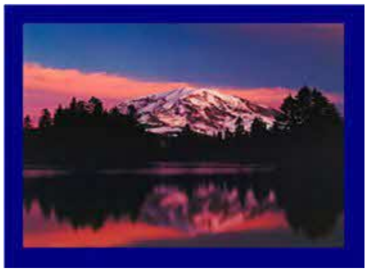
PEARLMAN 2024

PEARLMAN

BUILDING RELATIONSHIPS • KEEPING THEM STRONG

Pearlman 2024



On behalf of the Board of Directors and Sustaining Members of the Pearlman Association, I want to thank you for joining us again at this year's 2024 Pearlman Conference. We know that folks travel from all across the country to join us, and that for some of you, our events coincide with the start of school. My kids started yesterday! Given these and other sacrifices you have made to join us, we've endeavored to provide a tremendous Pearlman program this year along with our standard extra-curricular activities.

Pearlman is an organization designed, built and managed exclusively by company-side surety professionals. Its close, continuous access to the collective heartbeat of a large number of surety companies makes for a unique, targeted perspective on the needs, goals and challenges facing the industry. Our annual events draw from this special vantage point as we design our curriculum, training and recreational events.

As you take part in our events this year, please keep in mind that Pearlman has but one mission; to strengthen and enhance the talent, professionalism and career prospects of the surety professional. We will accomplish this mission through our scholarship distribution, our educational programs and our commitment to building industry relationships and keeping them strong.

Thank you, again, for joining us this year.

Luis Aragon
Chairman/Director, The Pearlman Association

Special Recognition

The Pearlman thanks the following for their tremendous contributions:

Special thanks to **Lih Hudson**. She does it all. Every year. She has to work with Luis every day. And then when it's all over, she signs up to do it again the next year. **Lih** is Pearlman, and for that, we are all thankful! There's only one **Lih Hudson!!**

Special thanks also to **Christine Brakman**, who once again put all the conference materials together. We can't thank her enough for her hard work in making sure The Pearlman Packet is ready for the world! Thank you, Chris!

A big thanks to **David Stryjewski** for graciously volunteering his time to do the books and keeping the Pearlman finances in order.

A great big thanks to **Brenna Stuhlman** for obtaining CE credits for Washington, Texas, and Florida, and CLE credits in California and Texas! Thank you also to **Eric Liberman** of **Carney Badley Spellman P.S.** for applying for Washington CLE credits.

Lastly, we have lots of new stuff this year, and lots of people to thank for it!

I want to thank **Rachel Charlton** of **Sticky Communications** for her tremendous efforts in putting together Pearlman's new logos and branding! **Rachel** worked directly with Luis and Lih to come up with a design that paid homage to our roots while also modernizing our look and feel. Thank you, **Rachel**, for helping us look so good!

Special thanks also to **Brian Rice** of **RiskScape Strategies** for helping us modernize our Registration process! **Brian** helped us move Registration online and made the entire back-end process more efficient! **Brian** is also helping us update our website, which will have even more functionality next year when the time comes to register. Together, **Brian** and **Rachel** helped us put together our Registration Packet, which looked sharp! It even had hyperlinks, which makes me feel so 2024! Thanks again **Rachel Charlton** of **Sticky Communications** and **Brian Rice** of **RiskScape Strategies**!

We have brand new signage this year, thanks to **Angela Zanin** and **Mark Oertel** of **Lewis Brisbois!** All our signs are getting an upgrade and will incorporate our new logo and branding. **Angela** and **Mark** worked with us to make sure things looked great and were professionally produced using the in-house design team at **Lewis Brisbois**. When you see the Welcome Sign, the Sustaining Member sign, your name tag, or the sponsor signs for Golf and Sip 'n Putt, say thank you to **Angela** and **Mark!**

Lastly, thank you to **Jim Carlson** of **MPCS** for helping us upgrade our A/V presentation. We have struggled for years with limited A/V options, and **Jim** generously stepped in to help us provide better lighting, better displays, and better support for the panelists. When we can see the presentation and the panelists from anywhere in the room, we have **Jim Carlson** to thank!

Schedule of Events

WEDNESDAY SEPTEMBER 4, 2024

4:30-7:30 **Hospitality Reception** – The Willows Lodge, Woodinville
Hosted by The Vertex Companies, Inc., Langley LLP,
Sage Associates, Inc., and The Hustead Law Firm

Hospitality Reception Entertainment
Hosted by Faux Law Group, and Friedrich & Dishaw

THURSDAY SEPTEMBER 5, 2024

7:00 – 8:00AM **Registration and Breakfast – Sparkman Cellars Winery, Woodinville**
Hosted by SMTD Law LLP, PCA Consulting Group, CSG Law,
and Forcon International Corporation

All Day Coffee/Beverage Service
Hosted by Sokol Larkin

Espresso Bar
Hosted by MPCS

8:15 AM **Opening Remarks**
Luis Aragon

8:30 AM **Program Intro**
Co-Chairs Mark Gamell, Patricia Wager, David Grycz, and James Carlson

THE TIME MACHINE:
WHAT DOES A SURETY GAIN, OR LOSE, BY WAITING?

8:45 – 9:05 **Surety Theater – Scenes 1 and 2**

9:05 – 9:40 **Pre-Bankruptcy and Bankruptcy Planning and Strategy**:
Moderator: Mark Gamell, Esq., Torre, Lentz, Gamell, Gary
& Rittmaster, LLP
Panelists: Scott Leo, Esq., Law Offices of T. Scott Leo
Robert Berens, Esq., SMTD Law LLP
Chad Schexnayder, Esq., Jennings Haug

9:45 – 10:15 **Finding and Reaching The Hard to Reach Assets**:
Moderator: David Grycz, RLI Insurance Company
Panelists: Steven Elizer, Esq., Elizer Law Group, LLC
Jordan Faux, Esq., The Faux Law Group
Julian Grijns, Managing Director Kroll Associates, Inc.
Jeff Olson, Liberty Mutual Insurance Company

10:15 – 10:30 **MORNING BREAK**

10:30 – 10:40	**Surety Theater – Scene 3**
10:40 – 11:10	**<u>Contractual ADR/Mediation Provisions and Early Neutral Evaluation: Are They Useful, Do They Matter?</u>** <u>Moderator</u>: Patricia H. Thompson, JAMS <u>Panelists</u>: Michael J. Timpane, Esq., SMTD Law LLP Marilyn Klinger, Esq., SMTD LAW LLP Susan Weinstock, Arch Insurance
11:10 – 11:45	**<u>Early Access To and Analysis Of The Principal's Books and Records</u>**: <u>Moderator</u> Mary Lynn Kotansky, Liberty Mutual Insurance Company <u>Panelists</u>: Brian Rice, RiskScape Strategies Tiffany Schaak, Liberty Mutual Insurance Company Paul Friedrich, Esq., Friedrich & Dishaw
11:45 – 1:15	**LUNCH BREAK** Hosted by Wolkin Curran, LLP, Aperture LLC, and Weinstein Radcliffe Pipkin LLC
1:15 – 1:30	**Surety Theater – Scene 4**
1:30 – 2:05	**<u>Getting the Most out of Site Visits: Protocols and Strategies</u>**: <u>Moderator</u>: Stephanie Vreeland, Great American Ins. Group <u>Panelists</u>: Jim Carlson, MPCS Michael Spinelli, II, Cashin Spinelli & Ferretti, LLC Shoshana Rothman, Merchants Bonding Co. John Fouhy, Travelers Insurance Company
2:05 – 2:40	**<u>Early Evaluation of the Principal's Affirmative Claims:</u>** <u>Moderator</u>: Frederick E. Hedberg, Robinson+Cole, LLP <u>Panelists</u>: Donald Lefler, The Lefler Brophy Group Paul Bordieri, Perini Management Services, Inc. Benjamin Chambers, The Hartford Michael Seminara, IAT Surety
2:40 – 2:45	**<u>Scholarship Presentation</u>** Mary Lynn Kotansky, Liberty Mutual Insurance Company
2:45 – 3:00	**<u>AFTERNOON BREAK</u>** Snacks provided by RJT Construction, Inc.
3:00 -3:10	**Surety Theater – Scene 5**
3:10 – 3:45	**<u>Underwriting and Claims with Foreign Principals or JV Partners</u>**: <u>Moderator</u>: Edward J. Reilly, SVP, American Global <u>Panelists</u>: Sam Barker, Liberty Mutual Insurance Company Megan Mazzeffi, RLI Insurance Company Michael Keller, CNA Surety
3:45 – 3:50	Audience Discussion

3:50 – 4:35	<u>**The View From The Top:**</u> <u>**Heads of Surety Claim Department Insights and Observations**</u>**:** <u>Moderator</u>: Patricia Wager, Torre, Lentz, Gamell, Gary & Rittmaster, LLP <u>Panelists</u>: Blake Wilcox, Liberty Mutual Insurance Company Christine Alexander, Arch Insurance Darrell Leonard, Zurich American Insurance Company Bruce Kahn, Berkley Surety Samantha Canterino, Applied Underwriters
4:35 – 4:40	Announcements and Adjournment for the day
5:00	**Welcome Reception – Sparkman Cellars Winery** **Cocktails and Hors d'oeuvres** Hosted by Sokol Larkin, Jennings Haug Keleher McLeod Waterfall LLP, and Nicholson Professional Consulting
6:00	**Dinner – Sparkman Cellars Winery** Hosted by Watt, Tieder, Hoffar & Fitzgerald, LLP, RJT Construction, Inc., and J.S. Held, LLC
7:15	**Hold 'Em Tournament – Sparkman Cellars Winery** Dealers Sponsored by J.S. Held, LLC and Weinstein Radcliffe Pipkin, LLP **Cocktails** Hosted by Krebs Farley, PLLC

<u>**FRIDAY SEPTEMBER 6, 2024**</u>

7:00 – 8:00	**Registration and Breakfast – Sparkman Cellars Winery** Hosted by Cashin Spinelli & Ferretti, LLC, Spencer Fane Snow Christensen & Martineau, and Carney Badley Spellman **All Day Coffee/Beverage Service** Hosted by Guardian Group, Inc. **Bloody Mary Bar** Hosted by Dry Law, PLLC **Espresso Bar** Hosted by MPCS
8:00 – 8:10	Opening Remarks – Luis Aragon
8:10 8:25	**Surety Theater – Scene 6**
8:25 – 9:00	<u>**Section 3.1 Meetings and the A312 Bond: How Far Can You Go?**</u> <u>Moderator</u>: Ryan Dry, Esq., Dry Law PLLC <u>Panelists</u>: Stephanie Shear, Amtrust Samantha Canterino, Applied Underwriters Nick Belanger, The Hartford

9:00 – 9:45	<u>Obligee Interference with Surety's Completion Options in the A312 Universe</u> <u>Moderator</u>: Michael Prisco, Esq., Torre, Lentz, Gamell, Gary & Rittmaster, LLP <u>Panelists</u>: Joseph Healy, Cashin Spinelli & Ferretti, LLC; Richard Baudouin, Skyward Specialty Ins. Stephanie Keddy, Berkley Surety
9:45 – 10:00	**Surety Theater – Scene 7**
10:00 – 10:15	**MORNING BREAK**
10:15 – 10:50	**<u>Dealing with the Tough Agency Obligee:</u>** <u>Moderator</u>: Robert Niesley, Watt Tieder <u>Panelists</u>: Rebecca Glos, Watt Tieder Patrick Toulouse, Travelers Insurance Company Mark Degenaars, Vertex
10:50 – 11:25	**<u>Dealing With a Principal's Bad Faith Claims and Defenses by the Principal or Indemnitors</u>:** <u>Moderator</u>: David J. Krebs, Krebs Farley <u>Panelists</u>: Leigh Anne Henican, Gray Surety Megan Daily, Esq. Krebs Farley Paul Harmon, Markel Surety
11:25 – 11:30	Closing Announcements and Adjournment

<u>FRIDAY AFTERNOON, SEPTEMBER 6TH – GOLF TOURNAMENT</u>

The Golf Club at Redmond Ridge
11825 Trilogy Parkway NE, Redmond, WA 98053

12:00pm	**Bus Service to/from The Golf Club at Redmond Ridge** Hosted by Law Offices of Larry Rothstein Bus leaves Willows Lodge at 12:00pm
1:00	**Sign in/Warm Up – The Golf Club at Redmond Ridge**
1:30	**Scramble Tournament – Shotgun Start**
	Beverage Cart Hosted by Watt, Tieder, Hoffar & Fitzgerald, LLP, Ernstrom and Dreste, LLP, and Imperium Consulting Group
6:30	**Dinner – The Golf Club at Redmond Ridge** Hosted by Ward Hocker & Thornton, PLLC
	Cocktails Hosted by Sokol Larkin
7:00	**Awards**
7:30	**Bus returns to Sparkman Cellars Winery and Willows Lodge**

FRIDAY AFTERNOON, SEPTEMBER 6TH – SIP 'N PUTT

Rainbow Run Mini-Golf at Willows Run
10402 Willows Road, Redmond, WA 98052

12:00 – 5:30

Sip 'n Putt
Hosted by Booth Mitchel & Strange LLP, Guardian Group, Inc., Lewis Brisbois Bisgaard & Smith LLP, and Liberty Mutual Surety

Transportation – On your Own
Only 1 mile from Willows Lodge and Sparkman Cellars Winery

Lunch and Beverages - Provided

SATURDAY, SEPTEMBER 7TH – ON YOUR OWN

We would like to extend our sincerest appreciation to our Sustaining Members and friends of Pearlman who graciously volunteered their time to coordinate and chaperone Saturday's "On Your Own" event.

Woodinville Wine Tour

Hosted by Torre, Lentz, Gamell, Gary & Rittmaster, LLP, SMTD Law, LLP and The Law Offices of T. Scott Leo

Program Co-Chairs

MARK GAMELL

Mark Gamell is a founding partner in TLGGR. Mark was previously a partner at Hart & Hume, LLP and Stockman Wallach Lentz and Gamell, LLP, and has practiced in the fields of fidelity, surety, construction litigation and related commercial insurance and bankruptcy law for over 30 years.

A 1976 graduate of Dartmouth College and a 1979 graduate of Fordham University School of Law, Mark has served as a Vice-Chair of the ABA/TTIPS Fidelity & Surety Law Committee, co-chairman of its Bankruptcy Law Subcommittee, and has delivered papers and addresses at meetings of the committee through the years on surety, fidelity and bankruptcy law related subjects as well as contributed to several of the committee's publications.

Mark has also addressed the ABA Forum on the Construction Industry, as well as other fidelity and surety industry professional organizations such as the Fidelity Law Association, the Surety And Fidelity Claims Institute, the National Bond Claim Association and the Pearlman Association.

From 2009 to 2014, Mark served as Educational Program Director for The Pearlman Association, which is dedicated to developing the skills of surety industry professionals. He is admitted to practice in New York, as well as in all four U.S. District Courts in the State of New York, the U.S. Courts of Appeal for the Second, Third and Federal Circuits and the U.S. Court of International Trade.

PATRICIA WAGER

Patricia Wager Patricia Wager is a partner at TLGGR. Tricia focuses her practice on advising sureties and construction industry participants on claims situations, performance bond defaults, payment bond claims, and bankruptcy issues, as well as complex indemnity and collection, pursued through litigation, negotiation and/or alternative dispute resolutions. She regularly handles claims on executors and administrator bonds, court fiduciary bonds, and guardianship matters, and provides broad-ranging counsel on fidelity bond claims and conflicts. She is a frequent advisor on creditor's rights in bankruptcy.

Tricia is actively involved in industry organizations including the ABA TIPS Fidelity and Surety Law Committee, the Pearlman Association and the Surety Claims Institute. Tricia was an FSLC Vice-Chair from 2017-2020, a Mid-Winter surety program chair in 2012, a co-editor of The Surety and Bankruptcy,1st Edition in 2010, and a contributing author to, among other publications, The Law of Performance Bonds, 3d Edition, "Chapter 5, The Surety's Rights of Recover Against Principal and Indemnitors under the Common Law and Indemnity Agreement", The Bond Default Manual 4th Edition, "Chapter 5 – Takeover", and Financial Institution Bonds, 4th Edition, Chapter 11 – The Principal Exclusions" . She is a well-regarded industry speaker who, as education director, program chair, or presenter has arranged or contributed to multi-day programs and CLE focusing on the areas of surety and construction law, as well as fidelity bond coverage, MBE/WBE issues, bankruptcy and related topics.

JIM CARLSON

As a graduate of William Howard Taft University (JD: International Contract Law), University of La Verne (MBA: Finance and Executive Management Negotiations) and California State Polytechnic University-Pomona (B.S. in SHRM Operations Management), Jim is Managing Principal of Maximum Property Construction Services "MPCS" (sister company to Maximum Energy Professionals "MEP"). Jim brings more than 20 years of experience in owner's representation, surety claims, litigation, mediation, productivity plans, expert testimony, strategic programs, and construction oversight.

Specific technical knowledge and experience includes: backup generator systems, PV arrays, ATS systems, and grid-tie connections; central boiler and chiller plants, distribution systems for chilled water, high temperature hot water, steam; retrofit and replacement for packaged AC units including boxcar type systems; final wiring and startup for systems from 1-ton to 500- tons; mechanical cooling for primary pump motor systems and substations; steam turbine generators, geothermal, and multi-fuel generator backup systems; property condition assessments and partially constructed acquisition estimates; OSHA 30 trained health and safety management; EPA compliance for refrigerant and oils management and disposal, coordination for chain of custody on all aspects of abated equipment; general construction and mechanical construction analysis as related to design, in field corrective measures to mitigate delays for in field conflicts; catastrophe claim construction, defect contract claims, and commercial property claims; surety claims investigation, cost to complete analysis, delay impact analysis, well versed in tendering, take over and completion, ratification of relevant sub-contractors, negotiation of terms for completion and augmentation of liquidated damages clauses; payment and performance bond claims investigation, opinions and determination of reasonableness and merit of claims determination.

DAVID GRYCZ

David Grycz is Assistant Vice President, Claims with RLI Insurance Company in Chicago, Illinois overseeing a team of examiners and legal staff handling contract and commercial surety claims nationwide at RLI. David is currently the President (and a Board Member) of the Chicago Surety Claims Association, a Vice Chair on the ABA Fidelity and Surety Law Committee's General Committee, and a member of the SFAA's Surety Claims Advisory Committee. David received his undergraduate degree in International Relations, summa cum laude, from Boston University in 2004 and his law degree, cum laude, from the University of Illinois in Urbana-Champaign in 2008. Before starting with RLI, David was an attorney with the law firm Sedgwick LLP focusing primarily on the defense of insurance coverage, bad faith/extracontractual, and product liability matters. David has been an Illinois-licensed attorney since 2008 and is one ethics test away from obtaining his AFSB® designation.

Presenters/Biographies

We would like to thank each of our co-chairs and presenters for the significant time and talent that each of them have selflessly invested into the success of our educational programs.

Christine Alexander – Senior Vice President Surety Claims, Arch Surety

Chris joined Arch Surety in 2022 to lead the Surety Claims team. Chris is a graduate of the University of Delaware and the University Of Baltimore School Of Law. She is licensed to practice law in Maryland, the District of Columbia, and Pennsylvania. She is past President and Board Member of the Philadelphia Surety Claims Association; a Member of the Board of Directors of the Surety Claims Institute; the Vice Chair of the SFAA Surety Claims Advisory Committee; a Vice Chair of the ABA Surety Law General Committee, the Corporate Counsel Committee, and the In-House Professionals General Committee; and is a Member of the Law Division Subcommittee for Underwriting and Risk Management.

Richard Baudouin – Senior Surty Counsel, Skyward Specialty

Richard Baudouin is Senior Surety Counsel at Skyward Specialty Insurance where he handles contract and commercial surety claims and provides legal support for underwriting. He received his B.A. from University of Texas-Austin and J.D. from Loyola University, College of Law, in New Orleans, LA where he was Managing Editor of the Loyola Law Review. Following law school, he worked as an associate and eventually partner at Krebs Farley, PLLC for nearly fifteen years. He is a Vice-Chair of the ABA Fidelity and Surety Law Committee and is a Member of the Law Division Subcommittee for Miscellaneous Bonds. Richard resides in New Orleans, LA.

Sam Barker – Director-Asia Pac, Liberty Mutual

Sam is a graduate of Stanford University (BA Economics) and Seattle University School of Law and has over 30 years of experience in commercial and surety law. His current role with Liberty focuses on the administration and review of domestic and reverse flow claims for large international accounts, specifically for the Asia Pacific region, including Australia, Singapore and Hong Kong. In his spare time he can be found performing on stage, traveling or flailing on a golf course, weather permitting.

Nick Belanger – Engineer, The Hartford

Nick Belanger – Engineer; providing support to the entire bond claim department at The Hartford. Nick graduated from Central Washington University with a B.S. in Business Administration. He has been in his role with Hartford for a little over two years. Prior to that he worked for 16 years as a project manager for a large commercial general contractor based in Washington.

Paul Bordieri – Senior Project Manager, Perini Management Services

Paul Bordieri is a Senior Project Manager at Perini Management Services, Inc., a wholly owned subsidiary of Tutor Perini Corporation, and is also the Program Manager for all surety services performed by Tutor Perini Corporation. Paul earned his Bachelor of Science degree in Civil Engineering with a concentration in Structural Design from Worcester Polytechnic Institute in Worcester, Massachusetts. He is a registered Professional Structural Engineer licensed in Massachusetts.

Samantha Canterino – Head of Surety Claims, Counsel, Applied Surety Underwriters

Samantha Canterino is the Head of Surety Claims, Counsel at Applied Surety Underwriters. Prior to joining Applied Surety Underwriters, Samantha was employed as a Claim Counsel for Travelers Bond & Specialty Insurance in the Federal Way and Philadelphia offices. While in private practice, Samantha handled high exposure matters from inception to trial on behalf of fortune 500 companies including owners, general contractors, and subcontractors in the construction industry. Samantha is a graduate of Fordham University, cum laude, and New York Law School where she was the recipient of the Public Service Award for her continued service to the City of New York as well as other municipalities. Samantha is admitted to practice in the State of New York and the State of Washington.

Benjamin Chambers – Director, Bond Claims, The Hartford

Benjamin Chambers – Has worked for The Hartford in bond claims for the last 11 years in a number of roles. He is currently a Director, Bond Claims and Credit and Political Risk Insurance Claims managing a team that handles claims across the country. He graduated from Western Washington University with a B.A. in Philosophy and received a J.D. from Seattle University School of Law, magna cum laude. He is admitted to practice law in Washington State.

Megan Daily – Krebs Farley

Megan Daily is a member of the New Orleans, Louisiana law firm of Krebs Farley, PLLC, practicing primarily in the areas of surety, construction law, insurance defense and commercial litigation. Prior to attending law school, Megan earned a Bachelor of Arts Degree in Middle Eastern Studies from Washington and Lee University. She graduated cum laude from LSU Law School in 2017, where she received a certificate in Civil Law in addition to her law degree. While at LSU, she served on the Editorial Board as a Senior Associate for the LSU Journal of Energy Law and Resources and was a published member. Megan is a member of the State Bar of Louisiana, the State of Louisiana and the American Bar Association.

Ryan Dry –Dry Law PLLC

Ryan Dry is founding member of Dry Law PLLC, a firm with services extending across the country with a team of attorneys licensed in Texas, Oklahoma, Arkansas, and New Mexico. Ryan's practice focuses on the resolution of complex construction claims with an emphasis on both creativity and efficiency. Throughout his career, he has successfully obtained over $60 million in collateral orders through injunctions filed all over the South, including Texas, Oklahoma, Arkansas, Alabama, and Georgia.

When not practicing law, Ryan enjoys fishing with his three children, and drinking wine on the dock with his wife when the fish are not biting.

Steven H. Elizer - Elizer Law Group, LLC

Steve has been living in the Surety World for more than thirty years. He started his career as a claims attorney with a third party administrator for specialty market companies. He later formed his own practice and began representing sureties in performance bond defaults, payment bond claims and other facets of surety law. Over the past ten years, Steve has focused on recovery of surety bond losses, including indemnity and subrogation claims, as well as the management of indemnity litigation across United States for his firm's surety clients.

Jordan Faux – The Faux Law Group

Jordan Faux, Esq. is an attorney at the Faux Law Group. His expertise is in construction and surety law and he does things like fend off bogus claims, help his clients get paid, and try to stop you from signing awful contracts. He went to law school at The George Washington University and after clerking for Magistrate Judge Robert J. Johnston in the US District Court, District of Nevada went to work with his dad in the family business. He likes to spend his spare time with his wife and two adorable children.

John M. Fouhy – Technical Director & Counsel, Travelers

John Fouhy is a Technical Director and Counsel at Travelers Casualty and Surety Company of America. John has been with Travelers in the Federal Way, WA Construction Services Claim office since 2010 and has handled several large losses in the western U.S. during his tenure at Travelers, in addition to providing support to bond underwriters. John received his law degree from the University of Oregon and is a member of the Washington State Bar Association.

Paul K. Friedrich – Friedrich Dishaw, PLLC

Paul K. Friedrich is a Partner at Friedrich & Dishaw, PLLC, and is licensed to practice in both Washington and Oregon. His practice is focused on representing sureties and insurers in all aspects of contract, commercial, and fidelity bond claims, with a particular emphasis on construction law, including the representation of general contractors and subcontractors on a wide range of issues involving public and private projects. Mr. Friedrich has extensive experience defending against surety-related bad faith claims and is a frequent speaker and author on surety and construction related legal issues.

Rebecca Glos – Senior Partner, Watt, Tieder, Hoffar & Fitzgerald, LLP

Rebecca S. Glos is a senior partner in the Irvine, California office of Watt Tieder. Ms. Glos graduated from University of California, Los Angeles (B.A. 1996) and Tulane School of Law (J.D. 2000). She joined Watt Tieder in 2006 and has focused her practice primarily in construction litigation with a heavy concentration in state and federal courts throughout the state of California, including, San Diego, Orange County, Los Angeles, Ventura, San Luis Obispo, and Sacramento Counties. Ms. Glos has extensive expertise in preparing, negotiating, and prosecuting construction claims against local, state, and federal public agencies.

Most recently, in 2017-2018, Ms. Glos was a member of the trial team for the Plaintiff Kiewit Power Constructors Co. ("Kiewit") in a 12-day jury trial against the Los Angeles Department of Water and Power ("LADWP") in the United States District Court, Central District of California, which resulted in a jury's verdict of $45 million to Kiewit.

Ms. Glos has also represented sureties that issued performance bonds on projects for the United States Army Corps of Engineers ("USACE") on U.S. military bases throughout the world. Ms. Glos has negotiated directly with the USACE in securing waivers and releases for sureties and settling affirmative claims.

Throughout her career, Ms. Glos has participated in all phases of the construction litigation process. She has arbitrated through the State Office of Administrative Hearings, American Arbitration Association, and JAMS. Ms. Glos is an expert at state and federal civil procedure, evidence, and public contract law.

Ms. Glos is fluent in Mandarin Chinese and Spanish.

Julian Grijins – Managing Director, Kroll

Julian Grijns is a managing director in the Investigations, Diligence and Compliance practice of Kroll, based in the New York office. With over 20 years of consulting experience in complex matters, Julian is an expert in gathering information from disparate sources and identifying patterns of misconduct. Julian's experience is founded in rigorous research methodologies and years of strategic analysis of corporate operations.

David Grycz – RLI Insurance

David Grycz is Assistant Vice President, Claims with RLI Insurance Company in Chicago, Illinois overseeing a team of examiners and legal staff handling contract and commercial surety claims nationwide at RLI. David is currently the President (and a Board Member) of the Chicago Surety Claims Association, a Vice Chair on the ABA Fidelity and Surety Law Committee's General Committee, and a member of the SFAA's Surety Claims Advisory Committee. David received his undergraduate degree in International Relations, summa cum laude, from Boston University in 2004 and his law degree, cum laude, from the University of Illinois in Urbana-Champaign in

2008. Before starting with RLI, David was an attorney with the law firm Sedgwick LLP focusing primarily on the defense of insurance coverage, bad faith/extracontractual, and product liability matters. David has been an Illinois-licensed attorney since 2008 and is one ethics test away from obtaining his AFSB® designation.

Paul Harmon – Claims Counsel, Markel Surety

Paul joined Markel in September 2023. Prior to joining Markel, Paul spent nearly sixteen years with Travelers Bond and Specialty Insurance where he handled a variety of performance and payment bond claims. Paul has appeared as a panelist at American Bar Association conferences and other surety industry events. Several years ago, he served as a co-chair of the Pearlman Surety Conference. He has written or collaborated on whitepapers and case law surveys about numerous surety law topics. Paul graduated with a degree in political science and a minor in music from the University of California, San Diego in 2004 and graduated from the University of Oregon School of Law in 2007.

Joseph Healy – Professional Engineer, Cashin Spinelli & Ferretti

Mr. Healy is a knowledgeable Professional Engineer with experience in the design and implementation of mechanical systems and equipment, as well as large and small scale electrical systems. With over fifteen years in the Engineering, Construction Management, and Surety Consulting Industry, he has experience in the design and development of contract documents. In his capacity as a Surety Engineering Professional, Mr. Healy has managed performance bond claims that include: project investigation, engineering analysis, cost to complete, re-let, and project completion management. Mr. Healy is well versed in all aspects of claims investigation including the analysis of payment bond claims and claim litigation support, and has testified as an expert in construction and engineering matters.

Frederick Hedberg – Partner, Robinson & Cole LLP

Frederick Hedberg is a partner with the law firm of Robinson & Cole LLP residing in the firm's Hartford, CT and Boston, MA offices. Fred has more than 25 years of construction and surety law experience, representing owners, contractors, sureties and design professionals on a wide variety of public and private construction projects. Prior to practicing law, Fred was a licensed structural engineer for more than 10 years in the government, defense and energy sectors. Fred holds a B.S. in Civil Engineering from the University of Connecticut, a M.S. in Mechanical Engineering from Rensselaer Polytechnic Institute, and a J.D. from Quinnipiac University School of Law.

Leigh Ann Henican – Sr. Vice President of Claims, Gray Surety

Leigh Anne has more than fourteen years of experience in insurance defense, with eleven years of experience solely devoted to handling surety bond claims. She graduated from the University of Alabama with a B.A. in Public Relations and Political Science, and received her law degree from Loyola University New Orleans College of Law. She started as Surety Claims Counsel with The

Gray Surety in 2013 and became Surety Claims Manager in 2015. Leigh Anne was promoted to Senior Vice President of Claims in 2018 and named Corporate Secretary in 2021. In her free time, Leigh Anne enjoys spending time with her family.

Bruce Kahn – Senior Vice President, Claims, Berkley Surety

Bruce Kahn is a commercial litigation attorney whose practice focuses on the construction, surety and real estate industries. He presently heads the claims department as a senior vice president at Berkley Surety, a Berkley Company. He is a graduate of Albany Law School, where he was managing editor of the *Albany Law Review*. He holds a Master of Business Administration degree from Cornell University's S. C. Johnson School of Business. He is also an arbitrator on the American Arbitration Association's construction, commercial and consumer panels.

Stephanie Keddy – Vice President, Berkley Surety

Stephanie M. Keddy is Vice President of Berkley Surety, Morristown, NJ, where she manages complex surety performance and payment bond claims. Before joining Berkley Surety, Stephanie was Senior Claims Counsel with CNA and prior thereto, practiced law in Chicago, focusing her practice on surety, construction and commercial litigation. Stephanie also served as an Assistant Attorney General for the Office of the Illinois Attorney General. Stephanie received her Juris Doctorate from DePaul University College of Law and her Bachelor of Arts in History from Xavier University.

Michael Keller – Underwriting Director, CNA Surety

Michael Keller was born outside of the Seattle, WA area and studied at the University of Washington. He's been in the surety industry for over 10 years with most of that time spent at CNA Surety. He currently holds the role of Home Office Underwriting Director which entails handling both middle market and international reverse-flow surety clients.

Mary Lynn Kotansky – Assistant Vice President, Liberty Mutual

Mary Lynn Kotansky is an Assistant Vice President in the Claims Financial Services department for Liberty Mutual in Seattle. Mary Lynn joined Liberty in 2014 where she focuses on forensic investigations of large surety claims. Her prior surety experience includes 10 years at Reliance Surety Company as Surety Accounting Manager and then Principal at Quantum Financial Consulting, LLC which she founded in 2005. She has 30 years experience as a CPA within the surety industry. Mary Lynn is a licensed CPA in Washington State and is a member of the Washington State Society of CPAs. She earned her accounting degree at the University of Washington and her MBA in Finance from Seattle University.

David J. Krebs – Krebs Farley

David J. Krebs is a member of the New Orleans, Louisiana law firm of Krebs Farley, PLLC, practicing primarily in the areas of surety and fidelity law, construction law, and commercial litigation. Mr. Krebs received his Bachelor of Arts degree, *cum laude*, from Tulane University in 1976. He received a Master of Arts degree, with honors, from the University of Tübingen, West Germany, in 1979. He graduated *magna cum laude* from Tulane Law School in 1982, where he was member of the Board of Editors of the Tulane Law Review and the Order of the Coif. He is a member of the State Bar of Louisiana, the State Bar of Texas, and the American Bar Association. He is also a member of the ABA's Forum Committee on Construction Law and the Fidelity and Surety committee of the Tort and Insurance Practice Section, and a former chair of that committee.

Don Lefler – The Lefler Brophy Group

Don Lefler is a licensed professional engineer and principal with The Lefler Brophy Group, LLC, a consulting firm specializing in forensic analysis of construction processes and disputes, with over 35 years of experience on vertical, heavy civil and infrastructure projects including high-rise buildings, hospitals, hotels, laboratories, schools, airports, bridges, railways, roadways and treatment plants.

Megan Mazzeffi – Surety Counsel, RLI

Megan Mazzeffi is Surety Counsel at RLI Insurance Corp. She provides legal support to underwriting across all surety lines. Before joining RLI, Megan worked as Claims Counsel with Travelers and CNA where she managed complex surety performance and payment bond claims. Prior to moving in house, Megan practiced law in Chicago, focusing her practice on surety, construction and commercial litigation. Megan received her Juris Doctorate from University of Illinois, Chicago School of Law and her Bachelor of Arts in Spanish and Political Science from Purdue University.

Jeff Olson – Salvage and Collateral Manager

Jeff Olson is the Salvage and Collateral Manager for Liberty Mutual. Jeff has worked in the surety claims field since 2000, handling primarily performance and payment bond claims. Jeff was also the President of the Pearlman Association in 2015-2022. Jeff enjoys spending time with his family and getting in a round of golf every so often. He claims a 10 handicap. Jeff has been a licensed attorney in the state of Washington since 1996.

Elizabeth Paquet – Beacon Consulting Group, Inc.

Elizabeth Paquet is a seasoned Project Manager and Construction Consultant with Beacon Consulting Group, where her extensive experience in the construction industry is a major asset. With over 25 years in the field and a master's degree in construction management from Stevens

Institute of Technology, Elizabeth has a solid foundation in both practical and technical aspects of construction. Prior to her role at Beacon, she founded and successfully ran a construction firm in the Northeast specializing in bridge and infrastructure projects. Her expertise in Surety bond default matters, project monitoring, construction claims review, and funds control provides valuable support to clients.

