid liability for the consequences of its deficient work. In this particular case, involving more than seven years of litigation over a breach of a large public works contract between Salt Lake City Corporation ("SLCC") and James Constructors ("James"), those consequences include a judgment against the contractor's corporate indemnitor, Hood Corporation ("Hood") awarded to the bond surety, Industrial Indemnity Company ("Industrial"), attorneys fees and costs incurred over the same general period and totalling \$171,316.89 (including interest) [R.3476].

In making its ruling and entering its judgment and fee award in favor of Industrial, the trial court had the benefit of more than the evidentiary hearing Hood requested on Industrial Indemnity's fee request. It had been directly involved, from the bench, over most of the protracted dispute on the underlying contract and bond claims. In that light, a brief review of the case context, as reflected on the record, and completing and correcting appellant's cursory (and potentially misleading) offering¹, is important to a proper understanding of the nature and justification for the award appellant now challenges.

¹Appellant has neglected to support its factual statement with any citation to the record, as specifically required by Rule 24(a)(7), U.R.A.P.

B. Factual Background and Prior Proceedings:

On or about April 15, 1981, and in consideration of Industrial's issuance of certain performance and payment bonds for general contractor James Constructors, Inc. ("James"), a Hood subsidiary, Hood and B. M. Laulhere (an individual indemnitor, since deceased) executed a written indemnity agreement by which they agreed to indemnify and to hold Industrial harmless against losses, costs and expenses (including attorneys fees) incurred under or as a result of bonds issued. [A copy of the Contract of Indemnity, introduced at the hearing as Exhibit P-5, is attached hereto at App. D, A22-26.]

Industrial subsequently issued several bonds for James, including performance and payment bonds (each in the amount of \$1,128,481) in connection with a contract between James and SLCC for a large underground water transmission pipeline. [April 1988 Stipulation [Exh. P-12; also R.902-09, 910-18; (App. C) at ¶ 2.]

In early 1984, based on alleged breach of James' contract but without prior notice to Industrial, SLCC terminated James and relet the contract to correct significant deficiencies [R.3582]. When it learned of the termination and resulting dispute between SLCC and James, Industrial, through its local counsel, Snow, Christensen & Martineau, undertook a substantial, good-faith investigation and analysis of the factual and legal issues involved in the dispute [R.3582-87; Exh. P-13 at ¶5]. The assessment of Snow, Christensen & Martineau was that the case was a "nasty, dangerous" one, with significant exposure to the bond surety [R.3583]. The principal

players resisted a resolution, however, and, in separate actions consolidated in August, 1984 [R.63] James and SLCC each sued the other for breach of contract. In addition to naming James, SLCC's complaint leveled claims against Industrial, as surety on James' performance bond, and against Hood, as James' parent corporation, and sought recovery of more than \$2 million in damages.

With litigation commenced from both sides, Industrial tendered its defense in the matter to James and its counsel, under the indemnity agreement [R.3586]. James ultimately accepted the tender, but its local counsel, Reed Brown, requested the assistance of Industrial's counsel in formulating and pursuing defenses in the matter [R.3586]. Hood, on the other hand, represented separately by local counsel David Reeve, undertook to separate itself from the James/SLCC dispute by moving for (and at least initially obtaining) a summary judgment dismissing SLCC's claims against Hood [R.162-163].² At the same time the court granted Hood's motion for dismissal, it also granted SLCC leave to amend its complaint against James to add claims of negligence. [Minute Entry of August 2, 1985, R.161].³

²SLCC appealed Hood's dismissal and also attempted to amend its complaint to more clearly allege an "alter ego" theory against Hood. While SLCC ultimately prevailed on the appeal, the order reversing and remanding the case against Hood to the district court was not entered by the Court of Appeals until October 11, 1988 [R. 1057-1065]. Hood and its counsel kept a very low profile in the trial court over the entire period of appeal.

³SLCC's purpose in adding negligence claims was prompted by concerns over James' apparent inability to respond to any judgment, coupled with Hood's possible dismissal and the monetary limitations of Industrial's bond, and was thus clearly designed to involve

On June 12, 1986, as a consequence of the new negligence claims and by means of a Reply to Salt Lake City's Amended Counterclaim, attorneys Elwood Powell and Jay Jensen entered their appearance on behalf of James, through its liability insurer, Cigna Insurance, and under a reservation of rights [R.180; R.3728]. While the scope of the insurer's defense eventually grew to encompass contract issues as well, Jensen's and Powell's initial representation of James was limited to SLCC's claims of negligence and related property damage [R.3728].

On June 24, 1987, three years into the litigation, and while SLCC's appeal from the Hood dismissal was still pending, Industrial's counsel received a letter from Reed Brown, reversing Industrial's earlier tender and advising that he was withdrawing as Industrial's counsel. [Exhibit P-10; also at R.3606] Mr. Brown stated that he would remain as James counsel only for purposes of its counterclaim against SLCC; that attorneys Jensen and Powell would represent James on the property damage claims; and that Industrial Indemnity would have to handle the contract and bond issues on its own. [Id.] Consistent with and contemporaneous to that letter, Mr. Brown also filed a Notice of Withdrawal with the Court [R.369].

That highly unusual action, apparently prompted by Brown's own difficulties in obtaining payment for his services [R.3598], prompted Industrial's counsel to a more direct involvement in the

James' liability insurer. [See SLCC's Motion to File an Amended Complaint, dated July 5, 1985, at ¶¶ 5-6, R. 131-33.]

litigation and a demand to Hood for security and assurances of protection against any ultimate bond losses and expenses. [Id.]

On or about August 6, 1987, Industrial's counsel forwarded a demand letter to Hood, outlining scheduled deadlines in the action (including a looming trial date) and demanded that Hood make satisfactory arrangements to undertake Industrial's defense and otherwise to comply with its indemnity obligations [Exhibit P-11; also at R.3197-99]. Under the circumstances, Industrial also demanded that Hood post collateral sufficient to protect Industrial from any eventual loss or judgment on its bond exposure [Id.; see R.3599-3602].

Hood resisted Industrial's demand for collateral, but apparently patched up its disagreement with Brown, who thereafter inquired into a possible re-tender of Industrial's defense [R.3743-44]. Ill-at-ease over the prospects of having ultimately to deal with an insolvent corporate shell (James) and a parent company (Hood) fighting to exit rather than to resolve the litigation, Industrial again tied any re-tender of the case to the posting of collateral [R.3602]. When, by August 27, 1987, Hood failed to respond to Industrial's demand, Industrial's counsel entered a formal appearance in the action [R.381]. When Hood's cooperation was still not forthcoming by September 21, 1987, Industrial obtained leave to file an amended answer to the SLCC action, with a crossclaim and third-party complaint for indemnification against Hood and Laulhere [R.394]. On that basis, the Court also vacated

the then-existing scheduling order, continued the trial date and extended the discovery cutoff [R.419].⁴

On April 4, 1988, after months of negotiation and positioning on the issue of Industrial's cross-claim, Hood and Industrial finally entered into a stipulation resolving the indemnity issues. Under terms of the stipulation [Exhibit P-12; also at R.902-909; App. C], Industrial agreed to waive its demand for collateral in exchange for Hood's consent to judgment over in the amount of any judgment entered in favor of SLCC and against Industrial [Id. at ¶7]. The additional issue of Hood's obligations to hold Industrial harmless from attorneys fees incurred under its bonds was also specifically addressed and agreed to as follows:

Industrial shall [also] be entitled to further judgment against Hood and Laulhere, jointly and severally, upon motion and supporting affidavit, for Industrial's costs and reasonable attorneys fees incurred in this action or otherwise in connection with the described bonds . . . subject only to rights of Hood and Laulhere to request a hearing with respect to the reasonableness of the claimed costs and attorneys fees. All parties agree to be bound by the Court's determination of reasonableness.

Id. at ¶8.

Consistent with the Stipulation, Industrial conditionally waived its earlier demand for collateral, but continued to monitor Hood's financial status. While it also maintained its separate representation in the dispute with SLCC, Industrial agreed at that

⁴SLCC's appeal from the order dismissing Hood from the action was still pending at the time.

time to minimize its direct involvement, leaving the "laboring oar" in the litigation to James' and its counsel (which, by then, was primarily that of its insurer).⁵ In fact, Industrial's attorneys did not thereafter attend any depositions and, aside from providing periodic assistance or consultation as requested by James' counsel, essentially limited its activities to monitoring the litigation, consulting with counsel, participating in occasional settlement discussions, and providing necessary reports and updates to Industrial [R.3608; Exh. P-1].

Industrial's reduced involvement and low profile, beginning in April 1988, in fact continued until approximately October, 1990, when the case once again entered an active pretrial stage, due in part to the appearance and involvement of attorney Robert Anderson, on behalf of James or Hood,⁶ replacing attorneys Brown and Reeve. By that time, neither Reed Brown nor David Reeve were actively involved in representing either Hood or James, and Mr. Anderson began coordinating with Mssrs. Powell and Jensen in preparation for

⁵As Mr. Powell testified at the fee hearing, it was originally the insurer's intention to limit its defense to the negligence and property claims against James. However, the complexity of the case made it virtually impossible to separate those issues from the contractual issues involved, and the insurer's defense ultimately expanded to include issues relating to SLCC's contract claims against James, as well [R.3728]. Even after Hood later returned directly to the action on the reversal of the trial court's earlier summary judgment of dismissal, its own counsel played a minimal role in the litigation until late 1990.

⁶Mr. Anderson formally entered his appearance on behalf of Hood in February, 1991, at which time Mr. Reeve withdrew. [R. 1260] However, most pleadings filed thereafter designated Mr. Anderson as James' counsel, along with Mssrs. Jensen and Powell.

trial. It was at that time that James' counsel also once again solicited Industrial's direct involvement, in efforts to regain or reassert key surety defenses which Industrial believed had been earlier confused with similar defenses raised by James and which, with James' defenses, had fallen victims to an order in limine barring them as defenses against SLCC's claims [R.3710-3714]. At a meeting on or about October 23, 1990, Mssrs. Anderson, Powell and Jensen discussed a coordinated defense strategy with Industrial's counsel, David Slaughter. The conclusion by Hood's counsel was that the potential benefit to Hood of successful surety defenses justified renewed efforts to challenge the Court's earlier order in limine and to preserve defenses relating specifically to surety prejudice arising from the City's negligent inspection of the James contract.⁷ [Id.] Industrial's motion to that end was filed in early February, 1991 [R.1093] and resulted in Industrial's active involvement the case for that specific purpose.

After the surety defenses were again rejected by the Court, and following further consultation between Mr. Anderson and Mr. Slaughter over the potential risks of creating a "deep-pocket" image by Industrial's separate representation at trial, Industrial consented to again tender its defense to Hood's counsel. [R.3715-

⁷If Hood could defeat SLCC's alter ego claims, its exposure was limited to that of an indemnitor to the surety. Thus, limitations to the surety's exposure as a result of SLCC's negligent project inspection would limit Hood's exposure to the same extent. Separate surety defenses concerning possible overpayments to James for work in place were surrendered as potentially counterproductive to the James/Hood defenses [R.3712-13].

3720; Slaughter letter to Anderson, Exh. P-20, reproduced in the Addendum to Appellants' Brief at 76.] Finally, after more than seven years of starts and stops, appeals and changes of counsel for both Hood and James, Hood settled directly with SLCC before trial.

On August 26, 1992, after settlement of the principal action and upon Hood's failure to respond to Industrial's invitation to address the issue of reimbursement of its attorneys fees, Industrial filed a "Motion for Summary Judgment and Award of Attorneys Fees Against Hood Corporation on Indemnity Agreement and Stipulation," seeking recovery from Hood under terms of the Stipulation [R.3153].

In bringing the fee matter before the court by a summary judgment motion, Industrial presented copies of detailed fee statements paid by Industrial [Exh. P-1]. Although it relied on the weight of legal authority affording a surety full indemnification against fees and expenses incurred, absent a demonstration of the surety's bad faith in the exercise of its discretion in deciding what legal expenses were in its best interests to incur, [August 6, 1992 Memorandum at 9-11, R.3164-3166], Industrial also argued that its fees were reasonable in the context of relevant facts and factors, none of which were in dispute. [Id. at 11-15, R.3166-3170.]

The trial court initially granted Industrial's motion on December 23, 1992 [R.3412]. However, on Hood's challenge and motion for a new trial, the court was persuaded to set aside its

summary ruling and, without objection from Industrial⁸, ordered an evidentiary hearing on the fee issue. During a one-day hearing on March 4, 1993, evidence was introduced, witnesses were examined and cross-examined and arguments were presented by both parties. The court also received all testimonial and documentary evidence offered by Hood's counsel. After making minor adjustments to the fees sought, to account for services rendered in connection with other than the SLCC dispute,⁹ the district court awarded judgment to Industrial in the amount of \$171,316.89 (including the adjusted fee total, plus prejudgment interest)¹⁰ which, on its conclusion, and "in light of all the factors," was "reasonable, and was actually and necessarily incurred by Industrial in defense of this action." [Findings/Conclusions at 10, ¶ 29, R. 3474.]

⁸In responding to Hood's motion for a rehearing, Industrial observed that, with Hood's demonstrated litigiousness, it was virtually certain that it would appeal almost any judgment or award. Thus, it suggested that, if the court believed, in its discretion, that an evidentiary hearing on the reasonableness of Industrial's fees would minimize the prospect of further proceedings and thus reduce the accrual of additional costs and fees to any significant degree, Industrial would have no objection to such a hearing [January 12, 1993 Memorandum at 2, R.3439].

⁹Although the adjustments involved fees incurred in connection with claims on other bonds furnished for James and thus also within the scope of Hood's indemnity agreement [R.3680], Industrial has not raised any cross-appeal to the court's judgment.

¹⁰Simple prejudgment interest was calculated from the date each fee payment from Industrial Indemnity was received by Snow, Christensen & Martineau [R.3708; Exhibit P-2].

Hood raised no objection to the form of the Findings and Conclusions as entered, but, on April 28, 1993, noticed its appeal from the Judgment entered March 30, 1993.

VII. SUMMARY OF ARGUMENTS

1. Hood agreed to be bound by the district court's determination of the reasonableness of Industrial's fees, as supported by affidavit. Its attempts by this appeal to avoid that determination run contrary to the April 1988 Stipulation entered, which designated the trial court as the sole and final arbitrator of any disagreement over fee reasonableness.

2. Contrary to Hood's arguments, the trial court did not rely on any "presumption" of reasonableness in awarding Industrial its fees. Although Industrial argued for that presumption in its initial motion for summary judgment and fee award, Hood balked at the motion and insisted on an evidentiary hearing, which the Court granted. Industrial did not argue any presumption at the hearing, but recognized and adequately satisfied its obligation to prove the reasonableness and necessity of its fees, in the context and under the facts of this case. The Court's ruling is supported on the record and the evidence presented at the hearing Hood requested.

3. The record supports the conclusion that, with the exception of the period between James' rejection of Industrial's tender and the Stipulation reached with Hood, Industrial's counsel was involved only in monitoring the case, responding to discovery requests from plaintiff, participating in settlement discussions,

or filing motions and otherwise rendering assistance or expertise requested by James or Hood relating to Industrial's independent surety defenses and in support of general defense strategy. Despite Hood's attempts to downplay Industrial Indemnity's role and interest in the litigation, and the separate issues and defenses independent of the defenses upon which James relied, there was no finding by the Court of any duplication or redundancy in Industrial's representation and therefore no error, as a matter of law, in its ruling and judgment of reasonableness.

4. There are multiple, legal justifications for the award of prejudgment interest in this case, distinguishable from other cases upon which appellant relies. Interest is easily calculated on fees actually paid by Industrial for Hood's account and therefore fully liquidated. In addition, prejudgment interest is an appropriate factor in the Court's determination of the reasonableness of the fees for which Hood is and has been responsible for an extended period.

VIII. ARGUMENT

Hood's brief on appeal attempts to make of this case something different and more significant than it is. This appeal is essentially appellant's attempt to avoid the agreed mechanism for the resolution of limited issues relating to the enforcement of an indemnity agreement and to Industrial's rights to reimbursement of attorneys fees against a litigious, non-resident corporate indemnitor and co-defendant who, over a period of more than ten

years, has resisted reasonable settlement of every local dispute on which its surety was also exposed.

The case is not what Hood describes, and Industrial's response to the contentions raised on Hood's appeal are distilled to three general areas: (1) Hood's entitlement to appeal the trial court's judgment; (2) the evidentiary and record support for the court's findings and conclusions, without the benefit of Hood's hypothetical "presumption" of reasonableness; and (3) Industrial's entitlement to prejudgment interest on the fees actually paid as an additional measure or factor of reasonableness in the award. Against this outline, and under the circumstances of this case, Hood simply has no valid basis to challenge the trial court's findings and judgment.

A. By Its Stipulation with Industrial, Hood Agreed to Abide by the Trial Court's Ruling of Reasonableness.

As an initial point, Hood has no business before this Court. There has never been any question or dispute over Hood's contractual obligations, as an indemnitor and under clear terms of a written indemnity agreement, to hold Industrial harmless from the consequences of claims or lawsuits on bonds furnished for James Constructors. There has also been no question that Hood's indemnity obligation extends to Industrial's costs and reasonable attorneys fees. Both of those issues were resolved by Stipulation in this very lawsuit [Exh. P-12; also R.902-909]. Finally, there is no dispute that Industrial in fact incurred substantial fees and expenses as a result of claims on James bonds, including more than

seven years of the litigation between SLCC, James, Industrial and Hood. The only potential issue specifically reserved under terms of the Stipulation was the "reasonableness" of fees ultimately incurred and which Industrial would otherwise be entitled to reduce to judgment "on motion and affidavit." [Stipulation, Exh. P-12, at ¶8; App. C at A17-18.]

By their stipulation, Hood and Industrial agreed that, upon their own inability or failure to come to an agreement and settlement on the reasonableness of Industrial's fees, the matter would be directed to the district court for resolution, on any hearing Hood might request. [Stipulation, Exh. P-12 (App. C) at ¶8.] In that same connection, however, both parties agreed "to be bound by the Court's determination of reasonableness." [Stipulation (App. C) at ¶10; R.906]. (Of course, given the nature and extent of the court's own first-hand experience with counsel in the context of the underlying dispute with SLCC, it made sense for the parties to agree to have the trial court decide the matter.)

The clear purpose and effect of the April 1988 stipulation was to resolve as much of the indemnification issue as could be addressed at that time to enable a unified defense against SLCC's claims. [See Stipulation, Exh. P-12 (App. C) ¶6.] Inherent in that arrangement, and particularly in the specific covenant of each to abide by the court's determination of reasonableness, was an agreement that the trial court would be the sole and final arbitrator of the fee issue. The parties thus effectively limited their rights to challenge the award on appeal. To permit Hood a

second-level challenge to the reasonableness ruling not only violates its agreement to be bound by the trial court's determination (whatever that was) but subjects this matter to the perpetual and repetitive adjudication which the Stipulation was specifically designed to avoid.

Utah's Supreme Court has long observed "that the law of this state favors arbitration as a speedy and inexpensive method of resolving disputes." Utility Trailer Sales of Salt Lake, Inc. v. Fake, 740 P.2d 1327, 1329 (Utah 1987). In the interest of preserving the policy and benefits of arbitration, the Court has also stated that "judicial review of arbitration awards should not be pervasive in scope or susceptible to repetitive adjudications; it should be strictly limited to the statutory grounds and procedures for review," Robinson & Wells, P.C. v. Warren, 669 P.2d 844, 846 (Utah 1983), and that "[a]s a general rule, awards will not be disturbed . . . so long as the proceeding has been fair and honest and the substantial rights of the parties have been respected." Utility Trailer Sales, 740 P.2d at 1329 (Utah 1987).

In turn, the statutory grounds for review, set forth in § 78-31a-14(1), Utah Code Annot., are limited to circumstances of fraud or improper conduct by the arbitrator, which are not applicable to the present case. There is nothing in the statutes suggesting that the rules of review on appeal should be any different or broader in situations where the parties have agreed to be bound by the trial court's findings than in cases of binding arbitration outside the court. If the trial court is to be afforded great deference in its

factual findings in the traditional setting, there is reason to afford it even broader deference in situations, such as this one, where each of the parties has agreed to be bound by whatever determination the court makes.

Through all its arguments, appellant has thus simply ignored that it has no business bringing this appeal in the first place.

B. The Court's Ruling, Findings and Judgment Were Not Based On Any "Presumption" of Reasonableness Afforded to Industrial's Fees and Costs.

Contrary to appellant's suggestions, this appeal has nothing to do with any "presumption of reasonableness" guiding the district court's findings and conclusions and its ultimate award of Industrial's fees and costs. Judgment was entered on findings of fact, following a day-long evidentiary hearing, at which Industrial offered evidence supporting the reasonableness and necessity of its fees and at which Hood had an opportunity to offer whatever it considered appropriate to challenge and rebut that evidence. In bringing its initial motion for summary judgment on the fee issue, Industrial admittedly argued in support of a presumption of reasonableness in favor of a surety's rights to repayment of fees and costs from indemnitors. In doing so, it relied on compelling precedent holding indemnitors seeking to avoid obligations for fees actually incurred to a burden of showing that the surety incurred the fees in "bad faith," requiring in turn a showing of dishonest purposes or improper motives in the surety's actions [Engbrock v. Federal Insurance Company, 370 F.2d 784 (5th Cir. 1967)], neither of which is at issue in this case.

In the end, however, Industrial did not press that theory or argue that entitlement during the evidentiary hearing. In fact, Industrial's counsel, Scott Daniels, specifically acknowledged Industrial's burden at the hearing, stating, "I suppose we [Industrial] have to prove that our fees are both reasonable and necessary." [R.3770]

Ultimately, Hood's suggestion that the Court afforded Industrial a presumption of reasonableness is based solely on an unwarranted twist on a comment by Judge Young, quoted out of context: "So if it begins out as all being reasonable then the prong that I think that Mr. Anderson is claiming the right to prevail on is that it, in fact, wasn't necessary." [R.3782.] Hood suggests that it is "apparent" from that statement alone that the Court decided "to accord Industrial's attorneys' fees request a presumption of reasonableness." [Appellant's Brief at 9.] However, the full context of Judge Young's statement reveals how far-fetched Hood's argument is.

Judge Young prefaced the remark by referring to the testimony of Craig Mariger, who, as Hood's own expert witness, had earlier testified as follows:

I am not saying that their [Industrial's attorneys'] hourly rates were too high, they are ultimately very reasonable. I'm not saying any particular task was unreasonable. What I'm saying is it was not necessary for them to interject themselves in the litigation and that those fees and costs were not necessarily incurred, therefore, not reasonable.

. . . [and] . . .

I'm saying they're unnecessary and therefore unreasonable . . . But I'm not saying they are unreasonable in terms of the amount of time that was spent or the dollars charged for the services performed.

[R.3766, 3771]

Thus, aside from whether or not a surety is entitled to a presumption of reasonableness as a matter of law, it is clear that no such presumption guided either the evidentiary hearing or the Court's findings or conclusions in this case. Even on Hood's argument against such a presumption, there can be no error where no presumption was applied. Hood's argument to that end is a classic "red herring."

C. The Court's Findings and Conclusions Are Supported on Adequate Evidence, Even Under the Most Restrictive of Approaches.

Cases involving a surety's rights to recover under its indemnity agreement for legal fees and other expenses incurred in litigation on its bond reveal at least three categories of analysis.

The most common approach, with a rich tradition in basic principles of common law, is simply to hold the parties to the terms of their contract. Under that rule, exemplified by U.S. Fidelity and Guaranty Co. v. Hittle, 96 N.W. 782 (Iowa 1903), and adopted by many other courts,¹¹ all expenses incurred by the surety are recoverable under the indemnity agreement, unless the principal has shown bad faith on the part of the surety. This approach

¹¹See, e.g., Transamerica Insurance Co. v. Bloomfield, 401 F.2d 357 (6th Cir. 1968); Kilgore v. Union Indemnity Co., 132 So. 901 (Ala. 1931); J.D. Halstead Lumber Co. v. Hartford Accident & Indemnity Co., 298 P. 925 (Ariz. 1931); Indemnity Insurance Co. of North America v. McMillan, 153 S.W.2d 264 (Tex Civ. App. 1941). Similar cases likewise give literal interpretation to broad terms of indemnification contracts, without express reference to Hittle. E.g., Hennepin Public Water District v. Peterson Construction Co., 270 N.W.2d 419 (Ill. App. 1971); Fireman's Fund Insurance Co. v. W.H. Myrick, 317 So.2d 632 (La. App. 1975).

recognizes that the surety has broad discretion to decide what legal expenses are in its best interests to incur.

In stark contrast to Hittle is the holding of the Tennessee Court of Appeals in Central Towers Apartments, Inc. v. Martin, 453 S.W.2d 789, 799 (Ct.App.Tenn. 1969)--a case upon which Hood relies in its brief. Central Towers modified the Hittle approach by looking beyond the written agreement to place greater weight on the facts and circumstances of the relationship between the principal and the surety in that case. The court was thus willing to look beyond the issue of the surety's good faith to probe both the reasonableness and necessity of the surety's action. To that end, the court's decision (which reversed the trial court's decision in favor of the surety) also offered a list of facts which it felt "will have a bearing on the reasonable necessity of action and good faith under the circumstances." 453 S.W.2d at 800. The list was intended as neither an exclusive nor exhaustive list of considerations, but was simply a means of providing some framework for essentially second-guessing the surety's decision.

Somewhere between Hittle and Central Towers lies a third group of cases which have rejected the "necessity" test but which still require good faith by the surety and the exercise of reasonable discretion and due diligence on its behalf. See, e.g., Fidelity & Casualty Co. of New York v. Mauney, 116 S.W.2d 960 (Ky. 1938).

Of these three approaches, that adopted by Central Towers is the only one which exposes the surety's decisions to subjective tests of reasonableness and necessity with the benefit of hindsight. As

such, and from at least the surety's standpoint, it is also the most restrictive of the various tests. Yet, as pointed out in Industrial's August 6, 1992 memorandum accompanying its Motion for Judgment and Award of Attorney's Fees on Stipulation [R.3156-3171], its entitlement to the fees ultimately awarded survives even the dissective Central Towers analysis. The court's award to Industrial is supported by the facts and circumstances of this case, sustained on the evidence, and ultimately reduced to and summarized in findings and conclusions.

1. Industrial's Decision to Retain Separate Counsel Was Reasonable and Justified Under the Circumstances (Finding of Fact No. 14).

Hood suggests (at page 19 of its Brief) that the evidence marshalled in support of the various subsidiary findings upon which Finding No. 14 is ultimately based is "legally insufficient to support the trial court's finding" that "Industrial Indemnity was justifiably concerned as to whether Hood would adequately protect the interests of Industrial . . . [and that, under the various circumstances], it was not unreasonable for Industrial to determine that it was necessary to defend itself in the litigation to protect and preserve its interests." [R.3469]

As reflected on Hood's marshalling of the evidence, several factors contributed to Finding No. 14: (1) James' insolvency, as bond principal [R.3580-81]; (2) Hood's lack of attention to the litigation, despite its substantial exposure [R.3583-85, 3595]; (3) Hood's failure even to list the litigation and related \$2 million exposure on its financial statements [R.3601-02, 3613-14, 3621-23];

(4) Hood's reluctance to pay Reed Brown's attorneys fees, even over the period when Mr. Brown was representing both James and Industrial [R.3586-88, 3698]; (5) James' rejection of Industrial's tender of defense [R.3596-98]; (6) Hood's stubborn refusal to post collateral or to provide other adequate and acceptable security to Industrial [R. 3599-3602]; and (7) Hood's refusal to authorize or participate reasonably in settlement negotiations with SLCC over an extended period, despite great exposure to James under the contract and to Industrial under the bond [R.3583-85, 3691-94; 3698].

While Hood makes a modest attempt to challenge some of the subsidiary findings, including in Finding No. 14, its marshalling demonstrates that each is supported by adequate evidence. As a result (and despite its reliance on the Central Towers approach) Hood's ultimately relies on an argument that seems to suggest that the various circumstances of the relationship between Industrial and Hood over the course of this case are ultimately not as important as the fact that Hood was "financially able" to respond to any judgment that might enter against Industrial. [See Appellant Brief at 19-20.] Hood would thus have this Court hold that the only factor to which a court may properly look to gauge the reasonableness of the surety's independent involvement in a case is whether or not there is an ultimate "absence of risk to the surety as a practical matter." [Appellant's Brief at 19.] All others, including the several suggested under even the restrictive Central Towers analysis, are apparently of little importance.

This is not a single-factor case, however. While it is easy for Hood, at this stage, and after having ultimately settled with SLCC, to suggest that Industrial need not have been involved in the litigation as it was, the suggestion does more to beg the question than to answer it. The question of reasonableness is not properly a matter of hindsight analysis. It is properly viewed and judged from Industrial's position at the time. It was in that context that the fees were incurred and it was in that context that the trial court ruled.

Thus, consistent with the deference afforded a judicial fact-finder under the abuse-of-discretion standard, Baldwin v. Burton, 850 P.2d 1188 (Utah 1993); Scharf v. BMG Corporation, 700 P.2d 1068 (Utah 1985), Hood's appeal must be properly limited to the question of whether there is at least a minimal evidentiary basis of facts and circumstances to support the court's findings that it was reasonable for Industrial to conclude that it was necessary to defend itself in the litigation (as it did) to protect and preserve its interests. There is clearly sufficient evidence relevant to at least the following circumstances:

- a. James' insolvency had a potential, detrimental impact on Industrial's position.

Hood suggests that the Court abused its discretion by taking into account James' insolvency, thus overlooking Hood's status as a guarantor [Appellant's Brief at 20]. Yet, by even Hood's argument, James' financial status did not become "irrelevant" until after Hood executed the Stipulation with Industrial. [Id.] The

Stipulation was, in turn, a result of Industrial's direct involvement in the case, prompted by James' return of Industrial's original tender of defense.¹²

Industrial's counsel, Dennis Norton, provided some perspective to the issue as follows:

It wasn't just a matter of one lawsuit, the principal asking the surety to tender the defense so it could handle it and be economical. At the same time we, as Industrial Indemnity started getting claims from other subcontractors and materialmen, not only on this job but on several other jobs, and I had a total of twelve other claims that I had to investigate and discuss with Mr. Brown and make a decision as to what to do. And three of those cases were litigated through trial and James lost all three of 'em. And two of those three cases were appealed and the appeals were unsuccessful in each case. And so we were starting to build a track record at this point.

[My] fear . . . , based on the experience that we had had for three full years was that James was going to lose the case and Hood would stay in Los Angeles and Industrial Indemnity would then have to pay the entire judgment and then go to Southern California to sue Hood and be in court down there for another 5 1/2 years before it got a trial date

[R.3593-94, 3602]

- b. The primary responsibility for James' defense shifted from Reed Brown to James' insurer, whose representation, under a reservation, was initially limited and never fully co-extensive with Industrial's independent defenses.

Hood's repeated suggestion, as if fact, that "the attorneys for Hood and James vigorously defended Industrial's interests in the Litigation" [e.g., Appellant's Brief at 21] is simply contrary

¹²Mr. Norton testified that he could not think of another time, in all of his experience when a principal had ever reversed the surety's tender of defense "except when the principal was getting ready to file bankruptcy." [R.3599]

to the evidence. While it is true that James' counsel, Reed Brown, accepted Industrial's tender of defense, he requested Industrial's continued assistance in that regard: As Mr. Norton testified,

Mr. Brown objected to the tender. And so he and I then discussed the nature of his objection. And the nature of his objection was that it was a small office and a big, dangerous case and he requested our involvement in it. My personal involvement to assist him as he defended James. And so Mr. Brown and I worked together and he worked very hard in defending James through this period.

[R. 3586]

Furthermore, the vigor with which Mr. Brown pursued the joint defense was (understandably) tied to his ability to obtain payment, and problems in that regard prompted him to return the tender to Industrial three years into the litigation [R.3598]. Brown's role was eventually overshadowed by the representation afforded James by its insurer. Yet, there is no dispute that the insurer's representation of James did not extend to Industrial's defense as well. As Industrial's counsel, Max Wheeler, testified,

[Mr. Powell, as insurer's counsel] was defending only a small portion of the claims that the City had made, and those claims had to do with property damage occurring as a result of the failure of the pipeline. And he was always in a quandary, as I recall, as to how far he should go, because the exposure of Cigna [the insurer] was just a small percentage of the total amount. And I recall Mr. Powell and I discussing that from time to time about his limited role, although, as it developed, he kind of became the lead lawyer because in defending a small claim it was necessary for him to defend a lot of the overall claims dealing with negligent installation of the pipeline and all of the rest of it.

[R. 3695]

Under examination by Mr. Daniels at the hearing, Mr. Powell himself confirmed that the surety/insurer defenses were not coextensive:

Q. And you were trying to cooperate with Snow, Christensen & Martineau lawyers in the defense of this; isn't that right?

A. To the extent cooperation was possible, certainly.

Q. To the extent that your clients didn't have conflicting interests; is that right?

A. That is correct.

Q. And they seemed to be doing the same?

A. As far as I could tell.

[R. 3733]

Even with the appearance of successive counsel for either Hood or James over the course of the litigation, it was unclear to the very last who was actually represented and who was not, and to what extent the various parties had or might have had interests contrary to or potentially prejudicial to Industrial Indemnity's.

- c. Hood's primary goal seemed to be to avoid, not to actively participate in the lawsuit, leaving the matter to James and Industrial.

Contrary to the picture Hood paints in its brief, there is no evidence that it made any direct effort to undertake Industrial's defense until the very final stages of the litigation, despite Industrial's repeated invitations and strong recommendations that Hood address some interest and attention to the dispute. In fact, from the commencement of the lawsuit in 1984 until late 1988, Hood

was fighting to obtain (and then to retain) dismissal of SLCC's direct claims against it. As Mr. Norton testified,

I've been involved in nasty, dangerous cases before, but the difference here was that Hood Corporation seemed uninterested in what was happening out here and had let the defense of the case to James who, at that point, consisted of the President of James, a fellow named Jim Foreman, and his secretary. . . . But we knew, and James knew that James couldn't pay any Judgments and we tried to interest Hood Corporation in the case to come out, investigate, do some independent work to see what, to see what the exposure really was rather than relying on the guy who was in charge of the project. And we couldn't get that interest.

[R. 3583-3584.]

The court, from its own experience in the case, clearly agreed. When Hood's attorney, Mr. Anderson, made clear that he was not part of the case over a period to which the Court addressed some criticism, Judge Young responded as follows:

I know. And the bad thing is that you weren't [in the case] and the bad thing is that you weren't in this case early on and that the case by Hood was just simply being ignored or neglected. It may go away.

And I'll be really candid, the real errors in this case were made by Hood. They were the ones who didn't want to take an affirmative, assertive role here

[R. 3795-96.]

- d. Hood refused to post collateral, despite clear exposure and Industrial's rights to demand it.

Substantial net worth or not, Hood signed the indemnity agreement and agreed to its terms, including the potential requirement to post collateral. It was not unreasonable for Industrial to insist on that performance. Yet,

[Hood] objected to being named in the suit, objected to the demand for collateral. And it was my strong recommendation to my client that we obtain collateral if the company was as strong as it said it was, then it would be no problem for it to give us security interest in a piece of property.

[R. 3600-01]

At no time did Industrial agree that Hood's financial strength was security enough. In fact, Mr. Norton testified of "many, many, many experiences" of corporations in strong financial positions which were later unable to respond to claims for indemnity. [R. 3677.] The Stipulation to which Hood ultimately agreed, entitling Industrial to a judgment against Hood in the amount of any eventual judgment against Industrial, plus a judgment for reasonable fees incurred, involved a compromise of Industrial's demand. Although short of the security to which it was entitled, the Stipulation did afford Industrial relief from the prospects of having to chase Hood in the California courts. By the same token, however, that interim resolution was also not tied to any surrender of Industrial's defenses or separate representation. Industrial essentially fell back into the earlier arrangement with Mr. Brown, where it was not actively and visibly involved in the litigation, except as and when such involvement was requested by counsel for James or Hood.

- e. Hood made no attempt, even after the Stipulation, to request that Industrial again tender its defense until late in the process.

Neither Hood nor James made any effort in connection with the Stipulation or for some time thereafter to request that Industrial again tender its defense. In fact, despite Industrial's consent to

minimize its involvement from that point, Hood's interests and activities, through attorney David Reeve, remained focused on SLCC's then-pending appeal of Hood's dismissal - not on the details and merits of the underlying litigation.

Even when Hood did become involved (at least prior to the final stages, under Robert Anderson's representation), it was through counsel who "never understood the case, never made any attempt to understand the case, and was never paid to make any attempt to understand the case." [R. 3593.]

This point was not lost on the trial court:

Judge Young: Let me ask you this, Mr. Norton. From the time when you earliest tendered the defense to Hood there would have been no reason that they could not have simply stepped forward, and since they were potentially on the line have taken over and retained their own counsel to do that which you were ultimately doing thereafter, isn't that correct?

The Witness: Yes. They were -- the problem was that we had James being defended and Hood not coming forward in any capacity. And that raised my stress level and that of my client because Hood -- and then when Hood finally did come forward it was through David Reeve who was never involved enough in the case to keep track of it.

[R. 3595]

As noted above, James' defense at that time was being handled primarily by its insurer, which had no obligation or interest in extending its defense beyond James. Hood and James both seemed satisfied that Industrial was in the background and that its counsel was available to participate in a coordinated defense, as

appropriate. There was certainly never any suggestion by James' counsel that Industrial should not remain involved in that fashion [R.3733]. In fact, Hood did not again request Industrial's tender until 1991, after Industrial, with Hood's and James' blessing and encouragement, had made a final (albeit unsuccessful) effort to preserve separate surety defenses which had earlier been barred but which, if successful, would have inured to Hood's benefit [R.3710-3714, 3779].

While the foregoing does not address every circumstance which distinguishes this case from the cases upon which Hood relies, even this brief rehearsal of evidence makes clear that the circumstances guiding Industrial's decisions involved more than the apparent financial strength of a non-resident parent corporation who may or may not have had any direct involvement in the case had the original order of dismissal against it been sustained and had Industrial not brought the cross-claim against it for indemnification. There is certainly no basis in fairness for challenging, as an abuse of discretion, the court's findings on the reasonableness of Industrial's decision to proceed as it did.

2. Industrial's Fees Were Reasonable and Necessary (Finding No. 25).

Hood challenges the evidentiary base for the Court's Finding of Fact No. 25 that the fees incurred on behalf of Industrial were both reasonable and necessary in light of various factors. To an extent, its arguments against Finding No. 25 dovetail those made against Finding No. 14, and thus fail for the same reasons. It is

interesting, however, that its fee challenge appears to be much broader on appeal than it was at the hearing.

- a. The fees incurred were "reasonable and necessary" in the context of the governing circumstances.

As noted above, testimony by Industrial's counsel as to the circumstances of Industrial's involvement and of the justification for its mostly low-profile but separate representation under those circumstances was largely unchallenged by Hood at the hearing. Instead, Hood focused on theories of "necessity" and "duplication" in an effort to trivialize Industrial's even limited activity over seven years of litigation in light of Hood's "undisputed" solvency. Nowhere is this more clear than on the testimony of Hood's own expert, Craig Mariger [R 3735-3781].

Mr. Mariger's analysis of Industrial's involvement and the fees charged in fact provide a rational framework, not only for Hood's analysis of Industrial's involvement, but for a focused consideration of various time-related factors bearing on the reasonableness issue before the Court. Mr. Mariger's testimony and related analysis focused on separate time periods of Industrial's involvement between 1984 and 1992:

The first period of Industrial's involvement began in early May, 1984, when Industrial learned of SLCC's claim and of the threatened action against both James and Industrial under the bonds. Mr. Mariger did not raise any issue with the fees incurred over this initial period, involving as it did Industrial's independent investigations and assessment [R.3753]. In fact, he

concluded that it was entirely consistent with what a surety would be expected to do to avoid potential bad faith liability [id.].

Similarly, Mr. Mariger did not question Industrial's fees or activities during the period following James' acceptance of the surety's tender of defense in August 1984 and prior to James' subsequent (and "unusual") rejection of that tender in June 1987 [R. 3753-54].

Mr. Mariger also found no issue with the fees incurred between June 24, 1987 and at least August 25, 1987 - a period beginning with Reed Brown's rejection of Industrial's tender of defense (three years into the litigation) and ending with James' one-time request to renew and regain Industrial's initial tender. As Mr. Mariger acknowledged, "It's very unusual for a principal to re-tender back a case and I didn't see anything unusual in the activities during that period of time." [R.3754.]