Michael A. Prisco – Partner, Torre, Lentz, Gamell, Gary & Rittmaster, LLP

Michael A. Prisco is partner at Torre Lentz Gamell Gary and Rittmaster, LLP in New York. He focuses his practice on construction and surety litigation, and appellate advocacy. Following the conclusion of his clerkship with the New York State Supreme Court, Appellate Division, Third Department, Michael joined Torre Lentz, where he has been involved in successfully litigating some of the largest surety and construction disputes in the country. Michael has not only achieved positive defensive results for his surety clients, but also large affirmative recoveries, including a recent judgment for a surety client in excess of $20 million. Michael has also been closely involved in the firm's appellate practice, using the insight and expertise he gained during his clerkship at the Appellate Division to challenge and defend lower court decisions. Michael graduated from the University at Buffalo earning a B.A. in Political Science in 2006. Michael then graduated first in his class and as Valedictorian while earning his JD from Touro Law Center in 2010. While there, Michael was a Faculty Fellow and served as an Editor for the Law Review. Michael is a member of the ABA's Tort Trial and Insurance Practice Section and was selected as a co-author for the Tort Trial & Insurance Practice Law Journal.

Edward J. Reilly – Senior Vice President, American Global

Ed Reilly is a Senior Vice President at American Global working with contractors both in the Greater New York region as well as firms with a national and global presence. Ed brings over 30 years of legal and surety underwriting expertise providing strategic surety solutions to contractors throughout North America. Ed has been a broker for over a decade and prior to that spent over twenty years on the carrier side in various surety underwriting and legal roles with Chubb. Ed regularly writes articles and presents on various construction and legal topics related to surety to industry organizations. Ed holds a J.D. degree cum laude from Seton Hall University School of Law and a B.S. in Economics from New York University.

Brian Rice – Founder & CEO, RiskScape Strategies, LLC

Brian Rice is the Founder & CEO of RiskScape Strategies, LLC, with over two decades of experience in enterprise IT for an international client base. He also serves as the CTO at Element Standard, a litigation case management system, and is the founder and president of Hedgehog Claims Management, a surety claims management system. Brian and RiskScape specialize in working with law firms, insurance companies, sureties, and professional services firms. Their services include Strategic Risk Management Consulting, Cyber Defense, Security Breach Analysis, Cyber Forensics, Surety Forensics, ESI (Electronically Stored Information) collection and expertise, Discovery Support, Fidelity Claims Investigations and Expert Witness services. He actively participates in industry discussions, frequently appearing as a podcast guest, and is deeply involved with the American Bar Association. Since 2019, he has been the Technology Co-Chair for the Fidelity and Surety Law Committee (FSLC) and serves as the Technology Vice-Chair for the FSLC for the 2024-2025 term.

Shoshana "Shana" Rothman – Senior Contract Claims Attorney II, Merchants Bonding Company

Shoshana "Shana" Rothman is a Senior Contract Claims Attorney with Merchants Bonding Company. Prior to joining Merchants in 2023, Shana spent seventeen years in private practice successfully litigating cases in federal and state courts across the country on behalf of sureties, general contractors, subcontractors, owners, and developers. Shana is known for her assertive, yet practical, business judgment in the resolution of disputes.

Tiffany Schaak – Liberty Mutual

Tiffany is the U.S. Western Regional Counsel and Legal Director for ASIA PAC for Liberty Mutual Insurance Company. She has been in the surety industry since 1994 serving in both in-house legal and private practice representing surety clients. Tiffany is a graduate of the University of Puget Sound (B.A. in Finance) and the Seattle University School of Law (Juris Doctor, cum laude) and has earned the AFSB and CPCU industry designations. She also manages to stay in the good graces of the State of Washington Bar Association.

Chad L. Schexnayder – Jennings Haug Keleher McLeod Waterfall LLP

Chad L. Schexnayder is a partner with the law firm of Jennings Haug Keleher McLeod Waterfall, LLP with offices in Phoenix, Albuquerque and Tucson. For more than 40 years, his practice has focused principally on the surety and construction industries, representing not only sureties, but builders, public and private owners, design professionals, suppliers, and insurers. He is a member of the NASBP Attorney Advisory Council, and a Past Chair of the Fidelity and Surety Law Committee of the American Bar Association, Tort & Insurance Practice Section. Mr. Schexnayder is an editor of industry publications, including *Surety Aspects of Bankruptcy Law and Practice*, American Bar Association (2021), *The Quick Reference Guide to Western States Surety & Fidelity Law* (2006 - 2020), and *The Surety Underwriter's Desk Book,* American Bar Association. He has authored numerous publications, including Chapter 145 "Surety and Bankruptcy" in the *New Appleman on Insurance Law Library Edition* and chapters in the following FSLC publications, *Managing and Litigating The Complex Surety Case, 3rd ed.; Bond Default Manual, 4th ed.; The Contract Bond Surety's Subrogation Rights; The Law of Commercial Surety and Miscellaneous Bonds, 2nd ed; The Law of Payment Bonds, 2nd ed.; The Law of Performance Bonds, 2nd ed.; The Surety's Indemnity Agreement: Law and Practice, 2nd ed.; The Most Important Questions a Surety Can Ask About Bankruptcy, 2nd ed.; and The Law of Suretyship, 2nd ed.* He is a graduate of Washington University in St. Louis (cum laude) and the Sandra Day O'Connor College of Law at Arizona State University (cum laude).

Michael Seminara – AVP Project Executive

Lifelong construction manager, initially trained as an architect since 1993. Specialized in construction problem solving as a design-build general contractor; and practiced construction/surety consulting for 14 years, including as a member of two of the nation's most prolific consulting firms. Manages and performs surety consulting as Project Executive for IAT Surety since 2019.

Stephanie Shear – Amtrust

Stephanie Shearhas over 40 years' experience in the surety industry. In her robust career she has had the privilege of learning many facets of the Industry, providing the perfect groundwork for the out of the box thinking. Graduating Cum Laude with a Bachelor of Science in Finance from California State University, Northridge, she started her career as the Underwriting Manager of a Nationwide Specialty Surety Program for an MGA handling a growing SBA program. Her career was enhanced when she had the opportunity to be the Managing Underwriter for a California Surety dealing solely with small contractors. The move into being an Agent/Broker for Contractors doing bonded work in California also provided valuable knowledge on understanding the agent/client relationships. Stephanie is an avid traveler and animal lover.

Michael J. Timpane – SMTD Law LLP

Michael J. Timpane is the managing partner for SMTD's Oakland office. He is an accomplished trial lawyer, mediator, arbitrator, special master and project neutral. Mr. Timpane has forty years of experience representing sureties, general contractors, subcontractors and owner/developers in complex construction, commercial, real estate and business matters. Mr. Timpane is on the AAA's Complex Construction and Commercial arbitration panels, and mediates both for AAA and independently. Mr. Timpane received his BA from the University of Virginia in 1981, and his JD from Berkley Law in 1984.

Patrick G. Toulouse – Technical Director & Counsel, Travelers

Patrick Toulouse earned a B.A. in Economics from Pomona College in Claremont, California in 1983. He received a J.D. from Cornell University in 1986 and a M.B.A. from the University of Washington in 1999. Prior to joining Travelers in 2002, Patrick was in private practice in Seattle for 16 years working on general business, bankruptcy, commercial, real estate, construction, and estate planning matters. He is currently a Technical Director & Counsel in Travelers' office in Federal Way, Washington where he manages and resolves complex performance and payment bond matters.

Stephanie Vreeland – Claims, Great American Insurance Group

Stephanie Vreeland is a claims attorney at Great American Insurance Group, where she specializes in managing a wide range of performance and payment bond claims. With various experience in claim investigations, Stephanie is well versed in navigating complex payment bond claims, conducting site visits, collaborating with outside consultants, overseeing project interventions, negotiating tender and take over agreements, and loss mitigation efforts. Stephanie holds a degree from the University of California, Irvine, and a law degree from Chapman University School of Law. She is a licensed attorney in California and joined the surety business in 2017. In her free time, Stephanie enjoys traveling with her husband and two daughters.

Susan Weinstock – Assistant Vice President, Claims, Arch Insurance

Susan Weinstock joined Arch in September 2023. Prior to joining Arch, she was a Technical Director at Travelers handling design professional liability claims. Before handling professional liability claims, Sue handled surety bond claims for 15 years, working as a Managing Director at Travelers Bond Claim, and before that at St. Paul and at USF&G. Sue started her surety industry career at Fidelity and Deposit Company of Maryland. Sue is a graduate of the University of South Carolina and the University of Maryland School of Law. She is licensed to practice law in Maryland. She is a member of the ABA Torts and Insurance.

Blake Wilcox – Executive Vice President, Liberty Mutual

Blake Wilcox is Executive Vice President, Chief Claims Officer, Liberty Mutual Surety Claims. He is responsible for managing all aspects of the Surety Claims Department. Prior to becoming Liberty Mutual Surety's Claims EVP, Chief Claims Officer, Blake served as the Vice President of Claims in Surety's Western Region where he was responsible for the management of all claims activity and personnel in his region. Blake began his surety career in 1994 with Safeco Surety (now Liberty Mutual Surety) in Atlanta as a Surety Claims Representative for the Southeast Region. In 1996, he accepted the position of Eastern District Surety Counsel with Firemen's Fund Surety but returned in 1998 to Safeco in Seattle as a Regional Claims Manager. In 2004 Blake was promoted to Assistant Vice President. Over the course of his career at the former Safeco Surety, he has managed each of the three Surety claims regions. Prior to entering the surety industry, Blake worked in the Office of the General Counsel of MCI, Inc. Blake is a member of the Louisiana Bar Association and the American Bar Association (ABA). He is currently the Chair of the ABA, Fidelity and Surety Law Committee. Blake is also a member of the Board of Directors of the Pearlman Surety Claims Association and Chairman of the Board of Directors for the National Bond Claims Association. Blake is a graduate of Louisiana Tech University with a Bachelor of Science in Finance and a J.D. from Louisiana State University, Paul M. Hebert School of Law.

BAINS LAW PLLC

Bains Law is a boutique business litigation and construction/surety firm, serving clients in Texas, Florida, Arkansas, and bankruptcy courts throughout the nation. Bains Law prides itself on focusing on the client and its goals, which may range from an early, cost-effective settlement to "all hands on deck" litigation through trial and appeal. As a small firm, Brandon is intimately involved in all facets of each case. This oversight ensures that the case is progressing in accordance with client's desires, costs are monitored and budgets kept, and clients remain continually informed and updated. Originally born in DeSoto, Texas, Brandon has spent most of his life in Texas, with the exception of a stretch in Miami as part of opening a law office for his prior firm. Brandon misses Cuban coffee more than can be expressed in words. Luckily, Bains Law is active in Florida, which provides a good excuse to return from time to time to enjoy a cortadito. Brandon has been married to Allison since 2008 and they have three beautiful (and sometimes crazy) children: Sailor, Saxon, and Cannon. At any given time, there are also dogs, cats, rabbits, and lizards running around. Brandon is thankful that his HOA does not allow chickens, donkeys, and the like, or he would come home one day to find Allison running a small farm. Finally, all rumors are true – Brandon is superb at karaoke.

Please visit our website at https://bainslaw.com/.

BEACON
CONSULTING GROUP, INC.

Beacon Consulting Group is a leading construction consulting and management services company. Our clients appreciate our track record of success and trust Beacon's team to take on the largest and most challenging assignments. For more than 20 years, our team has provided professional services related to the analysis, planning, management, monitoring and turn-around of construction projects of all kinds across North America.

Beacon's team brings a unique combination of technical competence, hands-on construction site experience, and unparalleled expertise related to the analysis of ongoing and troubled projects. While Beacon specializes in serving the Surety and Insurance industries, we also provide a full range of construction consulting and project management services to owners, banks, AEs, government agencies, law firms and other construction project stakeholders.

Please visit our website at https://www.beacon.ws/.

BOOTH MITCHEL & STRANGE LLP

Since 1955, Booth, Mitchel & Strange LLP has provided exemplary legal service to businesses and individuals throughout California. With offices in Los Angeles, Orange County and San Diego, we are positioned to efficiently handle litigation and transactions throughout Southern California. In addition, over half of the firm's practicing lawyers are partners who have a personal stake in the quality of our work, the satisfaction of our clients in the results obtained and in the professionalism with which we represent them.

Rated AV by Martindale-Hubbell, Booth, Mitchel & Strange LLP handles private and commercial lawsuits and arbitrations involving tort, contract, environmental, construction, surety, commercial, employment, professional liability, landlord-tenant and real estate disputes. We represent both plaintiffs and defendants and have thereby developed a breath of insight that facilitates prompt and accurate analysis of our client's problem and an ability to obtain the most favorable resolution in the most efficient and cost effective way.

We are also available to consult in the areas of commercial and construction contracting, real estate transactions, leasing, surety and employment.

Please visit our website at www.boothmitchel.com.

Bronster Fujichaku Robbins
ATTORNEYS AT LAW

Bronster Fujichaku Robbins is recognized as one of the premier trial law firms in Hawaii, handling cases on all of the islands. We are an experienced litigation firm with an established track record of successful settlements, work outs, and trial verdicts in a wide variety of complex litigation, arbitrations and mediations. Our firm is strongly committed to serving the community through significant public and private *pro bono* work.

Our philosophy is to obtain the best results possible for our clients through aggressive advocacy and efficient management practices.

Our areas of practice include commercial, business, surety and real property litigation; consumer protection law involving financial fraud, unfair or deceptive business practices; antitrust and competition law; litigation and advice to trustees and trust beneficiaries, including claims of breach of fiduciary duties; regulatory and administrative law before state and county agencies; environmental litigation; civil rights employment cases including discrimination, harassment, and wrongful discharge; and arbitration, mediation and other dispute resolution services.

Please visit our website at www.bfrhawaii.com.

CARNEY
BADLEY
SPELLMAN

Carney Badley Spellman works with a wide range of clients including, individuals, professionals, entrepreneurs, educators, closely-held or family businesses, franchises, as well as insurance companies, Fortune 500 companies and global industry leaders. They are in the private sector, public sector and governments. Our clients are forward thinkers, creative, collaborative and deliver high-quality products and business services to their markets. Our clients markets extend into almost every industry including, food and beverage, retail, professional services, arts, health care, education, manufacturing, technology, construction, surety, real estate and more. We partner with them so they can drive their journeys.

Please visit our website at www.carneylaw.com.

CSF
CASHIN SPINELLI FERRETTI

Cashin Spinelli & Ferretti, LLC is a multi-disciplinary firm providing consulting and construction management services to the Surety and construction industries. Since 2000, Cashin Spinelli & Ferretti has been providing expert advice and analysis to the nation's leading Surety companies. Drawing on the expertise of its staff of Professional Engineers, Architects, Attorneys, Certified Public Accounts, Field Inspectors and Claims experts, Cashin Spinelli & Ferretti is well poised to offer Surety consulting and litigation support services to the industry. Cashin Spinelli & Ferretti's workforce is large enough to handle any surety matter, but still maintain the client contact that is so important in our industry.

Operating from offices in: Hauppauge, New York (Long Island); Southampton, Pennsylvania (Philadelphia area); Avon, Connecticut (Hartford area); Crystal Lake, Illinois (Chicago area); Bend, Oregon; and Miami, Florida; Cashin Spinelli & Ferretti provides its services to all areas of the United States, and the Caribbean.

Please visit our website at www.csfllc.com.

Chiesa Shahinian & Giantomasi PC

Chiesa Shahinian & Giantomasi PC, with offices in New York, NY, West Orange, NJ and Trenton, NJ, is committed to teaming with our clients to achieve their objectives in an increasingly complex business environment. This goal is as important to us today as it was when our firm was founded in 1972.

Over the past four decades, CSG has expanded from eight to more than 130 members and associates, all of whom are dedicated to the legal profession and to the clients they serve. As our firm has grown, we have steadfastly maintained our commitment to excellence, offering businesses and individuals comprehensive legal representation in a cost-effective, efficient manner.

Our firm provides the high level of service found in the largest firms while fostering the type of personal relationships with the firm's clients often characteristic of small firms. We take pride in our reputation for excellence in all our areas of practice, including banking, bankruptcy and creditors' rights, construction, corporate and securities, employment, environmental law, ERISA and employee benefits, fidelity and surety, government and regulatory affairs, health law, intellectual property, internal investigations and monitoring, litigation, media and technology, private equity, product liability and toxic tort, public finance, real estate, renewable energy & sustainability, tax, trusts & estates, and white collar criminal investigations.

Please visit our website at www.csglaw.com.

Clark Hill

Clark Hill has been at the forefront of the fidelity and surety industry for over fifty years. From the quiet days of the 1960's to the mercurial 1980's dealing with the banking and real estate crisis throughout the country, to the advent of electronic banking and mega-construction projects of the 1990's and 2000's, the lawyers in Clark Hill's Fidelity & Surety group have worked in partnership with our clients in every aspect of the industry.

Clark Hill's surety lawyers provide experienced representation in all facets of the surety industry. The group's lawyers have significant experience representing sureties in connection with all types of bonds, including performance, payment, probate, public officials, subdivision, and various other miscellaneous commercial surety bonds. Our lawyers have successfully handled countless complex contract surety claims, expertly guiding sureties through pre-default investigations and negotiations and completion of construction projects after default, including drafting and negotiating completion contracts, takeover agreements, ratification agreements, financing agreements, and other pertinent surety agreements. Our lawyers likewise have extensive experience handling complicated and varied commercial surety bond claims, from the initial investigation and analysis to conclusion. Our expertise and experience extends to protecting the surety's interests in bankruptcy proceedings, including pre-bankruptcy and post-filing negotiations of reorganization plans, conflicts regarding unpaid proceeds of bonded contracts, negotiations regarding assumption of bonded obligations, and other issues affecting the surety in bankruptcy.

Please visit our website at www.clarkhill.com.

D'ARCY | VICKNAIR
ATTORNEYS AT LAW

D'Arcy | Vicknair LLC is a law firm that primarily focuses on Construction Law and Surety Law. The firm is a group of attorneys with records of successful litigation outcomes. Many of our attorneys are named in Super Lawyers, Best Lawyers, and many of the firm's attorneys also participate in bar associations and other professional organizations, frequently serving in leadership roles. Our attorneys also have degrees in other areas related to the practices of the firm, such as Electrical Engineering, Economics and Civil Engineering. In addition, two of our attorneys (including Mr. D'Arcy) teach at Loyola Law School New Orleans as adjunct law professors. As regards surety work, all aspects of construction performance and construction claims are handled by D'Arcy Vicknair. The firm tackles each phase of bond work from assessing claims through working out settlements, and, when appropriate and necessary, through detailed discovery, trial of the claim and handling any appeals, and associated indemnity actions. The firm provides a full range of surety-related legal services including, but not limited to, defaults, claim analysis, management and coordination, project takeovers, indemnity issues, subrogation issues, workouts, and mediation, arbitration, and litigation. Headquartered in New Orleans, Louisiana, the firm has attorneys licensed to practice in Louisiana, Texas, Mississippi, and New York. Please visit our website at www.darcyvicknair.com.

DRY LAW PLLC
ATTORNEYS AT LAW

At Dry Law, with a team of attorneys licensed in Texas, Oklahoma, Arkansas, and New Mexico, our services extend across the country, catering to clients from all corners of the nation. We pride ourselves on understanding how each client defines a successful resolution of their dispute, and work with them to achieve those results whether that occurs before, during, or at the conclusion of trial. Our goal is to provide our clients with efficient and cost-effective solutions that protect their interests. We realize that "legal victories" and "business victories" are not always synonymous and we are committed to achieving the best possible outcome for our clients, whether it is through creative and efficient pre-litigation solutions or, if necessary, tenacious advocacy in the courtroom. We understand that trust is essential in our field, and we work hard to earn our clients' trust and respect. Our clients trust us to handle their complex disputes, and we take that trust seriously. We are committed to finding the best solutions for our clients and providing them with the high-quality representation they deserve.

Over the years, the firm's attorneys have successfully obtained over $60 million in collateral orders through injunctions filed all over the South, including Texas, Oklahoma, Arkansas, Alabama, and Georgia.

Finally, our practice impacts lives not only in Texas, but across the United States and around the globe. That impact is not lost on our team and we are proud to be a part of this greater community. For 2023, Dry Law has committed to fund Eden's planting of over 33,000 mangroves and other native trees in Madagascar and Haiti.

Please visit our website at: https://drylaw.com/.

DUNLAP • FIORE
ATTORNEYS AT LAW

The attorneys at Dunlap Fiore, LLC, represent surety clients throughout the United States and have extensive experience in all aspects of the construction industry including: default, project completion, disputes involving payment, defective work, defective design, delay claims, and claims for additional work. Our attorneys are actively involved in negotiations with project owners, creditors and financially troubled contractors during all stages of the construction process.

Our firm has a particular focus in federal contracting and issues involving the Federal Acquisition Regulation. Representing sureties for government contractors, we draw on decades of experience in resolving government contract controversies. Our approach to legal representation involves fully understanding the needs of our clients, followed by personalizing our representation to obtain quick, positive results.

Please visit our website at: www.dunlapfiore.com.

ERNSTROM &DRESTE LLP

The Ernstrom & Dreste, LLP law firm is proud to focus its practice on the surety and construction industries. Our experience and in-depth knowledge of surety and construction law is recognized locally, across New York State and even nationally. We serve clients across the country and around the globe. We are more than just a law firm; our industry knowledge helps us understand what is important to our clients. As leaders in surety and construction law, we are a team of accomplished professionals who understand the nature of both industries and the forces which shape those industries. Because the industries we serve are intertwined, our understanding of the surety industry means we can better serve our construction clients, and our knowledge of the construction industry means we can better serve our surety clients. We go the extra mile to make sure our clients are satisfied with the legal services we provide.

Please visit our website at www.ed-llp.com.

Fasano Acchione & Associates provides consulting services for a variety of clients in the construction and surety industries. The individuals at Fasano Acchione & Associates are accomplished professionals with expertise in surety, construction, engineering, project management, and dispute resolution including litigation support.

FA&A maintains offices in New York, NY, Philadelphia, PA, Mount Laurel, NJ, Seattle, WA, and Baltimore, MD. If you would like more information, please contact Vince Fasano at (856) 273-0777 or Tom Acchione at (212) 244-9588.

Please visit our website at www.fasanoacchione.com.

The Wild-Wild West is the home of Faux Law Group. Faux Law Group represents sureties in Nevada, Idaho and Utah regarding claims on public and private payment and performance bonds, subdivision bonds, commercial bonds, license bonds, DMV bonds, and miscellaneous bonds. Faux Law Group represents sureties in the recovery of losses through indemnity and subrogation actions. Our attorneys are actively involved in the local communities in order to better represent the interests of our surety clients.

Please visit our website at www.fauxlaw.com.

Forcon International is a multi-dimensional consulting and outsourcing firm that has provided services to the surety, fidelity, insurance and construction services industry for more than twenty-nine years. Our surety and construction services include books and records review, claim analysis, third party claims administration for sureties, bid procurement, estimating, project administration, scheduling and funds control. We are able to offer these broad ranges of services because FORCON is composed of senior claim management professionals, accountants, professional engineers and construction management executives. Forcon has acted as third party administrator dealing with bond claims and runoff services since its inception. The firm operates from six (6) offices located throughout the United States [FL, GA, MI, MD, PA, VA].

Please visit our website at www.forcon.com.

Located in Seattle, Washington, Friedrich & Dishaw is a boutique Pacific Northwest law firm specializing in representing sureties, design professionals, and contractors in both Washington and Oregon.

Our practice primarily involves litigation and we represent our clients in federal and state courts and arbitration. However, we also offer pre-litigation assistance to all clients to help them navigate legal issues before they escalate. We are committed to serving our clients' unique interests and achieving favorable outcomes at all stages no matter the size or nature of the dispute.

Please visit our website at https://fdlawpllc.com/.

Global Construction Services, Inc.

Global Construction Services, Inc., located in Redmond, Washington, has provided project management, claims consulting services and surety loss consulting to virtually the entire spectrum of the construction industry since 1972. Our construction experts have assisted owners and contractors alike with the preparation and updating of project schedules, change order pricing and negotiation, and time extension calculations. We have prepared and/or defended claims on behalf of general contractors, subcontractors, sureties, public owners, private owners, architects and engineers. We have extensive experience providing expert testimony at deposition, arbitration and trial. We have deftly handled surety losses through all phases of project completion as well as the resolution of related claims both asserted by and defended by the surety.

Please visit our website at www.consultgcsi.com.

Guardian Group, Inc. is a full-service consulting firm with offices nationwide specializing in surety claims, property and casualty claims, construction management and claims, construction defect claims, fidelity claims, construction risk management, expert witnessing and litigation support.

When you need expert construction and surety claims support, our distinguished twenty-five year track record yields confidence, unprecedented efficiency and results.

Guardian's management and staff consists of a unique combination of highly qualified engineers, architects, schedulers, project estimators, accountants, claims personnel and other professionals with expertise in all types of construction and surety bond claims. This knowledge, together with fully automated systems, provides our clients with expedient and cost effective claims resolutions.

Call on the one company engineered to exceed your expectations. Please learn more about Guardian Group, Inc.'s successful approach to consulting by visiting our website at www.guardiangroup.com.

Founded in 1979, JAMS is the largest private provider of mediation and arbitration services worldwide. With Resolution Centers nationwide and abroad, JAMS and its nearly 300 exclusive neutrals are responsible for resolving thousands of the world's important cases. JAMS may be reached at 800-352-5267.

JAMS neutrals are responsible for resolving a wide array of disputes in the construction industry, including matters involving breach of contract, defect, cost overrun, delay, disruption, acceleration, insurance coverage, surety, and engineering and design issues. The JAMS Global Engineering and Construction Group consists of neutrals who serve the industry through traditional ADR options such as mediation and arbitration, and through several innovative approaches to ADR such as Rapid Resolution, Initial Decision Maker, and Project Neutral functions. Further, JAMS neutrals understand the complexity of project financing and the demands of large infrastructure and other mega-projects and are uniquely qualified to serve on Dispute Review Boards and other institutional approaches to conflict resolution.

Please visit our website at www.jamsadr.com.

JKW | JENNINGS HAUG KELEHER McLEOD WATERFALL LLP

The surety, construction, and litigation firm of Jennings Haug Keleher McLeod Waterfall LLP delivers effective courtroom representation, capable legal advice, and superior personal service to our clients in the construction and surety industries. Our experienced lawyers provide representation in a broad array of practice areas including construction law, surety/fidelity law, bankruptcy, Indian law, business law, and insurance defense.

What distinguishes our Firm is the quality of service and the consistent follow-through clients can expect from our attorneys and staff. We pride ourselves in providing timely, effective, and efficient legal services to our surety and contractor clients.

The firm serves businesses and individual clients throughout the state of Arizona, and we can accept cases in the southwest United States, California, New Mexico, Nevada and in select bankruptcy actions nationwide.

Please visit our website at www.jkwlawyers.com.

J.S. Held is a leading consulting firm specializing in construction consulting, property damage assessment, surety services, project and program management, and environmental, health & safety services. Our organization is built upon three fundamental pillars: to provide high quality technical expertise; to deliver an unparalleled client experience; and to be a catalyst for change in our industry. Our commitment to these pillars positions us as a leading global consulting firm, respected for our exceptional success addressing complex construction and environmental matters in the world. Our team is a group of multi-talented professionals, bringing together years of technical field experience among all facets of projects including commercial, industrial, high rise, special structures, governmental, residential, and infrastructure. Our uncompromising commitment to our clients ensures our position as one of the most prominent consulting firms in our industry.

Please visit our website at www.jsheld.com.

Established in 1874, Kerr, Russell and Weber, PLC has evolved from a small practice in Detroit into a firm of committed, resourceful and respected lawyers with many talents and specialties. Our areas of practice include fidelity and surety. Kerr Russell represents sureties in a wide range of matters, including the handling of defaults; claims against performance bonds, payment bonds, probate bonds and other commercial bond forms; performance takeovers, tenders and subcontract ratifications; pursuit of indemnification; and all aspects of litigation. Our attorneys also include those whose specialties afford our surety practice access to a wide array of disciplines which are often beneficial to our services for surety clients, including corporate, tax, real estate, bankruptcy, and employment practices.

Please visit our website at www.kerr-russell.com.

Koeller, Nebeker, Carlson, Haluck, LLP (KNCH) prides itself in its handling of complex litigation matters. Our broad spectrum of practice areas includes litigation defense, business law, employment law, insurance coverage and bad faith, environmental law, and most types of general practice areas. Our clients range from small business owners and their insurance companies; to mid-sized commercial contractors, landlords and tenants; to large nationwide homebuilders and commercial builders.

Over the 30 years of our existence, we have also become a recognized authority in all areas of construction litigation and transactions, with a particular specialty in representing builders, developers and general contractors. From real estate acquisition, development and financing, to construction and business litigation for both residential and commercial projects, our breadth of experience and geographical coverage ensures that our clients' personal business and financial concerns are being represented every step of the way.

As a direct result of the faithful support of our clients and the dedicated service of our attorneys and staff, the firm has grown to over 80 attorneys, 200 employees, with offices in Irvine, San Diego, Sacramento, Las Vegas, Phoenix, Orlando and Austin. Indeed, since its inception in 1986, KNCH has formed a dynamic presence throughout the states of California, Arizona, Nevada and Florida and has recently extended its reach into Texas. We look forward to developing new client relationships while continuing to excel at serving the needs of existing clients by achieving the highest level of excellence.

Dedicated to service, and driving ahead with integrity and courage, we are the law firm you want on your side.

Please visit our website at www.knchlaw.com.

KREBS FARLEY

The nationally recognized attorneys of Krebs Farley have litigated cases all over the United States. Our attorneys' skills show not only in the courtroom, but also in negotiation. The personal commitment and dedicated effort that our attorneys put forth make a difference in every case we handle. We are smart, pragmatic, and diligent. And we are dedicated to creatively pursuing the best solutions for our clients.

We understand the importance of prompt, correct, and concise responses; foreseeing and accounting for future contingencies in contract drafting; resolving disputes that can be amicably resolved; and positioning those matters that cannot be settled for a successful outcome in litigation. We do this while remaining cognizant that litigation often impacts business considerations beyond the case at hand. We also work closely with our clients in developing and operating within a litigation budget. Whether it be in negotiation, in mediation, in arbitration, in trial or on appeal, the attorneys at Krebs Farley seek pragmatic solutions for our clients.

Please visit our website at https://krebsfarley.com.

LANGLEY LLP
ATTORNEYS & COUNSELORS
Working Smarter.

Langley LLP is a Texas civil trial, commercial bankruptcy, and appellate firm that represents Fortune 500 and middle- market industry leaders in disputes throughout the United States. Our firm is made up of ambitious and smart lawyers who demonstrate passion and zeal in representation of the firm's clients. We help our clients solve their legal challenges through aggressive negotiation or litigation. Our areas of specialty include surety and construction, property insurance claims, commercial litigation, and commercial bankruptcy.

Our attorneys try cases, handle arbitrations, litigate, negotiate, analyze, and communicate. At the heart of the matter, for us it is all about understanding our clients' business and keeping our clients informed. We are strong believers in creating a plan for each matter designed to arrive at an efficient and effective resolution. Most cases in the United States settle, as do most of ours. When a case must be tried, our trial lawyers relish the opportunity – whether it is a two day trial to the bench or a sixteen week jury trial. Whether the amount in controversy is hundreds of millions of dollars or a small sum, our experience, communication skills, and use of cutting edge technology position us to achieve the winning result.

Please visit our website at www.l-llp.com.

The Law Offices of
John L. Fallat

Our firm has been representing fidelity and surety companies for over 20 years. We focus on problem solving, always attempting to resolve conflicts efficiently in a good-faith effort to avoid expensive, protracted litigation. However, we are certainly prepared to defend claims through the entire judicial process, including appeals. The size of our firm enables us to give personal attention to our clients' needs.

Please visit our website at www.fallat.com.

LC LEVY CRAIG
— LAW FIRM —

Levy Craig is a Kansas City-based full-service law firm that can support clients across many different practice areas from corporate law to family law. Though our attorneys represent a variety of disciplines, we all share a common focus: you.

Levy Craig attorneys not only take a professional interest in your goal, but each takes a personal interest in you, too. We'll develop a close working relationship with you to resolve the legal issues you face and achieve your success.

If you want big-firm expertise with a smaller firm's responsiveness, you'll like how we represent you.

Please visit our website at https://www.levycraig.com.

Lewis Brisbois offers its clients counsel experienced in handling all facets of surety practice from its offices throughout the United States. Our attorneys have successfully represented clients in resolving contract and commercial surety, and issues ranging from simple license bonds to complex multi-state contract surety defaults. Our attorneys have extensive experience handling surety matters in mediation, arbitration, state, and federal courts, as well as appellate courts, including United States Circuit Courts.

Please visit our website at www.lewisbrisbois.com.

The Loewke Brill Consulting Group was formed in 1992 by Peter J. Brill. Peter had a wealth of construction and claim knowledge from his 40+ years of service to the industry. In 1998 Mike Loewke and Peter joined forces. The company expanded its capability in 2003 when Jim Loewke joined the team. Peter Brill passed away in the summer of 2003. Today, partners Mike and Jim Loewke continue to provide quality service as “The Best Defense in the Construction Industry.” They are supported by a staff of talented, highly trained professionals that attend to each project with attention to detail. We service all levels of surety and construction including litigation support projects.

The Loewke Brill Consulting Group professionals are Construction Specialists with three generations of experience and service in the industry. Our company's commitment to its core values of integrity, trust, and reliability has resulted in exceptional client satisfaction for many years.

The Loewke Brill Consulting Group has offices located in Rochester, NY, Hudson Valley, NY, Jensen Beach, FL, Charlotte,NC and our newest location in Ontario, Canada.

Please visit our website at www.loewkebrill.com.

Manier & Herod, P.C. is located in Nashville, Tennessee and provides representation, counsel, and advocacy on behalf of sureties and fidelity insurers throughout the United States. Manier & Herod's attorneys are actively involved in the Fidelity and Surety Committee of the American Bar Association (ABA) and frequently address the ABA and other professional organizations on topics relevant to the fidelity and surety industries. Manier & Herod represents fidelity insurers and sureties in underwriting, pre-claim workouts, coverage analysis and litigation, contractor defaults including performance bond and payment bond claims, contractor bankruptcies, surety litigation, indemnity actions, and other matters and forums.

Please visit our website at www.manierherod.com.

Markel Surety is proud to be a Sustaining Member of Pearlman, one of the finest networking and continuing surety claims education organizations for our industry. Markel Surety builds long-term, mutually beneficial relationships to help our partners grow their business through all market cycles. We are a Fortune 500 Company with superior capitalization. We pride ourselves on being responsive, consistent in our approach to surety credit, and committed to our clients for the long term. Our claims team strives to be responsive, creative in our approach to dispute resolution and avoidance, and a resource to our underwriters, producing partners, and accounts.

Please visit our website at www.markel.com.

Matson, Driscoll & Damico LLP is a world-class forensic accounting firm that specializes in economic damage quantification assessments. We have deep rooted and comprehensive expertise in matters related to the surety and construction industry.

Our experts speak over 30 languages and we have 42 offices on 4 continents. Our work spans more than 130 countries and 800 industries, and we frequently work with law firms, government entities, multi-national corporations, small businesses, insurance companies and independent adjustment firms.

For more information please contact David Stryjewski or Peter Fascia at 215.238.1919 or visit us at mdd.com.

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m a x i m u m MPC property construction

Maximum Property Construction's mission is to provide expertise in the unique practices of Construction Defect Evaluations, Expert Witness Services, Owner's Representative Services, and Surety Claims Investigations. We apply core values of rapid response to all inquiries, personal integrity in our business relationships, impeccable customer service, and excellence of our work product at all times.

Our services include:

- Expert Witness services in the fields of mechanical-HVAC, plumbing, and general construction
- Construction Defect Evaluation, Analysis, and Litigation Support
- Construction Surety Claims Investigations
- Owner's Representative
- Commercial Construction License

Please visit our website at www.mpcs-llc.com.