With no real objection to the fees incurred over the first two periods, Hood's challenge ultimately focuses on a period between August 27, 1987, when Mr. Brown requested that Industrial consider re-tendering to James the rejected tender of defense, and April 27, 1988, when Hood and Industrial Indemnity entered the Stipulation resolving Industrial's indemnity claims under its cross-claim and third-party action [R.3754]. Mr. Mariger opined that, given Hood's strong financial position (and apparently despite Industrial's difficulties in soliciting Hood's attention and active involvement in the dispute) it was "unreasonable" for Industrial to enter a separate answer on behalf of the surety and to insist on collateral

as a condition to returning the tender earlier rejected by James [R.3754-55].

Hood extends that position also to criticize Industrial's limited involvement after the Stipulation was signed and through the end of that year [R.3755], as well as its final period of activity, beginning in early January 1991 [R.3756],¹³ relating to what Mr. Mariger described as efforts "to reverse the court's order that was entered several years earlier" [R.3756] However, Mr. Mariger admitted to having drawn his conclusion on a review of less than the entire record [R.3737]. He also admitted that he had never encountered a case where such a tender was later rejected by the contractor, and considered such action "very unusual." [R.3769] He further acknowledged that his analysis would have been different had he known that counsel for James and Hood had requested the assistance and expertise of Industrial's counsel in the matter: "Well, if he asks for assistance then I would have a hard time saying it was unreasonable for them to interject themselves in litigation." [R.3777]

As Mr. Mariger described his own conclusion, "the primary basis of my opinion is that Industrial Indemnity should not have asserted itself in the litigation in August of '87." Hood was clearly entitled to offer that opinion in support of its argument. But the Court was just as entitled to reject it, which it clearly did.

¹³Mr. Mariger again raised no issue over the fees incurred between January 1989 through January 1, 1991 [R. 3755-56].

b. The court found no "duplicative and unnecessary legal representation."

As an alternative to its "abuse of discretion" arguments, Hood also suggests that the court erred in awarding fees for "redundant and duplicative work." [Appellant's Brief at 30.] In fact, however, the court found no such duplication, and Hood's suggestion that the court drew an erroneous "legal conclusion that redundant and duplicative legal services can be reasonable and necessary" is a pure contrivance, fully unfounded on the record. To the contrary, and as outlined above, the court's findings properly considered the circumstances of the case and supported a valid legal conclusion that the fees and costs paid by Industrial were both reasonable and necessary, based on those circumstances.

Hood's argument of duplicative work simply puts an alternative twist on its earlier argument that there was no good reason for Industrial to have entered the litigation as it did. However, rather than focusing on its own financial condition, Hood focuses the "duplication" argument on Industrial's efforts to raise and maintain its surety defenses and attendance by Industrial's counsel at a limited number of depositions without asking questions.¹⁴ However, the court's findings obviously found justification in the evidence presented for each challenged category of activity:

¹⁴Hood also points to the fees incurred in monitoring and reporting to Industrial, even during periods of less than active involvement. Interestingly, however, its own expert witness found no issue with those activities, "which you would expect any surety counsel to be doing to their client." [R. 3752-53.]

1) Industrial's motion practice was justified and requested. The record more than adequately deals with issues concerning Industrial's pursuit of its inspection-related defenses, independent of similar defenses raised by James. Mr. Norton testified that

We [Industrial] felt like the general contractor was not in a great position to argue negligent inspection because the contractor had the obligation to do the work in the first place, but the surety had a right to rely on the City and if the City inspected it negligently, but the surety ought to be able to rely on that.

[R. 3591]

Hood's own witnesses acknowledged that the interests involved in defending the claims against James were not exactly coextensive with the interests of the surety [R. 3780-81] and that Industrial's independent defenses, specifically those relating to negligent project inspection, would have directly benefitted Hood if SLCC failed at trial to establish its alter ego theory [R. 3779].

And while Hood takes particular exception in its brief to Industrial's efforts to "assert the same legal defenses and theories" that James and Hood had asserted, and in "unsuccessfully attempting to preserve its separate affirmative defenses," it fails to mention the uncontroverted testimony of Mssrs. Norton, Wheeler and Slaughter (on behalf of Industrial) and Mr. Powell (on behalf of James) that, as part of his "vigorous defense," James' counsel requested the assistance of Industrial's counsel [R.3586, 3588], and that the defendants' strategy was to cooperate and support each

other's efforts, "to the extent cooperation was possible" [R.3733]. Hood also fails to mention that even Industrial's renewed attempt in 1991 to preserve and assert its affirmative defenses relating to negligent inspection was the result of a decision jointly made with counsel for James and Hood [R.3710-14].

2) Deposition time was limited and coordinated with James' counsel. The "issue" over Industrial's involvement in depositions, limited to the time between James' rejection of Industrial's tender and the date of the Hood/Industrial Stipulation, is similarly resolved on the record. As Max Wheeler of Snow, Christensen & Martineau testified, he and Mr. Powell coordinated the questioning of all deponents over that period:

The idea was that we were cooperating with them in every way we could. I was certainly not interested in saying anything that would undermine anything they did, and in terms of what was going to be brought out through Mr. Powell. And I knew what that was going to be before the deposition. And he did it. And there was no reason for me to ask questions in some of those depositions.

[R.3697]

And as to the "necessity" of even that level of involvement, Mr. Wheeler testified,

I think it would have been malpractice not to attend those depositions. We had, to some degree, an adversarial relationship with everybody else and if something had come out at those depositions adverse to Industrial Indemnity the other parties might have agreed to something on the record or convinced a witness to say something without any cross-examination that could have jeopardized Industrial's position. And we had to be there to make sure that didn't happen.

[R 3697]

At no time prior to Industrial's efforts actually to obtain reimbursement of its fees did Hood or its counsel raise any objection to Industrial Indemnity's continued independent involvement in the litigation. In fact, as Mr. Wheeler observed, "I had strong feelings that they appreciated our involvement." [R. 3698-99.] Similarly, Hood raised no issue with its obligation for fees thus incurred, until it came time to pay.

D. PREJUDGMENT INTEREST WAS PROPERLY FACTORED INTO THE TOTAL FEE AWARD:

The court's award of prejudgment interest as part of the fees awarded to Industrial was justified on at least two separate bases:

1. Prejudgment Interest Is Calculable on Fees Paid, as Paid.

Hood's brief on appeal, as with its argument to the trial court, challenges Industrial's entitlement to prejudgment interest on fees expended as a part of the total fee award. As the trial court recognized, however, this case is very different from the types of cases, including contingent fee arrangements, relied upon by Hood in its arguments at trial. It differs in at least two important respects:

First, Hood's fee obligation to Industrial Indemnity arises under Hood's contractual undertaking to indemnify Industrial and hold it harmless from losses, costs and expenses incurred under or as a result of bonds furnished for bond principal James Constructors, a Hood subsidiary. It is not a question of a fee award to a prevailing party in a lawsuit, as in the many cases upon which Hood relies in its brief. It is a question of reimbursing

costs incurred by Industrial Indemnity which it would not have suffered in the first place, but for (1) the litigation arising as a result of James' failure to perform as required under its bonded contract with SLCC, and (2) failure by both James and Hood to abide by their continuing undertaking to hold Industrial harmless from the results of that litigation, including fees and costs. Thus, as a distinction from all of the cases upon which Hood relies, each reasonable fee dollar expended by Industrial was expended for Hood's account, and was, in a very real and practical sense, a cash advance to Hood under the indemnity agreement. Under those circumstances, and consistent with § 15-1-1, Utah Code Annot., Hood is also responsible for the statutory rate of interest on each fee advance, as applicable to any "loan or forbearance of money."

The second distinction is closely tied to the first. Unlike Parents Against Drunk Drivers v. Graystone Pines Homeowners' Ass'n, 789 P.2d 52 (Utah App. 1990), Industrial's entitlement to prejudgment interest is not based on a contingent fee arrangement. It is based instead on unrebutted evidence at trial establishing fee payments which were liquidated and certain in amount as of the dates paid. [Findings/Conclusions at 10, ¶ 27.] There was no guesswork or estimation in the total of the fees incurred, nor, as a result, in the interest calculation on those fees. It was (and remains) readily calculable on each payment and is awardable on that basis.

2. Alternatively, Interest Is Another Factor in the Court's Determination of a "Reasonable Fee" Due Industrial.

A third factor relates more to public policy. Under Hood's argument, any indemnitor may effectively avoid answering to a surety (or other indemnitee) for interest, as the only measure of the time value of payments made on its behalf or for its account, simply by challenging the "reasonableness" of those advances. Obligations for even a fully-reasonable fee, incurred over an extended period, such as this one, may thus effectively be discounted, and full indemnification thus abrogated, on a simple challenge. The result runs contrary, not only to justice and equity, but to the policy behind the statutory interest provisions, recognizing that there is a value to a contractual, monetary obligation which can be properly addressed only by an award of prejudgment interest, as an element or factor in a party's damages or in the overall determination of a reasonable fee.

Although not specific to the issue of attorneys fees, the Utah Supreme Court's decision in Worthington & Kimball Construction Co. v. C & A Development Co., 777 P.2d 475 (Utah 1989) acknowledged a similar justification in reversing the district court's reduction of an arbitrator's award of 15% interest on sums past due from an owner to a contractor. Despite that the interest award was in excess of the statutory rate, the Supreme Court sustained the interest award was actually part of the overall compensation for damages. [Id. at 478; see also, Morrison-Knudsen Co. v. Makahuena Corp., 675 P.2d 760, 767 (Haw. 1983).]

While the present case does not involve precisely the same issue of "damages" inherent in Worthington, it lends itself to an equivalent analysis, even within the framework of the court's role of "determining" a reasonable fee. In the specific context of Hood's arguments against prejudgment interest, Mr. Anderson correctly described the Court's role as follows:

And the very stipulation here, your honor, provides that you're going to determine what's reasonable after looking at everything and considering the continuum of the fact that services have been provided over this period and it's not a lock step thing.

[R. 3793.]

The court responded in that same context, and in a fashion entirely consistent with Mr. Anderson's charge:

I already have the feeling that I'm not going to deal with this as though they [Industrial] have to be locked into a fixed fee from representing somebody in 1982 to 1993 where they have no payment.

[R. 3799.]

Thus, however designated, the prejudgment interest factor allowed to Industrial is simply a part of "everything" to which the Court looked in determining "what's reasonable." There is no abuse of discretion or error of law in that approach.

IX. CONCLUSION

Stripped of the unfounded and unjustifiable overstatements of the case, and of issues that are not raised by or even relevant to an appropriate analysis, Hood's Brief reveals no specific challenge to any of these factual findings, other than the ultimate conclusion of reasonableness.

Against the highly-deferential "abuse of discretion" standard applicable to findings of fact, there is no significant issue justifying any challenge to the trial court's exercise of its fact-finding powers in resolving the issue of reasonableness as anticipated by the governing Stipulation. The trial court's judgment should stand and this appeal should be dismissed.

DATED this 31 day of January, 1994.

SNOW, CHRISTENSEN & MARTINEAU

By Scott Daniels
Scott Daniels
Attorneys for Appellee
Industrial Indemnity Company

IN THE UTAH COURT OF APPEALS

JAMES CONSTRUCTORS, INC.

Plaintiff,

vs.

SALT LAKE CITY CORPORATION,

Defendant.

SALT LAKE CITY CORPORATION,

Plaintiff,

Case No. 930452-CA

vs.

JAMES CONSTRUCTORS, INC., et al.,

Defendants.

INDUSTRIAL INDEMNITY COMPANY,

Cross-Claimant, Third Party
Plaintiff and Appellee

vs.

HOOD CORPORATION,

Cross Defendant and Appellant

ADDENDUM/APPENDIX TO APPELLEE'S BRIEF

MAR 30 1993

SCOTT DANIELS (A0813)
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Salt Lake City, Utah 84145
Telephone: (801) 521-9000

By CP
SALT LAKE COUNTY
County Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

JAMES CONSTRUCTORS,
Plaintiff,

vs.

SALT LAKE CITY CORPORATION,
Defendant.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

SALT LAKE CITY CORPORATION,
Plaintiff,

vs.

JAMES CONSTRUCTORS, INC., et
al.,

Defendants.

Civil No. C-84-2857

INDUSTRIAL INDEMNITY COMPANY,

Cross-Claimant and
Third-Party
Plaintiff,

Judge David S. Young

vs.

HOOD CORPORATION, et al.

Cross- and Third-
Party Defendants.

On March 4, 1993, a hearing was held to determine reasonableness of attorney's fees incurred by Industrial Indemnity Company in the above-entitled matter, and the liability of Hood Corporation to pay those fees, Judge David S. Young presiding. Industrial Indemnity Company was represented by its attorney, Scott Daniels. Hood Corporation was represented by its attorney, Robert M. Anderson. Witnesses were sworn and called, exhibits were admitted and the attorneys were allowed to present argument. The Court being fully informed in the premises, now hereby enters its:

FINDINGS OF FACT

1. On April 15, 1981, Industrial Indemnity Company entered into an Indemnity Agreement with W.C. James, Inc., Hood Corporation, B.M. Laulhere, W.C. James, and Barbara M. James, whereby these parties agreed to indemnify Industrial Indemnity for any losses, damages, costs, or counsel fees which Industrial Indemnity may sustain as a result of surety bonds written on behalf of W.C. James, Inc. (now known as James Constructors, Inc.).

2. On July 8, 1983, James Constructors (hereinafter "James") entered into a contract with Salt Lake City Corporation for the construction of a project described as Big Cottonwood Extension Terminal/Park Transmission Pipeline.

3. As part of the project contract, Salt Lake City required that James furnish contractor performance and payment bonds, which

Industrial Indemnity consequently issued, as surety for James, in the amount of \$1,128,481.00.

4. In the Spring of 1984, Salt Lake City Corporation declared James in default on the project.

5. On June 28, 1984, Salt Lake City Corporation filed suit against James, Industrial, and Hood, claiming that the work done by James was defective.

6. When Industrial was put on notice of Salt Lake City's claim, it retained the firm of Snow, Christensen & Martineau to investigate the claim and to represent and protect Industrial's interest in the litigation, if litigation should arise. Snow, Christensen & Martineau was also charged to investigate and defend, or to arrange proper defense to, claims or lawsuits by unpaid suppliers and subcontractors furnishing labor or material to James for the Salt Lake City project. Snow, Christensen & Martineau had represented Industrial previously in connection with another claim brought against James.

7. In the Spring and Summer of 1984, A. Dennis Norton, an attorney with the firm of Snow, Christensen & Martineau conducted a good-faith investigation of the failed pipeline on behalf of the surety.

8. After Salt Lake City filed suit and after Norton's original investigation, Norton tendered Industrial's defense to James, through its attorney, C. Reed Brown.

9. After James' acceptance of Industrial Indemnity's tender of defense, and prior to early 1987, Snow, Christensen & Martineau's involvement in the Salt Lake City litigation was generally limited to monitoring the case, meeting periodically with Mr. Brown, and providing research and other assistance to Mr. Brown, at Mr. Brown's request or as otherwise needed as part of preparation of trial in the matter.

10. On or about June 24, 1987, C. Reed Brown withdrew as Industrial Indemnity's counsel in this action under the prior tender of defense and tendered back the Industrial Indemnity defense to Snow, Christensen & Martineau. At that time, Mr. Brown told Norton that his withdrawal was prompted by James' likely insolvency, and an inability to come to agreement with James' parent company, Hood Corporation, concerning payment of considerable outstanding legal fees owed to Mr. Brown.

11. On August 6, 1987, Norton sent a demand letter to Hood Corporation demanding that Hood make satisfactory arrangements to defend Industrial and to post collateral sufficient to protect Industrial from any eventual loss or judgment.

12. Industrial was entitled to demand collateral under its indemnity agreement.

13. On or about August 25, 1987, Mr. Brown wrote to Norton and requested that Industrial re-tender its defense. Norton informed Mr. Brown at that time that Industrial intended to defend

itself and to level a cross claim against Hood and to join B.M. Laulhere as a third-party defendant, unless collateral was posted as demanded.

14. Although Hood had provided a financial statement showing it had a large net worth, Industrial Indemnity was justifiably concerned as to whether Hood would adequately protect the interests of Industrial. These concerns were based upon the fact that James, the bond principal, was without assets; that Hood had paid very little attention to the Salt Lake City litigation even though its exposure approached three million dollars; that Hood did not list this very significant and dangerous litigation in its financial statement; that Hood had been reluctant to pay Mr. Brown's attorney's fees, even though Mr. Brown had vigorously defended James and had also accepted tender of the Industrial defense; that the defense of Industrial Indemnity had been tendered back to Industrial; Hood's stubborn refusal to post collateral or to provide other adequate and acceptable security to Industrial; and Hood's refusal to authorize or participate in settlement negotiations with Salt Lake City Corporation, even though massive failures had occurred in the pipeline project and the City had removed and re-laid virtually the entire pipeline. Under these circumstances, it was not unreasonable for Industrial to determine that it was necessary to defend itself in the litigation to protect and preserve its interests.

15. On April 4, 1988, Industrial and Hood entered into a Stipulation resolving the indemnity claims raised on Industrial's cross-claim and third-party complaint against Hood and Laulhere. Under the terms of the Stipulation, Industrial agreed not to require Hood and Laulhere to post collateral. In exchange, Hood and Laulhere agreed that Industrial could have judgment over against Hood in the event Salt Lake City obtained judgment against Industrial, and that Industrial would also be entitled to judgment against Hood for Industrial's costs and reasonable attorney's fees incurred in this action or otherwise in connection with bonds furnished for James, subject only to the right of Hood to submit the question of reasonableness of those fees and costs to the Court for determination.

16. Following April 1988, Industrial Indemnity continued to be represented by its separate counsel, but agreed to permit Hood and James to take the lead in the continuing litigation with Salt Lake City, providing support and assistance, as appropriate, and as generally consistent with the defendants' collective defense strategy.

17. The firm of Snow, Christensen & Martineau thereafter limited its participation in the case until October of 1990, when it was agreed among counsel for Hood, James and Industrial that Industrial would attempt to re-assert its independent defenses to the suit. Counsel for defendants determined that if Industrial

Indemnity were successful in that effort, the success would inure to the benefit of the indemnitors, including Hood. For a brief period of time following this October 1990 agreement, and as part of a pretrial effort to define and preserve issues for trial, Snow, Christensen & Martineau was involved in the case in asserting these defenses. The decision to more heavily involve Industrial and its counsel in the case was reasonable under the circumstances and was agreed to by James and Hood.

18. All of the legal fees and costs for services rendered for Industrial Indemnity Company and related to the James file were recorded on daily time records and were in turn combined with separate cost accounting records relating to costs advanced on behalf of Industrial Indemnity to create itemized statements.

19. The itemization of services and costs contained on these statements accurately reflect services actually rendered and costs actually advanced between December 23, 1982 and April 7, 1992. Fees over that period of time totaled \$104,858.11 and costs totaled \$5,099.50.

20. Some of the fees and costs recorded in those statements do not relate specifically to the Salt Lake City matter and should be deducted from the total. These fees and costs amount to \$5,148.00.

21. Industrial Indemnity paid all of the amounts billed on these statements shortly after the time that the statements were each sent.

22. The fees charged to and paid by Industrial Indemnity were based on time spent, calculated at hourly rates for the attorneys involved. These services were rendered primarily by A. Dennis Norton, David W. Slaughter and Max D. Wheeler. The hourly rates for these attorneys over the period of their involvement are set out below:

A. DENNIS NORTON

1983	\$ 100.00
1984	110.00
1985	120.00
1986	130.00
1987	135.00
1988	140.00
1989	145.00
1990	150.00
1991	155.00
1992	160.00

MAX D. WHEELER

1983	\$ n/a
1984	n/a
1985	n/a
1986	n/a
1987	120.00
1988	125.00
1989	130.00
1990	135.00
1991	n/a
1992	n/a

DAVID W. SLAUGHTER

1983	\$ n/a
1984	n/a

1985	85.00
1986	95.00
1987	105.00
1988	110.00
1989	115.00
1990	125.00
1991	130.00
1992	135.00

23. In addition to the amounts set forth on these bills, Industrial Indemnity has incurred further expenses in preparation for the hearing on attorney's fees. These include the legal efforts and testimony by three attorneys listed above and in addition, the services of Scott Daniels, whose hourly rate is \$135.00. A reasonable attorneys fee in preparing for this hearing is \$5,220.00.

24. All of the hourly rates charged by the attorneys for Snow, Christensen & Martineau are reasonable, considering the experience of the attorney involved and the complexity of the matter.

25. The fees and costs expended by Industrial, as set forth in the statements of Snow, Christensen & Martineau, were both reasonable and necessary, considering the complexity of the matter, the reasonableness of the decision of Industrial to defend itself, the reasonableness of the investigation which needed to be done, the reasonableness of the decision and agreement to assert Industrial's independent defenses, and the dispute regarding the amount of attorney's fees.

26. Industrial's attorney fees are also reasonable in light of the fact that they were incurred over a ten-year period, the litigation was very complex, and the other defendants expended \$626,065.62 in defense costs.

27. The amounts paid by Industrial were liquidated and certain in amount as of the dates paid, were actually paid by Industrial on known and established dates, and are subject to and capable of interest calculation.

28. Interest, calculated at 10% simple interest from the date each payment was received from Industrial by Snow, Christensen & Martineau to the date of this hearing amounts to \$56,139.23.

29. In light of all the factors, the court concludes that a total of fees and costs of \$171,316.89 is reasonable, and was actually and necessarily incurred by Industrial in defense of this action.

From the foregoing Findings of Fact, the court enters the following:

CONCLUSIONS OF LAW

1. Industrial is entitled to recover from Hood under the Indemnity Agreement of April 15, 1981, and the Stipulation of April 4, 1988, total attorney's fees and costs in the principal amount of \$115,177.61; and

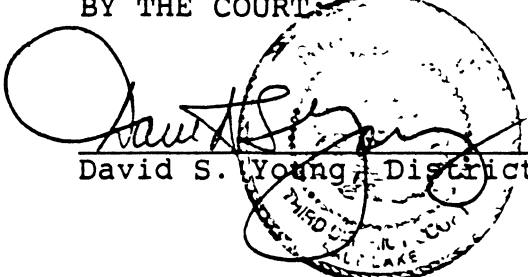
2. As part of its reasonable fees and costs, Industrial is further entitled to recover from Hood pre-judgment interest on all

fee expenditures at the simple rate of 10% per annum, calculated from the date of fee payments, for a total amount of \$56,139.23.

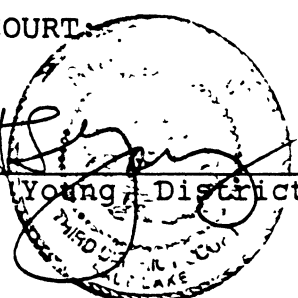
3. Judgment should be entered accordingly, against Hood Corporation and in favor of Industrial Indemnity Company in the total amount of \$171,316.89, and that interest thereon should accrue, from the date the Judgment is entered, at the judgment rate of interest, 12% per annum.

DATED this 50th day of March, 1993.

BY THE COURT:



David S. Young, District Judge



SD\Ind.Ind.Conclusions

MAR 30 1993

SCOTT DANIELS (A0813)
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Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

JAMES CONSTRUCTORS,
Plaintiff,

vs.

SALT LAKE CITY CORPORATION,
Defendant.

JUDGMENT

2182208
4-6-93-8:05am

SALT LAKE CITY CORPORATION,
Plaintiff,

vs.

JAMES CONSTRUCTORS, INC., et
al.,

Defendants.

Civil No. C-84-2857

INDUSTRIAL INDEMNITY COMPANY,

Cross-Claimant and
Third-Party
Plaintiff,

Judge David S. Young

vs.

HOOD CORPORATION, et al.

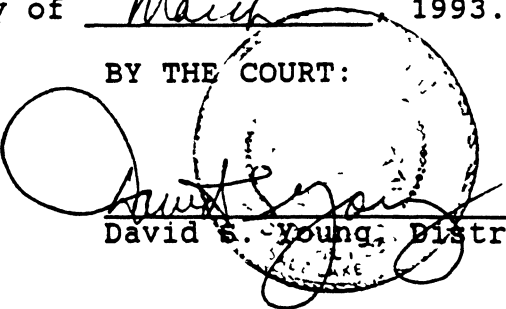
Cross- and Third-
Party Defendants.

On March 4, 1993, a hearing was held to determine reasonableness of attorney's fees incurred by Industrial Indemnity Company in the above-entitled matter, and the liability of Hood Corporation to pay those fees, Judge David S. Young presiding. Industrial Indemnity Company was represented by its attorney, Scott Daniels. Hood Corporation was represented by its attorney, Robert M. Anderson. Witnesses were sworn and called, exhibits were admitted and attorneys were allowed to present argument. The Court being fully informed in the premises and having entered its Findings of Fact and Conclusions of Law, hereby enters the following:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Industrial Indemnity Company, have Judgment against Hood Corporation, in the amount of \$171,316.89, and that interest thereon accrue at the Judgment rate of interest, 12% per annum.

DATED this 30th day of March 1993.

BY THE COURT:


David S. Young, District Judge

SD\Ind.Ind\Judgment



Third Judicial District Court
Salt Lake County Utah

MAY 2 1988

C. Paulin

MAX D. WHEELER (A3439)
DAVID W. SLAUGHTER (A2977)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Industrial Indemnity
Company
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

JAMES CONSTRUCTORS, INC., a
Nevada corporation,

Plaintiff,

vs.

SALT LAKE CITY CORPORATION,

Defendant.

STIPULATION OF INDUSTRIAL
INDEMNITY COMPANY, HOOD
CORPORATION AND B. M.
LAULHERE

SALT LAKE CITY CORPORATION, a
municipal corporation of the
State of Utah,

Plaintiff,

vs.

JAMES CONSTRUCTORS, INC., et
al.,

Defendants.

C 84-2857
No. ~~C 86-2857~~

Judge David S. Young

INDUSTRIAL INDEMNITY COMPANY, a
California corporation,

Cross-Claimant and
Third-Party Plaintiff,

vs.

A-000014

000907

HOOD CORPORATION, et al.

Cross- and Third-Party
Defendants.

COME NOW Industrial Indemnity Company ("Industrial"), a California corporation and third-party plaintiff, cross-defendant Hood Corporation ("Hood"), and third-party defendant B. M. Laulhere ("Laulhere"), and agree and stipulate as follows:

1. On or about April 15, 1981, Hood and Laulhere (the "Indemnitors") each executed a Contract of Indemnity (General) (the "Indemnity Agreement") by which Indemnitors agreed to indemnify Industrial, and to hold it harmless from, among other things, "any and all liabilities, claims, demands, losses, damages, costs, attorneys fees, judgments and expenses of whatever kind or nature" that Industrial might sustain or incur by reason of or in consequence of Industrial's issuance of bonds for work performed or to be performed by James Constructors, Inc., one of Hood's subsidiary companies. The Indemnity Agreement also entitles Industrial to require the Indemnitors to post collateral in the amount of any claim made against Industrial's bonds, together with a reasonable sum for costs and attorneys' fees.

2. Relying upon the Indemnity Agreement, Industrial issued certain contractor performance and payment bonds in the

face amount of \$1,128,481.00 in connection with a contract between James Constructors, Inc., and the City of Salt Lake, Utah, for a project known generally as the "Terminal Park Water Transmission Pipeline, Water Main Extension No. 35-4184."

3. The undersigned parties stipulate and agree that the Indemnity Agreement signed by Hood and Laulhere covers the bonds above described and that pursuant to said Indemnity Agreement Hood and Laulhere are liable for any payments Industrial may be obligated to make pursuant to the terms of the bonds, together with other costs and reasonable attorneys' fees incurred by Industrial in connection with those claims.

4. By a Verified Complaint dated June 28, 1984, Salt Lake City Corporation filed suit against James Constructors, Inc., and Industrial (the "Complaint") alleging, among other things, that there was a failure of performance under the construction contract described in paragraph 2 above. The Complaint claims damages against Industrial under the bonds in a sum in excess of \$2,000,000.

5. By Crossclaim and Third-Party Complaint in this action, Industrial seeks indemnification from Indemnitors and otherwise seeks enforcement of its rights under the Indemnity Agreement.

6. It is the desire of the parties to this Stipulation to resolve some of the issues presented under the Indemnity

Agreement and the Crossclaim/Third-Party Complaint without litigation, and without entwining those issues with the underlying claims and issues in the suit by Salt Lake Corporation. Accordingly, the parties hereby agree to a complete resolution of the specified claims raised by Crossclaim/Third Party Complaint or otherwise related to Indemnitors' obligations of indemnity as hereinafter set forth.

7. Hood and Laulhere hereby waive any defenses that they might assert, now or hereafter, to the Indemnity Agreement, and jointly and severally agree and stipulate that if Salt Lake City Corporation obtains a judgment against Industrial on the underlying claims of the Complaint, the Court, upon ex parte application by Industrial Indemnity, and without further notice to Indemnitors, shall enter an immediate and final judgment in like amount over in favor of Industrial and against Indemnitors Hood and Laulhere jointly and severally.

8. Independent of and in addition to the amount of any judgment over against Indemnitors as outlined in paragraph 7 above, Industrial Indemnity shall be entitled to further judgment against Hood and Laulhere, jointly and severally, upon motion and supporting affidavit, for Industrial's costs and reasonable attorneys fees incurred in this action or otherwise in connection with the described bonds furnished to, for, or at the request of James, Hood or Laulhere, subject only to rights

of Hood and Laulhere to request a hearing with respect to the reasonableness of the claimed costs and attorneys fees. All parties agree to be bound by the Court's determination of reasonableness.

9. Joint and several execution may issue immediately upon entry of judgments pursuant to paragraphs 7 and 8 above.

10. In addition to all of the foregoing, Indemnitors Hood and Laulhere confirm their obligations to hold Industrial Indemnity harmless from any enforcement of and execution upon that judgment entered against James Constructors and Industrial Indemnity in favor of Ortega Ru in that certain action, also involving claims on the described bonds, entitled Ortega-Ru v. James Constructors, et al., Third District (Utah) Case No. _____, and currently on appeal before the Utah Supreme Court. Industrial Indemnity may have judgment (or may supplement judgment) against indemnitors Hood and Laulhere in accordance with paragraph 7 above in the event of affirmance of the Ortega-Ru judgment and in the amount of any demand or execution upon Industrial Indemnity in payment and enforcement of said judgment.

11. As consideration for Hood and Laulhere's Stipulation hereunder, Industrial agrees not to require the posting of collateral or other security under the Indemnity Agreement, unless the net worth of Hood Corporation deteriorates more than

twenty percent (20%) from its 1987 tax year end audited financial statement. Hood and Laulhere shall submit financial statements and other proof of financial condition at any time at the request of Industrial.

12. Industrial Indemnity specifically reserves all rights under the Indemnity Agreement.

DATED this 19th day of April, 1988.

INDUSTRIAL INDEMNITY

Snow, Christensen & Martineau
By *[Signature]*
its ATTORNEYS

Utah
STATE OF ~~CALIFORNIA~~)
COUNTY OF Salt Lake) ss.

On the 19th day of April, 1988, personally appeared before me A. Dennis Norton, the attorney of for Industrial Indemnity, who duly signed the foregoing Stipulation on behalf of Industrial Indemnity, and states that it is true and correct as to his information, knowledge and belief.

Kay L. Brown
NOTARY PUBLIC
Residing at Salt Lake County, Utah

My Commission Expires:

7/15/88

HOOD CORPORATION

By Marc Laulhere
Its President

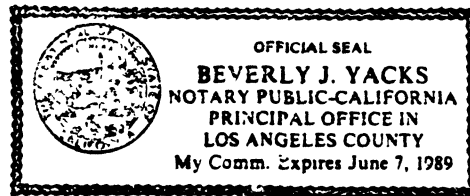
STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

On the 14th day of April, 1988, personally appeared before me Marc Laulhere, the President of Hood Corporation, who duly signed the foregoing Stipulation on behalf of Hood Corporation, and states that it is true and correct as to his information, knowledge and belief.

Beverly J. Yacks
NOTARY PUBLIC
Residing at Whittier, California

My Commission Expires:

June 7, 1989



B. M. LAULHERE

STATE OF _____)
COUNTY OF _____) ss.

On the ____ day of April, 1988, personally appeared before me B. M. Laulhere, who duly acknowledged to me that he signed

the foregoing Stipulation, and that the same is true as to his
information, knowledge and belief.

NOTARY PUBLIC

Residing at _____

My Commission Expires:

SCMDS142

<p>INDUSTRIAL INDEMNITY COMPANY</p> <p>HEREINAFTER CALLED THE SURETY</p> <p>HOME OFFICE</p> <p>San Francisco, California</p>	<p>INDUSTRIAL INDEMNITY</p>
--	---------------------------------

CONTRACT OF INDEMNITY
(GENERAL)

BOND DEPT.

MAY 29 1981

1 I KNOW ALL MEN BY THESE PRESENTS that whereas, at the special instance and request of the undersigned, hereinafter called
2 Indemnitors, and upon the express condition that this instrument be executed, the _____

3 INDUSTRIAL INDEMNITY COMPANY, hereinafter called Surety, has on behalf of

4 W. C. JAMES, INC.
Principal(s)

5
6 hereinafter called Principal, executed, or procured the execution of, and may, from time to time, execute, or procure the execution
7 of certain bonds, undertakings or instruments of guarantee (all of which are hereinafter included within the term "bonds") as have
8 been, or may hereafter, be applied for by said Principal; and

9 Whereas, the Indemnitors have a substantial, material and beneficial interest in obtaining the said bonds;

10 NOW, THEREFORE, in consideration of the premises and of other good and valuable considerations, the receipt of which is
11 hereby acknowledged, and of the prior or future execution of said bonds, the Indemnitors hereby agree and bind themselves, their
12 heirs, executors, administrators, successors, and assigns, jointly and severally, as follows:

13 First. That the Indemnitors will pay, or cause to be paid, to the Surety, upon the execution of each of the said bonds, and
14 annually thereafter in advance, on the corresponding date of succeeding years, and until it has been served with competent legal
15 evidence of its discharge from all liability upon such bonds, the annual premium or charge computed in accordance with the
16 Surety's regular manual of rates in effect on the date said premiums become due.

17 Second. That the Indemnitors shall and will at all times indemnify and keep indemnified the Surety, its Co-Sureties or
18 Reinsurers and its or their successors and assigns, from and against any and all liabilities, claims, demands, losses, damages, costs,
19 counsel fees, judgments, and expense of whatever kind or nature, that the Surety shall or may for any cause at any time sustain or
20 incur by reason of or in consequence of the said bonds or any renewal thereof or any new bonds issued in continuation thereof or
21 as a substitute therefor or in connection with any litigation, investigation or other matters connected therewith; that if the Surety
22 shall set up a reserve to cover any claim, suit or judgment under any such bonds, the Indemnitors will, immediately upon demand,
23 deposit with the Surety a sum of money or acceptable security equal to such reserve, such sum to be held by the Surety as collateral
24 security on said bonds; and any such collateral security shall be held subject to the terms of the Surety's regular form of "Collateral
25 Agreement," which is hereby made a part of this instrument with the same force and effect as if set out at length herein. The Surety
26 shall be entitled to charge said Indemnitors, and said Indemnitors, and each of them, agree to pay for any and all disbursements
27 made by it in good faith with respect to the matters herein contemplated by this agreement, under the belief that it is or was liable
28 for the sums and amounts so disbursed, or that it was necessary or expedient to make such disbursements, whether or not such
29 liability, necessity or expediency existed. An itemized statement of such disbursements made by the Surety for any of the purposes
30 specified herein, sworn to by an Officer of the Surety, or the voucher or vouchers for such disbursements, shall be prima facie evi-
31 dence of the liability of the Indemnitors to reimburse the Surety for such disbursements, with interest; and if the Surety shall bring
32 suit to enforce any obligation of the Indemnitors under this instrument, the Indemnitors shall be liable for the costs and expenses,
33 including fees of attorneys, incurred in prosecuting such suit, and such costs and expenses shall be included in any judgment that
34 may be rendered against the Indemnitors.

35 Third. The Surety without notice to the Indemnitors has the right and is hereby authorized but not required, (a) from time to
36 time, to make or consent to any change in any such bonds or to issue any substitute for or any renewal of any such bonds, and this
37 instrument shall apply to such substituted or changed bonds or renewal; (b) to take such steps as the Surety may deem necessary or
38 proper to obtain release from liability under any such bonds; and (c) to pay, satisfy, adjust, settle or compromise any claim or suit
39 arising under said bonds and, with respect to any such claim or suit, to take any action it may deem appropriate or refrain from
40 taking any action it may deem inappropriate.

41 Fourth. If any such bonds be given in connection with a contract, the Surety has the right and is hereby authorized, but not
42 required, (a) to consent to any change, alteration or modification in the contract or in the plans and specifications relating thereto;
43 (b) from time to time to make or guarantee advances or loans for the purpose of the contract and such guarantees, advances or
44 loans shall be conclusively presumed to be a loss hereunder notwithstanding that said guarantees, advances or loans, or any part
45 thereof, have not been used for the purpose of the contract; (c) in event of the abandonment, forfeiture or breach of the contract
46 or the breach of any bonds given for the performance thereof or in connection therewith or the inability, failure, neglect or refusal
47 to pay when due, for labor or materials used in the prosecution of the contract, to take possession of the work under the contract
48 and, at the expense of the Indemnitors, to complete the contract or cause the same to be completed or to consent to the completion
49 thereof, and to take any other action which the Surety, in its sole discretion, may deem appropriate; and the Indemnitors hereby
50 assign, transfer and set over to the Surety (to be effective as of the date of such bond or bonds, but only in the event of abandon-
51 ment, forfeiture, breach, failure, neglect, refusal or inability as aforesaid) all of their rights under the contract, including their right
52 title and interest in and to (1) all sub-contracts let in connection therewith, (2) all machinery, plant, equipment, tools and materials
53 which shall be upon the site of the work or elsewhere for the purposes of the contract, including all materials ordered for the con-
54 tract, and (3) any and all sums due under the contract at the time of such abandonment, forfeiture, breach, failure, neglect, refusal
55 or inability as aforesaid, or which may thereafter become due, and the Indemnitors hereby authorize the Surety to endorse in the
56 name of the payee and to collect any check, draft, warrant or other instrument made or issued in payment of any such sum and to
57 disburse the proceeds thereof.

58 Fifth. The Indemnitors hereby waive notice of the execution of any such bonds and notice of any breach thereof or of any
59 act or default that may give rise to claim thereunder or hereunder.

65 Sixth. That the Indemnitors by requesting the Surety to prosecute, defend, take part in any action, suit, proceeding,
66 trial, or writ of error, or to defend any claim or demand, will place in the possession of the Surety funds or securities, which in
67 the sole opinion of the Surety, are sufficient to cover any costs, charges, and expenses that the Surety may incur in complying with
the said request and also sufficient to cover the amount of any liability, order, adjustment, or adjudication that may result from a
compliance with the said request. Provided, that Surety may, if it sees fit, place the matter in the hands of its attorneys and shall
68 have the right to handle it as it may deem best and in such event, the Surety may, if it sees fit, settle such action, etc., at any stage
69 or pay any judgment whereupon the Indemnitors agree to pay the Surety the amount of such settlement or judgment and any and
70 all costs, charges and expenses of every nature, including attorney's fees together with legal interest thereon until paid.

71 Seventh. That the Surety at its option shall have and may exercise in the name of the Indemnitors or otherwise, every right,
72 remedy, and demand that the Indemnitors may have for the recovery of any sums paid by the Surety under the said bonds or any
73 renewal thereof or any new bonds issued in continuation thereof or as a substitute therefor; and the Indemnitors do hereby assign
74 all the said rights, remedies and demands to the Surety with full power and authority to take such action in regard thereto in the
75 name of the Indemnitors or otherwise as the Indemnitors might take if such assignment had not been made; and the Indemnitors
76 hereby appoint the Surety the Indemnitors' attorney for such purposes.

77 Eighth. That in the event of any claim or demand being made by the Surety against the Indemnitors, by reason of or in con-
78 sequence of the execution of the said bonds or any renewal thereof or any new bonds issued in continuation thereof or as a substi-
79 tute therefor, the Surety is hereby expressly authorized to settle with one or more of the Indemnitors individually, and without
reference to the others, and such settlement or composition shall not affect the liability of any of the other Indemnitors, and the
Indemnitors hereby expressly waive the right to be discharged and released by reason of or in consequence of the release of one or
more of the joint debtors, and hereby consent to any settlement or composition that may hereafter be made.