Nicholson

Nicholson Professional Consulting, Inc. – a time-tested accounting and construction consultancy based in Atlanta, Georgia, with various other office locations throughout the United States. NPCI provides Accounting, Engineering, Construction Management and litigation support expertise, primarily to the surety/fidelity industry, as well as, construction clients and owners. In response to our client's needs, NPCI has also developed a project completion unit, known as Nicholson Management, and has continued to expand its own expert testimony and reporting in the areas of litigation support. NPCI is vertically integrated, providing clients with a range of services that span from early-phase performance review to full-scale Surety intervention, from prime takeover and project completion to litigation support in the resolution of construction claims. NPCI leverages its experience at all phases of contract administration to provide greater peace of mind and confidence to its various clients.

Please visit our website at npcius.com

PCA Consulting Group was formed in January 1989 for the purpose of providing the surety, insurance, legal and financial industries with cost effective technical services. With over 80 years of aggregate experience, the construction and engineering professionals of the PCA Consulting Group have served the surety and insurance industries throughout the majority of the continental United States and have been involved in matters requiring knowledge of every construction specialty.

PCA has adapted its experience and systems to meet the Surety's requirements. From evaluating the status and cost-to- complete projection for an individual project, to analyzing the fiscal and operating point-in-time cash position of an entire construction company, PCA has developed the systems, acquired the expertise, and retained the personnel to provide results in a timely and cost effective manner.

Please visit our website at www.pcacg.com.

Companies with business interests across the South turn to Phelps Dunbar for counsel on their legal needs. With 13 office locations in the U.S. and in London, we serve clients in the region's major commercial centers. Our 350-plus lawyers serve clients in several core practice areas, including labor and employment, litigation, business, admiralty, insurance coverage, and healthcare, and have a substantial construction and surety law focus in our Louisiana, Florida, Texas, Alabama, and Mississippi offices. But it's more than our casework that sets our firm apart.

We spend time with you off the clock, so we can learn everything from your strategic goals to challenging operational issues. We are known for asking questions, not just about what is, but about what should be. And we make sure that you access our experience seamlessly, with every lawyer in every office available to be part of your team. We do this because anything can make the difference in a business-critical deal or lawsuit.

We embrace the future, not just of your industry but of our own. We are constantly looking for how to improve services and outcomes through technology. Through our Phelps Analytics Lab, we partner with Tulane University to pilot programs that use AI to identify business trends, develop litigation strategies and improve efficiency.

We are proud to offer national talent with local pricing to companies working throughout the Gulf South. We welcome the chance to work with you.

Please visit our website at https://www.phelps.com/.

RJT CONSTRUCTION, INC. CONSULTING SERVICES

For over 30 years, RJT Construction, Inc. has been dedicated to providing exceptional quality, experience, and professional services to the construction, surety, and legal industries. RJT operates as a full service consulting firm specializing in construction, surety, and related claims and litigation. RJT's typical services include: surety claims investigation and default analysis, completion obligations and oversight on behalf of surety, reporting, monitoring, payment bond analysis, claims preparation, claims analysis including support and defense, construction defect claims and litigation support, forensic investigation, scheduling analysis, and expert designation and testimony.

Please visit our website at www.rjtconstruction.com.

ROBINS KAPLAN LLP

Robins Kaplan LLP is among the nation's premier trial law firms, with more than 250 attorneys in eight major cities. Our attorneys litigate, mediate, and arbitrate client disputes, always at-the-ready for an ultimate courtroom battle. When huge forces are at play, major money is at stake, or rights are being trampled, we help clients cut through complexity, get to the heart of the problem, and win what matters most.

Our surety attorneys have combined over 100 years of experience in the evaluation, resolution and litigation of bond claims. This includes the handling of multi-project defaults to achieve a timely completion of open projects while mitigating losses and maximizing recovery efforts. Our surety attorneys also counsel clients on matters arising out of fiduciary bonds, litigation bonds, license and permit bonds, and other miscellaneous bond matters, as well as provide necessary training and counsel on state regulations and Department of Insurance requirements.

Please visit our website at www.robinskaplan.com.

Robinson+Cole

Robinson+Cole is an Am Law 200 firm serving regional, national, and international clients from nine offices throughout the Northeast, Florida, and California. Our 200-plus lawyers and other professionals provide legal solutions to businesses, from start-ups to Fortune 100 companies and from nonprofits and educational institutions to municipalities and state government.

Through an understanding of our clients' industry, the nature and structure of their business, their level of risk tolerance, and their budget considerations, we tailor our legal strategy to align with their overall business needs. Where appropriate, alternative billing arrangements are made to provide clients with a greater degree of certainty about their legal costs. Robinson+Cole's varied practice areas include construction and surety; insurance and business litigation; land use, environmental and real estate; labor, employment and benefits; tax; and intellectual property and technology.

Please visit our website at www.rc.com.

Sage Associates, Inc.

Sage Associates is very pleased to be among the sponsoring firms of Pearlman. We have provided high quality, high value consulting services in the surety industry, as well as construction, banking, and insurance industries, for more than 30 years and our contacts within the construction community and with attorneys and mediators within the construction field is unmatched in the western United States.

The firm's employees and associates offer a broad mix of expertise and skills. Surety claims work is facilitated by knowledge, patience, focus, and relationships. We focus on our client's business and objectives, working hard to assist sureties "deliver on the promise" and resolve claims. Cost to benefit is always a paramount consideration at Sage Associates as is a long term focus both in the assignment and with our relationship with our clients.

Please visit our website at www.sage-associates.com.

Sage, an Aperture Company, provides consulting and expert witness services to the surety and construction industry on projects throughout the United States and Canada. Our expertise is focused on the heart of construction projects: time and money. The background of Sage, an Aperture Company's team makes rapid and precise evaluation of costs to complete and project status possible. Sage, an Aperture Company's extensive background in construction claims and litigation is an asset when reviewing actual or potential defaults since troubled projects often have significant construction disputes. Favorable resolution of those disputes can be a significant source of salvage and reduce losses. Construction disputes arise out of the need by one of the parties to recover monetary damages. Sage, an Aperture Company focuses on first the areas of damage and then focuses on causation to narrow the research effort to the relevant areas of performance, resulting in a more cost-effective approach to claims assessment, development, and defense.

Please visit our website at www.sageconsulting.com.

SMTD Law LLP is a boutique law firm specializing in construction, surety and business litigation. The Firm's attorneys are highly experienced in handling disputes unique to the construction and surety industries and they understand the rigors and challenges of litigation. The Firm handles matters for many of the world's leading sureties in all types of commercial and contract surety matters. Our attorneys frequently assist our surety clients with: defense of contract and commercial bond claims; analysis and prosecution of affirmative claims; preparation of transactional documents, including loan and financing agreements; subdivision workouts with lenders and local entities; and handling complex indemnity and other salvage actions.

Please visit our website at www.smtdlaw.com.

Simon
Peragine
Smith &
Redfearn LLP

Simon, Peragine, Smith & Redfearn, LLP has extensive experience in handling fidelity and surety related matters and litigation. Over the years, the firm's attorneys have handled numerous fidelity, contract surety, financial guarantee and miscellaneous bond and commercial surety matters.

The firm's attorneys who practice in the surety law field have been active participants in many professional associations, such as the Fidelity & Surety Committee of the Tort Trial Insurance Practice Section of the American Bar Association; the DRI Surety Committee; National Bond Claims Institute; Surety Claims Institute; and Louisiana Surety Association.

H. Bruce Shreves is the former Chair of the American Bar Association Fidelity & Surety Committee and the DRI Surety Committee; Jay Kern has served as a Vice-Chair of the American Bar Association Fidelity and Surety Committee; Mr. Shreves, Mr. Kern and Denise Puente have delivered numerous papers and lectures before various ABA Committees, as well as DRI, National Bond Claims and Surety Claims Institute.

Mr. Shreves is currently the Chair of the Louisiana Fidelity, Surety & Construction Law Section of the Louisiana Bar Association. Mr. Shreves, Mr. Kern and Ms. Puente have been named by New Orleans Magazine as Best Lawyers in New Orleans in the area of construction/surety, and have been named as Louisiana Super Lawyers in the areas of construction and surety. They are contributing authors or editors to various ABA publications, including the Law of Payment Bonds; the Law of Performance Bond; and the Law of Suretyship.

Please visit our website at www.spsr-law.com.

Sokol Larkin, a boutique law firm located in Portland, Oregon, has earned its reputation as one of the Pacific Northwest's premier firms in the areas of construction and design law, surety and fidelity law, and business, commercial and real estate matters. The firm's clients range from individuals and small businesses to large multi-national companies.

Jan Sokol and Tom Larkin established the firm to create a team of excellent attorneys. With principle, passion and purpose, our mission is to provide the highest level of legal service in an aggressive, though pragmatic and cost-effective, manner to help clients achieve the best possible results. The firm's success has helped the firm develop long-standing trust and relationships with its clients. At Sokol Larkin our attorneys and support staff each contribute their individual expertise to provide our clients with exceptional service and personal attention in all matters. The firm has attorneys admitted to practice in Oregon, Washington, Idaho, Alaska, California, the District of Columbia and other jurisdictions.

Please visit our website at www.sokol-larkin.com.

With a combination effective on March 1, 2024, Spencer Fane, LLP, steps into the shoes of Snow Christensen & Martineau as a sustaining member of The Pearlman Association and now counts Snow Christensen's Salt Lake City and St. George offices among the twenty-six Spencer Fane offices located across the United States. That combination preserves Snow Christensen's legacy of litigation expertise and related legal services to clients in Utah and throughout the Intermountain West since 1886. Spencer Fane adds to its full-service scope of business law a continuing commitment of dedicated professionals serving the surety industry, instilling confidence and certainty that the clients' interests are the firm's priority.

Please visit our website at www.spencerfane.com.

The Horowitz Law Firm
A Professional Corporation

Our principal lawyer, Jeffrey D. Horowitz, who has more than 30 years of surety law experience, spent 10 years as in-house counsel for a national surety bond company, has since been in private practice for more than 20 years, and currently represents sureties with their bond claims and litigation needs all over California.

We have experience handling many types of surety bonds, including Performance Bonds, Payment Bonds, Subdivision Bonds, License and Permit Bonds including Contractor's License Bonds, Mechanics Lien and Stop Payment Notice Release Bonds, Bid Bonds, Motor Vehicle Dealer Bonds, Notary Bonds, and Insurance Broker Bonds.

With more than three decades of experience working specifically on issues related to surety bonds, and handling a wide range of surety bond litigation, including trials, appeals, mediations and negotiation, our office has built a reputation of successful and effective representation. For strong representation on issues related to surety bonds, including surety defense, indemnity and subrogation, we are ready to represent your interests. Mr. Horowitz also practices construction and real estate law.

The Horowitz Law Firm, APC is based in Sherman Oaks, a suburb in the City of Los Angeles, California.

Please visit our website at www.jdhorowitzlaw.com.

The Hustead Law Firm
A Professional Corporation

The Hustead Law Firm, A Professional Corporation, launched in 1996 when Patrick Q. Hustead left the partnership of one of Denver's largest law firms to create a dedicated litigation practice focused on the surety and insurance industry. Since that time, the Firm has grown into a dynamic mix of attorneys and technology that produces the results its clients deserve and expect. From complex surety matters to nuanced bad faith claims, the Firm delivers the firepower of a large firm with the personal attention of a small one.

Please visit our website at www.thlf.com.

Torre, Lentz, Gamell, Gary & Rittmaster, LLP is a boutique New York based law firm specializing in surety, fidelity and construction law and providing clients with the best features of small and large firms. TLGGR is able to provide this service by combining the seasoned legal talent and modern technology of a large firm with the personal attention, expertise and congeniality of a small firm. Our office is located in Jericho, Long Island, New York, which is within 30 minutes of Manhattan. While the firm's practice is located primarily in New York and New Jersey, TLGGR also has recently handled substantial matters in Connecticut, Pennsylvania, Delaware and Washington, D.C.

TLGGR handles all manner of commercial and business problems but in large measure specializes in counseling and litigation relating to (1) construction bonds, commercial surety bonds and other forms of suretyship, (2) construction contract and engineering disputes, (3) claims against project owners for wrongful termination and additional compensation, (4) financial institution bonds and other forms of fidelity or crime insurance, and (5) creditors' rights in bankruptcy. These matters involve us in a broad range of commercial problems, including workouts, bankruptcy proceedings, and insurance coverage analysis and litigation.

Please visit our website at www.tlggr.com.

VERTEX is an international technical services firm that operates with urgency and produces exceptional value for our clients. VERTEX provides construction, environmental, energy, air quality, and engineering solutions. With over 20 domestic and international offices, along with unique teaming arrangements worldwide, we have the reach and relevant expertise to approach projects with remarkable efficiency gained through local knowledge. Our reputation for excellence, both in terms of timely results and quality service, spans the globe. It has earned us the trust of a prestigious client base that includes Fortune 100 companies and esteemed boutique firms in virtually every line of business.

Please visit our website at www.vertexeng.com.

For over a quarter of a century, the attorneys at Ward, Hocker & Thornton, PLLC (WHT) have diligently and competently served their clients and have provided them with the highest quality legal representation. With offices in Lexington and Louisville, WHT serves the entire state of Kentucky and has litigated cases in nearly all of its 120 counties.

Additionally, WHT often handles cases in the adjoining states of Indiana, Ohio, Tennessee and West Virginia.

WHT is a firm which generally represents the insurance industry and its insureds, the surety and fidelity industry, and the trucking industry. We also directly represent self-insured corporations (many of which are Fortune 500 companies) and various hospitals, health care providers and financial institutions. The net result is that our team of 30 lawyers has tremendous negotiation and litigation experience, having collectively handled thousands of cases encompassing several different areas of law, including: appellate practice, automobile/motor vehicle litigation, construction law, commercial and business litigation, extra-contractual/coverage issues, financial institution law, fire & casualty, governmental liability, healthcare professional liability, insurance defense, large loss subrogation, products liability defense, premises liability, surety & fidelity law, trucking & transportation litigation, and workers' compensation defense.

Our attorneys are licensed to practice in all courts in Kentucky, and in addition have attorneys licensed to practice in the states of Indiana, Ohio and Tennessee. WHT has been awarded the prestigious AV rating offered by LEXISNEXIS Martindale-Hubbell, and we are listed in the Best Directory of Recommended Insurance Attorneys and Adjustors.

Our goal is to provide you and your business with result-oriented legal services in an effective, cost-efficient manner. We at WHT welcome the opportunity to be of service to you and will aggressively work to achieve a successful outcome.

Please visit our website at www.whtlaw.com.

Watt, Tieder has one of the largest construction and surety law firms in the world, with practices that encompass all aspects of construction contracting and public procurement. Our practice groups include: domestic construction law, government contracts, international construction law and surety law. Watt, Tieder's work characteristically relates to major development and construction projects involving highways, airports and seaports, rail and subway systems, military bases, industrial plants, petrochemical facilities, electric generating plants, communication systems, and commercial and public facilities of all types in the United States and globally.

Watt, Tieder is one of the premier surety law firms in the country. We represent more than a dozen sureties in North America, acting as national, regional or public contract counsel for them. Our surety clients include industry leaders like Arch Insurance Company, Cincinnati Insurance Company, Hartford Fire Insurance Company, Liberty Mutual Surety Insurance Company, RLI Corp., SureTec Insurance Company, Travelers Casualty and Surety Company and Zurich North America. In our thirty years of practicing surety law, Watt, Tieder has gained particular expertise in default terminations, affirmative construction claims, surety "abuse of discretion" cases, government contract disputes, surety bad faith claims and all forms of contract bond defaults.

With offices in Washington DC Metro; Irvine, California; Las Vegas, Nevada; Seattle, Washington; Chicago, Illinois; and Miami, Florida, we have a staff of over 50 legal professionals working throughout the United States, Canada, Europe, the Middle East, Asia, South America, Australia and Africa.

Watt, Tieder and its attorneys are annually recognized for accomplishments in construction and surety law, including top tier rankings in Chambers USA, the Legal 500 and US News-Best Lawyers.

Please visit our website at www.WattTieder.com.

Weinstein Radcliff Pipkin LLP is a Dallas, Texas–based commercial litigation law firm with extensive experience in commercial construction, surety, fidelity and professional liability coverage and defense, and labor and employment. As advocates, clients nationwide look to us as their go–to firm for litigation in Texas, Oklahoma, Arkansas, and elsewhere. As advisers, we provide an early, honest case assessment, offering creative solutions and establishing reasoned expectations that save time, money, and headaches. Our attorneys have extensive experience handling construction and surety cases involving contractor defaults, construction and design defects, impact and delay claims, and catastrophic loss. We also have considerable trial and litigation experience for fidelity and professional liability insurers, as well handling labor and employment cases involving corporate management, employee benefits, and non-compete agreements.

Please visit our website at www.weinrad.com.

Williams Kastner has been serving clients in the Northwest since 1929. With more than 90 attorneys in offices located throughout Washington and Oregon and affiliated offices in Shanghai, Beijing and Hong Kong, we offer global capabilities and vision with a local sensibility.

We are well known for our vast trial and litigation successes. Our deep bench of seasoned litigators have extensive trial experience in federal and state courts. In fact, over the course of the last three decades, Williams Kastner has tried (and won) more cases to jury verdict than any other firm in Washington.

The Construction Litigation & Surety Practice Team at Williams Kastner serves clients involved in all aspects of the construction industry, including general contractors, specialty subcontractors, owner/developers, architects, engineers, lending institutions, sureties and insurers. In the surety context, the Team handles the entire spectrum of issues, such as: analyzing and responding to default terminations and other performance bond claims; providing advice regarding complex bond claim investigations; addressing various project completion scenarios, including tenders, takeovers and financing the bond principal; defense of performance and payment bond claims under the Miller Act and state law, including discharge, exoneration and other surety-specific defenses; defense of extra-contractual claims by claimants, bond principals and indemnitors involving claims brought under the Washington Insurance Fair Conduct Act, the Consumer Protection Act and common law bad faith; prosecution of affirmative construction claims to mitigate surety losses; prosecution of indemnity and other salvage actions on behalf of sureties; resolving priority disputes between sureties, banks, trustees and public agencies; and defense of claims on miscellaneous bonds, including license bonds and public official bonds. When the situation warrants, the Team draws upon other practice areas within the firm to serve the needs of our construction industry clients. These practice areas often include: labor and employment, collections, bankruptcy, land use and real estate.

Please visit our website at www.williamskastner.com.

WOLKIN • CURRAN, LLP

Wolkin Curran specializes in surety, construction and insurance coverage litigation. With offices in both San Francisco and San Diego, Wolkin Curran's primary practice areas are in California and Nevada.

Wolkin Curran's surety and construction practice emphasizes the representation of sureties, general contractors, and public entities. Wolkin Curran investigates, negotiates, settles and litigates bond claims in trial, bankruptcy, and appellate courts. Wolkin Curran represents sureties in all aspects of commercial and contract suretyship, including takeover, completion, payment and creditor issues.

Please visit our website at www.wolkincurran.com.

WC&S Wright, Constable & Skeen LLP
Attorneys At Law

Wright, Constable & Skeen's Fidelity and Surety Law Group has over 100 years of combined surety and fidelity experience. WC&S lawyers represent sureties in federal and state courts at both the trial and appellate levels, before regulatory bodies, as well as in various forms of alternative dispute resolution, including mediation and arbitration. WC&S lawyers draw on experiences gained both from working within, and for, surety companies.

WC&S' experience and knowledge provide efficient representation for its clients throughout the Mid-Atlantic region, including handling complex surety cases with the federal government. WC&S' practice encompasses all aspects of performance bond claims, payment bond claims, bankruptcy, indemnity/subrogation, and commercial surety bonds. WC&S is an active participant in various legal and industry groups and associations, and its lawyers are leaders and speakers on a wide variety of important topics to the surety and fidelity industry. In addition, WC&S' lawyers are contributing authors or editors to various ABA and industry publications and books. WC&S has developed a national reputation in representing sureties in bankruptcy, authoring various papers and texts on the subject, and speaking at numerous conferences.

Wright, Constable & Skeen has been named to the "2012 Top Ranked Law Firms™ in the U.S." by Lexis Nexis® Martindale-Hubbell®, as published in Fortune magazine. WC&S was recognized as a U.S. law firm of 21 or more attorneys where at least one out of every three lawyers, including associates, achieved the AV®Preeminent™ Peer Review Rating℠.

Please visit our website at www.wcslaw.com.

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Pearlman 2024 Attendees

Calbin Agus
CNA Surety
601 Union Street, Suite 1601
Seattle, WA 98101
(360) 348-0525
calvin.agus@cnasurety.com

Christine Alexander
Arch Insurance Group, Inc.
1601 Cherry Street
Philadelphia, PA 19102
(215) 606-1596
calexander@archinsurance.com

Luis Aragon
Liberty Mutual Surety
1001 4th Avenue, Suite 3800
Seattle, WA 98154
206-473-6812
Luis.aragon@libertymutual.com

Stephen Baker
Krebs Farley, PLLC
400 Poydras Street, Suite 2500
New Orleans, LA 70130
469-387-9724
Sbaker@krebsfarley.com

Sam Barker
Liberty Mutual Surety
1001 4th Avenue, Suite 3800
Seattle, WA 98154
(206) 473-6449
sam.barker@libertymutual.com

Christine Bartholdt
Liberty Mutual Surety
1001 4th Avenue, Suite 3800
Seattle, WA 98154
(206) 473-3353
christine.bartholdt@libertymutual.com

Richard Baudouin
Skyward Specialty Insurance
800 Gessner Road, Suite 600
Houston, TX 77024
504-420-8564
rbaudouin@skywardinsurance.com

Todd Bauer
Guardian Group
2350 W. 205th Street
Torrance, CA 90501
310-320-0320
todd.bauer@guardiangroup.com

Will Beasley
Merchants Bonding Company
5502 Vanderbilt Avenue
Dallas, TX 75206
214-250-1493
wbeasley@merchantsbonding.com

Steven Beauchamp
Dry Law PLLC
909 18th Street
Plano, TX 75074
(972) 797-9517
sbeauchamp@drylaw.com

Nicole BeBeau
Liberty Mutual Surety
3009 N 24th Street
Tacoma, WA 98406
(206) 473-5426
nicole.bebeau@libertymutual.com

Robert J. Berens
SMTD Law LLP
2001 E. Campbell Avenue, Suite 103
Phoenix, AZ 85016
602.258.6219
rb@smtdlaw.com

Amy Bernadas
Liberty Mutual Surety
1339 E Second Street
Pass Christian, MS 39571
(601) 503-1176
amy.bernadas@libertymutual.com

Makayla Biegler
Applied Underwriters
10825 Old Mill Road
Omaha, NE 68154
(877) 234-4420
mrbiegler@auw.com

Melissa Black
Liberty Mutual Surety
7900 Windrose Avenue
Plano, TX 75024
(469) 997-6756
melissa.black@libertymutual.com

Clarence Bolanos
Guardian Group
13101 Preston Road, Suite 110
Dallas, TX 75240
310-320-0320
clarence.bolanos@guardiangroup.com

Jonathan Bondy
Chiesa Shahinian & Giantomasi PC
105 Eisenhower Parkway
Roseland, NJ 07068
973-530-2052
jbondy@csglaw.com

Paul Bordieri
Perini Management Services, Inc.
73 Mt. Wayte Avenue, Suite 1
Framingham, MA 01701
(508) 628-2125
pbordieri@perini.com

Connie Boudreau
Liberty Mutual Surety
1001 4th Avenue, Suite 3800
Seattle, WA 98154
206-473-3395
Connie.boudreau@libertymutual.com

Ron Boyle
Nicholson Professional Consulting, Inc.
500 Sun Valley Drive
Roswell, GA 30076
(316) 648-2560
ron@npcius.com

Christine Brakman
Sage Associates, Inc.
18872 MacArthur Blvd, Suite 320
Irvine, CA 92612
949-724-9600
cbrakman@sage-associates.com

Stacie Brandt
Booth, Mitchel & Strange, LLP
701 South Parker Street, Suite 6500
Orange, CA 92868
(714) 903-2313
slbrandt@boothmitchel.com

Andrew Brouwer
The Vertex Companies, LLC
25486 Bayes Street
Lake Forest, CA 92630
(949) 383-8421
abrouwer@vertexeng.com

Marc Brown
Travelers
33650 6th Avenue S, Suite 200
Federal Way, WA 98003
(253) 943-5805
mbrown6@travelers.com

Daniel Butler
Watt, Tieder, Hoffar & Fitzgerald, L.L.P.
4 Park Plaza, Suite 1000
Irvine, CA 92614
(516) 978-9295
dbutler@watttieder.com

Whit Campbell
The Hartford
520 Pike Street, Suite 900
Seattle, WA 98101
206-419-3304
jamesw.campbell@thehartford.com

Steven Cannon
Dry Law PLLC
909 18th Street
Plano, TX 75074
(972) 797-9512
scannon@drylaw.com

Samantha Canterino
Applied Surety Underwriters
50 Rockefeller Plaza, 15th Floor
New York, NY 10020
(917) 848-9891
scanterino@auw.com

Jim Carlson
MPCS
1111 Baseline Road
La Verne, CA 91750
(909) 851-7756
jim@mpcs-llc.com

Gerald Carozza
Retired (Selective Insurance)
108 Winterberry Drive
Milford, PA 18337
(570) 832-0058
gncarozza@hotmail.com

Benjamin Chambers
The Hartford
520 Pike Street, Suite 900
Seattle, WA 98101
253-853-2215
benjamin.chambers@thehartford.com

Rachel Charlton
Sticky Communications
9107 SW 9th Place
Portland, OR 97219
469-323-5251
rachel@stickycommunications.org

Edward Claxton
Travelers
33650 6th Avenue S, Suite 200
Federal Way, WA 98003
(425) 287-8286
eclaxton@travelers.com

Jack Costenbader
PCA Consulting Group
1738 Union Street, Suite 201
San Francisco, CA 94123
(415) 828-0446
jack_costenbader@pcacg.com

James Curran
Wolkin Curran, LLP
111 Maiden Lane, 6th Floor
San Francisco, CA 94108
(415) 982-9390
jcurran@wolkincurran.com

Megan Daily
Krebs Farley, PLLC
400 Poydras Street, Suite 2500
New Orleans, LA 70130
(205) 908-3674
mdaily@krebsfarley.com

Adrian D'Arcy
D'Arcy Vicknair LLC
650 Poydras Street, Suite 2705
New Orleans, LA 70130
(504) 701-8466
aadarcy@darcyvicknair.com

Camille Daylong
Liberty Mutual Surety
1001 4th Avenue, Suite 3800
Seattle, WA 98154
(206) 430-0354
camioue@comcast.net

Douglas Dearie
Liberty Mutual Surety (retired)
15604 Manion Way NE
Duvall, WA 98019
(425) 949-2787
douglasdearie1331@gmail.com

Nick Deeley
The Vertex Companies, LLC
22841 E Marsh Road
Queen Creek, AZ 85142
(808) 286-3168
ndeeley@vertexeng.com

Mark Degenaars
The Vertex Companies, LLC
7595 Irvine Center Drive, Suite 150
Irvine, CA 92618
(303) 956-1749
mdegenaars@vertexeng.com

Meredith Dishaw
Friedrich & Dishaw PLLC
92 Lenora Street, Suite 119
Seattle, WA 98121
206-360-7653
meredithd@fdlawpllc.com

Janet Doherty
The Vertex Companies, LLC
1 N. LaSalle, Suite 1620
Chicago, IL 60602
708-723-6299
jdoherty@vertexeng.com

Ryan Dry
Dry Law PLLC
909 18th Street
Plano, TX 75074
(972) 797-9514
rdry@drylaw.com

Thomas Duke
Money Law & Title
2606 Lee Street
Greenville, TX 75401
(469) 231-2686
tom@moneylaw.com

Jonathan Dunn
SMTD Law LLP
17901 Von Karman Avenue, Suite 500
Irvine, CA 92614
949-537-3800
jdunn@smtdlaw.com

Nina Durante
Liberty Mutual Surety
1001 4th Avenue, Suite 3800
Seattle, WA 98154
(206) 473-5237
nina.durante@libertymutual.com

Bruce Echigoshima
Liberty Mutual Surety
1001 4th Avenue, Suite 3800
Seattle, WA 98154
(206) 473-3349
bruech@safeco.com

John Egbert
Global Construction Services, Inc.
8040 161st Avenue NE
Redmond, WA 98052
(425) 681-1868
john@consultgcsi.com

Steven Elizer
Elizer Law Group, LLC
7366 N Lincoln Avenue, Suite 305
Lincolnwood, IL 60712
(847) 983-4343
selizer@elizerlaw.com

John Fallat
Law Offices of John L. Fallat
68 Mitchell Blvd., Suite 135
San Rafael, CA 94903
(415) 457-3773
jfallat@fallat.com

Matt Farley
Krebs Farley, PLLC
400 Poydras Street, Suite 2500
New Orleans, LA 70130
(504) 616-4249
mfarley@krebsfarley.com

Jordan Faux
Faux Law Group
2625 N. Green Valley Pkwy, Suite 100
Henderson, NV 89014
702-458-5790
jfaux@fauxlaw.com

Kurt Faux
The Faux Law Group
2625 N. Green Valley Pkwy, Suite 100
Henderson, NV 89014
(702) 460-3290
kfaux@fauxlaw.com

Leland Faux
Travelers
33650 6th Avenue S, Suite 200
Federal Way, WA 98003
(253) 350-6928
lfaux@travelers.com

Taylor Feldt
Weinstein Radcliff Pipkin LLP
2626 Throckmorton Street, Apt 1148
Dallas, TX 75219
972-510-4656
tfeldt@weinrad.com

Trey Felty
Liberty Mutual Surety
1001 4th Avenue, Suite 3800
Seattle, WA 98154
(847) 551-2891
trey.felty@libertymutual.com

Stephen Ferretti
Cashin, Spinelli, Ferretti LLC
801 Motor Parkway, Suite 103
Hauppauge, NY 11788
(631) 737-9170
sferretti@csfllc.com

Jennifer Fiore
Dunlap Fiore, LLC
6700 Jefferson Highway
Baton Rouge, LA 70806
(225) 282-0652
jfiore@dunlapfiore.com

Mason Fleming
Nicholson Professional Consulting, Inc.
PO Box 705
Bremen, GA 30110
(785) 418-7509
mason.fleming@npcius.com

Gina Fortino Dickson
Law Offices of John L. Fallat
68 Mitchell Blvd., Suite 135
San Rafael, CA 94903
(707) 227-5331
gdickson@fallat.com

John Fouhy
Travelers
33650 6th Avenue S, Suite 200
Federal Way, WA 98003
(253) 943-5806
jfouhy@travelers.com

Anna Frederick
Employers Mutual Casualty Company
717 Mulberry Street
Des Moines, IA 50309
(515) 345-2481
anna.c.frederick@emcins.com

Paul Frederick
Friedrich & Dishaw PLLC
92 Lenora Street, Suite 119
Seattle, WA 98121
206-360-7655
paulf@fdlawpllc.com

Mark Gamell
Torre, Lentz, Gamell, Gary & Rittmaster, LLP
100 Jericho Quadrangle, Suite 309
Jericho, NY 11753
(516) 240-8900
mgamell@tlggr.com

Patricia Gill
United Fire Group
118 2nd Ave SE
Cedar Rapids, IA 52401
319-247-6270
pgill@unitedfiregroup.com

Rebecca Glos
Watt, Tieder, Hoffar & Fitzgerald, L.L.P.
4 Park Plaza, Suite 1000
Irvine, CA 92614
(949) 852-6700
rglos@watttieder.com

David Gorman
The Vertex Companies, LLC
115 NE 100th St., Suite 308
Seattle, WA 98125
(206) 741-5337
dgorman@vertexeng.com

Julian Grijns
Kroll Associates
55 East 52nd Street, 17th Floor
New York, NY 10055
(917) 349-5808
jgrijns@kroll.com

David Grycz
RLI Insurance Company
500 W. Madison Street, Suite 2700
Chicago, IL 60661
(312) 351-1417
david.grycz@rlicorp.com

Craig Guenther
Booth, Mitchel & Strange, LLP
701 South Parker Street, Suite 6500
Orange, CA 92868
714 814-0403
ceguenther@boothmitchel.com

Jonathan Hahn
The Vertex Companies, LLC
400 Libbey Parkway
Weymouth, MA 02189
(781) 710-1869
jhahn@vertexeng.com

Tara Hannebaum
Aperture LLC
1428 15th Street
Denver, CO 80202
303-389-4924
Tara.Hannebaum@Aperturellc.com

Paul Harmon
Markel Insurance Co.
9500 Arboretum Blvd, Suite 400
Austin, TX 78759
(360) 768-3946
paul.harmon@markel.com

David Harris
Bovis, Kyle, Burch & Medlin, LLC
200 Ashford Center North
Atlanta, GA 30338
678-338-3931
dah@boviskyle.com

Josh Harvey
Liberty Mutual Surety
221 20th Street
New Orleans, LA 70124
504-335-2114
joshua.harvey@libertymutual.com

Joseph Healy
Cashin, Spinelli, Ferretti LLC
801 Motor Parkway, Suite 103
Hauppauge, NY 11778
631-682-6144
jhealy@csfllc.com

Alyssa Hecht
Merchants Bonding Company
6100 219th Street SW, Suite 480
Mountlake Terrace, WA 98043
(425) 530-8832
ahecht@merchantsbonding.com

Frederick Hedberg
Robinson & Cole LLP
280 Trumbull Street
Hartford, CT 06103
(860) 275-8237
fhedberg@rc.com

Elizabeth Henderson
The Hartford
223 Young Road
Mossyrock, WA 98564
206.450.6551
elizabeth.henderson@thehartford.com

Leigh Anne Henican
The Gray Casualty & Surety Company
1625 West Causeway Approach
Mandeville, LA 70471
(504) 301-8418
lhenican@graysurety.com

Betty Hernandez
CNA Surety
601 Union Street, Suite 1601
Seattle, WA 98101
(714) 673-4115
beatriz.hernandez@cnasurety.com

Elmira Howard
Anderson, McPharlin & Conners, LLP
707 Wilshire Blvd., Suite 4000
Los Angeles, CA 90017
(949) 697-0536
erh@amclaw.com

Lih Hudson
Liberty Mutual Surety
1001 4th Avenue, Suite 3800
Seattle, WA 98154
206-473-3577
Lih.Hudson@LibertyMutual.com

Michael Huhn
JHST&C
PO Box 9500
Danville, CA 94526
(925) 820-1821
mhuhn@jhstc.com

Patrick Hustead
The Hustead Law Firm
4643 S. Ulster Street, Suite 1250
Denver, CO 80237
303-721-5000
pqh@thlf.com

Nicholas Hyslop
Liberty Mutual Surety
7900 Windrose Avenue
Plano, TX 75024
(469) 997-6762
nick.hyslop@libertymutual.com

Matt Joy
J.S. Held LLC
50 Jericho Quadrangle, Suite 117
Jericho, NY 11753
(602) 525-9852
mjoy@jsheld.com

Jeff Jubera
Berkshire Hathaway Specialty Insurance
1100 Abernathy Rd NE, Suite 1200
Atlanta, GA 30328
312.702.2857
jeffrey.jubera@bhspecialty.com

Bruce Kahn
Berkley Surety
412 Mt. Kemble Avenue, Suite 310N
Morristown, NJ 07960
(973) 775-5036
bkahn@berkleysurety.com

Brian Kantar
Chiesa Shahinian & Giantomasi PC
105 Eisenhower Parkway
Roseland, NJ 07068
(973) 530-2112
bkantar@csglaw.com

Garen Kasparian
Merchants Bonding Company
6700 Westown Parkway
West Des Moines, IA 50266
626-264-3860
gkasparian@merchantsbonding.com