80 Ninth. That the rights and remedies that the Surety may be subrogated to or may otherwise have, acquire, exercise, and
81 enforce shall not in any way be limited or abridged by this agreement nor by the acceptance of any payment for the said suretyship
82 nor by any agreement to accept other security nor by the acceptance of other security nor by the assent to any act of the Principal
83 named in the said bonds nor by the assent to any act of any person acting in behalf of the said Principal or of the Indemnitors, nor
84 shall this agreement impose on the Surety any liability that it would not have were this agreement not executed.

85 Tenth. The liability of the Indemnitors hereunder shall not be affected by the failure of the Principal to sign any such bond
86 nor by any claim that other indemnity or security was to have been obtained, nor by the release of any indemnity, or the return or
87 exchange of any collateral, that may have been obtained. In case the execution of this agreement by any of the Indemnitors be
88 defective or invalid for any reason, such defect or invalidity shall not in any manner affect the validity of this agreement or the
89 liability hereunder as to any and all of the Indemnitors properly executing this agreement; it is expressly understood that each and
90 every of the Indemnitors joining herein shall be and remain fully bound and liable hereunder to the same extent as if such defect
91 and invalidity had not existed.

92 Eleventh. The company, at its option, may decline to execute or participate in or procure the execution of any bonds
93 requested on behalf of said Principal without incurring any liability whatsoever to the Indemnitors.

94 Twelfth. That suits may be brought hereunder as causes of action may accrue, and the bringing of one or more suits or the
95 recovery of judgment or judgments therein shall not prejudice or bar the bringing of suits upon other causes of action, whether
96 theretofore or thereafter arising.

97 Thirteenth. That this agreement shall be liberally construed so as to fully protect and indemnify the Surety.

98 Fourteenth. This Contract of Indemnity shall continue in full force and effect until canceled by the Indemnitors; notice of
99 cancellation shall be given by registered letter addressed to the Surety at its office at 255 California Street, San Francisco, Calif.; under
100 no circumstances, however, shall such cancellation alter or change the effect of this agreement upon any bonds already executed, nor
101 shall cancellation notice by one Indemnitor in any manner alter or change the effect of this agreement as to any other Indemnitor.

102 Fifteenth. Wherever used in this instrument the plural term shall include the singular and the singular shall include the plural,
103 as the circumstances require.

104 Sixteenth. This instrument may not be changed or altered or modified orally.

105 Seventeenth. Wherever the word or term Principal is used in this agreement, it shall and does include the person, firm or cor-
106 poration so named and any partnership, joint venture or other firm of any nature in which the Principal is a partner, joint venturer
107 or member of any sort and this agreement also applies to and covers any bonds in connection with any contract where the Principal
108 acts as a joint venturer, partner of, or in any other capacity.

109 Eighteenth. _____

110 _____

111 _____

IN WITNESS WHEREOF the Indemnitors have hereunto set their hands and affixed their seals on this 15th day
of April, 19 81.

Attest: Barbara Ann James
Barbara Ann James Secretary
By: W. C. James
W. C. James President (Seal)

Attest: Jose Rey
Jose Rey Secretary
By: Marc Laulhere
Marc Laulhere President (Seal)

By: B. M. Laulhere
B. M. Laulhere Individually

By: Barbara Ann James
Barbara Ann James Individually
By: W. C. James
W. C. James Individually

At a _____
(Regular or Special)

HOOD CORPORATION

(hereinafter called Corporation), duly called and held on the 1st day of May, 1981.

a quorum being present, the following Preamble and Resolution were adopted:

"WHEREAS, this Corporation has a financial, material and beneficial interest in transactions in which

W.C.JAMES, INC.

(Name and Address of Principal)

(hereinafter called Principal) has applied or will apply to the Surety (hereinafter called Surety), for certain bonds or undertakings of whatever kind or nature; and

"RESOLVED that the officers authorized to execute documents in behalf of this Corporation, be and they are hereby authorized and empowered to execute any indemnity agreement or agreements required by the Surety as consideration for the execution by it of bonds or undertakings of whatever kind or nature in behalf of the Principal described.

"RESOLVED FURTHER, that the said officers be and they are hereby authorized and empowered, at any time prior or subsequent to the execution by said Surety of any such bonds or undertakings, to execute any and all amendments to said indemnity agreement or agreements; and to execute any other or further agreements relating to any such bonds or undertakings or to any collateral that may have been deposited with the Surety in connection therewith; and to take any and all other actions that may be requested or required by the Surety in the premises;

"RESOLVED FURTHER, that the said officers be and they are hereby authorized and empowered to affix the corporate seal to such indemnity agreement or agreements and to any and all amendments to said indemnity agreement or agreements and to any other or further agreements."

I, Jose Rey, Secretary of the Corporation, have compared the foregoing preamble and resolution with the original thereof, as recorded in the Minute Book of said Corporation, and do certify that the same are correct and true transcripts therefrom, and of the whole of said original preamble and resolution.

The officers authorized to execute documents in behalf of this Corporation are:

W. C. James - President

Barbara Ann James - Secretary

Given under my hand and the seal of the Corporation, in the City of Whittier

State of California, this 22 day of May, 1981

Secretary

INDIVIDUAL VERIFICATION

STATE OF CALIFORNIA } ss.:
COUNTY OF LOS ANGELES }
On this 15th day of April 1981, before me
personally came B.M. Lulhere

to me known and known to me to be the individual(s) who executed the foregoing instrument, and acknowledged that he/they executed the same.



BEVERLY J. GRIGGS
NOTARY PUBLIC
LOS ANGELES COUNTY
My Commission Expires May 25, 1981

Beverly J. Griggs
Notary Public

INDIVIDUAL VERIFICATION

STATE OF Utah } ss.:
COUNTY OF Wasatch }
On this 15th day of April 1981, before me
personally came W. C. James and Barbara Ann James

to me known and known to me to be the individual(s) who executed the foregoing instrument, and acknowledged that he/they executed the same.

Nadeen Reed
Notary Public

PARTNERSHIP VERIFICATION

STATE OF _____ } ss.:
COUNTY OF _____ }
On this _____ day of _____ 19____, before me
personally came _____

to me known, and stated that he partner in the firm of _____

and acknowledged that he executed the foregoing instrument as the act of the said firm.

Notary Public

CORPORATE VERIFICATION

STATE OF Utah } ss.:
COUNTY OF Wasatch }
On this 15 day of April 1981, before me
personally came W. C. James

to me known, who, being by me duly sworn, deposes and says that he resides in the City of Utah

that he is the President

of the W.C. James, Inc.

the corporation described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by the order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Nadeen Reed
Notary Public

INDIVIDUAL VERIFICATION

STATE OF _____ }
COUNTY OF _____ } ss.:

On this _____ day of _____, 19____, before me
personally came _____
to me known and known to me to be the individual(s) who executed the foregoing instrument, and acknowledged that he/they executed
the same.

Notary Public

PARTNERSHIP VERIFICATION

STATE OF _____ }
COUNTY OF _____ } ss.:

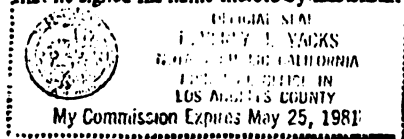
On this _____ day of _____, 19____, before me
personally came _____
to me known, and stated that he partner in the firm of _____
and acknowledged that he executed the foregoing instrument as the act of the said firm.

Notary Public

CORPORATE VERIFICATION

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.:

On this 15th day of April, 1981, before me
personally came Marc Leulhere
to me known, who, being by me duly sworn, deposes and says that he resides in the City of Huntington Beach,
California that he is the President
of the Hood Corporation
the corporation described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal
affixed to the said instrument is such corporate seal; that it was so affixed by the order of the Board of Directors of said corporation, and
that he signed his name thereto by like order.



[Signature]
Notary Public

CORPORATE VERIFICATION

STATE OF _____ }
COUNTY OF _____ } ss.:

On this _____ day of _____, 19____, before me
personally came _____
to me known, who, being by me duly sworn, deposes and says that he resides in the City of _____
that he is the _____
of the _____
the corporation described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal
affixed to the said instrument is such corporate seal; that it was so affixed by the order of the Board of Directors of said corporation, and
that he signed his name thereto by like order.

Notary Public

JOHN

1 IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
2 IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
3

4 * * *

Original

6 INDUSTRIAL INDEMNITY COMPANY,)
7 A CALIFORNIA CORPORATION,)

8 CROSS-CLAIMANT AND)
THIRD-PARTY PLAINTIFF,)

CIVIL NO. C-84-090-2857

9 -VS-)

10 HOOD CORPORATION, ET AL.,)

EVIDENTIARY HEARING

11 CROSS AND THIRD-PARTY)
12 DEFENDANTS AND APPELLANT,)

13 * * *

14
15 BE IT REMEMERED THAT ON THURSDAY, THE 4TH DAY
16 OF MARCH, 1993, COMMENCING AT THE HOUR OF 8:30 O'CLOCK
17 A.M., THE ABOVE-ENTITLED MATTER CAME ON FOR HEARING IN THE
18 COURTROOM OF THE THIRD JUDICIAL DISTRICT, IN AND FOR SALT
19 LAKE COUNTY, STATE OF UTAH; SAID CAUSE BEING HELD BY THE
20 HONORABLE DAVID S. YOUNG, JUDGE IN THE THIRD JUDICIAL DIS-
21 TRICT COURT, STATE OF UTAH.
22

23 * * *

24 FILED DISTRICT COURT
Third Judicial District

25 AUG 26 1993

By FILED DISTRICT COURT
Deputy Clerk

EILEEN M. AMBROSE, C.S.R.

OCT 13 1993

1 NEY, MET WITH THE CITY ENGINEERS, REVIEWED THE INFORMATION,
2 CONTACTED A CONSTRUCTION CONSULTANT AND WE WALKED THE JOB
3 AND TOOK SOME PICTURES AND LOOKED OVER THE SITUATION. AND
4 IT WAS VERY OBVIOUS THAT THERE WAS A MASSIVE FAILURE--THAT
5 DOESN'T GO TO CAUSATION, BUT THERE WAS A MASSIVE FAILURE.

6 Q ON THE PIPELINE?

7 A OF THE PIPELINE. YES. WE'VE EITHER TOOK OR
8 SAW PICTURES OF CARS FALLING DOWN INTO THE COMPLETED AND
9 PAVED TRENCH THAT HAD CAVED DOWN SEVERAL FEET BELOW THE
10 SURFACE, THE OTHERWISE SURFACE. AND SO IT WAS OBVIOUS WE
11 HAD A PROBLEM TO DEAL WITH. IT WAS NOT A SMALL CASE. THE
12 BOND WAS SLIGHTLY UNDER 1.3 MILLION DOLLARS BUT THE CITY
13 CONTENDED THAT IT WAS SPENDING MORE THAN TWO MILLION DOLLARS
14 TO RE-DO THE WORK AND, IN FACT, THE CITY TORE OUT THE WHOLE
15 PIPELINE AND REPLACED THE WHOLE THING. AND SO I CONSIDERED
16 IT A NASTY, DANGEROUS CASE.

17 NOW I'VE BEEN INVOLVED IN NASTY, DANGEROUS CASES
18 BEFORE, BUT THE DIFFERENCE HERE WAS THAT HOOD CORPORATION
19 SEEMED UNINTERESTED IN WHAT WAS HAPPENING OUT HERE AND HAD
20 LET THE DEFENSE OF THE CASE TO JAMES WHO, AT THAT POINT,
21 CONSISTED OF THE PRESIDENT OF JAMES, A FELLOW NAMED JIM
22 FOREMAN, AND HIS SECRETARY. AND JAMES HAD HIRED REED BROWN
23 AS ITS ATTORNEY AND THEY WERE BUSILY DEFENDING THIS CASE.
24 BUT WE KNEW, AND JAMES KNEW THAT JAMES COULDN'T PAY ANY
25 JUDGMENTS AND WE TRIED TO INTEREST HOOD CORPORATION IN THE

1 CASE TO COME OUT, INVESTIGATE, DO SOME INDEPENDENT WORK
2 TO SEE WHAT, TO SEE WHAT THE EXPOSURE REALLY WAS RATHER
3 THAN RELYING ON THE GUY WHO WAS IN CHARGE OF THE PROJECT.
4 AND WE COULDN'T GET THAT INTEREST.

5 Q AS AN ATTORNEY REPRESENTING THE SURETY DID YOU
6 FEEL YOU HAD A DUTY TO DO AN INDEPENDENT INVESTIGATION?

7 A YES. THE DUTY OF GOOD FAITH AND FAIR DEALING
8 THAT HAS BEEN IMPOSED ON INSURANCE COMPANIES HAS ALSO BEEN
9 IMPOSED ON SURETY COMPANIES. MAINLY BECAUSE SURETY COMPANIES
10 WERE LUMPED IN STATE INSURANCE CODES AS INSURERS. SURETIES
11 AREN'T INSURERS BUT THEY'RE PART OF THE INSURANCE CODE.
12 AND, IN ANY EVENT, THE CASES AROUND THE COUNTRY HAVE MADE
13 IT PRETY CLEAR NOW THAT A SURETY HAS A DUTY OF GOOD FAITH
14 AND FAIR DEALING AND PART OF THAT DUTY IS TO INDEPENDENTLY
15 EXAMINE THE PROJECT, WHAT THE PROBLEMS ARE, AND TO MAKE
16 AN EVALUATION AND TO TAKE AN ACTIVE PART RATHER THAN MERELY
17 TENDER. AND SO IN THE OLD DAYS WHEN SURETY LAWYERS DIDN'T
18 HAVE MUCH TO DO THEY JUST TENDERED TO THE PRINCIPAL. IN
19 THIS DAY AND AGE WE DON'T HAVE THAT LUXURY. WE HAVE TO,
20 EVEN ON SMALL CLAIMS, EVEN ON SUBCONTRACTOR'S CLAIMS, WE
21 HAVE A DUTY TO GO OUT AND INDEPENDENTLY FIND OUT IF WE CAN,
22 WHAT HAPPENED. AND THAT MEANS ALSO, IN A NUMBER OF STATES,
23 INCLUDING CALIFORNIA, HAVE SAID THAT WE CAN'T RELY ON THE
24 REPRESENTATIONS OF OUR PRINCIPAL OBLIGOR, IN THIS CASE,
25 JAMES. WE CAN'T RELY ON WHAT THEY SAY. WE HAVE TO CONDUCT

1 OUR OWN INVESTIGATION AND THAT'S WHAT I ATTEMPTED TO DO.

2 Q WELL--AND WHAT DID YOU DO TO TRY TO GET HOOD
3 INVOLVED AND INTERESTED IN THE LAWSUIT?

4 A REED BROWN WAS THE ATTORNEY REPRESENTING JAMES
5 AND DEALING WITH BOTH JAMES AND HOOD AT THAT TIME. AND
6 VERY EARLY IN OUR INVESTIGATIONS WE SAW THAT THE EXPOSURE,
7 THE POTENTIAL EXPOSURE TO DAMAGES WAS VERY GREAT. AND WE
8 TRIED TO GET MR. BROWN TO GET HOOD CORPORATION UP HERE TO
9 INDEPENDENTLY TAKE A LOOK AT IT AND INDEPENDENTLY ASSESS
10 ITS EXPOSURE BECAUSE HOOD WOULD EVENTUALLY BE PAYING IT,
11 WE HOPED.

12 Q I SEE. WELL NOW, AS I LOOK AT THE CHART, P-4,
13 IT SEEMS TO BE PRETTY FLAT ON THE BOTTOM AND THERE'S THREE
14 AREAS OF ACTIVITY. SIMILARLY, LOOKING AT P-3 I SEE THREE
15 AREAS WHERE THERE'S SOME SUBSTANTIAL AMOUNT OF FEES. THIS
16 TIME PERIOD WHEN YOU WERE DOING THE INVESTIGATION, WHEN
17 DID THAT TAKE PLACE?

18 A THAT WOULD HAVE BEEN BEGINNING ABOUT THE END
19 OF MAY 1ST OR JUNE OF '84.

20 Q ABOUT HERE?

21 A YES. AND THEN OVER APPROXIMATELY THE NEXT SEVERAL
22 MONTHS.

23 Q SO THIS AREA HERE IS YOUR AREA, AND I'M REFERRING
24 FOR THE RECORD TO EXHIBIT P-4, THE FIRST, TO THE FAR LEFT,
25 THE BAR GRAPHS, AND P-3, THE LITTLE PEAKS. THIS AREA OF

1 TIME WAS A TIME WHEN YOU WERE DOING YOUR INDEPENDENT INVESTI-
2 GATION?

3 A THAT'S RIGHT. AND I PERSONALLY DID ALMOST ALL
4 OF IT DURING THAT PERIOD OF TIME. I INVOLVED A CONSTRUCTION
5 CONSULTANT, ALSO MET EXTENSIVELY WITH REED BROWN, AND AT
6 SOME EARLY POINT IN THAT PROCESS WE RENDERED THE DEFENSE
7 TO JAMES AND MR. BROWN OBJECTED TO THE TENDER. AND SO HE
8 AND I THEN DISCUSSED THE NATURE OF HIS OBJECTION. AND THE
9 NATURE OF HIS OBJECTION WAS THAT IT WAS A SMALL OFFICE AND
10 A BIG, DANGEROUS CASE AND HE REQUESTED OUR INVOLVEMENT IN
11 IT. MY PERSONAL INVOLVEMENT TO ASSIST HIM AS HE DEFENDED
12 JAMES. AND SO MR. BROWN AND I WORKED TOGETHER AND HE WORKED
13 VERY HARD IN DEFENDING JAMES THROUGH THIS PERIOD.

14 Q LET ME SHOW YOU WHAT'S BEEN MARKED EXHIBIT 6
15 AND 7. EXHIBIT 6 PURPORTS TO BE A LETTER FROM YOU TO MR.
16 BROWN.

17 A YES. EXHIBIT 6 IS MY TENDER LETTER TO HIM AND
18 EXHIBIT 7 IS A LETTER BACK TWO DAYS LATER OBJECTING TO THE
19 TENDER AND SUGGESTING THAT WE SHOULD STAY INVOLVED. AND
20 THEN WE HAD A TELEPHONE CONVERSATION AT LEAST, SHORTLY AFTER
21 HIS LETTER, AND HE AGREED TO ACCEPT THE TENDER. HE, AT
22 FIRST, WAS UNDER THE MISAPPREHENSION THAT IT WAS A POLICY
23 OF INSURANCE AND WE HAD SOME DUTY TO COME IN AND DEFEND,
24 AND AS WE DISCUSSED IT HE SAW THAT IT WASN'T AND, IN FACT,
25 THERE'S AN INDEMNITY AGREEMENT, BUT HE NEVERTHELESS REQUESTED

1 INTERESTS IN THE CASE.

2 Q I SEE. WHAT ABOUT MR. BROWN? WAS HE, YOU KNOW,
3 INVOLVED IN--WELL, DID HE APPEAR TO BE FRUSTRATED WITH THE
4 SITUATION AS WELL?

5 A COME ABOUT THE END OF JUNE OF 1987 MR. BROWN
6 SUDDENLY WITHDREW AS COUNSEL FOR JAMES IN THE CASE.

7 Q BEFORE WE GET TO THAT I'M STILL TALKING ABOUT
8 UP-FRONT, YOUR CONCERNS AND WHY YOU CONSIDERED IT AN UNUSUAL
9 CASE.

10 A WELL, YES. TO SAY THAT MR. BROWN ONLY REPRESENTED
11 JAMES DIDN'T TAKE INTO ACCOUNT THE REALITIES BECAUSE JAMES
12 DIDN'T DO ANY FURTHER WORK, DIDN'T MAINTAIN AN OFFICE AFTER
13 A FEW MONTHS AND EVERYTHING CAME OUT OF HOOD. AND SO WHILE
14 TECHNICALLY REED BROWN REPRESENTED JAMES HE WAS GETTING
15 INFORMATION FROM HOOD, BUT THE FRUSTRATIONS WAS THAT IT
16 WAS A DANGEROUS CASE AND NOTHING WAS--HE HAD NO TOOLS, HE
17 HAD NO FINANCIAL TOOLS TO SETTLE THE CASE.