Stephanie Keddy
Berkley Surety
412 Mt. Kemble Avenue, Suite 310N
Morristown, NJ 07960
630-210-0385
skeddy@berkleysurety.com

Michael Keller
CNA Surety
601 Union Street, Suite 1601
Seattle, WA 98101
206-472-3796
michael.keller@cnasurety.com

Robert Kelley
Nicholson Professional Consulting, Inc.
500 Sun Valley Drive
Roswell, GA 30076
404-678-6724
rob.kelley@npcius.com

Marilyn Klinger
SMTD Law LLP
355 S. Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 268-8105
mklinger@smtdlaw.com

Mary Lynn Kotansky
Liberty Mutual Surety
11010 54 Street CT NW
Gig Harbor, WA 98335
(206) 643-0181
Marylynnkotansky@comcast.net

David Krebs
Krebs Farley, PLLC
400 Poydras Street, Suite 2500
New Orleans, LA 70130
(504) 388-0697
DKREBS@KFPLAW.COM

Frank Lanak
Tokio Marine HCC Surety Group
801 S Figueroa Street, Suite 700
Los Angeles, CA 90017
310-242-4403
flanak@tmhcc.com

Timothy Larson
Liberty Mutual Surety
1001 4th Avenue, Suite 3800
Seattle, WA 98154
425-873-4641
timothy.larson@libertymutual.com

Don Lefler
The Lefler Brophy Group
6261 Wrightsville Avenue
Wilmington, NC 28403
(910) 279-9611
dlefler@tlbgroup.com

Jason Leiker
Levy Craig Law Firm, P.C.
4520 Main Street, Suite 400
Kansas City, MO 64111
816-460-1835
jleiker@levycraig.com

Scott Leo
The Law Offices of T. Scott Leo
100 N. LaSalle Street
Chicago, IL 60602
312-857-0910
sleo@leolawpc.com

Darrell Leonard
Zurich
11074 Inspiration Circle
Dublin, CA 94568
219-218-6731
darrell.leonard@zurichna.com

Rick Levesque
Philadelphia Indemnity Insurance Company
PO Box 106, 125 Bella Bella
Fox Island, WA 98333
253 324 1324
richard.levesque@phly.com

Eric Liberman
Carney Badley Spellman. P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
(206) 607-4190
liberman@carneylaw.com

Hyung Lim
Liberty Mutual Surety
1001 4th Avenue, Suite 3800
Seattle, WA 98154
206- 406- 4765
hyung.lim@libertymutual.com

Sonnia Linnaus
Liberty Mutual Surety
790 The City Drive South, Suite 200
Orange, CA 92868
949-316-1833
sonia.linnaus@libertymutual.com

Gina Lockwood
Merchants Bonding Company
6700 Westown Parkway
West Des Moines, IA 50266
(214) 717-1074
glockwood@merchantsbonding.com

Jason Long
The Lefler Brophy Group
2030 Eastwood Road, Suite 10B
Wilmington, NC 28403
(910) 264-1389
jlong@tlbgroup.com

Maribel Luzunaris
The Hartford
1 Hartford Plaza, T 14
Hartford, CT 06155
860 547 8494
Maribel.Luzunaris@TheHartford.Com

James MacLellan
Borden Ladner Gervais LLP
22 Adelaide Street West, Suite 3400
Toronto, ON, Canada M5H 4E3
(416) 806-9810
jmaclellan@blg.com

Grant Margeson
Sokol Larkin
4380 S Macadam Avenue, Suite 530
Portland, OR 97239
(503) 221-0699
gmargeson@sokol-larkin.com

Christopher Marron
Loewke Brill Consulting Group
491 Elmgrove Road, Suite 2
Rochester, NY 14606
(585) 944-2505
chris@loewkebrill.com

Audrey Martin
Krebs Farley, PLLC
400 Poydras Street, Suite 2500
New Orleans, LA 70130
(504) 299-3570
amartin@krebsfarley.com

Rosa Martinez-Genzon
Anderson, McPharlin & Conners, LLP
707 Wilshire Blvd., Suite 4000
Los Angeles, CA 91001
(213) 236-1653
rmg@amclaw.com

Eric Mausolf
Travelers
33650 6th Avenue S, Suite 200
Federal Way, WA 98003
(253) 943-5813
emausolf@travelers.com

Megan Mazzeffi
RLI Insurance Company
9025 N Lindbergh Drive
Peoria, IL 61615
(312) 675-4142
Megan.mazzeffi@rlicorp.com

Taylor McMahon
Jermain Dunnagan & Owens, P.C.
111 W. 16th Avenue, Suite 203
Anchorage, AK 99501
(907) 261-6610
tmcmahon@jdolaw.com

Brent McSwain
Aperture LLC
1428 15th Street
Denver, CO 80202
(303) 875-2850
brent.mcswain@aperturellc.com

Stephani Miller
Liberty Mutual Surety
1001 4th Avenue, Suite 3800
Seattle, WA 98154
(206) 473-3576
stephani.miller@libertymutual.com

Thomas Moran
Wright, Constable & Skeen, LLP
301 Concourse Boulevard, Suite 120
Glen Allen, VA 23059
804-362-9434
tmoran@wcslaw.com

Clarisa Nail
Crum & Forster
305 Madison Avenue
Morristown, NJ 07960
(509) 934-0149
clarisa.nail@cfins.com

Steve Nelson
Markel Surety
7943 Caruth Court
Dallas, TX 75225
(512) 750-9720
snelson@constructiondr.com

Jack Nicholson
Nicholson Professional Consulting, Inc.
500 Sun Valley Drive
Roswell, GA 30076
(770) 331-0282
jack@npcius.com

Robert Niesley
Watt, Tieder, Hoffar & Fitzgerald, L.L.P.
4 Park Plaza, Suite 1000
Irvine, CA 92614
(949) 852-6700
rniesley@watttieder.com

Bob O'Brien
Liberty Mutual Surety
273 Palm Springs Drive
Fairfield Way, OH 45014
(513) 256-8463
robert.obrien@libertymutual.com

Mark Oertel
Lewis Brisbois Bisgaard & Smith, LLP
633 W 5th Street, Suite 4000
Los Angeles, CA 90071
(562) 884-8423
Mark.Oertel@lewisbrisbois.com

Jeff Olson
Liberty Mutual Surety
1001 4th Avenue, Suite 3800
Seattle, WA 98154
(206) 473-5929
jeff.olson@libertymutual.com

Scott Olson
Nicholson Professional Consulting, Inc.
15511 State Hwy 71 West, Suite 110-284
Bee Cave, TX 78738
512-913-9903
scott.olson@npcius.com

Steven Padula
Sage Associates, Inc.
18872 MacArthur Blvd, Suite 320
Irvine, CA 92612
949-678-4948
spadula@sage-associates.com

Steve Pand
Travelers
33650 6th Avenue S, Suite 200
Federal Way, WA 98003
253-740-1301
spand1@travelers.com

Amy Pascalide
Markel Surety / SurTec Insurance Company
5555 Garden Grove Blvd , Suite 275
Westminster, CA 92683
818-227-8174
amy.pascalide@markel.com

R. Michael Perez
Dry Law PLLC
909 18th Street
Plano, TX 75074
(972) 797-9519
mperez@drylaw.com

Jaime Perkins
Merchants Bonding Company
6700 Westown Parkway
West Des Moines, IA 50266
(346) 8029811
jperkins@merchantsbonding.com

Mike Pipkin
Weinstein Radcliff Pipkin LLP
8350 N. Central Expressway, Suite 1550
Dallas, TX 75206
(214) 865-7012
mpipkin@weinrad.com

Teresa Polk
SMTD Law LLP
17901 Von Karman Avenue, Suite 500
Irvine, CA 92614
949-537-3810
tp@smtdlaw.com

Alana Porrazzo
Jennings Haug Keleher McLeod Waterfall LLP
2800 N. Central Avenue, Suite 1800
Phoenix, AZ 85004
(602) 234-7856
alp@jkwlawyers.com

Michael Prisco
Torre, Lentz, Gamell, Gary & Rittmaster, LLP
100 Jericho Quadrangle, Suite 309
Jericho, NY 11753
(516) 240-8900
mprisco@tlggr.com

Jon Ramirez
Berkley Surety
412 Mt. Kemble Avenue, Suite 310N
Morristown, NJ 07960
(602) 635-0320
jramirez@berkleysurety.com

Edward Reilly
American Global LLC
20 Overhill Road, Summit
Summit, NJ 07901
(908) 432-9109
edward.reilly@americanglobal.com

Brian Rice
RiskScape Strategies, LLC
5415 N Sheridan Road, Suite 5403
Chicago, IL 60640
917-561-0171
brice@riskscapellc.com

Ken Rockenbach
Liberty Mutual Surety
1001 4th Avenue, Suite 3800
Seattle, WA 98154
(206) 473-3350
kenneth.rockenbach@libertymutual.com

Jordan Rosenfeld
Imperium Consulting Group
355 118th Avenue SE, Suite200
Bellevue, WA 98005
206-406-8331
jordan.rosenfeld@imperiumcg.com

Shoshana Rothman
Merchants Bonding Company
6100 219th Street SW, Suite 480
Mountlake Terrace, WA 98043
703-817-8337
srothman@merchantsbonding.com

Larry Rothstein
Larry A. Rothstein, A Professional Law Corporation
2945 Townsgate Road, Suite 200
Westlake Village, CA 91361
(818) 348-7000
lar@larlaw.net

Edward Rubacha
Jennings Haug Keleher McLeod Waterfall LLP
2800 N. Central Avenue, Suite 1800
Phoenix, AZ 85004
602-234-7846
er@jkwlawyers.com

Michael Saba
Guardian Group
615 Baltimore Pike, Suite H #1065
Bel Air, MD 21014
310-320-0320
michael.saba@guardiangroup.com

Gene Sawyer
Liberty Mutual Surety
7900 Windrose Avenue
Plano, TX 75024
(469) 278-2230
gene.sawyer@libertymutual.com

Tiffany Schaak
Liberty Mutual Surety
1001 4th Avenue, Suite 3800
Seattle, WA 98154
(206) 473-6428
Tiffany.Schaak@libertymutual.com

Elliot Scharfenberg
Krebs Farley, PLLC
400 Poydras Street, Suite 2500
New Orleans, LA 70130
504-299-3570
escharfenberg@krebsfarley.com

Chad Schexnayder
Jennings Haug Keleher McLeod Waterfall LLP
2800 N. Central Avenue, Suite 1800
Phoenix, AZ 85004
602-234-7830
cls@jkwlawyers.com

Jennifer Schildbach
Liberty Mutual Surety
790 The City Drive South, Suite 200
Orange, CA 92868
949-316-1845
Jennifer.Schildbach@libertymutual.com

Michael Sebright
Hudson International
900 Dudley Avenue
Cherry Hill, NJ 08002
856-701-3306
michael.sebright@hudsonies.com

Rob Senecal, II
Guardian Group
2350 W. 205th Street
Torrance, CA 90501
860-209-0886
rsenecal@youngonline.com

Munther Shamieh
J.S. Held LLC
50 Jericho Quadrangle, Suite 117
Jericho, NY 11753
(210) 842-9759
mshamieh@jsheld.com

Suzanna Shaub
Travelers
33650 6th Avenue S, Suite 200
Federal Way, WA 98003
(253) 943-5770
sshaub@travelers.com

Stephanie Shear
AmTrust Surety
21900 Burbank Blvd, Suite 270
Woodland Hills, CA 91367
(818) 422-4806
stephanie.shear@amtrustgroup.com

Chris Simmelink
Hudson Insurance Company
100 William Street
New York, NY 10038
(206) 586-2276
CSimmelink@HudsonInsGroup.com

Kara Skinner
Integrity Surety LLC
17544 Midvale Ave N
Seattle, WA 98133
206-546-1397
kara@integritysurety.com

David Slaughter
Spencer Fane Snow Christensen & Martineau
10 Exchange Place, Suite 1100
Salt Lake City, UT 84111
(801) 560-9237
dslaughter@spencerfane.com

Michael Sminelli, II
Cashin, Spinelli, Ferretti LLC
801 Motor Parkway, Suite 103
Hauppauge, NY 11788
(631) 737-9170
mspinelli2@csfllc.com

Gregory Smith
United Fire Group
118 2nd Ave SE
Cedar Rapids, IA 52401
(909) 238-7643
gsmith@unitedfiregroup.com

Jan Sokol
Sokol Larkin
4380 S Macadam Avenue, Suite 530
Portland, OR 97239
503- 221-0699
jdsokol@sokol-larkin.com

Michael Spinelli
Cashin, Spinelli, Ferretti LLC
801 Motor Parkway, Suite 103
Hauppauge, NY 11788
(631) 737-9170
mwspinelli@csfllc.com

Corey Stewart
The Hartford
One Hartford Plaza
Hartford, CT 06155
832-416-0727
corey.stewart@thehartford.com

Jason Stonefeld
Liberty Mutual SuretyPlus Claims
1001 4th Avenue, Suite 3800
Seattle, WA 98154
(206) 473-6390
jason.stonefeld@libertymutual.com

Damitta Straughter
West Bend Mutual Insurance Company
10508 Galveston Place
McKinney, TX 75071
214-683-3917
dstraughter@wbmi.com

Brian Streicher
Ernstrom & DreSuite LLP
925 Clinton Square
Rochester, NY 14604
(585) 473-3100
bstreicher@ed-llp.com

Michael Sugar, III
Forcon International
1413 Tech Blvd, Suite 212
Tampa, FL 33619
(813) 684-7686
michael.sugar@forcon.com

Laurie Svitenko
Liberty Mutual Surety
6106 Triple Crown Drive
Reno, NV 89511
(949) 510-0891
laurie.svitenko@libertymutual.com

Richard Tasker
Sage Associates, Inc.
18872 MacArthur Blvd, Suite 320
Irvine, CA 92612
949-724-9600
rtasker@sage-associates.com

Patricia Thompson
JAMS
5721 Riviera Drive
Coral Gables, FL 33146
(305) 794-4345
pthompson@jamsadr.com

Frances Thompson
The Hartford
520 Pike Street, Suite 900
Seattle, WA 98101
206-292-7873
frances.thompson@thehartford.com

Michael Timpane
SMTD Law LLP
2101 Webster, Suite 515
Oakland, CA 94612
949-537-3800
mt@smtdlaw.com

Mike Tomeo
J.S. Held LLC
1375 Dove Street, Suite 250
Newport Beach, CA 92660
949-813-5863
mtomeo@jsheld.com

Rodney Tompkins
RJT Construction, Inc. Consulting Services
1 Park Plaza, Suite 600
Irvine, CA 92614
530-305-0605
rodneyjr@rjtconstruction.com

Patrick Toulouse
Travelers
33650 6th Avenue S, Suite 200
Federal Way, WA 98003
(253) 943-5826
ptoulous@travelers.com

Charles Van Sickle
Ward, Hocker & Thornton, PLLC
9300 Shelbyville Road, Suite 700
Louisville, KY 40222
(502) 583-7012
mike.vansickle@whtlaw.com

Gregory Veal
Bovis, Kyle, Burch & Medlin, LLC
200 Ashford Ctr. N., Suite 500
Atlanta, GA 30338
(678) 338-3907
grv@boviskyle.com

Paul Versage
Sage Associates, Inc.
PO Box 5804
Carefree, AZ 85377
(602) 904-0040
pversage@sage-associates.com

Collin Vincent
Travelers
33650 6th Avenue S, Suite 200
Federal Way, WA 98003
206-713-1346
ccvincen@travelers.com

Patricia Wager
Torre, Lentz, Gamell, Gary & Rittmaster, LLP
100 Jericho Quadrangle, Suite 309
Jericho, NY 11753
(516) 240-8900
pwager@tlggr.com

J. Spencer Ward
Merchants Bonding Company
6700 Westown Parkway
West Des Moines, IA 50266
515-657.5932
sward@merchantsbonding.com

Gregory Weinstein
Weinstein Radcliff Pipkin LLP
8350 N. Central Expressway, Suite 1550
Dallas, TX 75206
(214) 865-6126
gweinstein@weinrad.com

Michael Vieregg
Insurors Indemnity
225 S. 5th Street
Waco, TX 76701
(254) 759-3859
mvieregg@insurorsindemnity.com

Stephanie Vreeland
Great American Insurance Group
18512 Gramercy Drive
Santa Ana, CA 92705
(513) 412-1933
svreeland@gaig.com

Christopher Ward
Clark Hill PLLC
2600 Dallas Pkwy, Suite 600
Frisco, TX 75034
214-651-4722
cward@clarkhill.com

Michelle Wargo
Liberty Mutual Surety
2815 Forbs Avenue, Suite 100
Hoffman Estates, IL 60192
(847) 396-7115
michelle.wargo@libertymutual.com

Susan Weinstock
Arch Insurance Group, Inc.
1601 Cherry Street
Philadelphia, PA 19102
(443) 226-0105
sweinstock@archinsurance.com

Patrick Weller
J.S. Held LLC
1375 Dove Street, Suite 250
Newport Beach, CA 92660
760-802-4436
pweller@jsheld.com

Beth Anne Wheeler-Ruich
Travelers
33650 6th Avenue S, Suite 200
Federal Way, WA 98003
(206) 739-9827
bwheeler@travelers.com

Blake Wilcox
Liberty Mutual Surety
1001 4th Avenue, Suite 3800
Seattle, WA 98154
425-922-6268
Blake.Wilcox@LibertyMutual.com

Scott Williams
Manier & Herod
1201 Demonbreun Street, Suite 900
Nashville, TN 37203
615-742-9370
swilliams@manierherod.com

Amber Williams
The Gray Casualty & Surety Company
1625 West Causeway Approach
Mandeville, LA 70471
(409) 351-9308
awilliams@graysurety.com

Tom Windus
Carney Badley Spellman. P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
206-607-4164
windus@carneylaw.com

Doug Wynne
Simon, Peragine, Smith & Redfearn, LLP
1100 Poydras Street, 30th Floor
New Orleans, LA 70163
504-569-2030
dougw@spsr-law.com

Angela A. Zanin
Lewis Brisbois Bisgaard & Smith, LLP
633 W 5th Street, Suite 4000
Los Angeles, CA 90071
(213) 250-1800
angela.zanin@lewisbrisbois.com

Gene Zipperle
Ward, Hocker & Thornton, PLLC
9300 Shelbyville Road, Suite 700
Louisville, KY 40222
502-753-3778
gzipperle@whtlaw.com

Notes

Papers

PANEL 1

Pre-Bankruptcy and Bankruptcy Planning and Strategy

A Bankruptcy Planning Trilogy for the Surety

By

Chad L. Schexnayder, Esq.,

Jennings Haug Keleher McLeod Waterfall LLP/Phoenix, AZ

Robert J. Berens, Esq.,

SMTD Law LLP/Phoenix, AZ

and

T. Scott Leo, Esq.,

Law Offices of T. Scott Leo, P.C./Chicago, IL

Presented to

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Woodinville, Washington

THE BANKRUPTCY PLANNING TRILOGY FOR THE SURETY

Chapter I

BANKRUPTCY PROOFING:

CAN A DEFAULT, FINANCING AGREEMENT OR LOOK-SEE DEAL REALLY BE "BANKRUPTCY PROOFED?"

By

Chad L. Schexnayder, Esq.,

Jennings Haug Keleher McLeod Waterfall LLP

Phoenix, AZ

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CAN A DEFAULT, FINANCING AGREEMENT OR LOOK-SEE DEAL REALLY BE "BANKRUPTCY PROOFED?"

"Bankruptcy-Proofing" is a misnomer. The term is widely used to refer to clauses that enhance the creditor's position in a subsequent bankruptcy. These clauses may protect against fraudulent conveyance or preference attacks, or may grant the creditor the right to immediate or expedited relief from the automatic stay in the bankruptcy.[i]

A. DISMISSAL

In some cases, the courts will dismiss a bankruptcy petition, in order to enforce the provisions of a pre-bankruptcy workout agreement.[ii] A comprehensive financing or default agreement between the Surety and Principal would be very similar to the "workout agreements" that the courts have favored in the reported decisions dismissing bankruptcies. The Surety may wish to include clauses that will permit the court to find that the parties understood and intended the agreement to be an alternative to bankruptcy.

B. PRE-PETITION AGREEMENT FOR STAY RELIEF

The surety should also consider inclusion of clauses that entitle the surety to immediate relief from the automatic stay if the financing agreement is unsuccessful and the principal later files a bankruptcy petition. Bankruptcy courts in some parts of the country have upheld such clauses, interpreting the pre-petition agreement to be "cause" for relief from the automatic stay under 11 U.S.C. § 362 (d) (1).[iii] The enforceability of such clauses is nonetheless entitled to a healthy dose of skepticism.

Even where such a clause has been used, and surety's bankruptcy counsel believes the court will likely enforce the stipulated stay relief, it would be advisable to first file a motion with the court and await the court ruling, rather than relying upon language stating that the stay is not applicable to the surety's actions at all.

C. CLAW-BACK CLAUSES

Financing or default agreements may provide a release to indemnitors or may reduce or "cap" the amount of the debt owed to the surety. This concession may be given in exchange for cooperation, collateral or some other consideration. A "claw-back" clause is intended to take away the benefits granted by the agreement, if the principal later files bankruptcy. The clawback may occur if there is any subsequent bankruptcy or only if the bankruptcy filing occurs within the preference period. The clawback may be activated only by the principal's bankruptcy, or by the bankruptcy filing of the principal or any single indemnitor. The choice among these options is determined by the nature of the consideration the surety has received, the potential to lose those benefits in the event of bankruptcy filing, and the extent of the releases given.

A clawback clause has two principal goals. First, it prevents the principal or indemnitors from unfairly claiming the benefits of the agreement, when their bankruptcy filing has destroyed or delayed benefits that should have flowed to the surety. Second, it creates incentives for the indemnitors and principal to stay out of bankruptcy, at least for the preference period. This purpose is particularly important where the surety has obtained new collateral under the terms of the agreement. The security interests will be avoidable if a bankruptcy is filed within the preference period, generally ninety (90) days.

D. OTHER CLAUSES

Just about every agreement with the principal, whether it be a tender of the bonded jobs, a default letter, or a financing agreement, should contain a recitation by the principal concerning it's solvency. Defaulting principals are often brought down by a cash flow crunch, and may not exhibit traditional balance sheet insolvency. This representation will offer some measure of protection against later fraudulent conveyance claims, whether brought by the principal in his bankruptcy or by third parties. The representation should not be used where the surety has already performed its own financial analysis demonstrating conclusively the principal's insolvency, as this will call into question the surety's good faith and suggest coercive strength in the negotiation of the agreement.

The agreement can contain the principal's representation regarding bonded project status (default) or the non "executory" nature of the bonded contract, which might be used to support surety motion practice in a subsequent bankruptcy case. Depending on the circumstances, representations regarding bonded payables exceeding the contract balance, common obligee status of multiple jobs, or a large range of other representations might be applicable to assist the surety in subsequent bankruptcy motion practice.

Some other kinds of bankruptcy protection are very simple to draft. For example, in any default or financing arrangement that will be reduced to writing, the surety should first request and receive financial statements from the indemnitors and the principal. The agreement should expressly recite that these statements have been requested, received and relied upon by the surety in entering into the agreement. The clause should also state that the principal and indemnitors understand and intend for the surety to rely upon the statements, and that this reliance is reasonable. If the information in the financial statements turns out to be inaccurate, the amounts loaned or losses incurred under the agreement may be non-dischargeable in a subsequent bankruptcy of the principal or the indemnitors. 11 U.S.C. § 523. A non-dischargeable claim benefits the surety in two ways. First, the debt can be pursued post-bankruptcy. Second, the principal or indemnitors may resist or avoid a bankruptcy filing altogether, because of the inability to discharge the debt owed to the surety.

Counsel for lenders (typically banks) tend to be the biggest proponents and believers in the power of "bankruptcy proofing" provisions. Below is an example of the kind of provisions sometimes advocated.

Provisions that prohibit or restrict access to bankruptcy relief

-Covenants that prohibit the filing of a voluntary petition

Provisions that appoint independent directors or partners

-Involuntary Petitions - collusion with creditors

-Springing guaranties

-Other "ipso facto" provisions that limit or condition the debtor's rights

* * *

Provisions regarding relief from the automatic stay and bad faith filing

-Stipulate to bad faith finding or waive right to contest

-Stipulate to stay relief or waive right to contest

-Stipulate to bad faith or stay relief facts-lack of equity, necessity for reorganization, cause, lack of adequate protection, transfers before petition, ..., etc.

-In rem orders from prior cases

-Repos, securities setoffs, other§ 362(b) exceptions to automatic stay

Provisions regarding executory contracts

-Stipulate that contract is/is not executory -material performance remaining, material breaches, completed transfers, etc.

-Financial accommodations, contracts for loans, etc.

-Provisions that limit or condition rights based on a bankruptcy filing or the debtor's financial condition or other "ipso facto" provisions

-Securing a claim for breach or securing the rights that are acquired

Provisions regarding fraudulent transfers

-Representations and warranties about financial condition, insolvency, ability to pay debts, capitalization

-Revival clauses

How To Bankruptcy-Proof A Workout Agreement," Howard J. Weg; Thomas J. Weber, (ABA Business Law Section 1998 Spring Meeting)

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i. Note: a clause attempting to prohibit the principal or indemnitors from filing a bankruptcy petition will be void as against public policy. In re Joshua Slocum Ltd., 922 F.2d 1081 (3d Cir. 1990); In re Club Tower L.P., 138 B.R. 307 (Bankr. N.D. Ga. 1991).

ii. In re Colonial Ford, Inc., 24 B.R. 1014, 1020 (Bankr. D. Utah 1982) (in order to encourage non-judicial workouts that are expeditious, economic, and sensible, "[w]here . . . the workout is comprehensive, and designed to end, not perpetuate, the creditor-company relations, dismissal under section 305 (a) (1) is appropriate."); In re Pengo Industr., 962 F.2d 543, 549 (5th Cir. 1992), cert. den., 113 S.Ct. 602 ("[w]e strongly disfavor a judicial interpretation of the Bankruptcy Code that contravenes the substantial congressional policy favoring out-of-court consensual workouts."); see also, In re Chateaugay Corp., 961 F.2d 378, 383 (2d Cir. 1992) (the court "will not attribute to Congress an intent to place a stumbling block in front of debtors seeking to avoid bankruptcy with the cooperation of their creditors [r]ather . . . Congress inten[ded] to encourage consensual workouts and . . . minimiz[e] bankruptcy filings ").

iii. In re Wheaton Oaks Office Partners, 1992 WL 381047 (N.D. Ill.), (a provision regarding stay relief could constitute "cause" under 11 U.S.C. § 362 (d) (1)); In re Club Tower L.P., 138 B.R. 307 (Bankr. N.D. Ga. 1991) (stay relief clause enforceable); Aurora Investments, Inc. 134 B.R. 982, 986 (Bankr. M.D. Fla. 1991) (in absence of coercion, fraud or mutual mistake in prepetition agreement contemplating automatic stay relief, "the [d]ebtor cannot escape the legal consequences of the stipulation.").

The United States Bankruptcy Court for the Middle District of Florida has been particularly active in publishing decisions on this point. Matter of Growers Properties No. 56 Ltd., 117 B.R. 1015 (Bankr. M.D. Fla. 1990); In re Citadel Properties,Inc., 86 B.R. 275 (Bankr. M.D. Fla. 1987); In re Orange Park South Partnership 79 B.R. 79 (Bankr. M.D. Fla. 1987); In re International Supply Corp.of Tampa, Inc., 72 B.R. 510 (Bankr. M.D. Fla. 1987); In re Gulf Beach Development Corp., 48 B.R. 40 (Bankr. M.D. Fla. 1985).

Contra, Farm Credit of Cent. Fla. v. Polk, 160 B.R. 870 (D. M.D. Fla. 1993); Sky Group Int'l, Inc., 108 B.R. 86 (Bankr. W.D. Pa. 1989); Best Finance Corp., 74 B.R. 243 (Bankr. P.R. 1987).

THE BANKRUPTCY PLANNING TRILOGY FOR THE SURETY

Chapter II

"What's A Surety To Do If The Principal Might File For Bankruptcy And Cause A Substantial Loss?"

By

Robert J. Berens, Esq., SMTD Law LLP

Phoenix, AZ

Presented to

The Pearlman Association

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What's A Surety To Do If The Principal Might File For Bankruptcy And Cause A Substantial Loss?

By Robert J. Berens[1]

While a surety may be surprised by its principal's bankruptcy, in the usual case telltale signs of pending disaster are apparent. Mounting payment bond claims, delayed performance, growing disputes with vendors and others, and slow response to requests for financial information can be signs of serious financial deterioration.

Every bond default is a potential bankruptcy filing, and every claims decision by the surety should be influenced by the possibility that a bankruptcy filing could occur. This knowledge may affect how aggressive the surety acts, whether to provide prepetition financing, and what terms to include in agreements prepared prior to a bankruptcy filing. After a bankruptcy filing it is not enough for a surety to understand its rights in bankruptcy. Merely reacting to and monitoring various motions and proceedings in a bankruptcy proceeding will not effectively limit a surety's exposure under its bonds. To protect itself in any bankruptcy proceeding to the greatest extent possible, a surety should not only understand various bankruptcy laws but also the court procedures unique to this forum.

What's a surety to do if the principal might file for bankruptcy and leave it exposed to substantial loss? This article discusses bankruptcy principles and actions a surety may take in a future bankruptcy proceeding, including proven strategies and suggested methods that a surety should consider before determining a course of action prior to a possible bankruptcy proceeding.

This article is limited in scope to provide instruction to the surety on how to best manage large and complex cases, and to limit its exposure and maximize recoveries in a bankruptcy proceeding. This article is further limited because the various bankruptcy issues are not addressed objectively, but rather from the prospective of the surety, consistent with the authors' purpose to instruct surety practitioners on how to best situate themselves prior to a bankruptcy filing.

- **Prepetition Termination of Bonded Contracts.**

Upon a bankruptcy filing, all creditors are prohibited from terminating the debtor's contracts, taking possession of the debtor's assets, obtaining a lien against the debtor's assets and/or perfecting a U.C.C. security interest previously granted. As discussed below, the "Automatic Stay," under 11 U.S.C. § 362(a),[2] prohibits further pursuit of all claims and actions against the debtor. A rule of thumb sometimes used by bankruptcy practitioners is, "If it makes you smile, then it probably violates the Automatic Stay."

The surety should consider whether any bonded contracts should be terminated prior to a bankruptcy filing to avoid the Automatic Stay prohibiting such termination. The surety obtaining

[1] Robert J. Berens has been practicing bankruptcy, surety, and construction law for over 30 years and is admitted to and regularly practices in Arizona, Nevada, and California. Mr. Berens has represented sureties in numerous complex Chapter 11 cases throughout the county. He has handled all forms of pre-bankruptcy and bankruptcy issues, construction project defaults, and guiding his clients through myriads of complex legal and practical issues. He is board-certified in business bankruptcy law by the American Board of Certification and Arizona Board of Legal Specialization.

[2] Unless otherwise indicated, all references to the "Code," "Bankruptcy Code," or "Section" throughout this article are to Title 11 of the United States Code, as presently amended.

a typical Voluntary Letter of Default would permit the surety to send/ deliver this letter to the counter-party to the contract to terminate that contract prepetition. Construction contracts that are validly terminated prior to the bankruptcy filing are not executory contracts. It is well settled that the filing of a bankruptcy petition cannot resurrect a contract that has been terminated prior to the bankruptcy filing.

Contracts that are not fully completed or terminated prior to a bankruptcy filing become property of the debtor's estate and subject to the Automatic Stay. If within the cure period under the construction contract, a bankruptcy filing preserves the contractor's opportunity to assume or reject the executory contract. The contractor may have until confirmation of a Plan of Reorganization to determine whether to assume or reject the contract, and to cure any outstanding defaults. Therefore, after a bankruptcy is filed, the bonded projects would be delayed and the surety's exposure for liquidated damages or other consequential damages increased.

- **Gaining Control of the Contract Proceeds from the Bonded Contracts.**

It is critical that the surety take whatever steps it can prior to a bankruptcy filing to insure that bonded contract balances remain available to pay for the prosecution of the bonded work. After a default on a bonded contract, it is typical for a surety to obtain an Irrevocable Letter of Direction from its principal, which irrevocably assigns the proceeds of the bonded contracts (and possibly non-bonded contracts funds) to the surety or its agent. Obtaining this Irrevocable Letter of Direction prior to a bankruptcy filing is important because, as a general rule, the Automatic Stay prohibits the surety from making demands concerning the bonded contract proceeds that may be considered to be property of the debtor's estate. Nevertheless, there is precedent that holds that a surety may send a post-petition communication to an obligee that is informational (without demands) concerning its interest in the remaining contract proceeds on the bonded projects.

- **Obtaining Liens Against the Principal's and Indemnitors' Assets**

One possible approach after a bond default is to bring a suit against the principal and other indemnitors seeking collateral in a *quia timet* action that seeks specific performance of a collateral security clause in the surety's general indemnity agreement.[3] From a bankruptcy perspective it is preferred to obtain liens against assets rather than a preliminary injunction prohibiting transfers of those assets. The reason liens are preferred is the surety becomes a secured creditor in a bankruptcy proceeding, which gives the surety an enhanced creditor status in the bankruptcy case. If the surety is merely an unsecured creditor in a bankruptcy proceeding, then it can expect only pennies on the dollar to be distributed to it from the bankruptcy estate.

Another method for the surety to become a secured creditor in any subsequently filed bankruptcy proceeding is to file the general agreement of indemnity with the proper secretary of state's office as a UCC-1 financing statement.[4] There is the possibility that a UCC filing of the general indemnity agreement will enhance the surety's position to a more elevated status of a secured

[3] *See* Griffin, Sebastian, Wilcox, *Enforcement of the Collateral Sec. Provisions in the General Indemnity Agreement: Tactics and Procedures*, presented to the Fidelity & Surety Law Committee of the Tort & Ins. Practice Section of American Bar Association on January 26, 2007, for a discussion of a *quia timet* action being brought prepetition against the principal and other indemnitors.

[4] Some collateral clauses in indemnity agreements require that a "default" occur under the terms of the indemnity agreement prior to the surety's security interest becoming effective. If so, then the surety should consider how best to create an event of default under the indemnity agreement to make the various security interests effective.

creditor in a subsequent bankruptcy proceeding. To the extent the UCC filing is outside the 90-day preference period, the surety would be entitled to retain any liens that it obtained.

Finally, after obtaining liens against assets, consideration should be given to waiting in the wings until after the 90-day preference period has passed. In other words, if the surety believes it has obtained valuable collateral, then it may be advantageous to be slightly less aggressive in the hope that a bankruptcy filing does not occur within 90 days of obtaining and perfecting liens against collateral. Of course, this may not be possible in some bond default situations. Nonetheless, getting beyond a possible preference period should at least be considered before the surety moves forward with an intended course of action.

- **Communicating with the Obligee about Bonded Contract Funds – "Freeze Funds Letters"**

Prior to the principal filing for bankruptcy, the surety may take several steps to protect its interests and mitigate its losses. In bankruptcy, cash will often be in short supply. Thus, a surety called upon to fulfill its obligation under performance bonds should act to protect the bonded contract proceeds that are necessary to complete the bonded projects. Normally, a surety required to complete projects due to a defaulting principal will simply notify the obligee of the surety's right to the bonded contract funds. The key objective of this notice is to direct the oblige to not release contract funds to the principal and hold the funds for the surety.

- **Prepetition Cancellation of Bonds.**

For bonds that provide for notice and cancellation, the surety may consider issuing cancellation notices before the principal files for bankruptcy, especially where it would face substantial exposure or loss because of a bankruptcy filing. This is typically an option for a commercial surety, since most performance and payment bonds do not have cancellation terms.

If cancellation notice(s) are issued prior to bankruptcy, then it should lead to cancellation of the bond(s). *See In re Lipscomb Farms*, 90 B.R. 422 (Bankr. W.D.Mo. 1988)(If the agreement is cancellable by the terms contained therein and one of the parties properly initiates such cancellation prepetition and nothing more remains to be done except wait for the passage of time, the mere filing of a bankruptcy petition should not halt nor stay the cancellation). As a general rule, the Automatic Stay will not apply to a cancellation where the bond provides that a notice is the last act required for its termination. Provided the last act needed to cancel the bond occurred prepetition (i.e., issuing cancellation notice(s)), the Automatic Stay cannot stop the cancellation of the bond(s).

The surety might only be able to cancel some of the bonds it issued prior to the bankruptcy filing. After the cancellation of various bonds, the debtor(s) might need the surety to re-issue new bonds in lieu of the cancelled bonds, which would give the surety significant leverage in a future bankruptcy proceeding. In that situation, the surety can demand that it receive cash collateral or an ILOC to fully secure the penal sums of the bonds issued post-petition. If cash collateral would be provided by the debtor(s), then the surety should consider demanding that a new cash collateral escrow agreement be executed by all debtors (even more debtors than the indemnitors under the indemnity agreement) and that the bankruptcy court issue an order approving this post-petition financing and the to be executed cash collateral escrow agreement.

- **The "Bankruptcy Crystal Ball" Discussion with the Surety's Indemnitors**

During initial meetings with the surety's indemnitors, an individual indemnitor might state that they intend to file for bankruptcy and discharge the surety's indemnity claim against them. The surety's response to that indemnitor might include an overall discussion of how the personal indemnitor would be treated under various Chapters of the Bankruptcy Code, which include issues under The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").[5] BAPCPA made substantial changes to the Bankruptcy Code that directly impacts several issues that sureties face in various bankruptcy proceedings. Many of the amendments to the Bankruptcy Code relate to consumer debts. However, many amendments affect businesses and creditors' rights of interest to the surety.

The types of bankruptcy filings a surety is most likely to be involved with are Chapters 7, 11 and 13. A Chapter 7 case is referred to as a liquidation. A Chapter 7 trustee is appointed that liquidates property of the estate and distributes the proceeds to creditors on a pro-rata basis. The goal of most Chapter 7 debtors is to obtain a discharge of debts.[6]

Chapter 7 debtors will have to qualify under an income "means" test before they can obtain a discharge of their debts.[7] The "means test" is a complicated formula that analyzes the debtor's monthly income as compared to the state median income.[8] If an individual does not meet the "means test" to qualify for a Chapter 7 discharge, then the case can be dismissed, or with the consent of the debtor, may be converted to Chapter 11 or 13.[9] Therefore, if a personal indemnitor's monthly income does not meet the "means test," then they will not be able to obtain a discharge under Chapter 7.

A Chapter 13 case is referred to as a statutory workout that enables individuals to restructure their debts by a court ordered repayment plan. An individual is permitted to file under Chapter 13 if their secured and unsecured debts are within the limits set in Bankruptcy Code § 109(e), which provides, "Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated debts of less than $2,750,000."

To confirm a Chapter 13 plan the debtor must pay their "disposable income" toward the repayment of debts for a period of between three and five years.[10] Under BAPCPA, the "super discharge" that previously enabled Chapter 13 debtors to discharge claims based on fraud, misleading financial statements, embezzlement and breach of fiduciary duty will no longer be able to discharge these types of debts.[11] Under the earlier version of Bankruptcy Code § 1328(a), claims for fraud, obtaining credit based on false financial statements, embezzlement, and breach of fiduciary duty were dischargeable by a Chapter 13 debtor.[12] Pursuant to BAPCPA a Chapter 13 debtor is no longer be able to obtain a discharge of various types of debts set forth in Bankruptcy Code § 523(a).

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[5] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Pub. L. 109-8, 119 Stat. 23 (April 20, 2005).
[6] 11 U.S.C. § 727(a). Only individuals are entitled to a discharge under Code § 727(a).
[7] *See* 11 U.S.C. § 707(b).
[8] *See* 11 U.S.C. § 707(b)(2).
[9] *Id.*
[10] 11 U.S.C. § 1322(d).
[11] *See* 11 U.S.C. § 1328(a).
[12] *See* 11 U.S.C. § 1328(a).

A Chapter 11 case is referred to as a reorganization. A reorganization occurs if a plan of reorganization is approved by the bankruptcy court.[13] It is beyond the scope of this article to discuss the Chapter 11 reorganization process in detail.

An individual Chapter 11 debtor's post-petition income is included within the definition of the bankruptcy estate.[14] Before enactment of BAPCPA, an individual Chapter 11 debtor's post-petition income was not included within the definition of "property of the estate."[15] Previously, a strategy used by individual Chapter 11 debtors was to use only the cash they held prepetition to reorganize and not include post-petition earnings in a plan of reorganization. This enabled the debtor to amass their post-petition monies during the Chapter 11 case that was exempt property that belonged solely to the debtor. In a dispute over confirmation of a Chapter 11 plan of reorganization, these post-petition earnings were not included when analyzing the liquidation test under Bankruptcy Code § 1129(a)(7), and these earnings did not have to be distributed to creditors on a pro-rata basis. BAPCPA has foreclosed this strategy for individual Chapter 11 debtors.

The definition of "property of the estate" in individual Chapter 11 cases was greatly expanded.[16] Now included in property of a Chapter 11 debtor's bankruptcy estate are: (1) all property acquired during the bankruptcy case and (2) post-petition earnings.

The real twist is the addition of Bankruptcy Code § 1129(a)(15) and the deletion of the "absolute priority rule," under Bankruptcy Code § 1129(b)(2)(B), to individual Chapter 11 debtors. Prior to BAPCPA, the "absolute priority rule" held that a Chapter 11 debtor could not retain anything for themselves unless the surety (which holds a higher level of claim) was paid in full prior to the debtor (which is the lowest level of claim). With the deletion of the absolute priority rule, at least theoretically, the debtor could wipe out their debts to the surety while retaining valuable assets for themselves. However, the addition of Code § 1129(a)(15) provides a strong tool for unsecured creditors, as follows:

> (15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan:
>
> (A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
>
> (B) the value of the **property to be distributed** under the plan is **not less than the projected disposable income of the debtor** (as defined in section 1325(b)(2)) **to be received during the 5-year period** beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.[17]

Based on this addition to the Bankruptcy Code, if the surety objects to confirmation of the debtor's plan of reorganization, then the individual indemnitors in Chapter 11 can now be required to make plan payments of all their disposal income for at least five years. In essence, a Chapter 11 of an

[13] 11 U.S.C. § 1141.
[14] *See* 11 U.S.C. § 1123(a)(8).
[15] *See* 11 U.S.C. § 541(a)(6) (which specifically excluded from property of the estate "earnings from services performed by an individual debtor after the commencement of the case").
[16] *See* 11 U.S.C. § 1115.
[17] *See* 11 U.S.C. § 1129(a)(15) (emphasis added).

individual has become more like a Chapter 13 plan because of the requirement that all "disposal income of the debtor" be distributed under a Chapter 11 plan for at least five years.

The United States Supreme Court recently issued its monumental decision that now bars non-debtor nonconsensual releases of non-debtors in Chapter 11 plans of reorganization in *Harrington v. Purdue Pharma L.P.*, 219 L. Ed. 2d 721 (Sup. Ct. June 27, 2024). Prior to this decision, it was typical for the reorganizing entity's plan of reorganization to include a provision that released claims against non-debtors (such as Purdue Pharma, L.P.) even though that non-debtor did not file for bankruptcy and make its assets subject to creditors' attacks and to the bankruptcy court's control. After this Supreme Court decision, this strategy is not available to wealthy indemnitors and they can no longer obtain a release of the surety's claims without personally filing for bankruptcy.

Based on the above, BAPCPA may make Chapter 7 unavailable for high income debtors[18] and Chapter 13 may not be available due to their debts being beyond the limits provided in the Code.[19] Thus, the only chapter left for high income individuals is Chapter 11, and pursuant to Code § 1129(a)(15) these individuals will be required to pay all their disposable income to be distributed under a Chapter 11 plan for at least five years. The surety may be able to use these revisions to the Code when negotiating with individual indemnitors prior to their filing for bankruptcy.

- **Exemptions and Avoidance of Fraudulent transfers to Homesteaded Property**

Excluding certain rollover accounts, BAPCPA permits debtors to claim the maximum amount of $1,000,000 as exempt in their IRA account.[20] Prior to BAPCPA, some wealthy indemnitors, with the ability for longer range planning, would take much of their non-exempt assets, liquidate them, and make sizeable contributions to their IRA account. BAPCPA curtails this pre-bankruptcy planning strategy up to the amount of $1 million.[21]

BAPCPA sets limits on homestead exemptions in bankruptcy cases. The amendments on homestead exemptions are set forth in Bankruptcy Code § 522. For many debtors the homestead exemption cap will be $125,000.[22] However, if a debtor acquired the homestead more than 1215 days prior to filing for bankruptcy or if it was a rollover of a previous homestead acquired in the same state, then the homestead may be higher depending on state law.[23] Prior to BAPCPA, debtors would move to states like Texas and Florida prepetition that had unlimited homestead exemptions and purchase expensive homes. This strategy has been somewhat curtailed in BAPCPA.

A very interesting change to the homestead exemption is any assets that were fraudulently transferred to purchase or reduce debt of a homesteaded property <u>within 10 years prior to the bankruptcy</u> can be avoided.[24] This revision will also implicate the common pre-bankruptcy planning tool of liquidating non-exempt assets and purchasing an expensive property in a state with an unlimited homestead exemption. Also affected by this amendment are debtors/principals that used bonded contract proceeds to purchase an expensive house or reduce the liens against their

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[18] *See* 11 U.S.C. § 707(b).
[19] *See* 11 U.S.C. § 109(e).
[20] *See* 11 U.S.C. § 522(n).
[21] *See* 11 U.S.C. § 522(n).
[22] *See* 11 U.S.C. §§ 522(p)(1) and (q)(1).
[23] *See* 11 U.S.C. § 522(p)(1).
[24] *See* 11 U.S.C. § 522(o).

residence. This Code provision enables the surety to reach back 10 years prior to the bankruptcy to avoid fraudulent transfers towards the debtor's homestead property.

- **A Surety Taking Cash or an ILOC Prior to a Bankruptcy Filing.**

Since Silicon Valley Bank was put in receivership, there may be concern about which bank issues an Irrevocable Letter of Credit ("ILOC"). The author was involved with a file where the surety received an ILOC from Silicon Valley Bank. A substitute ILOC was issued by First-Citizens Bank & Trust Company (as successor by Purchase to the Federal Deposit Insurance Corporation as Receiver for Silicon Valley Bridge Bank, N.A. (as successor to Silicon Valley Bank)). Therefore, the concern about the size of the bank issuing the ILOC is eradicated to the extent that the FDIC has guaranteed the bank's obligations.

An ILOC permits immediate demand for payment during the bankruptcy case. ILOC's have been held not to be property of the debtor's estate. *See In re K-Mart Corp.*, 297 B.R. 525 (N.D. Ill. 2003) (letters of credit are not property of debtor's estate subject to automatic stay; beneficiary not prevented from drawing on letter of credit when account party is in bankruptcy); *In re A.J. Lane & Co.*, 115 B.R. 738 (Bankr. D. Mass. 1990) (payment by a third party on letter of credit not stayed because it did not involve a transfer of debtor's assets). *But see, In re Sunset Sails*, 220 B.R. 1005 (10th Cir. BAP (Okla. 1998)), *motion den.*, 222 B.R. 914 (10th Cir. BAP 1998), *aff'd* 196 F.3d 568 (10th Cir. 1999) (letters of credit preferential transfers as the letters were issued to satisfy the principal's antecedent debt and, therefore, sureties were ordered to disgorge proceeds).

To the extent that a surety receives cash collateral prepetition, the surety should be a secured creditor to the extent of the cash collateral that the surety holds or has a lien against. Care should be taken to make sure that the indemnity agreement or the cash collateral escrow agreement contain an express grant of a security interest against the cash collateral that is being held in the applicable escrow account.

The next step is for the surety to perfect that security interest in the cash collateral that it holds. A secured party often perfects a security interest in collateral by filing a UCC-1 Financing Statement. However, a security interest in cash collateral may only be perfected by taking possession of the cash. *See* California Commercial Code (or similar UCC provisions in other states) §§ 9312(b)(3),[25] 9313(a)[26] and 9310.[27]

Some funds control agreements provide for an agent to hold the cash collateral in its escrow account. Care should be taken to make sure that the funds control agreement provides that the funds control entity is the agent for the surety. That would ensure that the surety (through the

[25] Cal. Comm Code §§ 9312(b)(3), "A security interest in **money** may be perfected only by the secured party taking possession under Section 9313." (emphasis added).
[26] Cal. Comm Code §§ 9313(a), "Except as otherwise provided in subdivision (b), a secured party may perfect a security interest in tangible negotiable documents, goods, instruments, **money**, or tangible chattel paper by taking possession of the collateral. A secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities under Section 8301." (emphasis added).
[27] Cal. Comm Code §§ 9310, "The filing of a financing statement is not necessary to perfect a security interest that satisfies any of the following conditions (6) It is a security interest in collateral in the secured party's possession under Section 9313."

funds control entity) is in "control" of the cash collateral in the agent's escrow account. The surety (or its agent) holding the cash collateral in its escrow account is proper perfection of its security interest in this type of collateral. Therefore, even though the cash collateral is property of the bankruptcy estate, these funds would be subject to the surety's perfected security interest.[28]

The exception is when the surety's security interest is perfected within 90 days of the bankruptcy filing, which may be avoided as a preference under Bankruptcy Code § 547. It is beyond the scope of this article to discuss defenses to a preference action, including the "contemporaneous exchange for new value given to the debtor" or the transfer that is a "subsequent advance" of new value.

- **Pre-Packaged Bankruptcies**

A pre-packaged bankruptcy is a plan for financial reorganization that a financially troubled company prepares in cooperation with its creditors and/or the purchasers of the company's assets, which may be implemented when the debtor files for bankruptcy.[29] The primary benefit of a pre-packaged bankruptcy is to streamline the reorganization process to save the debtor an immense amount of attorneys' fees and to save time on developing and implementing a plan of reorganization. The rationale behind the pre-packaged bankruptcy is, the sooner the company can emerge from bankruptcy, the sooner it can reap the intended benefits, including returning to a positive cash flow from its business operations.

Unlike a conventional bankruptcy where the debtor files for bankruptcy relief without having first agreed to the terms and conditions of its reorganization plan with its creditors, a pre-packaged bankruptcy is a pre-negotiated bankruptcy where the company, together with its most important creditors and/or purchasers, pre-arrange the restructuring of the company, pursuant to agreed-upon terms of a restructuring plan of reorganization that is typically memorialized in a lock-up agreement. The would-be debtor then files for its Chapter 11 reorganization following the execution of a lock-up agreement. One key distinction of a pre-negotiated and a pre-packaged bankruptcy, is the requirement that solicitation be completed before the case is commenced in pre-packaged bankruptcy.

Securing the approval from the key creditors, as well as suppliers and other entities that the debtor needs to maintain its operations, mitigates the amount of uncertainty and disruption that ordinarily transpires after a bankruptcy filing. Creditors may favor a pre-packaged bankruptcy, as they can often recover more in that scenario than they might otherwise obtain in a typical Chapter 11 case or if the case was converted to a Chapter 7 liquidation. In a pre-packaged bankruptcy, certain creditors' claims can be preserved as compared to other typical bankruptcy cases.

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[28] The Bankruptcy Code recognizes perfected security interests. *See* 11 U.S.C. § 506; *Butner v. United States*, 440 U.S. 48, 55 (1979) ("Property interests are created and defined by state law.").

[29] According to Tom R. Barber in *Pre-Pack Bankruptcies and First Day Orders: I Hear that Freight Train Coming (2011)*, a "pre-pack" bankruptcy filing is used for one or more of the following purposes:

- To allow for the dismemberment and sale of substantially of the assets of a business, over a very short term.
- Provide for the interim survival of the business to attempt to preserve the best value for secured creditors and, to a lesser extent, unsecured creditors, while the debtors' only viable assets are sold.
- To afford the best chance of accomplishing the above goals by stopping anyone from interfering. This is done by moving so fast and giving so little notice that no one has a chance to interpose a viable objection.
- Remove any "warts" that remain after the sale of substantially all the viable assets or, in some cases, that are attached to the viable assets, through the bankruptcy process.

To have an effective pre-packaged Chapter 11 bankruptcy, the debtor needs to orchestrate and coordinate a pre-arranged restructuring plan by getting buy-in and sign-off from its chief trade creditors, its chief lender(s) and, in many instances, but not all, potential purchasers of the company's or companies' assets. In many pre-packaged bankruptcies, the business (or aspects of it) is sold and much of the time and energy expended in the development of the reorganization plan and process is to accommodate the sale transaction and the entry of the new lender. In those cases, the pre-packaged scenario must provide for the interim maintenance of the existing business until the transaction or series of transactions is fully consummated. Sometimes, only certain assets are sold, while in other instances, it is a wholesale conversion of the company with a new entity or an entity to be purchased at the end of the transaction.

Proponents of pre-packaged bankruptcies believe the process creates efficiency and cost savings. Many would suggest that a pre-packaged bankruptcy gives a "leg up" to the debtor, key creditors and purchasers by catching some of the creditors who are not provided advance notice of the pre-packaged petition off guard.

THE BANKRUPTCY PLANNING TRILOGY FOR THE SURETY

Chapter III

THE SURETY'S BANKRUPTCY TOOLKIT:
AGREEMENTS AND PROVISIONS THAT HELP THE SURETY

By

T. Scott Leo, Esq.,

The Law Offices of T. Scott Leo, P.C./Chicago, IL

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THE SURETY'S BANKRUPTCY TOOL KIT:

AGREEMENTS AND PROVISIONS THAT HELP THE SURETY

Terms of the indemnity agreement, the construction contracts and the related underwriting documents are part of the tool kit that the surety can deploy to help reduce exposure from a future bankruptcy event. Documents executed when taking collateral can also aid the surety in avoiding undue complication should the principal seek bankruptcy relief. Typical underwriting documents, such as, the indemnity agreement and collateral pledge contain particularly useful provisions to assist the surety in securing its position when the principal is on the brink of a bankruptcy event. Other more exotic documents, taken in more unusual underwriting situations, such as, subordination agreements, must be drafted in anticipation of a bankruptcy event and offer provisions that will aid the surety in a later bankruptcy. Finally, for the contract surety, the construction contracts themselves typically have several provisions that will aid the surety in arranging for completion of the work and assuring that payments are made to the parties who are actually performing the work and providing materials.

A. Some Provisions of Typical Indemnity Agreements

Earlier treatises address the use of the indemnity agreement and enforcing its terms during a principal's bankruptcy in detail.[30] The goal here is to review some key provisions that help the surety prospectively before the bankruptcy event. Key provisions that assist the surety in securing its position before a bankruptcy filing include: the assignment provision, the trust fund provision, the segregation or separate account provision and the power of attorney

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[30] The most recent and notable publication treating this subject is Chad L. Schexnayder, Steven H. Rittmaster, and T. Scott Leo, *The Indemnity Agreement in Bankruptcy, in* THE SURETY'S INDEMNITY AGREEMENT: LAW AND PRACTICE (Marilyn Klinger, George J. Bachrach and Tracey Haley eds., 2d ed. 2008).

provision.

As noted above, the indemnity agreement typically contains an assignment provision that assigns contract receivables. Some limit this assignment to bonded contract receivables. Other agreements assign all contract receivables. Most provide that the indemnity agreement can be filed as a financing statement to perfect the assignment.[31] And, although these agreements often include assignments of equipment and other assets used for work on bonded contracts, unless the collateral descriptions in the indemnity agreements are supplemented by equipment and property descriptions, the general description of equipment in the typical indemnity agreements is not sufficient for a valid perfection of rights.

Some agreements contain collateral assignments, and others, pure assignments. Some may include language providing for both types of assignments. The type of the assignment may affect the surety's rights in a bankruptcy. In *In re Jones Constr. & Renovation, Inc.,* the court found the debtor principal held no interest in a claim for extras on a contract that was terminated before the bankruptcy filing because the surety indemnity agreement granted the surety a pure assignment of the contract rights upon default and termination of the contract.[32] In contrast, a collateral assignment provides that the assets are assigned as security for losses, as opposed to being absolutely assigned upon an event, such as, default and termination. If rights have been

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[31] An excellent article addressing the pros and cons of filing the indemnity agreement as a financing statement and perfecting the assignment rights is Richard W. Smith & Victor E. Covalt, III, *Should the Surety Stand on its Equitable Subrogation Rights or File Its Indemnity Agreement Under the Uniform Commercial Code?*, 69 NEB. L. REV. 664 (1990). The effect of filing the agreement and the legal consequences of asserting these rights sometimes caused sureties to question the practice of filing agreements and providing for an express right to perfect the assignment in the indemnity agreement. The fear was that courts might refrain from enforcing equitable rights where the surety has legal rights to enforce. At least one case rationally explains why a surety's exercise of its legal rights under the indemnity agreement should not affect its equitable subrogation rights. American Oil Co. v. L.A. Davidson, Inc., 290 N.W. 2d 144 (Mich. App. Ct. 1980).

[32] 337 B.R. 579 (Bankr. E.D. Va. 2006).

completely assigned to the surety before the principal's bankruptcy, these rights are not property of the estate. The pure assignment language helps the surety avoid fighting with the representative of the principal's bankruptcy estate over salvage rights that rightfully ought to belong to the surety.

Segregation of contract funds also helps the surety later assert that contract funds are trust funds in those states that require segregation of funds as an element of a trust.[33] The better indemnity agreement provision for the assertion of this right is the provision that allows the surety to demand segregation of the funds in a separate account at the surety's discretion and without conditions. Conditional provisions may make it difficult for the surety to assert this right.

A key problem in exercising the rights to perfect a security interest or to demand the principal deposit bonded contract funds in a separate account is that both these actions may violate the principal's loan covenants with its primary lender or lenders. The circumstances may require the surety to take these steps despite the potential violation of existing loan covenants. A dialogue with the principal's lenders seeking a waiver of these covenants could also prove to be the start of workout negotiations. But it is important to note that some of the key protections of the indemnity agreements often violate other loan agreements of the principal. Because, as noted above, perfection of the surety's assignment under the indemnity agreement may offer very little protection beyond the surety's subrogation rights, the scope of the assignment often being limited

[33] In addition to the cases discussed and cited in Chapter III regarding the treatment of contract funds as trust funds, there are some articles that generally address this topic in connection with construction contracts: Kent W. Collier, *The Nuts and Bolts of Bankruptcy, Trust Funds, and the Construction Industry: Building A Solution for Subcontractors "Nailed" With an Unpaid Bill,* 21 EMORY BANKR. DEV. J. 623 (2005); Gary W. March and Angelyn M. Wright, *Use of Statutory, Express and Constructive Trusts to Recover from Contractors in Bankruptcy,* 9 J. BANKR. L. & PRAC. 75 (1999).

to the bonded receivables, sureties sometimes hesitate to perfect this assignment.

Perfection of the indemnity agreement assignment, however, gives sureties notice of actions of other creditors, such as the sell-off of equipment by the principal, as the release of the surety's interest will likely be sought to achieve such sales. It may be a vehicle for offering the surety greater information and notice of the principal's financial dealings.

A broadly worded power of attorney provision in the indemnity can aid the surety in closing transactions and settling matters on the eve of a principal's bankruptcy.[34] The surety may want to use this provision to bind an uncooperative or reluctant principal to a settlement or other transaction before a bankruptcy filing. Many sureties have faced difficulties resolving claims issues and closing contracts because a debtor principal insists that it possesses a valuable affirmative claim or is able to assume a contract that is patently unprofitable. Closing these contracts before a bankruptcy event can avoid complications. After the filing, it is doubtful the surety can exercise its rights as the attorney-in-fact for the principal to bind the principal to some release or transaction without lifting the automatic stay, especially if the exercise of that right affects property of the estate.[35]

B. Pledge Agreements, Letters of Credit and Other Pre-Petition Agreements.

Sureties sometimes obtain collateral for the account. The terms for the pledge of

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[34] *See* Hutton Constr. Co. v. County of Rockland, 52 F.3d 1191 (2nd Cir. 1995); Liberty Mutual Ins. Co. v. Aventura Engineering & Constr. Corp., 534 F.Supp. 1290 (S.D. Fla. 2008).

[35] Where the exercise of this right does not affect property of the estate, for example, submission of paperwork signed as attorney-in-fact by the surety on a rejected and terminated contract, there is no reason the surety should not be able to exercise that right without lifting the stay. Interpreting the scope of the power of attorney may be a matter of state law. See *In Re Chapman,* 2021 Bankr. LEXIS 764, Case No. 18-30442-beh (Bankr. E.D. Wis. March 26, 2021) (finding scope of POA under state law included authority to file a bankruptcy case naming the grantor as debtor.)

collateral should anticipate financial decline and a prospective bankruptcy filing as possible events and offer some protection or alternatives to sureties facing imminent financial decline or bankruptcy of their principals.

1. Collateral Pledge Agreements

An account may be collateralized by cash or by letters of credit. Collateral pledge agreements are used to define the terms under which the collateral is taken, the rights of the parties in and to the collateral and often the terms for substitution of collateral or enhancement of existing collateral. These agreements can be used when the collateral is either in the form of cash or a letter of credit and can apply to pledges of other types of assets as collateral.

Some sureties prefer not to use collateral pledge agreements where collateral is in the form of a letter of credit. A common fear is that a side agreement might create non-documentary conditions restricting or qualifying the right to issue a sight draft. If the letter of credit itself creates no documentary conditions, however, the pledge agreement can be useful in defining the right of the surety to use the proceeds of the letter of credit once the sight draft is issued and the surety is holding cash. It may be preferable that there exists an agreement that provides the terms for the surety holding and using the proceeds of a letter of credit after its proceeds are deposited with the surety.[36] The pledge agreement can provide that no other party can claim the

[36] A letter of credit transaction is created out of three agreements but is an obligation solely between the issuing bank and beneficiary. In addition to the letter of credit, which is the agreement between the bank and the beneficiary, there is an agreement between the account debtor (principal) and the bank, and an agreement between the letter of credit beneficiary (the surety) and the account debtor or principal. In re Builders Transport, Inc., 471 F.3d 1178 (11th Cir. 2006). The pledge agreement can put to rest any argument that the proceeds of the letter of credit once deposited with the surety ought to be paid to the principal's estate because of the terms of another agreement. See, for example, PNC Bank, N.A. v. Spring Ford Industries Inc., No. 004-0479, 2005 Bankr. Lexis 730 (E.D. Penn. April 19, 2005) and In re Lancaster Steel Co., 284 B.R. 152 (S.D. Fla. 2002), which held the unused proceeds of the letter of credit should be returned to the debtors instead of being returned to the issuing banks or retained by the beneficiaries.

proceeds until the surety's exposure is eliminated and its bonds discharged and released.

The pledge agreement can provide that the cash or other property held by the surety is property of the surety until all of the bond exposure is resolved or discharged. By shifting title to the surety, any later bankruptcy estate of the principal cannot claim a property interest in these funds until the surety's bonds are discharged. One can argue that because the funds are property of the surety under the terms of the pledge agreement, the surety can use and apply the funds without lifting the automatic stay. The bankruptcy courts may nevertheless regard the surety's interest in these funds as a security interest and require the surety to lift the stay to use the funds held. Despite this uncertainty over the need to lift the stay, the clear statement in the pledge agreement that the funds or other property belong to the surety for use to secure it from all losses contemplated in the indemnity agreement will facilitate getting stay relief in a later bankruptcy case–it should be clear the debtor principal has no equity in the funds.

The pledge agreement ought to also enable the surety to demand substitution of collateral that might decline in value or be at risk. In an age of financial uncertainty that could include the substitution of a letter of credit from a bank that might be less stressed and better capitalized than the original issuing bank.[37] The surety should have broad discretion to demand substitution of

[37] After the banking and savings and loan crisis of the 1980's, some sureties shied away from using letters of credit as collateral for their bonds because in a number of isolated instances where either the FDIC or the RTC took over an institution, they refused to honor outstanding letters of credit. Sometimes this refusal was the consequence of the *D'Oench Duhme* Doctrine, named after a Supreme Court case, and later codified in Title 12 U.S.C. § 1823(e), which provides that obligations that are not found in the records of the institution, i.e., not susceptible to discovery during an audit, are not binding on the FDIC and RTC as a receiver of the institution. The Supreme Court in another decision also held that for purposes of FDIC insurance a standby letter of credit that was backed only by a contingent promissory note is not an insured deposit, which means a letter of credit holder might merely receive a pro-rata share of a liquidated institution's distribution to its uninsured and unsecured creditors. Federal Deposit Ins. Corp. v. Philadelphia Gear Corp., 476 U.S. 426 (1986). A reading of the case suggests, however, that its holding is limited to where the letter of credit is secured by a contingent liability. Where the letter of credit is a charge against the customer's account or secured by cash it may be an insured deposit liability.

collateral.

2. Letters of Credit versus Cash

Whether cash or a letter of credit is the preferable means of taking collateral is a common inquiry. Cash may be more difficult to accept as collateral administratively because it must be invested in some way. The accrual of interest must also be addressed in the pledge agreement. Letters of credit might pose a risk in a financial climate in which bank failures are likely.

Several cases hold that the proceeds of a letter of credit are not property of the account debtor's estate, the letter of credit constituting an independent obligation between the issuing bank and the surety.[38] Moreover, there is less risk that a bank failure today, as opposed to back in the 1980's, might affect an institution's obligation to honor a letter of credit that is collateralized.[39] The lack of any administrative burdens for a beneficiary of a letter of credit and the cases supporting the position that letters of credit are independent obligations between the bank and surety are evidence of the great utility of letters of credit as a form of collateral.

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[38] In re S-Tran Holdings, Inc., 414 B.R. 28 (Bankr. D. Del. 2009); In re Milford Group, Inc., 197 B.R. 31 (Bankr. M.Pa. 1996); In re M.J. Sales & Distributing Co., Inc., 25 B.R. 609 (Bankr. S.D.N.Y. 1982).

[39] A letter of credit that is collateralized by cash, for instance, may be treated as a deposit account for which FDIC insurance would apply. FDIC Advisory Opinion FDIC-90-13, June 4, 1990. After the adoption of FASB No. 107 in December of 1991, banks must show the letter of credit date as debt against the customer's account which should mean which means the *D'Oench Duhme* Doctrine should not be grounds for repudiating letters of credit. Moreover, in a statement of policy in 1995, the FDIC stated that after is appointment as conservator and receiver, it may continue collateralized letters of credit in effect, or pay the beneficiary the amount held as collateral. With regard to standby letters of credit, the FDIC continues to describe them as contingent obligations; and contingent obligations of institutions are not generally federally guaranteed obligations. A letter of credit from a strong bank and secured by collateral remains a fairly safe means of taking collateral. If there is a risk that the bank may be subject to imminent regulatory action, and the principal fails to replace the letter of credit in the face of this risk, or there is insufficient time to replace the letter of credit, the surety should issue the sight draft and draw the proceeds.

3. Subordination Agreements

In unique underwriting circumstances, such as where the secured lender also holds an equity stake in the principal company or where the surety is asked to provide surety credit for an already financially compromised company, the surety may, and in some cases, ought to request the secured party subordinate its security interest to the surety's claim for recovery should it incur losses. Subordination agreements are very common in other debt and financial transactions, but are used infrequently in surety underwriting. By subordinating the secured party's claim to the surety's claim, in a bankruptcy, the surety's claim is granted priority over the secured party's claim.

To fully and readily assert the rights granted by the secured party under the terms of the subordination agreement that agreement should, in addition to recognizing the superiority of the surety's claim to the secured party, grant the surety the right to exercise the rights of a secured party, such as, the rights as a secured party under the Uniform Commercial Code.[40] Agreements that merely subordinate the claim, and that fail to grant to the surety the power to pursue the remedies of the secured creditor to the surety, may not fully empower the surety to seek stay relief and proceed to execute against the secured property in a subsequent bankruptcy proceeding.

4. Workout and Financing Arrangements

Financing of a principal by the surety may occur just prior to a bankruptcy event. Provided the surety can formally document the financing terms, the surety can use this as an

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[40] A subordination agreement can give rise to a security interest. *See* Strosberg v. Brauvin Realty Services, Inc., 691 N.E. 834 (Ill. App. Ct. 1998).

opportunity to set forth terms regarding its expectations for the contracts. These terms might not be enforceable post-petition against a debtor, but as already discussed, can influence a later bankruptcy court's view of relief sought, especially when the party seeking relief provided financing to the debtor on the eve of a bankruptcy filing.

The agreement can stipulate events of default and events that support stay relief. It should provide for control of contract funds, as well as funds advanced, and define what would later be regarded as adequate protection. Progress milestones can be identified in the agreement for the contracts. The principal can stipulate that the contracts must promptly be assumed or rejected should bankruptcy occur. The surety can also get the individual indemnitors' consent to these terms.

These provisions may not be enforceable but will help preserve good arguments in seeking relief later before a bankruptcy court. It would, for example, be difficult for a later debtor's representative to argue that completion by a certain date is not crucial or a default, when there is a pre-petition agreement that stipulates to this default when the principal obtained surety financing.

C. Provisions of the Construction Contracts

The terms of the underlying contracts can help avoid complications in a contractor or subcontractor bankruptcy. A surety facing a series of defaults from a single principal will want to conduct a triage of the contracts and their terms to assess what will help. The terms that help most in reducing the risk of a bankruptcy filing not surprisingly are those addressing payment issues and the progress of the work. These provisions are the heart of the default and pre-default remedies afforded by the contracts.[41]

Most standard contract forms, AIA and ConsensusDocs, provide for the owner or general contractor to supplement the work force.[42] This is a key provision for keeping the work going where the principal contractor is literally or metaphorically absent from the project. Prior to the filing of the petition, this supplementation precedes the actual termination of the contractor. As previously discussed, if it is believed the principal will not return to the work, it is best to effect termination pre-petition. If a petition is filed and the principal debtor fails to proceed with the work, the obligee can supplement the workforce without moving to lift the automatic stay. In fact, as an immediate step to continue with work that is time sensitive, such as school construction, the surety can enter into an agreement with the obligee consenting to the supplementing of the workforce to keep the work moving until ultimately the stay is lifted and the contract terminated.

The construction contracts often contain their own trust provisions that enhance and compliment the surety's rights under the indemnity agreement and the rights of others on the

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[41] Some provisions that might help a contractor or surety confronting bankruptcy issues include:

1. Strong trust fund language in the payment provisions, A201, ¶9.6.7, 11.3.9;
2. A payment provision authorizing the general contractor to make direct payments to vendors the contractor has failed to pay, A201, ¶¶ 9.5.1.3, 9.5.3;
3. A broad no damages for delay clause that might protect the general contractor from impact claims from others arising out of a contractor's bankruptcy, A201, ¶ 15.1.6;
4. A termination provision that does not provide for a "cure" period and gives the contractor an absolute right to terminate, A201, ¶14.1;
5. A provision assigning vendor contracts, A201, ¶ 5.4.;
6. Strong provisions for taking control of the work, A201, ¶¶ 14.2.1, 14.2.2.

[42] A201, ¶ 2.4.

project under state statutory trust fund provisions.[43] These provisions offer strong support for the position that the debtor has no interest in the funds until the trust claimants are paid.