18 Q WERE THERE OTHER CLAIMS BEING RAISED AGAINST
19 JAMES AT THIS TIME OR WAS THIS SALT LAKE CITY ONE THE ONLY
20 ONE?

21 A OH, YES. AND THAT MADE THE CASE UNUSUAL IN THIS
22 OTHER RESPECT. IT WASN'T JUST A MATTER OF ONE LAWSUIT,
23 THE PRINCIPAL ASKING THE SURETY TO TENDER THE DEFENSE SO
24 IT COULD HANDLE IT AND BE ECONOMICAL. AT THE SAME TIME
25 WE, AS INDUSTRIAL INDEMNITY STARTED GETTING CLAIMS FROM

1 OTHER SUBCONTRACTORS AND MATERIAL MEN, NOT ONLY ON THIS
2 JOB BUT ON SEVERAL OTHER JOBS, AND I HAD A TOTAL OF 12 OTHER
3 CLAIMS THAT I HAD TO INVESTIGATE AND DISCUSS WITH MR. BROWN
4 AND MAKE A DECISION AS TO WHAT TO DO. AND THREE OF THOSE
5 CASES WERE LITIGATED THROUGH TRIAL AND JAMES LOST ALL THREE
6 OF 'EM. AND TWO OF THOSE THREE WERE APPEALED AND THE APPEALS
7 WERE UNSUCCESSFUL IN EACH CASE. AND SO WE WERE STARTING
8 TO BUILD A TRACK RECORD AT THIS POINT AND ONE, IN PARTICULAR,
9 ORTEGA-RU--

10 Q YOU WANT TO SPELL THAT FOR THE REPORTER?

11 A O-R-T-E-G-A HYPHEN R-U. OBTAINED A JUDGMENT
12 OF ABOUT \$65,000.00 IN TRIAL COURT, IT WAS APPEALED TO,
13 I THINK, THE SUPREME COURT AT THAT TIME, AFFIRMED, AND THE
14 JUDGMENT THEN WAS UP IN THE HIGH SEVENTY THOUSANDS AND
15 NEITHER JAMES NOR HOOD PAID IT SO THEN I RECEIVED A CALL
16 FROM GEORGE FADEL WONDERING IF I HAD ANY PARTICULAR PLACE
17 THAT HE COULD ATTACH THE ASSETS OF INDUSTRIAL INDEMNITY.

18 Q HE WANTED TO COME DOWN AND TAKE OVER THE INSURANCE
19 OFFICE OR SOMETHING?

20 A YEAH. SO THAT PROMPTED A QUICK DRIVE OUT TO
21 HIS OFFICE AND A CHECK IN HIS HANDS WITHIN 48 HOURS FOR
22 INDUSTRIAL INDEMNITY.

23 Q NOW, YOU SAY THAT YOU HAD HIRED AN EXPERT TO
24 LOOK AT THE PIPELINE. WHAT WAS YOUR EXPERT TELLING YOU?

25 A THE EXPERT WAS SAYING THAT THERE'S NO QUESTION

1 THAT THE PIPELINE--

2 MR. ANDERSON: I'M GOING TO OBJECT ON HEARSAY
3 GROUNDS. I THINK WE'RE GOING WAY FAR AFIELD.

4 JUDGE YOUNG: AND I'M NOT SO SURE IT'S REALLY
5 RELEVANT. I THINK THERE IS AN ADEQUATE FOUNDATION AS TO
6 WHAT THEY WERE DOING AND MAYBE CROSS-EXAMINATION WOULD FOCUS
7 ON HOOD'S CONCERNS.

8 MR. DANIELS: OKAY.

9 JUDGE YOUNG: LET ME ASK YOU THIS, MR. NORTON.
10 FROM THE TIME WHEN YOU EARLIEST TENDERED THE DEFENSE TO
11 HOOD THERE WOULD HAVE BEEN NO REASON THAT THEY COULD NOT
12 HAVE SIMPLY STEPPED FORWARD, AND SINCE THEY WERE POTENTIALLY
13 ON THE LINE HAVE TAKEN OVER AND RETAINED THEIR OWN COUNSEL
14 TO DO THAT WHICH YOU WERE ULTIMATELY DOING THEREAFTER, ISN'T
15 THAT CORRECT?

16 THE WITNESS: YES. THEY WERE--THE PROBLEM WAS
17 THAT WE HAD JAMES BEING DEFENDED AND HOOD NOT COMING FORWARD
18 IN ANY CAPACITY. AND THAT RAISED MY STRESS LEVEL AND THAT
19 OF MY CLIENT BECAUSE HOOD--AND THEN WHEN HOOD FINALLY DID
20 COME FORWARD IT WAS THROUGH DAVID REEVE WHO WAS NEVER
21 INVOLVED ENOUGH IN THE CASE TO KEEP TRACK OF IT.

22 Q (BY MR. DANIELS) WERE YOU TRYING TO TELL HOOD
23 THAT THEY HAD A SERIOUS EXPOSURE ON THIS CASE?

24 A YES. AND IN THE BEGINNING, THROUGH REED BROWN
25 AND THEN LATER IN A MEETING WHEN WE ACTUALLY, WHEN BROWN

1 TO SUCH RESERVE, SUCH SUM TO BE HELD BY THE SURETY AS
2 COLLATERAL SECURITY."

3 Q SO YOU DEMANDED THAT HOOD CORPORATION AND MR.,
4 WAS IT LAULHERE, STILL ALIVE AT THAT TIME?

5 A I BELIEVE SO.

6 Q SO YOU DEMANDED THAT THEY SET UP SOME COLLATERAL
7 OR SOME SECURITY?

8 A YES.

9 Q WHAT WAS THEIR RESPONSE?

10 A THEIR RESPONSE WAS MARK LAULHERE ASKED TO MEET
11 AND BROUGHT WITH HIM HIS INSURANCE AGENT AND WE MET AND
12 WE BROUGHT TOGETHER ALL THE ATTORNEYS AT THE SAME TIME.

13 Q NOW MARK LAULHERE IS THE OTHER--MR. LAULHERE'S
14 SON.

15 A YES, I THINK HE'S PROBABLY THE MAJOR OWNER NOW.
16 HE IS THE SON OF THE THEN OWNER. AND HE WAS ACTIVE. AND
17 MARK MAY HAVE BEEN PRESIDENT OF THE COMPANY AT THAT TIME.

18 Q OKAY. SO HE'S NOT PERSONALLY THE INDEMNITOR
19 AND HE'S STILL ALIVE.

20 A YES.

21 Q AND WHAT WAS THEIR RESPONSE ABOUT, IN THIS
22 MEETING, ABOUT PUTTING UP SOME SECURITY ON YOUR PART ABOUT
23 THE CONTRACT?

24 A WELL, THEY OBJECTED TO BEING NAMED IN THE SUIT,
25 OBJECTED TO THE DEMAND FOR COLLATERAL. AND IT WAS MY STRONG

1 RECOMMENDATION TO MY CLIENT THAT WE OBTAIN COLLATERAL IF
2 THE COMPANY WAS AS STRONG AS IT SAID IT WAS, THEN IT WOULD
3 BE NO PROBLEM FOR IT TO GIVE US A SECURITY INTEREST IN A
4 PIECE OF PROPERTY.

5 Q DID THEY PROVIDE YOU WITH SOME FINANCIALS AT
6 THAT TIME?

7 A YES. NOT AT THAT TIME BUT SHORTLY AFTER.

8 Q OKAY. AND DID YOU REVIEW THOSE?

9 A YES.

10 Q WHAT WAS YOUR FEELING ABOUT ACCEPTING THEIR CREDIT
11 RATHER THAN HAVING THEM PUT UP COLLATERAL?

12 A WELL, SEVERAL THINGS THAT, OF COURSE, WERE DIS-
13 TURBING. MY WIFE TELLS THE CHRISTMAS STORY ABOUT THE BARE
14 CHRISTMAS AND IT LOOKS LIKE CHRISTMAS AND IT FEELS LIKE
15 CHRISTMAS AND IT SMELLS LIKE CHRISTMAS, OR EVERYTHING, BUT
16 IT DOESN'T FEEL LIKE CHRISTMAS. WELL, IN THIS CASE, THE
17 FINANCIAL STATEMENT SUGGESTED LARGE ASSETS, BUT THE ACTIONS
18 OF THE COMPANY IT DIDN'T LOOK LIKE IT AND IT DIDN'T ACT
19 LIKE IT AND IT CERTAINLY DIDN'T FEEL LIKE THERE WERE ASSETS
20 THERE. AND SO WE WERE VERY CONCERNED.

21 AND THEN IN READING BOTH THE '85 AND THE '87
22 FINANCIAL STATEMENTS I NOTED THAT OUR LETTERS CLAIMING THEY
23 HAD A POTENTIAL EXPOSURE OF AROUND THREE MILLION DOLLARS
24 WASN'T EVEN IN THE AUDIT FINANCIAL STATEMENT. EITHER ONE.

25 Q IT DIDN'T REFER TO THAT STATEMENT OR TO THAT

1 CLAIM?

2 A IT DID NOT.

3 Q DID YOU FEEL THAT WAS KIND OF A SERIOUS OMISSION?

4 A WELL--AND WE WERE MADE AWARE OF, ABOUT THE SAME
5 TIME, THAT THEY WERE HAVING TROUBLE IN HAWAII AND WERE WITH-
6 DRAWING THEIR OPERATIONS FROM HAWAII. AND WE DIDN'T KNOW
7 WHAT ELSE WAS MISSING FROM THAT STATEMENT.

8 Q SO YOU FELT THAT INDUSTRIAL INDEMNITY SHOULD
9 STAND ON ITS CONTRACTUAL RIGHT TO DEMAND COLLATERAL.

10 A YEAH, IT WAS MY VERY STRONG RECOMMENDATION THAT
11 WE DO IT. THE FEAR ALSO, BASED ON THE EXPERIENCE THAT WE
12 HAD HAD FOR THREE FULL YEARS WAS THAT JAMES WAS GOING TO
13 LOSE THE CASE AND HOOD WOULD STAY IN LOS ANGELES AND INDUS-
14 TRIAL INDEMNITY WOULD THEN HAVE TO PAY THE ENTIRE JUDGMENT
15 AND THEN GO TO SOUTHERN CALIFORNIA TO SUE HOOD AND BE IN
16 COURT DOWN THERE FOR ANOTHER FIVE AND A HALF YEARS BEFORE
17 IT GOT A TRIAL DATE.

18 Q SO THAT'S WHY YOU WANTED THEM JOINED IN THIS
19 LAWSUIT.

20 A THAT'S CORRECT.

21 Q AND YOU FILED WHAT, A THIRD-PARTY COMPLAINT
22 AGAINST THEM OR SOMETHING?

23 A YES.

24 Q LET ME SHOW YOU WHAT'S BEEN MARKED EXHIBIT P-11
25 AND ASK YOU IF THAT'S YOUR LETTER DEMANDING SECURITY.

1 A YES.

2 Q AND THEN THERE, DURING THIS LONG SORT OF DRY
3 SPELL.

4 A YES. THERE WAS A PERIOD OF TIME WHEN THERE WAS
5 QUITE EXTENSIVE DISCOVERY AND A LOT OF DEPOSITIONS AND A
6 LOT OF DISCUSSIONS ABOUT SETTLEMENT AND THAT SORT OF THING.
7 MR. POWELL WAS HEAVILY INVOLVED AT THAT TIME. WHEN I FIRST
8 BECAME INVOLVED HE WAS NOT, AS I RECOLLECT, DIRECTLY
9 INVOLVED. HE CAME IN A LITTLE LATER. WHEN THE LIABILITY
10 CARRIER, I THINK HE REPRESENTED CIGNA, IF I'M NOT MISTAKEN,
11 HAD BEEN BROUGHT IN TO THE CASE, AND SO HE WAS DEFENDING
12 ONLY A SMALL PORTION OF THE CLAIMS THAT THE CITY HAD MADE,
13 AND THOSE CLAIMS HAD TO DO WITH PROPERTY DAMAGE OCCURRING
14 AS A RESULT OF THE FAILURE OF THE PIPELINE. AND HE WAS
15 ALWAYS IN A QUANDARY, AS I RECALL, AS TO HOW FAR HE SHOULD
16 GO, BECAUSE THE EXPOSURE OF CIGNA WAS JUST A SMALL PERCENTAGE
17 OF THE TOTAL AMOUNT. AND I RECALL MR. POWELL AND I DIS-
18 CUSSING THAT FROM TIME TO TIME ABOUT HIS LIMITED ROLE,
19 ALTHOUGH, AS IT DEVELOPED, HE KIND OF BECAME THE LEAD LAWYER
20 BECAUSE IN DEFENDING A SMALL CLAIM IT WAS NECESSARY FOR
21 HIM TO DEFEND A LOT OF THE OVERALL CLAIMS DEALING WITH NEGLI-
22 GENT INSTALLATION OF THE PIPELINE AND ALL THE REST OF IT.
23 SO I THINK IT BECAME KIND OF A TAR BABY FOR HIM AND HE ENDED
24 UP DOING A LOT MORE THAN HE WANTED TO DO IN THAT REGARD.

25 Q AND HE WAS BEING PAID BY THE INSURANCE COMPANY?

1 Q "WE," MEANING YOU AND MR. POWELL?

2 A ME AND MR. POWELL DISCUSSED IT. THE IDEA WAS
3 THAT WE WERE COOPERATING WITH THEM IN EVERY WAY WE COULD.
4 I WAS CERTAINLY NOT INTERESTED IN SAYING ANYTHING THAT WOULD
5 UNDERMINE ANYTHING THEY DID, AND IN TERMS OF WHAT WAS GOING
6 TO BE BROUGHT OUT THROUGH MR. POWELL. AND I KNEW WHAT THAT
7 WAS GOING TO BE BEFORE THE DEPOSITION. AND HE DID IT.
8 AND THERE WAS NO REASON FOR ME TO ASK QUESTIONS IN SOME
9 OF THOSE DEPOSITIONS.

10 Q WAS THERE ANY REASON FOR YOU TO GO AT ALL?

11 A OH, ABSOLUTELY.

12 Q WHAT WAS THAT?

13 A I THINK IT WOULD HAVE BEEN MALPRACTICE NOT TO
14 ATTEND THOSE DEPOSITIONS. WE HAD, TO SOME DEGREE, AN ADVER-
15 SARIAL RELATIONSHIP WITH EVERYBODY ELSE AND IF SOMETHING
16 HAD COME OUT AT THOSE DEPOSITIONS ADVERSE TO INDUSTRIAL
17 INDEMNITY THE OTHER PARTIES MIGHT HAVE AGREED TO SOMETHING
18 ON THE RECORD OR CONVINCED A WITNESS TO SAY SOMETHING WITHOUT
19 ANY CROSS-EXAMINATION THAT COULD HAVE JEOPARDIZED INDUS-
20 TRIAL'S POSITION. AND WE HAD TO BE THERE TO MAKE SURE THAT
21 DIDN'T HAPPEN.

22 Q OKAY. WAS MR. POWELL OF THE VIEW THAT THE CASE
23 SHOULD ALSO BE SETTLED?

24 A THAT'S MY RECOLLECTION. YOU'D HAVE TO ASK MR.
25 POWELL THAT, BUT AS I RECALL, HE AND I WERE PRETTY MUCH

1 WAS HAPPENING THAT STARTED THIS, YOU KNOW, THIS TREND?

2 A WELL, THE TREND ACTUALLY BEGAN, I GUESS, WITH
3 THE APPEALS PROCESS. JAMES CONSTRUCTORS HAD HAD A COUNTER-
4 CLAIM OR, ACTUALLY, A SEPARATE ACTION AND COMPLAINT AGAINST
5 SALT LAKE CITY CORPORATION THAT WAS CONSOLIDATED WITH THE
6 GREATER SALT LAKE CITY ACTION.

7 Q LET ME FOCUS YOU A LITTLE MORE. IN OCTOBER OF
8 '90 WAS THERE A MEETING HELD AT THE ALTA CLUB?

9 A THERE WAS IN OCTOBER, I THINK IT WAS OCTOBER
10 23RD AT 7:30, WHICH IS GENERALLY A LITTLE BIT EARLIER THAN
11 I COME INTO THE OFFICE. MR. BOB ANDERSON SUGGESTED THAT
12 THE DEFENSE COUNSEL INVOLVED IN THAT MEET AT BREAKFAST AT
13 THE ALTA CLUB.

14 Q WHO WAS PRESENT?

15 A TO MY RECOLLECTION MR. ANDERSON WAS THERE, ELWOOD
16 POWELL WAS THERE, JAY JENSEN AND MYSELF.

17 Q WHAT WAS DISCUSSED?

18 A THERE WAS A GENERAL DISCUSSION OF PHILOSOPHIES
19 AND STRATEGY CONCERNING DEFENSE OF THE ACTION, POST-APPEAL,
20 WHO OUGHT TO BE DOING WHAT, WHAT POSITIONS OUGHT TO BE TAKEN.

21 MY RECOLLECTION IS THAT MR. ANDERSON HAD RECENTLY
22 BECOME INVOLVED IN THE CASE AND I THINK THAT THERE WAS SOME
23 GENERAL, IF I REMEMBER CORRECTLY, SOME GENERAL ANALYSIS
24 OF THE POSITION OF THE CASE AT THAT TIME AND TO WHAT, IF
25 ANY, OF THE DEFENSES THAT HAD BEEN RAISED BY JAMES AND BY

1 INDUSTRIAL INDEMNITY HAD SURVIVED THE COURT'S EARLIER ORDERS.

2 THERE WAS A DISCUSSION OF WHAT MOTIONS OUGHT
3 TO BE MADE, WHETHER THERE OUGHT TO BE SOME ATTEMPT TO REFINE
4 A PRE-TRIAL ORDER. AND IF MY RECOLLECTION SERVES ME
5 CORRECTLY, MR. BEESLEY HAD OFFERED A PRE-TRIAL ORDER AT
6 ABOUT THAT SAME TIME THAT HAD DRAMATICALLY REDUCED A NUMBER
7 OF THE AFFIRMATIVE DEFENSES AND SIMILAR CLAIMS THAT HAD
8 BEEN ASSERTED BY THE DEFENDANTS IN THE ACTION. IT WAS AN
9 EFFORT TO REFINE THAT, TO SEE IF, IN FACT, THERE WAS A BASIS
10 FOR THAT, IF WE OUGHT TO MAKE A FINAL PUSH TO RESURRECT
11 SOME OF THOSE CLAIMS.

12 Q WAS THE DECISION MADE TO MAKE A FINAL PUSH TO
13 RESURRECT THOSE CLAIMS?

14 A IT WAS.

15 Q WHO SUGGESTED THAT; DO YOU REMEMBER?

16 A I DON'T REMEMBER SPECIFICALLY. I KNOW THERE
17 WAS SOME DISCUSSION AS TO WHETHER INDUSTRIAL INDEMNITY OUGHT
18 TO BE THE ONE TO DO THAT. AND THE CONSENSUS AMONG THOSE
19 PRESENT WAS THAT INDUSTRIAL INDEMNITY WAS IN THE BEST
20 POSITION TO DO THAT AND PROBABLY OUGHT TO TAKE THAT LEAD.

21 Q WHAT WERE THOSE CLAIMS?

22 A THE CLAIMS WERE PRIMARILY RELATED TO AFFIRMATIVE
23 DEFENSES THAT INDUSTRIAL INDEMNITY HAD MADE ARISING FROM
24 NEGLIGENT INSPECTION. THAT WAS THE PRIMARY ONE. AS MR.
25 NORTON INDICATED THERE WERE THREE PRIMARY DEFENSES THAT

1 INDUSTRIAL INDEMNITY HAD ASSERTED EARLY ON IN THE LITIGATION,
2 A FAILURE OF TIMELY NOTICE BY SALT LAKE CITY CORPORATION--

3 JUDGE YOUNG: SLOW DOWN, MR. SLAUGHTER.

4 THE WITNESS: I'M EXCITED, YOUR HONOR. NOTICE
5 WAS ONE ISSUE, OVERPAYMENT WAS ANOTHER ISSUE.

6 Q (BY MR. DANIELS) WAS THERE ANY DECISION MADE
7 ABOUT THE OVERPAYMENT ISSUE?

8 A MY RECOLLECTION IS THAT THERE WAS A DECISION
9 MADE, WHETHER IN CONNECTION WITH THAT MEETING OR LATER,
10 I DON'T RECALL, BUT--

11 Q LET ME SEE IF I UNDERSTAND THE OVERPAYMENT ISSUE.
12 WAS THE CLAIM THAT SALT LAKE CITY HAD PAID JAMES TOO MUCH?

13 A THERE'S A DEFENSE AVAILABLE TO SURETIES THAT
14 IF THE OBLIGEE, IN THIS CASE SALT LAKE CITY, PAYS TOO MUCH
15 TO THE CONTRACTOR, BASED ON THE PROGRESS OF THE WORK IN
16 PLACE AT THE TIME THAT THE SURETY MAY BE DISCHARGED PRO
17 TANTO TO THE EXTENT OF THAT OVERPAYMENT.