Other provisions regarding payment prevent the diversion of contract funds away from the parties that provide labor and materials.[44] Provisions allowing for direct payment of unpaid subcontractors and suppliers will allow payments to continue uninterrupted by a bankruptcy proceeding. Direct payments that are authorized by the contract are far less susceptible to claims that the funds should have been paid to the estate.[45]

CONCLUSION

The steps a surety might consider when its principal nears the bankruptcy court door include the following:

1) Get and preserve collateral–take it even if it might need to be surrendered in a later avoidance action—taking preference is not a sin—take the money and hope to count 91 days after taking it;

2) Lock down or segregate contract funds;

3) Consider perfecting a security interest in property of the principal;

4) If it is apparent the surety must complete the contract(s) through some arrangement, try to get the contract(s) terminated;

5) Consider an out of court workout as an option when a bankruptcy filing

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[43] *See* In Re Marrs-Winn Co., Inc., 103 F.3d 584 (7th Cir.1996) (upholding contract provision which designated progress payments as trust funds).
[44] A201, ¶¶ 9.5.1.3, 9.5.3.
[45] *See* In re Arnold, 908 F.2d 52 (6th Cir. 1990) (discussing direct payment provision and trustees attempt to avoid direct payments).

would horrendously impact the surety's options and ability to reduce the losses;

6) Consider pre-petition workout terms. Do not hesitate about entering into a pre-petition workout arrangement simply because of an imminent filing– document the need for any consideration and the potential adverse effect of continuing to provide surety credit without the consideration;

7) Consider issuing notices of cancellation for bonds that can be cancelled, possibly as an inducement for a surety credit agreement that includes collateral.

The bankruptcy of a principal should not cause a surety representative to abandon the goals and principles of sound claims handling. The surety must understand the law and the process and use it to greatest extent possible to achieve its goals of reducing or eliminating exposure and enhancing recoveries by gaining control of the contracts and the contract funds. Bankruptcy may complicate those efforts in some instances but facilitate those efforts in others. It should not be regarded as some monumental disaster but simply a condition and fact of claims handling and practice.[46]

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[46] In his *Devil's Dictionary,* Ambrose Bierce defined "birth" as the "first and direst of all disasters." Notwithstanding this definition, most of us cope with that event.

PANEL 2

Finding and Reaching The Hard to Reach Assets

Finding And Reaching The Hard To Reach Assets: LLC's:

Challenges of Collecting Assets Owned by an LLC Pursuant

to a Surety's Indemnity Agreement

Jordan Faux, Esq.

The Faux Law Group/Henderson, NV

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Hard to Reach Assets: LLCs

Challenges of Collecting Assets Owned by an LLC Pursuant to a Surety's Indemnity Agreement

Limited Liability Companies (LLCs) provide a robust legal structure that shields owners from personal liability for the company's debts and obligations. They largely live up to their name—they are companies that limit liability for the people that own them. When used skillfully, these protections pose challenges to the surety when attempting to collect assets owned by an LLC, member of an LLC, or manager of an LLC.

In this discussion, we'll look at several concepts and ideas that a surety claims representative, their counsel, consultants, and other service providers might think about when protecting the surety from loss, or recovering in the event loss has already occurred, in the context of an LLC or multiple LLCs.

1. **Why LLCs?**

The fundamental principle of LLCs is to separate business assets and liabilities from the personal assets and liabilities of its members. It's right on the label, the purpose of its existence is to limit liability. This separation can complicate efforts to collect against specific assets to satisfy an indemnity claim.

LLCs provide protection against two types of liabilities: 1) inside liability and 2) outside liability. Inside liability shields non-LLC assets from exposure for acts and omissions of the LLC that are not the fault of the individual members. Outside liability shields the LLC's assets from exposure for acts or omissions of the LLC's members that are not related to the LLC itself. Savvy principals can position their assets in light of these facts such that, on paper, they own nothing at all or that their assets are so encumbered as to render them worthless.

a. Series LLCs:

Certain states, such as Delaware, Illinois, Iowa, Nevada, Oklahoma, Tennessee, Texas, and Utah allow “Series LLCs.” A Series LLC is an arrangement where a parent LLC can establish a series of additional sub LLCs within the corporate structure. Each LLC in the series is compartmentalized with its own assets and liabilities contained in each sub-LLC. However, there is only one operating agreement that governs the entire structure and simplified tax filing requirements depending on the state. Other states may permit similar entities with varying limitations or requirements.

Each series has limited liability and shields its assets from the parent LLC and the other LLCs in the series. They can have different business purposes, members, managers, voting rights, profit/loss structures, distribution rules, & etc. In some states, assets associated with a series may be held directly, indirectly, in the name of the series, the name of an LLC, through a nominee or otherwise. Specifics vary from state to state.

With series LLCs, you may not always be able to believe what you see. For example, suppose you visit a jobsite and you see principal’s logo plastered over every truck, heavy machine, trailer, t-shirt, sweatshirt, even hard hats. It may look like they have many assets available if needed. However, if all of that equipment is owned by a separate series LLC that rents or leases the equipment back to principal, it may be harder to seize or pursue such assets should the need arise.

b. Misc. LLCs

Some states have specific LLCs that you would be unlikely to encounter in the wild. For example, an L3C or “low-profit limited liability company” is a hybrid entity that combines characteristics of non-profits (the purpose of furthering some charitable or educational purpose) but still permits profits. However, profits cannot be a significant purpose of the LLC nor can it have political or legislative purposes.

Another miscellaneous LLC is the Restricted LLC, only available in Nevada. This type of LLC benefits those seeking lower tax rates when transferring assets to family members. It isn't meant for conducting traditional business dealings and is only helpful for people with multiple properties. A restricted LLC must wait 10 years after formation before it can distribute assets to family members and the amount of assets that can be transferred is limited by state law. Real property held in such restricted LLCs may be difficult or impossible to encumber. Other states may have similar entities. The point is that, depending on the jurisdiction, there may be other types of LLC entites with which to be concerned or that may present unique challenges.

2. **<u>How can the surety find and pursue assets held by LLCs?</u>**

The first thing, as always, is to read the bond and read the indemnity agreement. What are the surety's obligations? Who are your indemnitors? What rights does the surety have under the IA? Where are you in the claims process? The answers to these questions will determine the options available to the surety moving forward.

a. <u>How can the surety identify assets held by LLCs?</u>

UCC Financing Statements: Although UCC filings against an LLC will only discover encumbered assets, they should be reviewed as part of an asset investigation. The filings may provide valuable information about related companies and individuals, as well as assets and income streams that may have equity that exceeds the debt owed to the first secured creditor. UCC filings can also create problems for indemnitors when seeking credit or other financial products that could trigger a conversation with the surety about resolving outstanding indemnity.

Real Property: While real property ownership by an LLC may not be common, it should not be overlooked. Your investigation should include searching for real properties owned or recently owned by any of the indemnitors. To the extent possible, determining value and equity of those properties at foreclosure will aid the surety in evaluating the indemnitors' ability to pay and could also be pressure points that can help facilitate collection.

Related Entities: In the course of an asset investigation, you may discover that the company has ceased operating. However, it is important to also review the current operations of the owners and their related companies. If the indemnitor LLC simply transferred its employees, assets, and/or accounts to a newly named company, it may be considered a successor, liable for the debts of the indemnitor.

b. What causes of action are available against LLCs?

- Breach of Contract—If the LLC is a named indemnitor, claims for breach of contract under the indemnity agreement may be raised. To be successful, the surety must show there was a valid contract, that the LLC breached the contract, and that the breach caused damages to the surety.
- Equitable Indemnity—Even if the LLC is not a named indemnitor, torts such as equitable indemnity may be raised. Such claims generally require the surety to show that it discharged some obligation held by the LLC, that the discharge should have been the obligation of the LLC, and that the LLC would be unjustly enriched if it does not reimburse the surety.
- Alter Ego/Piercing the Corporate Veil—This cause of action allows the surety to hold an individual liable for the acts or omissions of the LLC. In general, the question is whether the individual member or manager abused the corporate form such that it would be unfair to shield that individual from personal liability. Considerations courts usually look at include whether (a) the individual commingled his or her personal funds with the LLC, (b) the LLC was underfunded, (c) the individual treated the LLC's funds or assets as his or her own, or (d) whether required formalities were observed.

- Reverse Veil Piercing—Instead of using the LLC to go after the individual, the situation is reversed and the surety pursues the entity's assets in satisfaction of individual liability. Factors courts examine are similar to normal alter ego cases and require generally, such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice. For example, a reverse veil piercing analysis would consider an individual's questionable transfers of assets into an entity.
- Fraudulent Transfer/Voidable Transaction—In general the surety may challenge the transfer of real or other property if the express purpose of the transfer was to avoid liability to or prejudice a known creditor. Considerations the court will look at are the timing of the transfer, the value of the property transferred, whether the transfer benefits an insider, whether the transfer falls outside of the normal course of business, whether the transaction was for less than the reasonable value of the property, & etc. Sometimes express intent may be required, other situations intent may be presumed or implied. If the Uniform Fraudulent Transfer Act has been enacted in your state, there may be other factors to consider.
- Specific Statute—Some states may have specific statutes that address the surety's right to recover. *See e.g. CA Civil Code Section 2847*.
- Charging Order— A charging order enables the surety to attach an indemnitor's interest in an LLC or partnership to satisfy a debt. It directs the LLC to pay the indemnitor's share of distributions directly to the surety until the debt is settled. Importantly, a charging order does not grant the creditor management rights or control over the entity, thereby protecting the interests of other members and the entity's operations. This remedy is governed by state law and varies slightly by jurisdiction. In some jurisdictions it may be an exclusive remedy.

- Judicial Foreclosure—Some states permit foreclosure on the LLC as an alternative remedy to a charging order. This is an extreme remedy highly dependent on jurisdiction. In some instances, the distribution rights of the indemnitor may be forfeited to the surety or those rights subject to a commercially reasonable sale. The surety may only acquire the right to receive distributions and may not become a member of the LLC. Further, even if the surety were to become a member, there may be fiduciary or contractual duties owed to other members or third parties.
- Quia Timet/Preliminary Injunction—Latin for "because he fears" this cause of action can be brought when there is proof of imminent loss or danger where the apprehended damages are very substantial and it will be impossible to protect the surety's interests if relief is denied. In essence this is a cause of action for a preliminary injunction, asset freeze, collateral deposit, or other preemptive remedy.
- Specific Performance/Other Contractual Remedy—Specific performance is a cause of action whereby the surety seeks to enforce the IA and for the indemnitors to perform a specific act. This could be a collateral deposit, inspection of books and records, assignment provision, or other right the surety may wish to enforce under the IA.

c. <u>Common Asset Protection Strategies Used in LLCs:</u>

The LLC will be governed by its operating agreement. While most LLCs use "off the shelf" agreements that do not take full advantage of the asset protection possibilities of the LLC, some principals may have operating agreements that have language and employ strategies in order to protect assets. In order to address such strategies, the surety must be dogged and relentless. The indemnitors have placed hurdles and walls and so the surety must jump over, climb under, or break through in order to get to those hard to reach assets. Here are some examples:

i. LLC Claims it has no distributable cash.

The LLC may make a practice of distributing all of its cash which will then be "loaned" back to the LLC by the members for its operation. This means that any cash in the LLC's coffers may already be subject to a priority security interest from another creditor—in this case the members of the LLC itself—making the cash essentially worthless to the surety.

Such operating procedures open the LLC up to claims of alter ego as it may be underfunded. Claims for fraudulent transfer may also be appropriate.

ii. Poison Pill Language

Some operating agreements may have "poison pill" language where collection efforts trigger undesirable results. For example, the removal or change of members automatically under certain conditions or cessation or alteration of distributions. It could also give an LLC's Manager the exclusive right to redeem any LLC units lost or threatened by a creditor at a substantially reduced price. The operating agreement may be permitted to make uneven distributions and thus be able to distribute funds to other members and not the surety or member that is the surety's indemnitor. The manager may be permitted to hold funds in reserve and make no distributions. The other members' percentage interest may be augmented for a nominal amount. Transfer of interest may require consent of other members.

Such language can be challenged in court.

iii. Series LLCs May be Used to Guard Assets

As mentioned early, series LLCs may be used to guard and separate assets. So while principal's place of business may be owned and operated by a separate LLC, the trucks and equipment another LLC, the employees employed by a separate LLC, the back office by another, and so on. Depending on the indemnity agreement, it may be difficult to trace and hold all of the LLCs in the corporate structure liable to the surety.

The answer here is similar to every other situation question: the surety must be relentless. It must chase every thread, challenge every transaction, name every entity it can find in the lawsuit, get every name on the judgment. Obtaining a clear picture of the principal's corporate structure can be a real challenge, but this information can be had in discovery if the case is litigated, judgment debtor examinations if you already have a judgment, by way of written requests or demands prelitigation if the IA gives you the right to examine books and records.

As part of the examination of books and records, expertise may be needed in the form of consultants, accountants, or other asset recovery experts in order to identify potential pressure points.

If confronted with a series LLC, the most effective strategy is usually an "all of the above" strategy where every potential entity that may have assets of the indemnitor is named in a lawsuit and pursued using every possible cause of action that can be reasonably brought in good faith.

3. Conclusion

Pursuing an LLC will be part of an overall indemnification enforcement plan. In order to have the best chance of recovery, pressure must be placed on the indemnitors. The timing and content of a lawsuit can be important here. In certain contexts, filing of an early action to seek a temporary restraining order, freeze assets, or enforce other provisions of the IA may be appropriate and beneficial. Experience tells that finding an indemnitor's "pressure points" can very often bring a recalcitrant indemnitor to the bargaining table.

Apart from pursuing LLCs, social media can be very useful in finding an indemnitor's "pressure points." Some may not care one whit whether the surety pursues their series LLCs but if you set a deposition on a spouse or other less-involved co-indemnitor, pursue their prized boat, racecar, watch collection, or season tickets, that may be the nudge that brings the indemnitor to the table.

Other seemingly unrelated litigation could also provide useful information, especially divorce proceedings, child custody proceedings, or any other action in which the indemnitors may be involved. Locating assets can be a challenge.

Collecting assets owned by an LLC pursuant to a surety's indemnity agreement presents multifaceted challenges due to the LLC's legal protections, operational complexities, and regulatory frameworks. Sureties navigating these challenges must employ thorough asset identification, strategic legal approaches, and understanding of LLC governance structures. Collaboration between sureties, counsel, consultants, and the LLC's stakeholders is crucial to effectively navigate these challenges and ensure the best chance for indemnification.

PANEL 3

Contractual ADR/Mediation Provisions: Do They Matter?

MEDIATION

Enforcement of Mediation Provisions in Construction Contracts

Marlyn Klinger

SMTD Law LLP/Los Angeles, California

Presented to

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MEDIATION

Enforcement of Mediation Provisions in Construction Contracts

By Marilyn Klinger, SMTD Law LLP

A. INTRODUCTION.

There are all sorts of articles out there regarding the enforcement of arbitration provisions but much fewer regarding mediation.[1] Accordingly, in this article, we provide a few samples of mediation provisions in construction contracts, and we discuss enforcement of those mediation provisions – enforced in a variety of different approaches. The below discussion of the cases provides just a sampling—there are many more examples of courts taking on the issue of mediation provision enforcement.

B. SAMPLES OF MEDIATION PROVISIONS.

Below is the mediation provision in the AIA A201 General Conditions form contract:

> **Mediation**
>
> Claims, disputes, or other matters in controversy arising out of or related to the Contract, except those waived as provided for in Sections 9.10.4, 9.10.5, and 15.1. 7, shall be subject to mediation as a condition precedent to binding dispute resolution.
>
> The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the mediation.
>
> The request may be made concurrently with the filing of binding dispute resolution proceedings but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration is stayed pursuant to this Section 15 .3 .2, the parties may nonetheless proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings.

[1] See Stoel Rives discussion in "Can We Avoid Court? Construction Mediation Agreement Considerations" December 18, 2022, which provides a good discussion on the issue but does not cite to any authority on the subject, "Enforcing Mandatory Mediation in Construction Contracts," Snee, Lutche & Helmlinger, P.A., May 27, 2014, which suffers from a similar lack of authority. But see Jonah Orlosfky, "Can Courts Enforce Contractual Mediation Provisions?" September 19, 2016, published by the Litigation Section of the American Bar Association.

> Either party may, within 30 days from the date that mediation has been concluded without resolution of the dispute or 60 days after mediation has been demanded without resolution of the dispute, demand in writing that the other party file for binding dispute resolution. If such a demand is made and the party receiving the demand fails to file for binding dispute resolution within 60 days after receipt thereof, then both parties waive their rights to binding dispute resolution proceedings with respect to the initial decision.
>
> The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

Below is the mediation provision in ConsensusDOCS 200

> 12.4 MEDIATION If direct discussions pursuant to section 12.2 do not result in resolution of the matter and no dispute mitigation procedure is selected pursuant to the section immediately above,[2] the Parties shall endeavor to resolve the matter by mediation through the current Construction Industry Mediation Rules of the American Arbitration Association (AAA), or the Parties may mutually agree to select another set of mediation rules. The administration of the mediation shall be as mutually agreed by the Parties. The mediation shall be convened within thirty (30) Business Days of the matter first being discussed and shall conclude within forty-five (45) Business Days of the matter first being discussed. Either Party may terminate the mediation at any time after the first session by written notice to the non-terminating Party and mediator. The costs of the mediation shall be shared equally by the Parties.
>
> 12.5 BINDING DISPUTE RESOLUTION If the matter is unresolved after submission of the matter to a mitigation procedure or to mediation, the Parties shall submit the matter to the binding dispute resolution procedure selected below:
>
> □ [ARBITRATION]
>
> □ [LITIGATION]

The American Arbitration Association has published a proposed mediation provision, as follows:

Alternative Dispute Resolution (ADR) Clauses

Mediation

> If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good

[2] Project Neutral or Dispute Review Board

faith to settle the dispute by mediation administered by the American Arbitration Association under its Construction Industry Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.

Finally, Chat GBT provided an explanation and a few samples:

Mediation provisions in construction contracts are clauses that specify the process for resolving disputes through mediation before resorting to litigation or arbitration.

Sample Provision 1: Standard Mediation Clause

1. Mediation:

1.1 In the event of any dispute, controversy, or claim arising out of or relating to this Contract, or the breach, termination, or validity thereof, the Parties agree to first attempt to resolve such dispute through mediation.

1.2 Either Party may initiate the mediation process by providing written notice to the other Party, specifying the nature of the dispute and the desired resolution.

1.3 The mediation shall be conducted by a mediator mutually agreed upon by the Parties. If the Parties cannot agree on a mediator within fifteen (15) days of the written notice, either Party may request that the American Arbitration Association (AAA) appoint a mediator.

1.4 The mediation shall be held within thirty (30) days of the appointment of the mediator, at a location mutually agreed upon by the Parties, or as determined by the mediator.

1.5 The Parties agree to participate in the mediation in good faith and to share the costs of the mediation equally.

1.6 If the dispute is not resolved through mediation within sixty (60) days of the written notice, either Party may pursue any other remedies available under this Contract or by law.

Sample Provision 2: Detailed Mediation Procedure

2. Mediation Procedure:

2.1 Any dispute arising under or in connection with this Contract shall be submitted to mediation prior to the initiation of any litigation or arbitration.

2.2 The Party requesting mediation shall notify the other Party in writing, outlining the issues in dispute.

2.3 Within ten (10) days of receipt of such notice, the Parties shall jointly select a mediator. If they cannot agree on a mediator within that period, either Party may apply to the Mediation Center of the AAA or another mutually agreed-upon mediation service for the appointment of a mediator.

2.4 The mediator shall convene a mediation session within twenty (20) days of their appointment. The mediation session shall be held at a mutually agreed location, or if no agreement can be reached, at a location designated by the mediator.

2.5 The Parties shall submit to the mediator a brief written summary of the dispute and any relevant documents at least five (5) days prior to the mediation session.

2.6 The mediation shall be conducted in accordance with the rules and procedures of the AAA or other agreed-upon mediation service, except as otherwise provided herein.

2.7 The Parties shall participate in the mediation in good faith, with representatives having full authority to settle the dispute. All communications during mediation are confidential and inadmissible in any subsequent proceedings.

2.8 The costs of mediation, including fees and expenses of the mediator, shall be borne equally by the Parties. Each Party shall bear its own costs and attorney fees.

2.9 If the dispute is not resolved within thirty (30) days after the mediation session, either Party may pursue any other remedies available under this Contract or by law.

Sample Provision 3: Escalation and Mediation

3. Dispute Resolution:

3.1 Any dispute arising out of or relating to this Contract shall be resolved according to the following procedure:

3.1.1 Step 1: Direct Negotiations. The Parties shall first attempt to resolve the dispute through direct negotiations between representatives of each Party.

3.1.2 Step 2: Mediation. If the dispute is not resolved through direct negotiations within fifteen (15) days, the Parties agree to submit the dispute to mediation.

3.2 The Party requesting mediation shall notify the other Party in writing, describing the nature of the dispute and the desired outcome.

3.3 The Parties shall mutually select a mediator within ten (10) days of the notice. If they cannot agree on a mediator, either Party may request assistance from a recognized mediation service to appoint a mediator.

3.4 The mediation session shall be scheduled within twenty (20) days of the mediator's appointment, at a location agreed upon by the Parties or as designated by the mediator.

3.5 Each Party shall prepare a brief statement of the issues and submit it to the mediator and the other Party at least five (5) days before the mediation session.

3.6 The mediation shall be confidential and conducted in accordance with the rules and procedures of the chosen mediation service, unless otherwise agreed by the Parties.

3.7 The Parties shall share the costs of the mediation equally, including the mediator's fees and expenses. Each Party shall bear its own costs and attorney fees.

3.8 If the dispute is not resolved within thirty (30) days of the mediation session, either Party may pursue other remedies available under this Contract or by law.

What is the source of your samples?

> The samples provided are based on common language and structures typically found in mediation clauses of construction contracts. They are synthesized from standard practices and guidelines observed in the construction industry, including recommendations from legal professionals and organizations specializing in dispute resolution. However, they are not directly taken from a specific published source. For legally binding contracts, it's always recommended to consult with a legal professional to draft or review mediation provisions tailored to your specific needs and jurisdiction.

C. DISCUSSION OF CASES ADDRESSING MEDIATION PROVISIONS.

I. ENFORCE OR NOT

Love & Sons v. Shen Lian Chen, Superior Court of Washington, King County, 2017 Wash. Super. LEXIS 17116

To start off this discussion of cases regarding the enforceability of mediation provisions in construction contracts, we start with this case because it is so straightforward. The parties entered into a residential construction contract. The contract contained a mediation provision followed by arbitration. A dispute arose, the parties scheduled a mediation and, then, the owner repudiated for no justifiable reason. Accordingly, the superior court ordered:

> The [owner]…shall engage in Mediation of the parties' disputes arising out of the Contract immediately. If Mediation proves unsuccessful, then the parties shall engage in Arbitration immediately after the conclusion of Mediation….

And, the court designated both a mediator and an arbitrator!

Vanum Constr. Co. v. Magnum Block, L.L.C., Court of Appeals of Kansas, 45 Kan. App. 2d 54; 245 P.3d 1069; 2010 Kan. App. LEXIS 153

This case involves a subcontract for the construction of a retaining wall. The subcontract provided:

"MEDIATION

> Any claim arising out of or related to this Subcontract...shall be subject to mediation as a condition precedent to arbitration or the institution[] [of] legal or equitable proceedings by either party.
>
> The parties shall endeavor to resolve their claims by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to this Subcontract and the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing....

The general contractor discovered cracks in the retaining wall. In light of that discovery and the above, the general contractor offered to mediate but received no response from the subcontractor. Thereafter, the general contractor sued the subcontractor alleging breach of contract, negligence, and breach of warranty based on the discovery of cracks in the retaining wall. The general contractor again offered to mediate before it effected service of process—the subcontractor again did not respond. Once served, the subcontractor filed a counterclaim for monies owed on the subcontract work performed. The parties did engage in an unsuccessful court-ordered mediation. A jury found in favor of the subcontractor on both the complaint and counterclaim.

The general contractor then filed a motion for judgment as a matter of law based on the subcontractor's failure to pursue mediation in connection with its counterclaim. Although the subcontractor argued that the mediation clause did not apply to compulsory counterclaims asserted in an existing action, the trial court granted the general contractor's motion and issued judgment in the general contractor's favor and against the subcontractor on its counterclaim.

The court, in overruling the trial court, and citing to the language in the mediation provision, to wit: "the institution of legal or equitable proceedings," stated:

> Under the facts of this case, when parties to a construction contract agreed to mediate any claim arising out of or related to the contract as a condition precedent to the institution of legal or equitable proceedings by either party, only the plaintiff, i.e., the party instituting the lawsuit, was required to attempt mediation before filing suit. The plain language of the contract did not require the defendant, who filed a compulsory

> counterclaim after the commencement of litigation, to offer to mediate that counterclaim before filing the counterclaim.

The court cited from another Kansas case: "The law favors reasonable interpretations, and results which vitiate the purpose of the terms of the agreement to an absurdity should be avoided. [Citation omitted.]" *Johnson County Bank v. Ross*, 28 Kan. App. 2d 8, 10-11, 13 P.3d 351 (2000).

II. ENFORCE AND STAY

Acme Arsena Co. v. J. Holden Constr. Co., Ltd., 2008-Ohio-6501, 2008 Ohio App. LEXIS 5415; 2008 WL 5182912

The general contractor challenged a judgment denying its motion to stay the proceedings pending mediation and arbitration, in an action by subcontractor alleging breach of contract and quantum merit for work performed on its subcontract.

On appeal, the general contractor maintained that the trial court erred in failing to stay the case because the subcontract incorporated documents that contained mandatory and binding mediation and arbitration provisions for any claim arising out of or related to the subcontract. The appeals court agreed that the trial court erred in failing to stay the proceedings pending mediation and arbitration. The appeals court reversed and remanded for proceedings consistent with the opinion.

On the appeal, the general contractor's assignment of error stated: "The trial court committed reversible error by not staying the proceedings and ordering the parties to arbitration when there was an agreement between the parties to arbitrate the issues in dispute."

The court of appeal began its analysis noting: "Before addressing the merits of this appeal, we recognize that alternative dispute resolutions ("ADR") are a favored practice of both Ohio and federal courts and that there is a strong presumption in favor of avenues other than lengthy litigation to settle disputes between parties. See *ABM Farms, Inc. v. Woods, 81 Ohio St.3d 498, 500, 1998 Ohio 612, 692 N.E.2d 574*; *David Wishnosky v. Star Lite Bldg. & Dev. Co. (Sept. 7, 2000), Cuyahoga App. No. 77245, 2000 Ohio App. LEXIS 4081.*"

The mandatory mediation and arbitration provisions were not contained in the subcontract but rather were included in two documents that were incorporated by reference into the subcontract, the General Conditions (AIA A201, modified) and the Specifications. The court of appeal ordered the trial court to abide by the mediation and arbitration terms of the General Conditions and stay the action.

Advantage Roofing & Constr. of La. v. Mw Builders, Inc., 2009 U.S. Dist. LEXIS 142152, 2009 WL 10700354 (USDC M Dist.Louisiana)

The general contractor moved to dismiss, transfer, or stay action brought by subcontractor in Louisiana. The general contractor argued for its motion to dismiss that the subcontract at issue required that the action be brought in Kansas, notwithstanding that the construction project was in Louisiana. The District Court found that Louisiana's statute requiring actions on construction contracts be filed in the state where the project was located governs. The general contractor based its motion to transfer on a convenience of the parties' argument, which the District Court also rejected. The District Court did grant the general contractor's motion to stay the action based on the mandatory mediation provision in the subcontract, to wit:

> 14.1 Subcontractor agrees that the dispute resolution *provisions* of the Prime Contract between [general contractor] and Owner, if any, are incorporated by reference as part of this Subcontract so as to be binding as to disputes between Subcontractor and [general contractor] that involve, in whole or in part, questions of fact and/or law that are common to any dispute between [general contractor] and Owner....
>
> In addition, **[general contractor] and Subcontractor agree that in the absence of any requirement to mediate, the parties agree that *mediation* is a condition precedent to any other dispute resolution set forth in paragraph 14.2 below.**
>
> **14.2 Upon exhaustion of the dispute resolution above...[general contractor], at its sole option, has the right to elect resolution of all claims or disputes involving [general contractor], Subcontractor or other interested third parties by litigation in court, *mediation* and/or arbitration. If [general contractor] elects to resolve disputes through litigation, no action or proceeding shall be commenced or maintained except in...Kansas.... If selected, *mediation* and arbitration will be conducted pursuant to the Construction Industry Rules of the American Arbitration Association.... [Emphasis added by District Court.]**

The District Court did not rule on whether the arbitration provision was enforceable, essentially awaiting the results of mediation.

Auchter Co. v. Zagloul, 949 So. 2d 1189; 2007 Fla. App. LEXIS 3292; 32 Fla. L. Weekly D 635

The project owner terminated the construction contract and sued the contractor in court for causes of action based on a contract to construct a house. The trial court denied the contractor's motion to dismiss and/or compel mediation and/or arbitration and to stay the action. The contractor appealed.

The owner and contractor entered into a standard American Institute of Architects contract. The owner terminated the contract and filed a complaint against the contractor, who, in turn, filed a motion arguing that, pursuant to the mediation and arbitration provisions contained in the general conditions of the contract, the owner was required to submit any claims arising out of or related to the contract to mediation and, if mediation failed, to binding arbitration. The owner countered that because the owner terminated the contract, as a matter of law, the mediation and arbitration provisions in the general conditions did not survive. The trial court relied on a previous judicial decision that had held, in *dicta*, that mediation and arbitration provisions do not survive contract termination.

The appellate court found that the trial court erred by denying the contractor's motion, finding that the dispute resolution provisions of the contract were intended to survive the purported termination of the contract by a party:

> We are unable for several reasons to agree with the…dicta regarding the intent of the standard AIA contract as to alternative dispute resolution mechanisms. [A]n arbitration provision does not require any type of "savings clause" to survive contract termination. On the contrary, it is well established that the duty to arbitrate does not necessarily end when a contract is terminated, as long as the dispute concerns matters arising under the contract. *E.g., Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B.*, 501 U.S. 190, 208, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991); *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243, 255, 97 S. Ct. 1067, 51 L. Ed. 2d 300 (1977); *Doctors Assocs., Inc. v. Thomas*, 898 So. 2d 159, 162 (Fla. 4th DCA 2005); Qubty v. Nagda, 817 So. 2d 952, 956 (Fla. 5th DCA 2002); *Milbar Med. Co. v. Medicis Pharm. Corp.*, 741 So. 2d 1198, 1199 (Fla. 4th DCA 1999). Arbitration provisions are to be construed to require arbitration of disputes arising after the cancellation of the underlying contract unless such disputes are specifically excluded from arbitration. E.g., *Nolde Bros.*, 430 U.S. at 255; *Doctors Assocs.*, 898 So. 2d at 162; *Qubty*, 817 So. 2d at 956; *Milbar*, 741 So. 2d at 1199. Because post-termination disputes are not expressly excluded from the scope of the dispute resolution provisions of the contract, we must construe them as intended to be included.

On the issue of the survival of the mediation/arbitration provision in the contract, the court of appeal emphasized the definition of "Claims" contained in the General Conditions, providing: "[a] Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term 'Claim' also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract." The court determined that the definition of claim was intended to be all-inclusive and did not limit "Claims" to disputes arising before termination of the contract, "to encompass virtually all disputes between the contracting parties, including related tort claims." *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 637 (Fla. 1999).

The court of appeal also noted that arbitration clauses are to be given the broadest possible interpretation in order to accomplish the purpose of resolving controversies out of court, see, e.g., *Hirshenson v. Spaccio*, 800 So. 2d 670, 674 (Fla. 5th DCA 2001); *Ocwen Fin. Corp. v. Holman*, 769 So. 2d 481, 483 (Fla. 4th DCA 2000); *Royal Caribbean Cruises, Ltd. v. Universal Employment Agency*, 664 So. 2d 1107, 1108 (Fla. 3d DCA 1995). Because arbitration agreements are a favored means of dispute resolution, any doubts concerning their scope should generally be resolved in favor of arbitration. See, e.g., *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So. 2d 278, 289 (Fla. 1st DCA 2003).

Possibly, the most significant point the appellate court made was that to read mediation/arbitration provisions as not intended to survive contract termination permit parties to avoid mediation and arbitration simply by purporting to terminate the contract.

Therefore, the court of appeal ruled that, pursuant to the language of the contract, all claims arising out of or related to the contract were to be submitted to mediation and, if mediation failed, to binding arbitration. In so doing, the court reversed the judgment and remanded the case back to the trial court with directions to grant the contractor's motion, compel the parties to mediate and, if mediation failed, to order binding arbitration, while staying the action pending the parties' compliance.

HHF2020 LLC v. Trumbull-Nelson Constr. Co., United States District Court for the District of Vermont, 2022 U.S. Dist. LEXIS 124759; 2022 WL 2752582

This case involves a contractor's motion to compel arbitration and stay the court proceedings against the project owner. After terminating the contractor, the owner sued the contractor for typical causes of action, including Breach of Express Warranty, Breach of Contract, and judicial determination cancelling a mechanic's lien. The contractor filed a counterclaim for enforcement of a mechanic's lien, breach of construction contract/ Prompt Payment Act, breach of implied covenant of good faith and fair dealing, quantum meruit, and unjust enrichment.

The subject contract was an AIA form contract including reference to AIA A201-2017. The owner attempted to defend against the motion to compel arbitration arguing it neither signed nor reviewed AIA A201. Needless to say, that argument fell on deaf ears. The court noted that neither party attempted to proceed with mediation as required under the contract but because the contract requires it, the parties must mediate.

The court ruled:

> For the foregoing reasons, [the contractor's] motion to compel arbitration is CONDITIONALLY GRANTED. The court ORDERS [the owner and the contractor] to engage in mediation in good faith as required by their Contracts within sixty (60) days of this Entry Order, and if that is unsuccessful, it hereby ORDERS

> their claims and counterclaims to be arbitrated as required by the Contracts. See *Cullenen v. Town of Rockingham*, 2016 U.S. Dist. LEXIS 153362, 2016 WL 6496225, at *4 (D. Vt. Nov. 2, 2016) (holding where a contract required mediation before arbitration that "[t]he parties shall participate in mediation in good faith; if disputes remain, the parties shall participate in arbitration"). The court STAYS this action pending the resolution of those proceedings. See *Jr. Food Stores v. Hartland Constr. Group*, 2020 U.S. Dist. LEXIS 50805, 2020 WL 1442889, at *4 (W.D. Ky. Mar. 24, 2020) ("The [c]ourt will stay this proceeding until the conclusion of the ordered mediation and arbitration[.]")

Kane Builders S&D, Inc. v. Md. CVS Pharm., LLC, United States District Court for the District of Maryland, 2013 U.S. Dist. LEXIS 83432; 2013 WL 2948381

This case is a typical mechanic's lien and breach of contract case by a contractor against the owner, in this case to build a retail pharmacy. The parties used an AIA 201 contract including provisions for mechanic's liens and mediation but striking out the arbitration provision. The contractor filed a mechanic's lien and a petition to enforce same. In response, the owner filed a motion to dismiss, or, in the alternative, to stay and compel mediation.