18 Q OKAY. SO THE CLAIM THAT THE SURETY HAD WAS THAT
19 SALT LAKE HAD PAID TOO MUCH, BUT JAMES WAS TAKING THE
20 POSITION SALT LAKE HADN'T PAID ENOUGH.

21 A YEAH. JAMES HAD TAKEN THE POSITION THEY HAD
22 NOT RECEIVED ADEQUATE PAYMENT UNDER THE CONTRACT. AND THEY
23 WEREN'T VERY EXCITED ABOUT INDUSTRIAL INDEMNITY PRESSING
24 THAT PARTICULAR POINT, NOT ONLY THROUGH DISCOVERY BUT IN
25 THIS FINAL EFFORT TO REFINE THOSE AFFIRMATIVE DEFENSES.

1 Q I UNDERSTAND. SO WHAT DECISION WAS MADE ABOUT
2 THAT?

3 A EITHER IN CONNECTION WITH THAT MEETING OR LATER
4 THERE WAS AN AGREEMENT THAT INDUSTRIAL INDEMNITY WOULD NOT
5 PRESS THE ISSUE OF OVERPAYMENT, EXCEPT TO THE EXTENT THAT
6 WE COULD BRING IT IN AS A JUSTIFICATION FOR THE AFFIRMATIVE
7 DEFENSE RELATED TO NEGLIGENT INSPECTION.

8 Q TELL ME ABOUT THAT. NOW THAT, I TAKE IT, IS
9 A CLAIM THAT SALT LAKE DIDN'T INSPECT THE WORK WELL ENOUGH
10 AND SHOULD HAVE CAUGHT THE FACT THAT IT WASN'T BEING DONE
11 RIGHT. IS THAT ESSENTIALLY WHAT IT IS?

12 A THAT'S THE POSITION THAT JAMES HAD TAKEN IN AN
13 EARLIER AFFIRMATIVE DEFENSE WHICH, MY RECOLLECTION, HAD
14 BEEN STRICKEN, AND INDUSTRIAL INDEMNITY HAD MADE AN EFFORT
15 ON A PRIOR OCCASION AND AGAIN IN LATE 1990 TO DISTINGUISH
16 ITS POSITION AS SURETY FROM THE POSITION TAKEN BY THE CON-
17 TRACTOR.

18 Q I DON'T MEAN TO INTERRUPT YOU BUT YOU'RE TELLING
19 US QUITE A BIT MORE THAN WE WANT TO KNOW. WE WANT TO GET
20 THROUGH THIS QUICKLY, IF POSSIBLE. IS IT RIGHT TO SAY THAT
21 THE DEFENSE HAD ALREADY BEEN THROWN OUT BY THE JUDGE AS
22 TO JAMES?

23 A THAT'S RIGHT.

24 Q AND THE DECISION AT THAT MEETING IN THE ALTA
25 CLUB WAS THAT MAYBE THE SURETY OUGHT TO ASSERT THAT INDEPEN-

1 DENTLY.

2 A IT HAD BEEN A DEFENSE ALL ALONG AND WE WANTED
3 TO MAKE A FINAL PUSH TO DRAW THE DISTINCTION BETWEEN THE
4 SURETY AND THE PRINCIPAL.

5 Q OKAY. AND YOU SAY "WE." WAS EVERYONE AT THAT
6 MEETING PRETTY WELL AGREED THAT'S WHAT SHOULD BE DONE?

7 A YES.

8 Q AND THAT SHOULD BE DONE BY THE SURETY?

9 A THAT'S RIGHT.

10 Q SO DO THESE NEXT TWO BIG BAR GRAPH LINES THAT
11 I SEE RELATE TO PUSHING THAT MOTION IN SOME WAY?

12 A TO THAT AND OTHER PRE-TRIAL MATTERS THAT WERE
13 ALSO PENDING AT THE TIME.

14 Q I GUESS THE TRIAL WAS KIND OF HEATING UP. WE'RE
15 GETTING READY FOR TRIAL AT THIS POINT?

16 A THAT'S RIGHT.

17 Q SO THERE IS TRIAL PREPARATION AND THEN INDEPENDENT
18 DEFENSES, RIGHT?

19 A RIGHT.

20 Q OKAY. NOW, I WANTED TO ASK YOU. YOU SAY YOU
21 GOT INVOLVED SOME TIME IN THIS AREA, THE '80, '78 AREA AT
22 THE BEGINNING.

23 A RIGHT.

24 Q THEN SHORTLY AFTER THAT THE STIPULATION WAS
25 SIGNED.

1 A IN APRIL OF 1988.

2 Q OKAY. AND THEN DO YOU RECALL ANY TIME IN BETWEEN

3 THE PERIODS OF TIME THAT WE ARE TALKING ABOUT DID ANYONE

4 SUGGEST TO YOU THAT INDUSTRIAL INDEMNITY OUGHT TO TENDER

5 THE DEFENSE BACK TO JAMES, THAT JAMES SHOULD TAKE IT OVER,

6 THAT SNOW, CHRISTENSEN & MARTINEAU SHOULD GET OUT OF THE

7 CASE, THAT SNOW, CHRISTENSEN & MARTINEAU WAS SPENDING TOO

8 MUCH TIME? ANYTHING LIKE THAT?

9 A NO.

10 Q WAS NEVER ANY DISCUSSION BY ANYBODY?

11 A NO.

12 Q DID THERE COME A TIME WHEN MR. ANDERSON MADE

13 THAT KIND OF A SUGGESTION THAT SNOW, CHRISTENSEN & MARTINEAU

14 OUGHT TO GET OUT AND TENDER THE DEFENSE?

15 A YES. AFTER THE MOTIONS THAT WE'VE DISCUSSED

16 WERE REJECTED BY THE COURT AND THERE WAS A DISCUSSION TO

17 THAT EFFECT.

18 Q SO YOU WENT BACK AND ARGUED THESE MOTIONS ON

19 THE NEGLIGENT INSPECTION DEFENSE AND I TAKE IT YOU LOST.

20 A RIGHT.

21 Q AND SO AFTER THAT--LET ME SHOW YOU WHAT'S BEEN

22 MARKED EXHIBIT 19. HOW DID THAT--FIRST OF ALL, WHEN DID

23 THAT CONVERSATION TAKE PLACE?

24 A BASED ON MY MEMO, WHICH I PREPARED THE SAME DAY,

25 MAY 17 OF 1991.

1 Q SO THAT'S--WE'RE TALKING AFTER THESE MOTIONS
2 HAVE BEEN ARGUED AND WHILE PRE-TRIAL IS STILL HEATING UP
3 A LITTLE BIT.

4 A RIGHT.

5 Q HOW DID YOU HAPPEN TO TALK TO MR. ANDERSON?

6 A I WAS ON THE WAY TO THE BANK AT VALLEY BANK AND
7 I RAN INTO HIM OUTSIDE THE VALLEY TOWERS WHERE HIS OFFICE
8 WAS, I BELIEVE, AT THE TIME.

9 Q WAS ANYONE PRESENT BESIDES YOU AND MR. ANDERSON?

10 A SEVERAL PEOPLE WALKED BY BUT WE WERE THE ONLY
11 PARTIES TO THE CONVERSATION.

12 Q TELL ME ABOUT THE CONVERSATION. WHAT DID YOU
13 SAY AND WHAT DID HE SAY?

14 A MAY I RELY ON MY MEMORY?

15 Q CERTAINLY.

16 A I HAPPENED TO ASK BOB--WE WERE CONTINUALLY INTER-
17 ESTED IN THE STATUS OF SETTLEMENT DISCUSSIONS AND POTENTIAL
18 RESOLUTION OF THE DISPUTE BETWEEN JAMES/HOOD AND SALT LAKE
19 CITY, AND I OPENED THE CONVERSATION WITH MR. ANDERSON BY
20 ASKING HIM WHAT THE STATUS OF THAT WAS, IF HE SAW ANY BREAKS
21 IN THE IMPASSE. HE INDICATED HE DIDN'T. AND IT WAS AT
22 THAT TIME MR. ANDERSON SAID THAT WE PROBABLY OUGHT TO CONSI-
23 DER, I'M NOT EVEN SURE HE DISCUSSED IT WITH HIS OWN CLIENT,
24 AND I CERTAINLY HAD NOT WITH INDUSTRIAL, BUT WE OUGHT TO
25 CONSIDER, GIVEN THE NATURE OF THE CASE AS IT EXISTED AS

1 OF MAY OF 1991, WHETHER IT MIGHT BE BENEFICIAL, ULTIMATELY,
2 TO HOOD TO SORT OF REDUCE INDUSTRIAL INDEMNITY'S PRESENCE
3 AT THE TRIAL. AND HE SUGGESTED THAT MAYBE I OUGHT TO TALK
4 TO INDUSTRIAL ABOUT TENDERING, FORMALLY TENDERING, ONCE
5 AGAIN, INDUSTRIAL INDEMNITY'S DEFENSE IN THE MATTER FOR
6 PURPOSES OF THE TRIAL TO MR. ANDERSON SO THAT WE COULD REDUCE
7 COUNSEL BY ONE AND, I THINK, REDUCE, ULTIMATELY, THE IMPACT
8 THAT INDUSTRIAL INDEMNITY'S SEPARATE PRESENCE MIGHT HAVE
9 ON THE JURY DURING THE TRIAL.

10 Q SO THE THOUGHT WAS AS MUCH TO REDUCE ATTORNEY'S
11 FEES AS IT WAS TO REDUCE THE DEEP POCKET EFFECT OF HAVING
12 AN INSURANCE COMPANY--

13 A YEAH, IT WAS MY IMPRESSION AT THE TIME THAT THE
14 CONCERN WAS PRIMARILY WITH THE JURY EFFECT. I WAS ALWAYS
15 INTERESTED IN KEEPING OUR INVOLVEMENT TO AN ABSOLUTE MINIMUM.
16 CONSISTENT WITH OUR PROTECTION OF INDUSTRIAL INDEMNITY'S
17 POSITION.

18 Q HOW WOULD YOU CHARACTERIZE THE LEGAL POSTURE
19 OF THE CASE IN MAY OF '91? THAT IS TO SAY, AT THAT POINT,
20 DID INDUSTRIAL HAVE A SIGNIFICANT DIFFERENCE IN ITS POSITION
21 FROM JAMES?

22 A AT THAT TIME NO, THERE WAS NO SIGNIFICANT DIFFER-
23 ENCE. WE STILL HAD TECHNICALLY, I GUESS, AN OVERPAYMENT
24 DEFENSE BUT WE HAD PRETTY MUCH CONFIRMED THAT WOULD NOT
25 BE ASSERTED SO THAT PLACED US IN, ESSENTIALLY, THE SAME

1 SHOES AS JAMES CONSTRUCTORS EXCEPT TO THE EXTENT OF OUR,
2 INDUSTRIAL INDEMNITY'S, BOND CAP.

3 Q I SEE. SO YOUR CASE STOOD ON JAMES' CASE AND
4 YOU WON OR LOST WHETHER JAMES WON OR LOST, AT LEAST TO THE
5 EXTENT OF THE BOND.

6 A THAT'S RIGHT.

7 Q AND SO DID YOU FEEL THEN THAT IT WOULD NOT
8 JEOPARDIZE INDUSTRIAL'S POSITION TO ALLOW JAMES TO TAKE
9 OVER THE DEFENSE?

10 A BASED ULTIMATELY ON INDUSTRIAL INDEMNITY'S
11 ACCEPTANCE OF THE SUGGESTION AND THEIR RENEWED REVIEW OF
12 HOOD'S FINANCIAL STATEMENT THAT IS CORRECT.

13 Q OKAY. NOW, THIS TOOK PLACE IN MAY. I WANT TO
14 SHOW YOU AN EXHIBIT--

15 MR. DANIELS: WAS 19 RECEIVED, YOUR HONOR?

16 JUDGE YOUNG: NO.

17 MR. DANIELS: WE'D OFFER IT.

18 JUDGE YOUNG: 19 IS OFFERED. ANY OBJECTION TO 19?

19 MR. ANDERSON: NO OBJECTION.

20 JUDGE YOUNG: 19-P IS RECEIVED.

21 (WHEREUPON, PLAINTIFF'S EXHIBIT
22 NO. 19 WAS OFFERED AND RECEIVED
23 INTO EVIDENCE).

24 MR. DANIELS: THANK YOU.

25 Q (BY MR. DANIELS) I'M GOING TO SHOW YOU WHAT'S

1 BEEN MARKED EXHIBIT 20, ASK YOU IF YOU CAN REVIEW THIS LETTER
2 OF AUGUST 2ND.

3 A OKAY.

4 Q NOW, DID YOU WRITE THAT LETTER?

5 A I DID.

6 Q WHAT GENERALLY WAS THE PURPOSE OF WRITING THAT
7 LETTER?

8 A THE PURPOSE OF THE LETTER WAS TO CONFIRM THAT
9 INDUSTRIAL INDEMNITY WOULD, IN FACT, TENDER THE DEFENSE
10 FOR PURPOSES OF TRIAL TO HOOD AND TO ITS ATTORNEY. AND
11 WE WANTED TO CLEAR THAT. IN DOING SO WE WERE ALSO WAIVING
12 THAT OTHER INDEPENDENT DEFENSE AND THAT HOOD HAD NO OBJECTION
13 TO THAT. AND THE ULTIMATE PURPOSE OF THE LETTER WAS TO
14 HAVE SOMEONE ON BEHALF OF HOOD FORMALLY ACCEPT THE TENDER
15 UNDER THOSE TERMS AND CONDITIONS.

16 Q AND THERE WAS A BIT OF TIME THERE BETWEEN MAY
17 17 AND AUGUST 2ND. WHAT TOOK SO LONG?

18 A MY RECOLLECTION IS THAT WE HAD SOME DELAY IN
19 OBTAINING FINANCIAL INFORMATION REQUESTED FROM HOOD.

20 Q SO YOU HAD TO CHECK WITH YOUR CLIENT AND THEN
21 YOU HAD TO CHECK THE FINANCIALS AGAIN?

22 A THAT'S RIGHT.

23 Q OKAY. AND THEN DO YOU KNOW HOW LONG IT WAS FROM
24 THE TIME YOU SENT THAT LETTER UNTIL IT WAS ACCEPTED BY HOOD?

25 A MY RECOLLECTION IT WAS CLOSE TO A MONTH.

1 JUDGE YOUNG: THANK YOU. CROSS-EXAMINATION?

2 MR. DANIELS: JUST ONE OR TWO.

3

4 CROSS-EXAMINATION

5 BY MR. DANIELS:

6 Q WOODY, DID YOU EVER SUGGEST TO SLAUGHTER OR MAX
7 OR ANYONE AT SNOW, CHRISTENSEN & MARTINEAU THAT THEY WERE
8 SPENDING TOO MUCH TIME OR THEIR INVOLVEMENT WAS TOO GREAT
9 IN THE CASE, THEY OUGHT TO CUT BACK THEIR INVOLVEMENT?

10 A NO, I DID NOT. THAT WAS NOT MY PREROGATIVE TO
11 MAKE.

12 Q AND YOU WERE TRYING TO COOPERATE WITH SNOW,
13 CHRISTENSEN & MARTINEAU LAWYERS IN THE DEFENSE OF THIS;
14 ISN'T THAT RIGHT?

15 A TO THE EXTENT COOPERATION WAS POSSIBLE, CERTAINLY.

16 Q TO THE EXTENT THAT YOUR CLIENTS DIDN'T HAVE CON-
17 FFLICTING INTERESTS; IS THAT RIGHT?

18 A THAT IS CORRECT.

19 Q AND THEY SEEMED TO BE DOING THE SAME.

20 A AS FAR AS I COULD TELL.

21 MR. DANIELS: THANK YOU. I HAVE NOTHING FURTHER.

22 JUDGE YOUNG: THANK YOU. ANYTHING FURTHER?

23 MR. ANDERSON: NOTHING FURTHER.

24 JUDGE YOUNG: THANK YOU, MR. POWELL. YOU MAY
25 BE EXCUSED. YOU MAY STEP DOWN.

1 YOU'RE NOT SAYING THEY'RE UNREASONABLE YOU'RE SAYING THEY'RE
2 UNNECESSARY.
3 A I'M SAYING THAT THEY'RE UNNECESSARY AND THEREFORE
4 UNREASONABLE.
5 Q OKAY.
6 A BUT I'M NOT SAYING THEY ARE UNREASONABLE IN TERMS
7 OF THE AMOUNT OF TIME THAT WAS SPENT OR THE DOLLARS CHARGED
8 FOR THE SERVICES PERFORMED.
9 Q OKAY. SO YOU DON'T THINK ANYBODY'S HOURLY RATE
10 IS TOO HIGH OR TOO MANY HOURS SPENT PREPARING THIS DOCUMENT
11 OR THAT DOCUMENT, YOU'RE NOT PICKING IT APART IN TERMS OF
12 DETAILS, YOU'RE JUST SAYING THAT IN THESE THREE TIME PERIODS
13 THE FEES WEREN'T NEEDED, RIGHT?

14 A REALLY, THERE'S TWO TIME PERIODS. IN THE LAST
15 TIME PERIOD I'M NOT SAYING THEY'RE UNREASONABLE, THEY JUST
16 DON'T SEEM TO BE RELEVANT TO WHAT I WAS ASKED TO LOOK AT.
17 Q SO WHAT IT BOILS DOWN TO, BOTTOM LINE OF WHAT
18 YOU'RE SAYING, IS THAT FIRST OF ALL THIS PERIOD OF TIME
19 RIGHT HERE IS UNNECESSARY BECAUSE AFTER JAMES RE-TENDERED
20 THE SURETY WAS UNREASONABLE IN REQUIRING THE COLLATERAL
21 AND NOT ACCEPTING THE RE-TENDER.
22 A IT IS A LITTLE BIT MORE COMPLICATED THAN THAT.
23 THE SURETY COULD HAVE INITIALLY, ON AUGUST 6TH OF 1987,
24 SAID YOU'VE RE-TENDERED TO ME, THAT MAKES ME INSECURE, I
25 NOW AM GOING TO REQUIRE COLLATERAL, IF YOU DON'T BELIEVE

1 THAT MATTER WAS THROWN BACK TO THE TRIAL COURT BY THE SUPREME
2 COURT FINDING A FACTUAL ISSUE EXISTED. BUT IF YOU MAKE
3 THAT ASSUMPTION I AGREE WITH YOU.

4 Q SO IF THE SALT LAKE CITY ALTER EGO THEORY DIDN'T
5 FLY IT WOULD BENEFIT HOOD FOR THE SURETY TO MAKE ITS OWN
6 DEFENSES WORK.

7 A THAT'S CORRECT.

8 Q ONE OTHER THING. NOW WHEN MR. BROWN RE-TENDERED
9 THE DEFENSE IN EXHIBIT 10--DO YOU HAVE IT THERE IN FRONT
10 OF YOU?

11 A I PROBABLY DO. YES.

12 Q DID YOU READ THAT PART WHERE HE SAYS THAT WOODY
13 POWELL'S ONLY GOING TO BE DEFENDING THE PROPERTY DAMAGE
14 CLAIMS?