The motion to dismiss was based on the argument that the court did not have subject matter jurisdiction because of the failure of the parties to mediate their dispute. The court rejected that argument, noting that the failure of a condition precedent does not eliminate a court's subject matter jurisdiction regarding the subject contract. The court noted:

> [Owner] has conflated the concepts of subject matter jurisdiction and "condition precedent" to litigation. See *Harris v. Amoco Production Co.*, 768 F.2d 669, 680 (5th Cir. 1985) (concluding that "while the failure to comply with a condition precedent usually means that a plaintiff cannot bring suit...it does not mean that the district court lacks subject matter jurisdiction"); *N-Tron Corp. v. Rockwell Automation, Inc.*, No. 09-0733-WS-C, 2010 U.S. Dist. LEXIS 14130, 2010 WL 653760, at *4 (S.D.Ala. Feb. 18, 2010) (noting that "the question of subject matter jurisdiction is analytically distinct from that of failure to satisfy conditions precedent to suit"); but see *Tattoo Art, Inc. v. TAT Int'l, LLC*, 711 F.Supp.2d 645, 651 (E.D.Va. 2010) (finding that failure to engage in alternative dispute resolution as condition precedent to litigation constitutes a jurisdictional defect). Failure to satisfy a contractual condition precedent to litigation cannot divest the court of subject matter jurisdiction. Subject matter jurisdiction "refers to a tribunal's 'power to hear a case,' a matter that can never be forfeited or waived." *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs and Trainmen Gen. Comm. Of Adjustment, Cent. Region*, 558 U.S. 67, 81, 130 S. Ct. 584, 175 L. Ed. 2d 428 (2009) (citations omitted).

The court then found that the motion to dismiss was properly based on Rule 12(b)(6)—failure to state a claim on which relief can be granted. However, it never conducted the analysis. Rather, it focused on the condition precedent language in the contract and the contractor's mechanic's lien claim. It concluded that the mechanic's lien claim constituted a claim subject to the mediation provision because of the breadth of the provision applying to "[c]laims, disputes, or other matters in controversy arising out of or related to the Contract."

Then it dealt with the question whether to stay or dismiss the action pending mediation and chose the former:

> Because the contract allows the parties to pursue a mechanic's lien as a supplement to mediation, the petition will not be dismissed. Indeed, dismissal is not required when the parties fail to comply with dispute resolution proceedings provided for in a contract. See *N-Tron Corp.*, 2010 U.S. Dist. LEXIS 14130, 2010 WL 653760, at *7 (collecting cases, construing contractual mediation clause, and staying case pending mediation). Rather, when enforcing agreements to mediate, "district courts have inherent, discretionary authority to issue stays in many circumstances, and granting a stay to permit mediation (or to require it) will often be appropriate." *Advanced Bodycare Solutions, LLC v. Thione Intern. Inc.*, 524 F.3d 1235, 1241 (11th Cir. 2008). Here, granting a stay to require the parties to mediate is more appropriate than dismissal because it puts the parties in the position that they bargained for, and results in little or no prejudice to either party.

N-Tron Corp. v. Rockwell Automation, Inc., United States District Court for the Southern District of Alabama, Southern Division, 2010 U.S. Dist. LEXIS 14130; 2010 WL 653760

This case is not a construction case but rather a breach of a contract for cooperative marketing efforts for the parties' complimentary product lines, entitled Encompass Memorandum of Membership. The plaintiff ignored the dispute resolution provision in the contract, to wit:

> The parties will attempt in good faith to resolve any dispute arising out of Member's membership in the Program by negotiations between representatives who have authority to settle the controversy. If unsuccessful, the parties further will attempt in good faith to settle the dispute by non-binding third-party mediation.... Any dispute not so resolved by negotiation or mediation may then be submitted to a court of competent jurisdiction in accordance with the terms of this MoM. These procedures are the exclusive procedures for the resolution of all such disputes between the parties.

After the court concluded that at least two of the causes of action in the plaintiff's complaint arose out of the contract, it determined what course of action to take in response to the defendant's motion to dismiss:

> The final question presented by the Motion to Dismiss concerns the appropriate remedy for [the plaintiff's] failure to comply with the dispute resolution provision…before filing suit. [The defendant] requests that the Complaint be dismissed without prejudice, even though the practical effect of such dismissal would be to foreclose [the plaintiff] from ever re-asserting those tort claims because the applicable statute of limitations has expired in the interim. By contrast, [the plaintiff] proposes that this action be stayed and the parties be ordered to submit to mediation, with [the plaintiff] vowing that it "will most certainly mediate in good faith."
>
> [The plaintiff] has the better argument. When confronted with objections that plaintiffs have initiated litigation without satisfying arbitration or mediation requirements, courts routinely stay rather than dismiss the proceedings to allow for implementation of the agreed-upon dispute resolution mechanism. See, e.g., *Halim v. Great Gatsby's Auction Gallery, Inc.,* 516 F.3d 557, 561 (7th Cir. 2008) ("the proper course of action when a party seeks to invoke an arbitration clause is to stay the proceedings rather than to dismiss outright") (citations omitted)…. [D]istrict courts are vested with discretion to determine whether stay or dismissal is appropriate.

Accordingly, the court stayed the action in its entirety for a reasonable period of time to enable the parties to conduct negotiation and mediation on the counts subject to same.

U.S.A. Fanter Corp. v. Imperial Pac. Int'l (CNMI), LLC, United States District Court for the District of the Northern Mariana Islands, 2020 U.S. Dist. LEXIS 74811

This case is a typical contractor versus owner lawsuit for the contractor's collection of amounts due. The court described the dispute resolution provision in this contractor versus owner case as:

> "Article 20.1 of the parties' construction contract contained a dispute resolution clause requiring 'good faith negotiation and/or mediation as a condition precedent to binding dispute resolution.' (Citation omitted) This clause elaborated that 'representatives of each party who have authority to settle' any dispute arising under the contract 'shall meet at a mutually acceptable time and place within seven (7) calendar days after the date of the disputing party's notice…to attempt to resolve the dispute.' (Citation omitted.) Article 20.2 added: 'If good faith negotiations are not successful, the parties shall endeavor to resolve their disputes by mediation.' (Citation omitted.)"

When the contractor did not receive payment, it provided notice to the owner invoking the dispute resolution clause and requesting the parties meet to negotiate a solution. The resulting coffee shop meeting did not resolve the dispute so the contractor gave notice that it would file suit if the owner refused to further negotiate or mediate. No negotiations or mediation so the contractor filed the complaint.

In response to the complaint, the owner moved for dismissal or a stay pending mediation, claiming that the contractor breached the dispute resolution clause by filing this lawsuit before the parties mediated. The contractor argued that the good faith negotiation it attempted was enough to satisfy the dispute resolution clause. And, even if it needed to mediate first, it tried but the owner resisted. Further, the contractor advised the court that it was prepared to mediate if the owner would do so in good faith.

In ruling, the court noted:

> "The consensus among district courts is that failure to mediate a dispute pursuant to a contract that makes mediation a condition precedent to filing a lawsuit warrants dismissal under Rule 12(b)(6)." *Franke v. Yates*, No. 19-CV-00007-DKW-RT, 2019 U.S. Dist. LEXIS 170093, 2019 WL 4856002, at *5 (D. Haw. Oct. 1, 2019) (internal quotation marks omitted) (collecting cases). Alternatively, a court may opt to stay the case to allow for mediation. See *Kee Action Sports, LLC v. Shyang Huei Indus. Co.*, No. 3:14-CV-00071-HZ, 2014 U.S. Dist. LEXIS 75129, 2014 WL 2506496, at *4 (D. Or. June 2, 2014) (denying a motion to dismiss for failure to mediate but finding "that in the interest of judicial economy and efficiency, the case should be stayed pending the parties' conclusion of mediation").

The court discussed the "and/or" language in the dispute resolution provision in the contract and concluded that mediation was a condition precedent to suit. It also concluded that the contractor had attempted both. "Accordingly, this Court finds that [the contractor] satisfied the contract's condition precedent by negotiating in good faith and endeavoring to mediate before filing suit." Nonetheless, rather than dismiss the case, the court said:

> Of course, a past failure to mediate should not discourage future attempts at it. Both parties agreed at the...[motion to dismiss] hearing to a 30-day stay to allow them a renewed opportunity to settle this case. "A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979); see also *Kee Action Sports, LLC*, 2014 U.S. Dist. LEXIS 75129, 2014 WL 2506496, at *4. Because both parties support briefly staying this case to allow them to mediate, the Court finds that a stay is in the interests of judicial economy and fairness to the parties.

III. ENFORCE AND DISMISS

Arbea v. Itemp, Inc., United States District Court for the Southern District of Florida, 2024 U.S. Dist. LEXIS 90260

The contract at issue provided that "prior to instituting any kind of litigation or legal action, the parties shall attend *mediation*, in person, in an attempt to amicably resolve their dispute without the need for judicial intervention…."

Accordingly, the defendant moved to dismiss the action because the plaintiff failed to proceed to mediation before filing the lawsuit. The court found that the mediation requirement constituted a condition precedent, although those words were not included in the mediation provision and dismissed the case. The opinion states: "Courts favor non-binding *mediation* and will enforce agreements requiring non-binding *mediation* as a *condition precedent* to arbitration or litigation [emphasis added by court]. *See 3-J Hosp., LLC v. Big Time Design, Inc., No. 09-61077-CIVMARRA, 2009 U.S. Dist. LEXIS 100601, 2009 WL 3586830, at *1-2 (S.D. Fla. Oct. 27, 2009).* The court then quoted from *3-J Hosp.:*

> Mediation clauses, like arbitration clauses, are contractual in nature, and construction of such provisions is a matter of contract interpretation. *Seifert v. U.S. Home Corp.,* 750 So.2d 633, 636 (Fla. 1999). A court will not compel parties to attend such alternative dispute resolution proceedings where the parties have not agreed to do so. *Klay v. All Defendants,* 389 F.3d 1191, 2000 (11th Cir. 2004). The Court looks at the parties' intent to submit the dispute to mediation, starting at the language of the clause. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.,* 473 U.S. 614, 626, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985) ("Thus, as with any other contract, the parties' intentions control."). Where the parties' agreement requires mediation as a condition precedent to arbitration or litigation, the complaint must be dismissed. See *Kemiron Atlantic, Inc. v. Aguakem Intern., Inc.,* 290 F.3d 1287 (11th Cir. 2002) (holding that plaintiff's failure to request mediation, which was a condition precedent to arbitration under the parties' contract, precluded enforcement of arbitration under the contract); *Brosnan v. Dry Cleaning Station Inc.,* 2008 U.S. Dist. LEXIS 44678, 2008 WL 2388392 (N.D. Cal. 2008) ("Failure to mediate a dispute pursuant to a contract that makes mediation a condition precedent to filing a lawsuit warrants dismissal.")….

Interestingly, the Court exercised its discretion by dismissing the action, rather than staying it.

Archstone Dev. LLC v Renval Constr. LLC, 156 A.D.3d 432, 67 N.Y.S.3d 7; 2017 N.Y. App. Div. LEXIS 8548; 2017 NY Slip Op 08492; 2017 WL 6001649

The appellate court upheld the trial court's dismissal of an action for breach of a construction contract, the dismissal being based, in part, on the ground that the project owner failed to satisfy a ***condition precedent*** required for bringing suit. The owner failed to pursue mediation as required by section 15.3.1 of the AIA A201-2007 form construction agreement. The court cited to ***MCC***

Dev. Corp. v Perla, 81 AD3d 474, 475, 916 NYS2d 102 [1st Dept 2011], lv denied 17 NY3d 715, 958 NE2d 552, 934 NYS2d 373 [2011]) as authority requiring a mediation condition precedent.

The court rejected the owner's contention that it was not required to comply with the mediation condition precedent, arguing that contract that it alleged was breached, and agreement to use a deposit to engage subcontractors, was a separate and distinct agreement from the construction contract containing the mediation requirement. The court held that the construction contract governed costs and payment for work performed, which included the deposit, such that the negotiations and agreement giving rise to the deposit was superseded by the construction contract pursuant to merger clause and, thus, the mediation requirement applied.

The court dismissed the case.

Del Rey Fuel, LLC v. Bellingham Marine Indus., United States District Court for the Central District of California, 2012 U.S. Dist. LEXIS 200997

This case involved a contractor's motion to dismiss the owner's lawsuit based on the owner's failure to allege compliance with the mediation condition precedent contained in the construction contract. The court cited to precedent for dismissing a matter whether subject to arbitration or litigation:

> When a complaint and attached exhibits demonstrate that all of plaintiff's claims are subject to arbitration, a court may dismiss the complaint under Rule 12(b)(6). *Thinket Ink Information Resources, Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1060 (9th Cir. 2004); *Chappel v. Laboratory Corp. of America*, 232 F.3d 719, 725 (9th Cir. 2000). Similarly, a number of district courts have dismissed complaints under Rule 12(b)(6) for failure to mediate before filing suit. See *Delamater v. Anytime Fitness, Inc.*, 722 F.Supp.2d 1168, 1181 (E.D. Cal. 2010) ("[Plaintiff] failed to satisfy the condition precedent necessary to trigger the right to initiate litigation. The Court dismisses [Plaintiff's] complaint without prejudice because it is premature"); *Centaur Corp. v. ON Semiconductor Components Industries,* LLC, No. 09 CV 2041 JM (BLM), 2010 U.S. Dist. LEXIS 8495, 2010 WL 444715, *3-4 (S.D. Cal. Feb. 2, 2010) ("As mediation is a condition precedent to litigation between the parties, the current lawsuit is premature"); *Brosnan v. Dry Cleaning Station Inc.*, No. C-08-02028 EDL, 2008 U.S. Dist. LEXIS 44678, 2008 WL 2388392, *2 (N.D. Cal. Jun. 6, 2008) ("Failure to mediate a dispute pursuant to a contract that makes mediation a condition precedent to filing a lawsuit warrants dismissal."); cf. *B&O Mfg. v. Home Depot U.S.A., Inc.*, No. C 07-02864 JSW, 2007 U.S. Dist. LEXIS 83998, 2007 WL 3232276, *8 (N.D. Cal. Nov. 1, 2007) (applying Georgia law and holding that "[a] claim that is filed before a mediation requirement, that is a condition precedent to the parties' right to sue as set forth in an agreement, is satisfied shall be dismissed").

In light of the above-quoted precedent, the court noted that it needed to determine whether dismissal was appropriate in light of the plaintiff's failure to allege mediation. In making that determination, the court looked at all of the contract documents, their interplay, the fact that some of the contracts were typewritten and some were a printed form (AIA A201 General Conditions). It ultimately concluded that mediation was a condition precedent to litigation.

The court concluded: "The AIA Standard Form and the General Conditions together constitute an agreement to engage in non-binding mediation of all claims "arising out of or related to" the contract before seeking a binding adjudication. In the event mediation fails, the parties may proceed to litigate the claims in "a court of competent jurisdiction," rather than arbitrate them or use other dispute resolution means. Because [the owner] is bound by the contract, and has failed to comply with its provisions, its action must be dismissed." Accordingly, the court dismissed the action without prejudice and noted it may be refiled after completion of mediation, if necessary.

MCC Dev. Corp. v. Perla, Supreme Court of New York, New York County, 23 Misc. 3d 1126(A); 2009 N.Y. Misc. LEXIS 1173; 2009 NY Slip Op 50945(U); 886 N.Y.S.2d 68; 241 N.Y.L.J. 102

This action is one by the assignee of a construction company against the project owner for amounts due and to enforce mechanic's liens. The trial court granted the owner's motion to dismiss the action and discharge and cancel the mechanic's lien based on the mediation condition precedent in the contract, an AIA A101/202 form contract. The court noted that all of the causes of action, including foreclosure of the mechanic's liens, breach of contract, and unjust enrichment arise out of or relate to the construction contract. However, the assignee alleged nothing to dispute the owner's assertion "[n]o one on the construction side has ever sought mediation or arbitration under the Construction Contract." The court noted:

> An express condition precedent must be "literally performed" before a claimant may seek to recover on a contract (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690, 660 N.E.2d 415, 636 N.Y.S.2d 734 [1995]; *Preferred Mortgage Brokers, Inc. v Byfield,* 282 AD2d 589, 590, 723 N.Y.S.2d 230 [2d Dept 2001]). If the plaintiff has failed to perform an express condition precedent, then the complaint must be dismissed (id.; see e.g. *National Fuel Gas Distrib. Corp. v Hartford Fire Ins. Co.,* 28 AD3d 1169, 1170, 814 N.Y.S.2d 436 [4th Dept 2006] [court dismissed causes of action relating to surety bond on the ground that notice requirement contained in bond "is an express condition that must be literally performed 'or satisfied before defendant is obliged to perform' its obligations under the bond (citation omitted)"]).

As to waiver, the court rejected the assignee's boot strap argument that, by filing an answer[3] and the motion to dismiss, the owner waived the mediation condition precedent.

The court granted the motion to dismiss the complaint, including the mechanic's lien foreclosure cause of action.

Mitsui Sumitomo Ins. USA, Inc. v. Denham-Blythe Co., United States District Court for the Eastern District of Kentucky, 375 F. Supp. 3d 788; 2019 U.S. Dist. LEXIS 62582; 2019 WL 1575628

This case involves an insurance company's subrogation action arising out of a design build contract using an AIA A141 form contract. After damage to the roof of the building from high winds and the owner's insurance carrier having paid the owner's claim for the damages incurred, the carrier brought a subrogation claim against the contractor. In response, the contractor filed a motion to dismiss arguing, inter alia, that the dispute resolution clauses in the contract barred the claim. That dispute resolution clause made mediation a condition precedent to arbitration or the institution of legal or other binding dispute resolution proceedings. As the court noted:

> Pursuant to the terms of the present dispute resolution provisions, absent an initial decision from [the owner], and thirty (30) days having passed after submission of the claim to [the owner] for initial decision, the claim was subject to mediation then arbitration. [Citation omitted.] In lieu of the contracting parties mediating as directed by the Contract, [the carrier], as subrogee of [the owner], brought this action.[4] As [the contractor] correctly asserts, to allow [the owner] to ignore the express dispute resolution provisions found in the Contract that require mediation and arbitration and file a lawsuit instead would run afoul of both Kentucky and federal precedent and policy and render dispute resolution provisions "null and void." [Citation omitted.] If a contracting party could avoid mediation and arbitration by opting to file a lawsuit, dispute resolution provisions requiring mediation and arbitration would serve no purpose because parties who do not favor mediation or arbitration would simply file a lawsuit to avoid alternative dispute resolution.

Therefore, the court granted the contractor's motion to dismiss without prejudice, and directed the carrier to comply with the Contract's dispute resolution provisions.

MB Am., Inc. v. Alaska Pac. Leasing Co., Supreme Court of Nevada, 132 Nev. 78; 367 P.3d 1286; 2016 Nev. LEXIS 17; 132 Nev. Adv. Rep. 8

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[3] The answer included affirmative defenses regarding the assignee's failure to comply with conditions precedent.

[4] The court rejected the carrier's boot strap argument that bringing the lawsuit constituted the owner's initial decision.

This case is not a construction case and not an arbitration case but rather a dealership contract between the seller of rock-crushing machines and the dealer gone bad and involving litigation.[5] The seller filed an action against the dealer for specific performance of the mediation provision of the Agreement. The dealer filed a summary judgment motion, arguing that the seller's complaint was premature because it had not complied with the Agreement's mediation provision. The trial court granted the motion and Nevada's Supreme Court affirmed.

The Supreme Court found that mediation was a condition precedent to litigation, adopting the approach of *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 11 F.2d 326, 336 (7th Cir. 1987) (enforcing a prelitigation mediation provision by way of summary judgment) and *Tattoo Art, Inc. v. TAT International, LLC,* 711 F. Supp. 2d 645, 651 (E.D. Va. 2010) ("failure to mediate a dispute pursuant to a contract that makes mediation a condition precedent to filing a lawsuit warrants dismissal." *Id.*at 651.

While the seller, in its opposition to the dealer's summary judgment motion, presented various communications regarding mediation, the court noted that it failed to comply with the mediation rules of the American Arbitration Association, cited in the agreement, which rules in effect at the time provided:

> Any party or parties to a dispute may initiate mediation under the AAA's auspices by making a request for mediation to any of the regional offices or case management centers via telephone, email, regular mail or fax. Requests for mediation may also be filed online via WebFile at www.adr.org.
>
> *The party initiating the mediation shall simultaneously notify the other party or parties of the request. The initiating party shall provide the following information to the AAA and the other party or parties as applicable….* [Emphasis added by court].

The Court noted that the seller did not initiate mediation as described above and, thus, failed to comply with the mediation provision before filing its action, rejecting the seller's argument that the dealer had waived its right to mediate.

The Court also rejected the seller's argument that the trial court should have stayed the litigation and ordered the parties to mediation because the authorities that the seller cited were applicable to arbitration and not mediation.

Pac. Rim Land Dev., LLC v. Imperial Pac. Int'l (CNMI), LLC, United States District Court for the District of the Northern Mariana Islands, 2020 U.S. Dist. LEXIS 74812; 2020 WL 1942454

[5] Because the vast majority of construction cases deal with the AIA suite of contracts and, particularly, AIA A201 and those contracts have historically called for arbitration, and because many in the construction industry prefer arbitration over litigation, most of the cases that discuss the mediation requirement do so in the context of arbitration following mediation.

In this construction contract dispute, the contract provided:

> Any controversy or claim arising out of or relating to this Agreement or the breach hereof, shall be subject to good faith negotiation and/or mediation as a condition precedent to binding dispute resolution. [The parties] will attempt in good faith to promptly resolve any controversy or claim arising out of or relating to this Agreement or the breach thereof by negotiations between representatives of each party who have authority to settle the controversy....The representatives shall meet at a mutually acceptable time and place within seven (7) business days after the date of the disputing party's notice and thereafter as often as they reasonably deem necessary to exchange relevant information and to attempt to resolve the dispute.
>
> If good faith negotiations are not successful, the parties shall endeavor to resolve their disputes by mediation.

The parties met and negotiated a contract termination and the project owner issued a promissory note to the contractor. Thereafter, the contractor sued on both the contract and the promissory note. The owner filed a motion to dismiss arguing that the contractor had failed to meet the condition precedent. In determining that the contractor had complied with the condition precedent in the contract regarding good faith negotiation and/or mediation, the court said:

> [The contractor] satisfied [the good faith negotiation and/or mediation provision in the contract] when it successfully negotiated the promissory note and notice of mutual termination to resolve the dispute over nonpayment. Because the good faith negotiations were successful, there was no reason for the parties to mediate.

The court denied the owner’s motion to dismiss as well as its summary judgment motion based on the same argument.

IV. REFUSAL TO MEDIATE AS WAIVER OF RIGHT TO ARBITRATE

BMS Dev. California LLC v. HB Constr., United States District Court for the Central District of California, 2019 U.S. Dist. LEXIS 240764 *

This case involves a contractor’s motion to dismiss, or in the alternative stay and compel arbitration against the project owner with the owner arguing that the contractor waived its right to arbitrate by failing and refusing to engage in mediation, a condition precedent to arbitration.

The construction contract provided, in relevant part:

> Article 21 Claims and Disputes

> § 21.1 Claims, disputes and other matters in question arising out of or relating to this Contract shall be subject to mediation as a condition precedent to binding dispute resolution....
>
> § 21.3 The parties shall endeavor to resolve their disputes by mediation which, unless the parties mutually agree otherwise....
>
> For any claim subject to, but not resolved by, mediation pursuant to Section 21.3, the method of binding dispute resolution shall be as follows:
>
> ....
>
> [X] Arbitration - Pursuant to Section 21.4 of this Agreement

The contractor ignored the owner's numerous demands to mediate arising out of the owner's claim of defective construction on the part of the contractor. So, the owner sued the contractor in federal court. In response to the contractor's motion, the owner argued that the contractor had waived the right to arbitrate. The district court acknowledged that a party can waive the right to arbitrate:

> "The right to arbitration, like any other contractual rights, can be waived." *United States v. Park Place Assocs., Ltd.,* 563 F.3d 907, 921 (9th Cir. 2009). A determination of whether "the right to compel arbitration has been waived must be conducted in light of the strong federal policy favoring enforcement of arbitration agreements." *Martin v. Yasuda,* 829 F.3d 1118, 1124 (9th Cir. 2016) (citing *Fisher v. A.G. Becker Paribas Inc.,* 791 F.2d 691, 694 (9th Cir. 1986)). As such, "[a] party seeking to prove waiver of a right to arbitration must demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." *Becker Paribas,* 791 F.2d at 694.

Only the second prong of waiver was important to the case. The basis of the owner's argument that the contractor acted inconsistent with its arbitration right was its failure and refusal to engage in mediation. The contractor moved to compel arbitration immediately upon receiving the owner's lawsuit. The contractor cited to that fact in arguing that its acts were not inconsistent with its right to arbitrate. So, the question boiled down to whether having abandoned its right to mediate (a condition precedent to arbitration), also constituted an abandonment of its right to arbitrate.

The district court quoted from the California Supreme Court to answer the above question, No:

> "Specifically, where the only issue litigated is covered by the arbitration clause, and where plaintiff has not first pursued or attempted to pursue his arbitration remedy, it should be held that (1) plaintiff has impliedly waived his right to arbitrate, such that defendant could elect to submit the matter to the jurisdiction of the court; (2) defendant may also elect to demur or move for summary judgment on the ground that the plaintiff has failed to exhaust arbitration remedies; and (3) defendant may

> also elect to move for a stay of proceedings pending arbitration if defendant also moves to compel arbitration." See *Charles J. Rounds Co. v. Joint Council of Teamsters* No. 42, 4 Cal. 3d 888, 899, 95 Cal. Rptr. 53, 484 P.2d 1397 (1971) (affirming trial court's dismissal of a breach of contract action on the grounds that the dispute was covered by an arbitration clause).

The district court noted that courts have found that, without the condition precedent of mediation, an action is premature, and dismissal is warranted. See, e.g., *Brosnan v. Dry Cleaning Station Inc.*, No. 08-cv-2028-EDL, 2008 U.S. Dist. LEXIS 44678, 2008 WL 2388392, *2 (N.D. Cal. June 6, 2008) ("Failure to mediate a dispute pursuant to a contract that makes mediation a condition precedent to filing a lawsuit warrants dismissal.") (citing *Rounds*, 4 Cal. 3d at 888); *Centaur Corp. v. ON Semiconductor Components Indus., LLC*, No. 09-cv-2041-JM, 2010 U.S. Dist. LEXIS 8495, 2010 WL 444715, *3-4 (S.D. Cal. Feb. 2, 2010) ("As mediation is a condition precedent to litigation between the parties, the current lawsuit is premature."); *Golden State Foods Corp. v. Columbia/Okura LLC*, 2014 U.S. Dist. LEXIS 88304, 2014 WL 2931127 (C.D. Cal. June 26, 2014) (dismissing breach of contract claim where the plaintiff "failed to satisfy a condition precedent to seeking arbitration or legal or equitable remedies in litigation: submission of the claims to mediation").

To cap off the discussion, the court noted the provision in the contract that says "[f]or any claim subject to, but not resolved by, mediation…the method of binding dispute resolution shall be…[a]rbitration…."

The last argument the district court addressed and rejected was that the parties had bargained for a combined process of mediation/arbitration, with mediation as a precondition to arbitration and by failing to participate in mediation, there could be no arbitration. The court noted that mediation and arbitration are not part of one inseparable process and stated:

Indeed, other courts have similarly rejected the argument that a defendant waives its right to compel arbitration by failing to first mediate with a plaintiff. See, e.g., *Chau v. EMC Corp.*, No. 13-cv-4806-RMW, 2014 U.S. Dist. LEXIS 26381, 2014 WL 842579, at *5 (N.D. Cal. Feb. 28, 2014) (rejecting the argument that the "defendants waived their right to compel arbitration by failing to mediate" and concluding that "[f]ailing to respond to [the plaintiff's] request to mediate is not inconsistent with an intent to arbitrate"); *Williams v. Home Depot USA, Inc.*, No. 15-cv-3655-L, 2016 U.S. Dist. LEXIS 98388, 2016 WL 4039182, at * 1 (N.D. Tex. July 28, 2016) (rejecting the plaintiff's contention "that mediation is a condition precedent to arbitration, and [the defendant's] failure to respond to their request for mediation constitutes a waiver of the right to arbitration," and dismissing action).

The district granted the contractor's motion and dismissed without prejudice the owner's action in order to pursue its claims related to the construction contract against the contractor in arbitration.

V. ARBITRATOR PURVIEW RE WHETHER FAILURE TO MEDIATE PRECLUDES ARBITRATION

Him Portland v. Devito Builders, United States Court of Appeals for the First Circuit, 317 F.3d 41; 2003 U.S. App. LEXIS 659

A hotel owner contracted with a contractor to renovate a motel. A dispute ensued and the owner sued the contract in district court for breach of contract and other causes of action. Thereafter, the owner filed a motion to compel arbitration and stay the litigation pending the outcome. The district court denied the motion because the contract provided for mediation as a condition precedent for arbitration and neither party had pursued mediation. The court of appeal upheld the denial.

The operative portion of the contract was:

> 9.10.1 Claims, disputes and other matters in question arising out of or relating to this Contract…shall be referred initially to the Architect for decision. Such Matters…shall, after initial decision by the Architect, or 30 days after submission of the matter to the Architect, be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable
>
> proceedings by either party.9.10.3 The parties shall endeavor to resolve their disputes by mediation…. The request may be made concurrently with the filing of a demand for arbitration, but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings….
>
> 9.10.4 Claims, disputes and other matters in question arising out of or relating to the Contract that are not resolved by mediation…shall be decided by arbitration….

The court further noted: "Under the plain language of the contract, the arbitration provision of the agreement is not triggered until one of the parties requests mediation. See *Kemiron Atl., Inc. v. Aguakem Int'l Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002). In *Kemiron*, the Eleventh Circuit faced a similar issue and held: 'the parties agreed to conditions precedent before arbitration can take place and, by placing those conditions in the contract, the parties clearly intended to make arbitration a dispute resolution mechanism of last resort.' Id. at 1291. Further, 'because neither party requested mediation, the arbitration provision has not been activated and the FAA does not apply.' Id."

Since *Him Portland*, the situation may have changed with the Supreme Court ruling that the question of certain procedural issues being the purview of the arbitrator not the courts to decide.

Although not a construction case, *Chorley Enters. v. Dickey's Barbecue Rests., Inc.*, United States Court of Appeals for the Fourth Circuit, 807 F.3d 553 *; 2015 U.S. App. LEXIS 13652, a franchisee (plaintiffs) versus franchisor (defendant) case, lays out the change in approach.

> [T]the [plaintiffs] contend that [the defendant] cannot arbitrate its dispute because it failed to first seek mediation as required by...the franchise agreements. According to the [plaintiffs,] mediation is a condition precedent to invoking the arbitration provision, and so the motions to compel [arbitration] should be denied for this reason alone.
>
> As the Supreme Court has recently re-affirmed, however, arbitrators — not courts — must decide whether a condition precedent to arbitrability has been fulfilled. *BG Group PLC v. Republic of Arg.*, 134 S. Ct. 1198, 1207-08, 188 L. Ed. 2d 220 (2014) [arbitrator bears primary responsibility for interpreting and applying the local litigation requirement, analogous to mediation requirement) to an underlying controversy]; see also *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85-6, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) [timeliness of arbitration proceeding]. Accordingly, the [plaintiffs'] argument must be decided by the arbitrator, not the court. Should the arbitrator decide that the [plaintiffs] have no duty to arbitrate because [the defendant] failed to satisfy the mediation condition precedent, the parties may then seek relief in court under the FAA. See 9 U.S.C. §§ 9-11 (providing procedure for parties to seek confirmation, vacatur, or correction of an arbitration decision). But that possibility is irrelevant at this stage in the proceeding.

So, while *Chorley Enters.* is a mediation-to-arbitration case, the two cases it cites for the proposition that it is the arbitrator not the court to decide whether the parties have waived the right to arbitrate by not first pursuing mediation are not mediation to arbitration cases.

Matter of 33 Calvert Props. LLC v AMEC LLC, Supreme Court of New York, Westchester County, 70 Misc. 3d 295; 135 N.Y.S.3d 767; 2020 N.Y. Misc. LEXIS 7838; 2020 NY Slip Op 20280; 2020 WL 6326320

The property owner filed a petition against its construction manager to permanently stay mediation and arbitration proceedings, having previously obtained a temporary restraining order regarding same, based upon, among others, the argument that the construction manager failed to comply with the mandatory and explicit conditions precedent to mediation and arbitration. The construction manager opposed the petition contending that the court was not the proper forum to render a determination as to whether the dispute should be mediated and arbitrated but that, pursuant to the American Arbitration Association rules, the arbitrator should determine the proper forum.

The contract contained the AIA A201 General Conditions, which in turn cites to the American Arbitration Association rules. After contract termination and receipt of claims from the owner, the construction manager filed a mechanic's lien and, then, a petition with the AAA for mediation and arbitration. It is the petition to stay the mediation and arbitration that the court is addressing.

The construction manager argued that the court must dismiss the petition as a matter of law because the contract specifically incorporated the AAA's Construction Industry Arbitration and Rules and Mediation Procedures, which expressly and unequivocally reserve all issues regarding the arbitrability of disputes to the arbitrator. Entitled a delegation clause, the court quoted from another case to support its conclusion that it is the arbitrator that decides arbitrability:

> "The Supreme Court has also held that arbitration agreements must be enforced according to their terms, and that 'parties can agree to arbitrate "gateway" questions of "arbitrability"' (*Rent-ACenter, West, Inc.*, 561 US at 68-69; see *Nitro-Lift Technologies, L.L.C.*, 568 US at 19, 133 S Ct at 503; *Buckeye Check Cashing, Inc.*, 546 US at 445). Such 'delegation clauses' are enforceable where 'there is "clea[r] and unmistakabl[e]" evidence' that the parties intended to arbitrate arbitrability issues (*First Options of Chicago, Inc.*, 514 US at 944, quoting *AT&T Technologies, Inc.*, 475 US at 649). 'When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally…should apply ordinary state-law principles that govern the formation of contracts' (*First Options of Chicago, Inc.*, 514 US at 944)" (*Matter of Monarch Consulting, Inc.*, 26 NY3d at 675).

The court noted that where the subject contract's terms incorporate rules of an arbitration tribunal, the arbitrator should resolve the question of whether the dispute is arbitrable, citing to *Garthon Bus. Inc. v Stein,* 30 NY3d 943, 944, 64 NYS3d 622, 86 NE3d 514 (2017).

Hence, the court ruled that "because the issues raised in the petition are questions reserved for the arbitrator, [project owner's] petition [to stay mediation and arbitration] shall be denied, and the petition shall be dismissed."

D. CONCLUSION.

The above was just a sampling of the cases that have dealt with mediation provisions, primarily in construction contracts. The final section causes the most concern. Because arbitrations are private, if it becomes the purview of the arbitrator to determine whether a party has met the mediation condition precedent and those mediation determinations do not see the light of day, over time, there will be no precedent to rely upon, except the older decisions some of which are discussed above. Because (1) many construction contracts provide that mediation is a condition precedent, and (2) many construction contracts require arbitration, lawyers will be unable to advise their construction clients as to the likelihood that, based on precedent, certain actions will meet the mediation pre-condition. But, luckily, almost all players in the construction industry appreciate the value of mediation and willingly participate in same. Indeed, mediation might even help to avoid arbitration and all that it entails.

PANEL 4

Early Access To and Analysis Of The Principal's Books and Records

The Surety's Right to Examine the Bond Principal's Books and Records

Paul K. Friedrich, Esq.

Friedrich & Dishaw, PLLC | Seattle, Washington

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The Surety's Right to Examine the Bond Principal's Books and Records[1]

Most indemnity agreements provide the surety with the right, upon demand or within a specific period of time, to review and copy the books, records, accounts, and other financial documents of the principal and, often, the indemnitors, either by examining hard copies or by being provided access to the electronically stored information holding the relevant financial data. While the clauses vary from surety to surety and indemnity agreement to indemnity agreement, the language and purpose is generally the same. Access to the principal's books and records assists the surety in the prompt, orderly, and proper resolution of claims, allows the surety to make intelligent decisions with respect to indemnity/collateral security issues, and determine whether the surety should continue or decline to issue future bonds. The books and records exam is a critical, although underrated and underutilized, tool allowing the surety to determine the overall financial health of its principal and assess its overall risk in extending further surety credit by evaluating what underwriters refer to as "the three Cs": character, capacity, and capital.