15 A I DID READ THAT.

16 Q OKAY. BUT YOU TALKED TO WOODY AND CAME TO THE
17 CONCLUSION THAT HE, HIS DEFENSE, WAS MUCH BROADER THAN THAT.

18 A THAT'S CORRECT. AND ALSO NOT LOOKING AT THE
19 FILE IT APPEARS IT'S MUCH BROADER THAN THAT. YOU ALSO HAVE
20 TO KNOW SOMETHING ABOUT THE NATURE OF THE CLAIM HERE.
21 BASICALLY, WHAT THE CLAIM WAS IS THAT THEY WERE IMPROPER
22 MATERIALS AND IMPROPER METHODS OF COMPACTION AND THAT THAT,
23 THOSE METHODS, AND THOSE MATERIALS, CAUSED SUBSIDENCE AND
24 INJURY TO THE PIPE AND ALSO CAUSED ASSOCIATED PROPERTY DAMAGE.

25 Q RIGHT.

1 A IT WOULD BE ESSENTIAL TO ANYONE DEFENDING EVEN
2 THE PROPERTY DAMAGE CLAIMS ALONE TO ADDRESS THE VERY SAME
3 ISSUES THAT WERE INVOLVED IN THE DEFECTIVE WORK CLAIMS.
4 I MEAN, IT'S HARD TO SEPARATE OUT THE CAUSATIVE FACTORS
5 FOR INJURY TO THE PIPE AND INJURY TO THE ADJOINING SEWER
6 AND SIDEWALKS AND STREETS.

7 Q ISN'T THAT EXACTLY THE IMPRESSION YOU GOT FROM
8 ELWOOD POWELL TOO, THAT HE INITIALLY STARTED OUT TRYING
9 TO DEFEND ONLY THE PROPERTY DAMAGE CLAIMS AND IT JUST BECAME
10 OBVIOUS AS TIME WENT ON THAT HE WAS EITHER GOING TO HAVE
11 TO DEFEND THE WHOLE THING OR NOT AT ALL BECAUSE THEY WERE
12 WOUND TOGETHER?

13 A HE TOLD ME HE STARTED OUT WITH THE IDEA THAT
14 HE WAS LOOKING AT PROPERTY DAMAGE CLAIMS AND REALIZED HE
15 WAS LOOKING AT THE WHOLE LAWSUIT.

16 Q SO THAT'S SOMETHING THAT HAPPENED GRADUALLY.

17 A YEAH, BUT HE STARTED THIS LAWSUIT IN '86. AND
18 SO BY THE TIME OF THIS 1987 LETTER HE'S INTO DEPOSITIONS
19 IN A BIG WAY. I THINK DEPOSITIONS WERE--WELL, ACTUALLY,
20 DEPOSITIONS STARTED RIGHT AFTER JUNE OF '87. I HAVE A HARD
21 TIME BELIEVING THAT WOODY WAS LOOKING ONLY AT PROPERTY DAMAGE
22 CLAIMS IN JUNE OF '87.

23 Q WOULDN'T YOU AGREE WITH ME, THOUGH, THAT THE
24 INTEREST OF HIS CLIENT IN DEFENDING THE CLAIM THAT HE WAS
25 RETAINED TO DEFEND ARE NOT EXACTLY COEXTENSIVE WITH THE

1 INTERESTS OF THE SURETY?

2 A I AGREE WITH THAT.

3 MR. DANIELS: THANK YOU. I HAVE NOTHING FURTHER,
4 YOUR HONOR.

5 MR. ANDERSON: NOTHING FURTHER AND WE REST, YOUR
6 HONOR.

7 JUDGE YOUNG: ALL RIGHT. ARGUMENT?

8 MR. DANIELS: GO FIRST?

9 JUDGE YOUNG: YES.

10 MR. DANIELS: I WILL BE VERY BRIEF. JUDGE, YOU'VE
11 BEEN INVOLVED WITH THIS CASE A LOT LONGER THAN I HAVE AND
12 KNOW A LOT MORE ABOUT IT. I'M NOT GOING TO HAVE TOO MUCH
13 TO SAY HERE.

14 I ONLY THINK THE LAW IN THIS AREA IS VERY MUCH
15 IN DISPUTE. YOU KNOW, MR. ANDERSON WAS READING TO MR. NORTON
16 FROM A CASE AND SAID HOW WE HAVE TO PROVE THAT OUR FEES
17 ARE REASONABLE, NECESSARY AND SO ON. AND THAT'S--I DON'T
18 DISPUTE THAT. YOU KNOW, I COULD FIND SOME CASES THAT COME
19 TO THE SAME CONCLUSION BY, YOU KNOW, LANGUAGE THAT KIND
20 OF EMPHASIZES THE OTHER SIDE OF THAT, BUT THE LAW'S REALLY
21 PRETTY CLEAR.

22 BACK IN THE EARLY PART OF THE CENTURY THERE IS
23 A CASE NAMED HIDDLE THAT WAS DECIDED. AND BACK THEN THE
24 COURTS FOLLOWD THE HIDDLE COURT, THE HIDDLE COURT RULE THAT
25 YOU REALLY GOT TO SHOW IF YOU DON'T WANT TO PAY THE WHOLE

1 ATTORNEY'S FEES IS BAD FAITH. THE SURETY IS ENTITLED TO
2 GO OUT AND DO WHAT THEY HAVE TO DO TO DEFEND THEMSELF.
3 AND THE ONLY WAY THAT THEY WON'T BE FULLY REIMBURSED IF
4 IT'S BAD FAITH, THAT IS, IT'S NOT A BLANK CHECK, WE CAN'T
5 JUST GO OUT AND RUN UP ANY BILL WE WANT AND SAY DON'T WORRY
6 ABOUT IT BECAUSE SOMEBODY HAS TO PAY. THAT HIDDLE CASE
7 HAS SOMEWHAT ERODED SOME OVER THE CENTURY. THE SURETY NOT
8 ONLY HAVE TO SHOW THEY DIDN'T HAVE BAD FAITH BUT ALSO THEY
9 WERE REASONABLE AND NECESSARY.

10 JUDGE YOUNG: I DON'T THINK ANYBODY IN THIS CASE
11 IS DISPUTING THE REASONABLE ASPECT OF--

12 MR. DANIELS: THAT'S RIGHT.

13 JUDGE YOUNG: SO IT REALLY COMES, AS MR. MARIGER
14 SAID, WHETHER IT'S NECESSARY AND, THUS, UNREASONABLE. SO
15 IF IT BEGINS OUT AS ALL BEING REASONABLE THEN THE PRONG
16 THAT I THINK THAT MR. ANDERSON IS CLAIMING THE RIGHT TO
17 PREVAIL ON IS THAT IT, IN FACT, WASN'T NECESSARY.

18 MR. DANIELS: ONLY IN THAT, REALLY ONLY TWO PARTS.
19 ONE WAS THIS SITUATION BACK WHEN THEY TENDERED, THEY RE-
20 TENDERED THE DEFENSE, MR. BROWN RE-TENDERED THE DEFENSE.
21 BUT THE POINT I WANT TO MAKE IS THAT IT'S NOT A QUESTION
22 OF LOOKING BACK WITH HINDSIGHT AND SAYING WHAT WOULD HAVE
23 BEEN THE BEST THING TO DO LOOKING BACK. THEY'RE NOT ENTITLED
24 TO COME HERE LIKE MONDAY MORNING QUARTERBACKS AND SAY, WELL,
25 YOU KNOW, THIS WASN'T REALLY NECESSARY. THEY HAVE TO PUT

1 YOU'RE GOING TO HAVE TO AWARD INTEREST. NOT SO. VERY PRIME
2 CASE ON THAT ISSUE, YOUR HONOR, IS PARENTS AGAINST DRUNK
3 DRIVERS V. GREYSTONE CLIENTS, WHICH IS A 1990 UTAH COURT
4 OF APPEALS DECISION. AND THAT CASE IS CITED EXTENSIVELY
5 IN OUR BRIEFS. IN THIS MATTER AND IN THAT CASE BOB DE BRY
6 ASSIGNED HIS CLAIM FOR FEES OVER TO PARENTS AGAINST DRUNK
7 DRIVERS BUT HE HAD A CLAIM THAT SAID HE HAD ABSOLUTE RIGHT
8 TO DETERMINE WHETHER A CASE SHOULD BE SETTLED. NOW THE
9 COURT THREW THAT OUT AND SAID THAT'S CONTRARY TO PUBLIC
10 POLICY. BUT THEY SAID, OKAY, SO YOU GOT A CONTRACT THAT
11 YOU GET 30 PERCENT BUT WE'RE THROWING THAT OUT BECAUSE OF
12 THIS INVALID PROVISION. WELL, IF YOU DON'T HAVE A FIXED
13 AND DETERMINABLE AMOUNT, IF YOU DON'T HAVE A LIQUIDATED
14 AMOUNT, INTEREST DOESN'T APPLY.

15 JUDGE YOUNG: HOW--

16 MR. ANDERSON: AND THE VERY STIPULATION HERE,
17 YOUR HONOR, PROVIDES THAT YOU'RE GOING TO DETERMINE WHAT'S
18 REASONABLE AFTER LOOKING AT EVERYTHING AND CONSIDERING THE
19 CONTINUUM OF THE FACT THAT SERVICES HAVE BEEN PROVIDED OVER
20 THIS PERIOD AND IT'S NOT A LOCK STEP THING. WE DON'T PROVIDE
21 INTEREST ON AMOUNTS THAT ARE DETERMINED THAT WAY UNLESS
22 THEY'RE FIXED AND DETERMINABLE. AND THE PARENTS AGAINST
23 DRUNK DRIVERS CASE CLEARLY PROVIDES GUIDANCE THAT INTEREST
24 IS NOT AWARDBLE IN THIS CASE.

25 JUDGE YOUNG: WELL NOW, WAIT A MINUTE. THAT

1 SEEMS COMPLETELY DIFFERENT TO ME. THAT SEEMS LIKE A CONTIN-
2 GENT FEE CASE WHERE YOU DON'T KNOW WHAT YOU'RE GOING TO
3 GET. HERE, YOU HAVE MONTHLY STATEMENTS. IF HOOD AT ANY
4 TIME WANTED TO KNOW WHAT THE MONTHLY STATEMENTS ARE OF
5 INDEMNITY, IF THEY CALLED UP SNOW, CHRISTENSEN OR IF THEY'D
6 CALLED UP EVEN INDEMNITY AND SAID, LOOK, HOW MUCH EXPOSURE
7 HAVE YOU GOT RIGHT NOW, I THINK THEY WOULD HAVE READILY
8 BEEN GIVEN THE FEES FROM SNOW, CHRISTENSEN AT ANY TIME
9 THROUGHOUT. THIS IS QUITE A DIFFERENT SITUATION.

10 MR. ANDERSON: LET ME TIP IT THE OTHER WAY.
11 WHY DIDN'T THEY SEND US NOTICE OF IT, WHY DIDN'T THEY SEND
12 THE BILLINGS? WE HAD NO IDEA THAT IT WAS GOING TO BE ANY-
13 THING OF THIS ENORMITY. WHY DO WE HAVE THE BURDEN TO GO
14 TO THEM AND SAY, HEY, TELL US WHAT IT IS IF THEY'RE GOING
15 TO BE CLAIMING IT EVENTUALLY. LET US KNOW.

16 JUDGE YOUNG: I CAN SEE WHY YOU MAY WANT TO TIP
17 IT THAT WAY EXCEPT THEY'RE SHOWING UP AT EVERY DEPOSITION
18 AND NOT SAYING ANYTHING, YOU KNOW THAT THEY'RE APPEARING
19 AT EVERY HEARING BEFORE THE COURT. WHEN I LOOK BACK AT
20 THIS HISTORY THERE'S SEVERAL COINCIDENCES THAT APPLY IN
21 THIS CASE, BUT ONE OF THEM IS THAT THE MOTIONS IN LIMINE
22 AND THE OTHER MOTIONS THAT BECAME THE LAW OF THE CASE WERE
23 ARGUED BEFORE JUDGE BILLINGS. I CAME ON THE BENCH IN
24 FEBRUARY OF '87. ISN'T IT INTERESTING THAT EVERYBODY TRIED
25 TO, BY AGREEMENT, TO RE-RUN THE SAME MOTIONS WITH ME, AND

1 THEN I DENY THE MOTIONS?

2 MR. ANDERSON: I WASN'T IN THE CASE THEN SO . . .

3 JUDGE YOUNG: I KNOW. AND THE BAD THING IS THAT
4 YOU WEREN'T AND THE BAD THING IS THAT YOU WEREN'T IN THIS
5 CASE EARLY ON AND THAT THE CASE BY HOOD WAS JUST SIMPLY
6 BEING IGNORED OR NEGLECTED. IT MAY GO AWAY.

7 THERE'S ANOTHER FACTOR THAT COULD EVEN BE PLAYING
8 INTO THIS AND EVERYONE'S SKIDDISHNESS. I THINK WE ALL KNOW
9 THE CALIFORNIA REAL ESTATE MARKET WAS SUFFERING DRAMATICALLY
10 DURING THE MID TO LATE 1980'S. AND WHO KNOWS WHAT SIZE
11 CONTRACTS HOOD IS INVOLVED IN. ISN'T HOOD OUT OF WHITTIER,
12 CALIFORNIA?

13 MR. ANDERSON: YES.

14 JUDGE YOUNG: ALL RIGHT. SO HERE WE ARE IN
15 WHITTIER, CALIFORNIA WITH HOOD, WITH 13 TO 15 MILLION DOLLARS
16 IN THE BANK IN C.D.'S, BUT WE DON'T KNOW IF THEY'RE DOING
17 100 MILLION DOLLARS WORTH OF WORK EVERY YEAR. I DON'T KNOW.
18 I HAVEN'T REVIEWED THE FINANCIAL STATEMENTS NOR DO I FEEL
19 IT WOULD BE MY RESPONSIBILITY TO DO THAT, BUT THEY SAY
20 THEY'VE GOT 13 TO 15 MILLION. IF THEY ARE WORKING ON 100
21 MILLION DOLLARS WORTH OF WORK EVERY YEAR, 13 TO 15 MILLION
22 DOLLARS ISN'T A GREAT DEAL OF SECURITY. SO TO ME THIS WAS
23 THE KIND OF THING THAT THE REAL ERRORS IN THIS, AND I'LL
24 BE REALLY CANDID, THE REAL ERRORS IN THIS CASE WERE MADE
25 BY HOOD. THEY WERE THE ONES WHO DIDN'T WANT TO TAKE AN

1 AFFIRMATIVE, ASSERTIVE ROLE HERE, THEY SET UP THE CORPORATION
2 WHICH MR. MARIGER REFERRED TO AS A WHOLLY OWNED SUBSIDIARY.
3 WHY WERE THEY OPERATING UNDER THE WHOLLY OWNED SUBSIDIARY
4 IF THEY WEREN'T ATTEMPTING TO LIMIT LIABILITY IN RELATION
5 TO THE ACTIVITIES OF THE JOB?

6 MR. ANDERSON: LET ME ANSWER THAT.

7 JUDGE YOUNG: ALL RIGHT.

8 MR. ANDERSON: THEY BOUGHT THAT COMPANY. AND
9 IT WAS A VERNAL COMPANY THAT WAS ENGAGED IN BUSINESS IN
10 THE OIL PIPELINE BUSINESS IN VERNAL.

11 JUDGE YOUNG: UH-HUH.

12 MR. ANDERSON: THEY WANTED AN OPPORTUNITY TO
13 TRY THE INTEREST IN THE MARKET. HERE'S A GOING, EXISTING
14 COMPANY, THEY GOT INTO IN VERNAL, THEY COME TO SALT LAKE,
15 THEY BID ON A JOB IN SALT LAKE. I MEAN, THERE'S NOTHING
16 EVIL ABOUT HAVING A WHOLLY OWNED SUBSIDIARY.

17 JUDGE YOUNG: NO, I DON'T WISH TO CAUSE YOU TO
18 INFER THAT LITERALLY. MAYBE ONE OTHER COMMENT AND I WON'T
19 INTERRUPT YOU EITHER. BUT THE OTHER "COINCIDENCE," QUOTE
20 UNQUOTE, OF THIS TIME IS WE ARE IN 1983/'84 WHEN WE'RE DURING
21 THE WETTEST YEAR IN UTAH HISTORY, SO WE GET DOWN INTO THIS
22 TRENCH AND WE DEAL WITH THE COMPACTION ISSUES AND THE PIPE'S
23 ALL SETTLED BECAUSE OF ALL THE SUBTERRANEAN WATER OR OTHER
24 PROBLEMS THAT OCCUR. HOW MUCH CAN WE ATTRIBUTE TO GOD,
25 I DON'T KNOW, BUT THIS WHOLE THING--

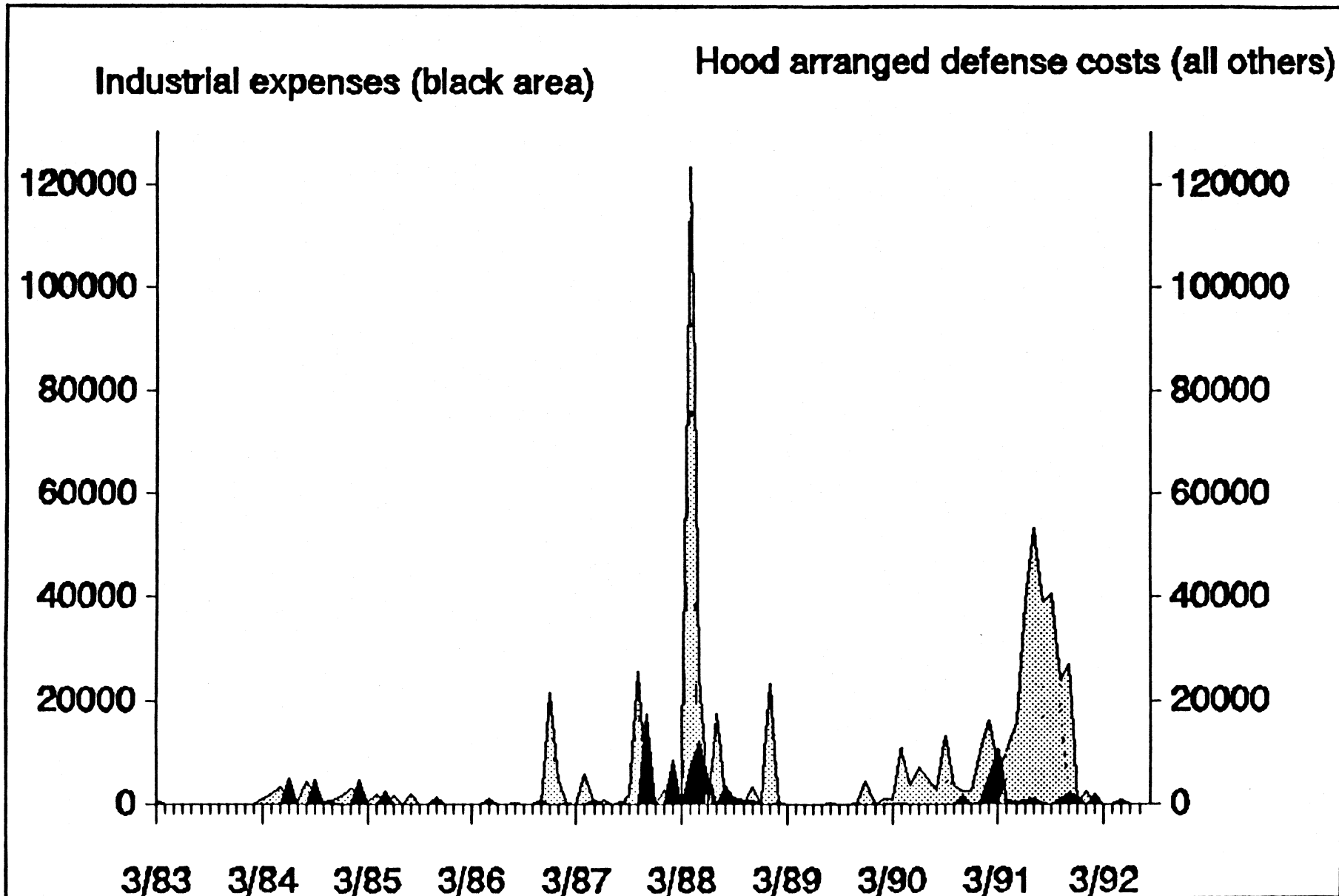


Figure 1 - Defense Costs of Hood compared in time to Expenditures of Industrial

CERTIFICATE OF SERVICE

On this 31st day of January, 1994, I hereby caused to be hand delivered two true and correct copies of the foregoing **Appellee's Brief** to the following:

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A handwritten signature in cursive script, appearing to read "David A. Staught", is written over a horizontal line.