Generally, the bond principal's cooperation is satisfactory if it is an active account because the bond principal is aware that if it seeks future bonds from the surety, it must provide such information; however, the cooperation often deteriorates when the surety receives claims and/or if the account is no longer active. The reasons for the decline in cooperation may vary (e.g., the principal has reduced its staff, the principal is no longer in business, the principal is no longer obtaining bonds from the surety, the claims are valid, the principal's resources are diverted elsewhere, the principal is trying to hide something, etc.). Despite these reasons, the lack of information or delay in its receipt may frustrate the surety's ability to respond promptly and properly to claims. For example, such information allows the surety to achieve critical insight into the project status when investigating a performance bond claim, including the ability to weigh the relative strengths and weaknesses of potential defenses of the bond principal and surety, and to identify the scope of work remaining to be performed.

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[1] See Omar J. Harb and Brett D. Divers, *Ch. VII*, *The Indemnity Agreement and the Handling of Surety Claims*, in THE SURETY'S INDEMNITY AGREEMENT: LAW AND PRACTICE (Mike F. Pipkin, Marilyn Klinger, George J. Bachrach, and Tracey L. Haley, eds., Am. Bar Ass'n., 3d ed 2023); See Price Jones, Daniel Pentecost & Patricia Wager, *Ch. 5*, *Surety's Rights of Recovery Against Principals and Indemnitors Under Common Law and the Indemnity Agreement* in THE LAW OF PERFORMANCE BONDS (Gregory M. Weinstein and Kimberly Zanotta, eds., Am. Bar Ass'n, 3d ed 2018).

Courts regularly enforce books and records provisions in indemnity agreements, which require indemnitors to provide a surety with access to their books and financial records. *See, e.g., Ohio Cas. Ins. Co. v. Fratarcangelo,* 7 F. Supp. 3d 206, 217 (D. Conn. 2014) (granting specific performance with respect to books and records clause of indemnity agreement because doing so would "merely place the parties in the position they [had] already bound themselves to be contractually" and because "defendants [had] pointed to no harm that they [would] suffer if they [were] forced to comply with [plaintiff's] document request"); *Safeco Ins. Co. of Am. v. M.E.S., Inc.,* 289 F.R.D. 41, 52-53 (E.D.N.Y. 2011) (granting plaintiff surety access to documents relating to the books and records of contractor defendants); *Travelers Cas. & Sur. Co. of Am. v. J.O.A. Const. Co.,* No. 07-cv-13189, 2009 WL 928848, at *3-4 (E.D. Mich. Mar. 31, 2009) (granting plaintiff access to defendants' books and records where defendants did not dispute that they had signed an indemnity agreement providing for such access); *Hartford Cas. Ins. Co. v. Cal-Tran Assocs., Inc.,* No. 05-cv-5575, 2008 WL 4165483, at *6 (D.N.J. Sept. 4, 2008) (holding that plaintiff surety was entitled to review defendant's books and records because "[p]laintiff's liability under the bond [had] been triggered and continue[d] to be in effect").

Purposes:

In practice, the surety's access to and review of the principal's books and records related to payment and performance bond claims will assist the surety in determining how to respond, including whether to complete the bonded project via takeover, tender a completion contractor, finance the bond principal, allow the obligee to complete the project, and pay or deny the claim.

Further, the review of the principal's books and records will assist the surety in establishing good faith in the claim investigation process and simultaneously foreclose allegations of bad faith in the enforcement of the surety's indemnity rights. For instance, courts have found that the surety's investigation of the bond principal's books and records is admissible evidence to establish the surety's good faith payments when enforcing its indemnity obligations. *Transamerica Ins. Co. v. Bloomfield,* 401 F.2d 357, 362 (6th Cir. 1968). Similarly, courts have found that the principal's refusal to provide access to its books and records foreclosed allegations of surety bad faith. *Fid. & Deposit Co. of Maryland v. A-Mac Sales & Builders Co.,* No. 04-72643, 2006 WL 1555985, at *7 (E.D. Mich. June 5, 2006); *RLI Ins. Co. v. Nexus Servs. Inc.,* 470 F. Supp. 3d 564 (W.D. Va. 2020) (failure to provide access to surety to its books and records precluded indemnitor from arguing that surety engaged in bad faith).

Sureties have also used the right to access and review the bond principal's books and records to enforce their rights to collateral security from the bond principal and indemnitors. *Fed. Ins. Co. v. Project Control Sys., Inc.,* No. 5:06-CV-11328, 2006 WL 1134442, at *2 (E.D. Mich. Apr. 27, 2006).

Enforcement:

When the principal and indemnitors have ignored the surety's demand for access to their books and records, the surety has several options to compel performance and/or cooperation, including but not limited to filing a lawsuit seeking specific performance of the books and records provision. Sureties often include a count for specific performance or such provision in the complaint for collateral security and indemnification. In order to obtain an expedited resolution, sureties can bring immediate motions for temporary restraining orders and/or preliminary injunctions, seeking a court order compelling compliance with the books and records clause.

However, oftentimes, resorting to filing a lawsuit seeking specific performance is time-consuming, expensive, and may result in further deterioration of the relationship between the bond principal and the surety. Accordingly, sureties must explore other ways to encourage and/or compel compliance with the books and records provision beyond litigation.

Fortunately, numerous routine provisions found in most indemnity agreements provide the surety with alternative means of encouraging a bond principal to comply with its obligation to provide access to its books and records. Most notably, the collateral deposit provision, the attorney-in-fact clause, the assignment clause, the right-to-settle clause, the surety's right to file UCC-1 Financing Statements and record involuntary liens, etc. Such provisions may be invoked by the surety to encourage voluntary compliance and avoid the time and expense associated with litigation.

In the event litigation is necessary, there are other means for compelling compliance with the books and records provision beyond the traditional means of filing a motion for preliminary injunction. Sureties may file a motion for default judgment, judgment on the pleadings, and/or motion for summary judgment. *Colonial Sur. Co. v. A&R Cap. Assocs.,* 420 F. Supp. 3d 38, 49 (E.D.N.Y. 2017) (granting summary judgment to surety on claim for specific performance of books and records provision).

Alternatively, once a lawsuit is commenced, sureties may propound traditional discovery (interrogatories and requests for production) or issue third-party subpoenas. For this reason, some courts have denied a surety's motion for preliminary injunction on the basis that such books and records can be obtained in discovery. *First Nat. Ins. Co. of Am. v. Sappah Bros. Inc.,* 771 F. Supp. 2d 569, 575 (E.D.N.C. 2011) ("First National has not made a clear showing of irreparable harm if it is not allowed to immediately inspect the records rather than at some later date, such as in the normal course of discovery.").

If the tools of the Indemnity Agreement or litigation are unsuccessful, the surety may need to think outside the box. One such approach is by exploring different lines of communication than the traditional channels, which typically involve the surety's in-house claims professional and/or its outside counsel and, instead, delegate such communication to the surety's outside consultant, who may be able to establish a relationship with the bond principal and persuade it to voluntarily comply.

Access to Information from Third Parties:

Indemnity Agreements often give the surety the right to obtain financial or other information or documents in the hands of third parties. *Ins. Com'r of Connecticut v. Novotny,* No. CIV.A. 07-262, 2012 WL 2087408, at *5 (W.D. Pa. June 8, 2012). While the provision could constitute the necessary consent from the principal or indemnitors for the release of information, in practice, most third parties, particularly banks or other financial institutions, are reluctant to release information without the additional written consent of their customer. Accordingly, if the indemnity agreement authorizes it, sureties may execute consent forms or releases for the principal or indemnitors under "attorney-in-fact" provisions. This authorization provision allows the surety to obtain financial information about the principal and indemnitors from third parties without needing to rely on the availability, cooperation, and honesty of the principal and indemnitors.

Privilege Issues:

Although sureties may have the contractual right to compel production or access to the principal's books and records, complications may arise if the bond principal asserts its right to withhold production on the basis of privilege. While there are a few reported decisions on these unique issues, there are some decisions which may shed light on how a court might balance the competing interests of the surety's contractual right to access books and records and the bond principal's common law and/or statutory privileges. *Ins. Com'r of Connecticut v. Novotny,* No. CIV.A. 07-262, 2012 WL 2087408, at *5 (W.D. Pa. June 8, 2012) (indemnitors waived accountant/client privilege by agreeing to authorize unrestricted access by surety to their books and records); *Travelers Cas. & Sur. Co. of Am. v. Dunmore,* No. CIV.44 S-07-2493 LKK, 2011 WL

4590783, at *1 (E.D. Cal. Sept. 30, 2011) (holding that books and records provision constitutes a waiver of the state-law privilege against disclosing tax returns.); *but see Morgan v. Thomas*, 448 F.2d 1356, 1361 (5th Cir. 1971) (holding that books and records provision does not waive Fifth Amendment privilege against self-incrimination); *Safeco Ins. Co. of Am. v. M.E.S., Inc.,* 289 F.R.D. 41, 53 (E.D.N.Y. 2011), *on reconsideration in part,* No. 09CV3312ARRVMS, 2013 WL 12362006 (E.D.N.Y. Feb. 12, 2013) (Safeco is entitled to the documents relating to the assignment of claims and those relating to the books and records *subject to* any claims of attorney-client privilege or work-product doctrine over those documents).

PANEL 5

Obligee Interference with Surety's Completion Options in the A312 Universe

Interference with the Surety's A312 Completion Options

Michael A. Prisco, Partner
Torre Lentz Gamell Gary & Rittmaster, LLP/Jericho, New York

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Interference with the Surety's A312 Completion Options

Michael A. Prisco, Torre Lentz Gamell Gary & Rittmaster, LLP
Richard Baudouin,. Skyward Specialty Insurance
Stephanie Keddy, Berkley Surety
Joseph Healy, Cashin Spinelli and Ferretti, LLC

Introduction:

When a surety is notified of a claim or potential claim, there are a myriad of issues that it must address. One of the most important is how to handle an overzealous obligee. Under the AIA-A312 form of performance bond, a surety has a variety of performance options at its disposal to remedy its principal's default. However, prior to selecting a performance option, a surety generally wishes to investigate its principal's alleged default and remaining scope of work. In conjunction with that investigation, a surety devotes time and resources to assessing which performance option best protects its interests on the project. This process can often take longer than an obligee is willing to wait, which can result in an obligee breaching the performance bond by usurping the surety's performance options. This paper will address two such examples – the first is when an obligee retains its own contractor to replace the principal prior to the surety exercising its performance options; and the second occurs when an obligee refuses to allow a surety to retain its own bond principal to complete the contract.

Performance Options Under the AIA-A312 Performance Bond

With respect to a surety's completion rights "courts have consistently held that an obligee's action that deprives a surety of its ability to protect itself pursuant to performance options granted under a performance bond constitutes a material breach, which renders the bond null and void." 120 Greenwich Development Assocs., LLC v. Reliance Insurance Co., No. 01 Civ. 8219, 2004 US Dist. LEXIS 10514, at *26 (S.D.N.Y. June 8, 2004) (quoting St. Paul Fire and Marine Ins. Co. v. City of Green River, Wyo., 93 F. Supp. 2d 1170, 1178 (D. Wyo. 2000)); see Tishman Westwide Constr. LLC v. ASF Glass, Inc., 33 A.D.3d 539, 540 (App. Div. 1st Dept. 2006); Dragon Construction Inc. v. Parkway Bank & Trust, 287 Ill. App. 3d 29, 33 (1997).

Under the AIA-A312 Performance Bond, the surety's performance options are set forth in paragraph 5. Paragraph 5 provides that, after an obligee has "satisfied the conditions of Section 3," a surety may select one of the following four performance options to address its principal's default:

> §5.1 Arrange for the [Principal], with the consent of the [the obligee], to perform and complete the Construction Contract;
>
> §5.2 Undertake to perform and complete the Construction Contract itself, through its agents or independent contractors;
>
> §5.3 Obtain bids or negotiated proposals from qualified contractors acceptable to the [obligee] for a performance and completion of the Construction Contract, arrange for a contract to be prepared for execution by the [obligee] and a Construction

Manager selected with the [obligee]'s concurrence, to be secured with performance and payment bonds executed by a qualified surety equivalent to the bonds issued on the Construction Contract, and pay to the [obligee] the amount of damages as described in Section 7 in excess of the Balance of the Contract Price incurred by the [obligee] as a result of the [Principal] Default; or

§5.4 Waive its right to perform and complete, arrange for completion, or obtain a new Construction Manager and with reasonable promptness under the circumstances:

1. After investigation, determine the amount for which it may be liable to the Owner and, as soon as practicable after the amount is determined, make payment to the Owner; or

2. Deny liability in whole or in part and notify the Owner, citing the reasons for denial.

To successfully address a performance bond claim, mitigate damages and preserve defenses, it is imperative for a surety to understand these performance options, and all the rights associated therewith. Without that understanding, sureties may be ill equipped to evaluate the impact on its rights caused by an overzealous obligee that tramples on their performance options.

<u>When the Obligee Retains its Own Completion Contractor</u>

A common refrain from obligees making a performance bond claim is that time is of the essence. Obligees are typically concerned about additional delays to the project resulting from the surety's investigation focused on evaluating the alleged default and selecting and properly implementing the surety's desired performance option. This concern can lead to the obligee taking matters into their own hands by hiring or utilizing other contractors to perform the principal's work or to remedy their alleged defaults prior to the surety exercising its performance options. While there may be legitimate concerns about escalating project delays, those concerns do not permit an obligee to undertake unilateral performance efforts in violation of the terms of the bond.

Through the language of the A312 bond paragraph 5, the Surety is vested with the sole right to select a performance option. There is no language anywhere in the bond that grants an obligee the right to usurp that power by unilaterally hiring a replacement contractor <u>except</u> as specifically set forth in paragraph 6.

Paragraph 6 of the A312 bond, dictates that an obligee is able to unilaterally exercise performance remedies only upon the occurrence of one of two events: 1) the Surety defaults on the Bond; or 2) the Surety waives its right to select a performance option. Specifically, paragraph 6 provides:

> If the Surety does not proceed as provided in Section 5 with reasonable promptness, the Surety shall be deemed to be in default on this Bond seven days after receipt of an additional written notice from [Obligee] to the Surety demanding that the Surety perform its obligations under this Bond, and [Obligee] shall be entitled to enforce

> any remedy available to [Obligee]. If the Surety proceeds as provided in Section 5.4, and [the Obligee] refuses the payment or the Surety has denied liability, in whole or in part, without further notice [the Obligee] shall be entitled to enforce any remedy available to [the Obligee].

Courts have repeatedly held that the "text of Section [6] of the A312 performance bond is unambiguous on this issue." Intl. Fid. Ins. Co. v. Americaribe-Moriarty JV, 192 F. Supp. 3d 1326 (S.D. Fla. 2016). As a result, "an [obligee] must . . . comply with [§6] of the bond before invoking its rights against the surety." Sleeper Vil., LLC v. NGM Ins. Co., 2010 DNH 173; Schuff Steel Co. v. Bosworth Steel Erectors, Civil Action No. 18-cv-0435 (TSC), 2022 US Dist. LEXIS 176417, at *34 (D.D.C. Sep. 28, 2022) (holding that the obligee's immediate self-performance prevented the surety "from electing a remedial option, let alone a reasonable one"); Fidelity & Deposit Co. of Maryland v. Jefferson Cty. Comm'n, 756 F. Supp. 2d 1329, 1338 (N.D. Ala. 2010) (holding that the performance bond obligations of the surety were discharged upon the obligee hiring a completing contractor before first permitting the surety to follow through with its election under the bond to take over the project).

In Sleeper, for example, the court found that an obligee materially breached the bond, even though it complied with §3, by entering into a completion contract without first complying with Bond §6's default requirements. 2010 DNH 173. Likewise, in Americaribe-Moriarty, the district court held that, regardless of an obligee's compliance with §3, the obligee breached §6 by hiring a completion contractor prior to the expiration of a surety's right to select a performance option:

> [E]ven if were to agree with [the obligee] that it did provide [the surety] with notice as required under both the performance bond and subcontract, **I still find that [the obligee's] actions in unilaterally hiring [the replacement contractor] to complete the scope of the subcontract breached the terms of the performance bond, thus precluding [the obligee] from seeking any relief under the performance bond. The text of Section [6] of the performance bond is unambiguous on this issue** . . . [the Obligee] did not have the right [to hire a replacement contractor] without first allowing [the surety] an opportunity to exercise its rights under the performance bond. 192 F. Supp. 3d at 1334 (emphasis added).

Additionally, in Seaboard Sur. Co. v Town of Greenfield, 266 F. Supp. 2d 189, 198 (D. Mass. 2003), a district court granted summary judgment to a surety after holding that an obligee materially breached the Bond by hiring a completion contractor prior to complying with §6.

Further, the basis upon which an obligee interferes with a surety's performance rights is generally irrelevant. In Granger Constr. Co. Inc. v. TJ., LLC, 134 A.D.3d 1329, 1332 (App. Div. 3d Dept. 2015), for example, the appellate court rejected an obligee's argument that commencing completion work before allowing the surety to exercise its performance options was justified in order to mitigate damages and prevent the project from being further delayed. The Appellate Division explained that fear of lost profits or "economic hardship" resulting from ceasing construction activities to comply with the terms of a bond did not justify breaching the terms of that bond: "we [are un]persuaded that the plain language of the bond should be construed so as to reflect the 'commercial reality' facing [the obligee]." Id. at 1332. Stated more broadly, the reasons why or how the obligee inferences with the bond is a "**distinction without a difference. Either way, the obligee interferes with the surety's choices, which materially breaches the bond.**" Bovis Lend Lease [LMB] Inc. v. Lower Manhattan Dev. Corp., 2015 NY Slip Op 30631[U], *13 [Sup. Ct., NY County 2015], modified on other grounds, 143 A.D.3d 597 (App. Div. 1st Dept. 2016) (emphasis added).

The foregoing demonstrates the potency of the surety's performance rights under the AIA-A312 bond, and the lengths to which they are protected by the courts. As a result, Sureties must reject any attempts to invade their performance options, and preserve any defenses related to an obligee's failure to adhere to the terms of the bond.

When the Obligee Refuses to Allow a Surety to Retain its Own Principal

Another way an obligee may interfere with a surety's performance options under the AIA-A312 Bond is when an obligee refuses to allow a surety to use its principal to complete the project. Unsurprisingly, when a surety receives a performance bond claim, it is typically because an obligee is unsatisfied with the principal's performance on the job. An obligee's dissatisfaction with a principal can sometimes result in the obligee issuing an edict purporting to prohibit a surety from retaining its principal to complete the remaining work on the project. Such a blanket prohibition interferes with a surety's duly negotiated performance options under the A312 performance bond and is generally considered a material breach of the bond. See St. Paul Fire & Marine Ins. Co. v. VDE Corp., 603 F.3d 119 (1st Cir. 2010); St. Paul Fire and Marine Ins. Co. v. City of Green River, Wyo., 93 F. Supp. 2d 1170, 1171, 1177-1178 (D. Wyo. 2000); see also 4A Bruner & O'Connor Const. L. §12:80 (noting that an "obligee has no right to unreasonably interfere with the surety's selection of its completion contractor, unless the bond provides otherwise").

There are two performance options of the A312 bond under which a surety may retain its principal – the first is set forth in paragraph 5.1 and the second is outlined in paragraph 5.2. Under paragraph 5.1, a surety may retain its principal to complete the remaining work upon consent of the obligee. An obligee is well within its rights to withhold its consent to the surety's retention of its principal under this specific performance option. Paragraph 5.2, on the other hand, allows a surety take over and perform the remaining work itself, retaining its own independent contractors, including its principal, without the consent of the obligee. The primary difference between a surety retaining its principal under these two provisions is that paragraph 5.1 limits the surety's liability to the penal sum of the bond, whereas 5.2 waives penal sum protection. The important distinction between an obligee's and surety's rights under these two performance options is explained in the First Circuit's decision in St. Paul Fire & Marine Ins. Co. v. VDE Corp., 603 F.3d 119 (1st Cir. 2010).

In VDE, the principal was declared to be in default and the surety was called upon to perform. Id. at 121. In notifying the surety of the default, the VDE obligee simultaneously advised the surety that it "opposed that the project be completed with [the principal] as contractor, either directly or indirectly." Id. Of course, being the first notice it received, the VDE surety had not yet expressed an intent to complete the project with its defaulted principal. Id. A week later, the VDE surety memorialized the obligee's assertion that it could not use the principal to complete, and reminded the obligee that it had no right to dictate the selection of the replacement contractor. Id. Less than a month later, the VDE surety instituted a declaratory judgment action requesting a declaration that the obligee had violated the terms of the performance bond when it refused to allow the principal or its forces to complete the work. Id. at 121-122. The court agreed and ruled the performance bond to be null and void. Id. at 125.

The court explained that, even though performance option 5.1 required the obligee's consent to retain the principal, option 5.2 did not; as a result, it would be improper to graft that same consent language into section 5.1. Id. at 123-125. Nor did the court limit its holding to objectively acceptable principals; rather, it held that, even when an obligee has concerns regarding the principal's ability to perform due to issues such as bad faith, the surety may retain its principal to complete the work because an obligee's apprehensions about a principal's performance did not endow the obligee with rights not explicitly provided for under the A312 performance bond. Id. at 125.

Despite these holdings, there may be some limitation to the surety's ability to retain its principal to complete the work. In New York, a court interpreting an AIA-A311 bond form used provisions of the incorporated bonded contract to limit the surety's right to retain its principal. See Bovis Lend Lease [LMB] Inc. v. Lower Manhattan Dev. Corp., 2015 NY Slip Op 30631[U] (Sup. Ct., NY County 2015). While it is unclear if this same holding would be applied equally to the AIA-A312 Bond, which is afforded far greater protection in New York and elsewhere, it is a potent reminder for sureties to review the underlying bonded contract for provisions that could be relevant to their defense.

While the caselaw in this area is still developing, a surety must be careful not to acquiesce to an obligee's edict regarding the use of the principal. Instead, a surety should confirm the obligee's position, and weigh its options for proceeding in light of this potential material breach of the bond.

Conclusion

When dealing with an overzealous obligee, a surety must be aware of its performance rights and how to protect them. In the event an obligee tramples on those performance rights, a surety is vested with powerful defenses upon which to deny a performance bond claim. Even if a surety is not inclined to immediately deny a claim based on these defenses, they must, at the very least, be expressly preserved through carefully crafted correspondence, and if appropriate, in agreements exchanged between the obligee and surety.

PANEL 6

Dealing with the Tough Agency Obligee

The Time Machine: What Does a Surety Gain or Lose by Waiting?

Robert C. Niesley, Senior Partner
Watt, Tieder, Hoffar & Fitzgerald, LLP/Irvine, California

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The Time Machine: What Does A Surety Gain or Lose by Waiting?

Robert C. Niesley, Senior Partner
Watt, Tieder, Hoffar & Fitzgerald, LLP
Irvine, California

"Run at problems, not away from them" is a saying frequently repeated at Watt Tieder as we try to think through various options to solve problems. Another often repeated saying is "We're driving an ambulance, not a hearse" in reference to executing our duties as surety claims counsel. When the Pearlman Program Chairs approached us with the topic of "waiting" as a claim objective or consequence, we had to pause as it seemed contrary to everything we were trained to do. Or is it? Time can be, and often is, a tool in resolving claims. This short article focuses on how to use time to successfully resolve bond claims and the potential consequences of not using your time effectively.

A surety bond is a commercial product sold to obligees for a premium and is intended to provide the specified guarantees as set forth therein. The goal of most surety claims professionals and their outside counsel in a bond claim investigation or subsequent litigation is to deliver the promise of the bond. All of the ideas discussed herein are intended to do just that - help deliver the promise of the bond. All of the ideas discussed herein are only attributable to the author and not to Watt Tieder or any client of the law firm.

A. Time As A Pre-Default Tool

1. Time Is Money – Look For Solutions That Save The Project Time

Most projects have completion deadlines and financial consequences to the principal and surety if such deadlines are not met. Some consequences include actual or liquidated damages, extended general conditions, or other delay costs incurred while the project continues forward. Such costs, by themselves, should be motivation to all parties to work together to find solutions that save time and minimize delays. Look for solutions that save the project time. Although they may not always be realistic, cost-efficient, reasonable or available options, at least exploring your time saving options is knowledge worth having and a possible negotiating point with the obligee or principal.

Some obligees are more flexible than others in their ability to negotiate solutions that save the project time. Oftentimes, private obligees appear to have the most flexibility to make good business decisions even if they do not always fit that profile. Public obligees are sometimes more constrained by statutory restrictions which can hinder their ability to demonstrate flexibility and/or reasonableness. These very legal constraints, however, can create a negotiating opportunity for the surety. For instance, without being governed by the same legal constraints, the surety may be able complete the work faster which may be a negotiating opportunity.

In order to use the surety's ability to proceed without the same restraints that apply to public obligees, it is necessary to understand the obligee's timing concerns. To do this, it is necessary to evaluate the surety's ability to meet those concerns and the cost of doing so. Sometimes, it is not possible to ever meet the obligee's timing goals. However, frequently in the pre-default time period between the initial identification of problems and a declaration of default, opportunities, if recognized, can arise to save time and money for everyone. The exercise of such opportunities should not, however, require the surety to go beyond the express terms of the bond. Instead, the focus is to develop knowledge early of the timing issues so that the surety is better situated to identify opportunities withing the terms of the bond to mitigate damages.

2. Reservation of Rights as a Tool to Save Time

While kicking the can down the road for dispute resolution at a later date is not usually a goal, the reality is that obligees and principals frequently disagree about the legal causes of delay which, in turn, can prevent a timely resolution. In a pre (and post)-default , it is often difficult to get the project participants to agree to a go-forward plan, especially if there is a risk that the deal itself can be used against either of them in future litigation over past problems.

One way to potentially assuage all parties' concerns, and, simultaneously allow the project to move forward is through a reservation of rights. Under a reservation of rights, the parties (including the obligee) accept that nothing can be resolved at the moment, but there is still added value for completing the project, such as saving time and mitigating damages while maintaining everyone's rights to sue each other for past wrongs after project completion. Continuing work on the project avoids further delays and maintains continuity of the project team. Replacing the principal with a new contractor is rarely seamless and will inevitably cost more time and money. If future litigation appears to be unavoidable, it is in everyone's best interest to mitigate damages now by limiting the cost to complete and reserving the right to litigate disputes later. As the proverb goes, "A bird in the hand is worth two in the bush." Stated differently, a completed project with contained delay costs may later prove valuable given the uncertainty surrounding litigation.

3. Project Neutral as a Tool to Save Time

Many times, the surety arrives on a troubled project and the obligee and principal are locked in multiple performance disputes over potential changes, plan interpretations, design defects and/or disputes over how the disputed extra work will be paid for. The obligee's answer to the payment question is almost always that the principal or surety have a contractual duty to pay for whatever the obligee can dream of and make a claim for it later. There are legal and contractual limitations on a duty to proceed clause, which are not the subject of this short article. Rather, the focus here is how to save time when these pre-default situations arise.

The bonded contract will frequently contain dispute resolution clauses that set forth a procedure for resolving disputes during construction. These clauses should be closely followed. One dispute resolution procedure gaining popularity is the establishment of a Project Neutral to resolve issues immediately for purposes of cash flowing the cost of performing the work, but subject to a reservation of rights as discussed in the previous section of this paper.

Again, the goal is to save time and keep the project moving. The project participants jointly select a Project Neutral to resolve disputed change orders or other defined disputes during construction. The Project Neutral, often a lawyer, is a construction professional. The Project Neutral decision must be followed for purposes of funding the extra work on the project but is non-binding and inadmissible for purposes of ultimate resolution in a court of law or arbitration. The Project

Neutral and parties agree to an abbreviated briefing and decision time so that project solutions can be found quickly. In some situations, the entire process can be completed in 30-45 days.

The Project Neutral process allows the job to be completed with the goal of saving time, mitigating damages, and reserving permanent solutions for a later date. Once the Project Neutral issues a decision, the work can proceed . Disputes over money are continued to a later date. This system works if parties have the financial ability to make it to the end of the project regardless of how the Project Neutral rules.

4. Surety Consultant as a Tool to Save Time

Oftentimes, by the time the surety gets involved, there are communication issues between the obligee and principal that interfere with problem solving. One side or both may have difficult individuals on the project team leading to delays and hostility. One side or both may have lost confidence in the other to competently perform their respective obligations under the contract. In such situations, the surety may save time simply by improving or changing the communication procedure and inserting a Surety Consultant on the job as a middle person and monitor for the surety.

Before utilizing a Surety Consultant in this manner, it is imperative to check state laws which may require a contractor's license for services being performed by the Surety Consultant.
Most states have laws requiring a contractor's license for individuals that perform contracting. Therefore, it is necessary to make sure the Surety or Surety Consultant is not performing contracting work when monitoring. It is equally crucial to both the obligee and principal that the Surety Consultant is not responsible for or directing any means and methods of construction. The principal remains the contractor of record. The Surety Consultant is simply a monitor to report to the surety the status of the project and, where practicable, assist the parties with communications issues. Any written correspondence and/or agreement memorializing the surety's use of a Surety Consultant on a bonded project must make abundantly clear the limitations in the Surety Consultant's role and obligations.

Regardless of any communication issues that may or may not exist between the obligee and principal, it is often a good idea for a surety to get its Surety Consultant onto a bonded project pre-default if for no other reason than to assess the status of the principal's performance and the surety's risk, if any. In some (not all) cases, the surety's involvement in this manner demonstrate to the obligee that the surety is paying attention and playing an active role. Further, in some (not all) cases, it is helpful for the surety to, independent from the principal, assess the status of work in order to make decisions about its bond risk and/or salvage. The Surety Consultant can provide invaluable information for the surety to make good and prompt decisions in the future.

When a Surety Consultant is used in a pre-default setting, the issue of who bears the cost for the consultant is often raised. There is no doubt under any indemnity agreement used by sureties today that: (1) the surety has the right to hire a Surety Consultant at any time during the project; and (2) the principal and indemnitors have the obligation to reimburse the surety for the fees and expenses incurred hiring the Surety Consultant. Notwithstanding the clear obligation of the principal and its indemnitors to pay this expense, principals often view the cost of hiring a Surety Consultant as extra work that the principal intends to pass through to the obligee. Not surprisingly, the obligee disagrees. To avoid this dilemma, the discussion regarding who bears the responsibility for paying for the Surety Consultant should be raised (and agreed upon) early on, If the principal, after reimbursing the surety, intends to pass the expense of the Surety Consultant onto the obligee, notice should be provided so as to avoid unpleasant surprises. Many times, the obligee will agree that this issue is subject to the reservation of rights.

5. Financing as a Tool to Save Time.

Not all pre-default fact patterns involve a problematic project or even disputes between the obligee and principal. Sometimes, the principal is simply experiencing financial difficulties which alert the surety to potential problems down the road, namely, completion delays.

The surety has no obligation to save the principal. The surety does not even have a duty to inform the obligee or anyone of the principal's financial difficulties . The surety is entitled to make decisions in the best interest of the surety. Under certain situations, such a decision involves the surety providing a bridge loan to help the principal reach a point where the surety can then takeover with minimal impact to the project schedule. In other situations, the best option is for the surety to simply provide financing to assist the principal to reach the end of the project on its own. The decision to finance should not be made without a belief that the principal is the surety's best option to execute the project work. Entire seminars within the surety industry have been dedicated to exploring how the decision of whether or not to finance the principal is made. This short article only discusses the impact of financing upon time.

In some cases, surety financing of the principal can save time. If the surety's investigation results in the conclusion that the principal cannot reach completion and default is inevitable, providing a bridge loan may be the most beneficial option for the surety. The surety should engage an accounting, consulting, and legal team to assist the surety in its investigation of the surety's options. Sometimes, payment of a few key subcontractors or suppliers is all that is needed to move the project in the right direction. Other times, the surety can loan funds to keep the principal afloat while the surety makes arrangements for others to complete the project. Under all of these options, the primary goal should be to keep the project(s) moving forward to save time and continuity.

Any payment by the surety that is necessary for the completion of bonded obligations should be considered an involuntary payment. Although disputed by some courts, involuntary payments generally give rise to subrogation rights and penal sum reduction. When considering financing as a tool to save time, it is imperative to check the case law in the jurisdiction where the financing will occur to confirm whether subrogation and penal sum reduction are available remedies to a financing surety. Even if such remedies are debatable, financing may still be the best options when compared to potential costs resulting from project delays. Also, consider whether the surety can improve its collateral security position to offset any risk of surety financing. Finally, it must be noted that this paragraph focuses on *pre*-default financing where the goal of financing may be to prevent the principal from defaulting. There is no question that a surety that pays losses *post*-default is entitled to both subrogation and penal sum reduction remedies.

6. Sometimes Saving Time is Not Possible.

The tools discussed in this short article are all designed to save time. However, in some situations, saving time simply is not possible. For instance, there may be a disagreeable obligee unwilling to work out options. Alternatively, a project may be waiting on long lead item equipment sitting on a ship in the ocean or waiting in line at the manufacturing facility to be built. These are a few scenarios among a myriad of other possibilities. The surety professional needs to develop a good understanding of the realistic goals of implementing any of the above strategies before doing so.

Frequently when faced with these types of problems the surety should consider engaging the Surety Consultant or another specialist to examine the project schedules. How did the project reach its current status? What, if any, were the causes of critical path delay? And, importantly, can surety strategies to recover time or mitigate future loss of time actually work in the real world? In any decision-making, the surety should be realistic about what it is trying to accomplish, how much it is going to cost the surety, and whether the principal has a realistic chance of meeting the surety's goals in implementing these tools.

B. Time As A Post-Default Tool.

A declaration of default by the obligee of the principal is sometimes unavoidable despite all efforts to avoid it. All of the tools discussed above available after there has been a declaration of default against the principal. A declaration of default does not eliminate a surety's ability to consider and/or implement strategies to save time and money. In some cases, a declaration of default can increase the willingness of all project participants to search for solutions that save time and money.

Step one in any project default is to read the bond and incorporated bonded contract. The surety's rights and remedies start with the terms of the bond. Most defeasance-type bonds only provide that the surety will pay money which, when the obligee lacks the ability to quickly mobilize and complete a project, may provide opportunities for the surety to suggest time-saving solutions to a default. Other bond forms, such as those on AIA forms, specifically list out the available remedies for a surety to follow. Read the bond. Know what the surety promised to do when the bond was issued. Strive to deliver on the promise of the bond.

When reviewing the bond form and related contract documents, it is important to identify any timing requirements. Some bond forms provide very short time periods (5 days? 10 days?) for the surety to publish its intentions. Other bond forms provide that the surety must respond in a "reasonable" amount of time which can vary from project to project or from courtroom to courtroom. Know your contractual time limitations. The obligee may require strict compliance with the time limitations in the bond although, generally, the obligee is focused on getting the project completed and is open to working with the surety on solutions. The best practice is to work fast and transparently. Call the obligee and principal to talk about timing. If possible, negotiate time extensions that are realistic and show the obligee that the surety is moving forward. In some situations, the surety will have had some warning in advance that a default was coming and can use that knowledge to begin its investigation. With or without warning, the surety should put a team together (i.e.. consultants, attorneys, etc.) quickly and get to work to figure out .

1. Time As A Regulatory Obligation

In some states, such as California, the time for a surety to respond to a bond claim is set forth in state claim regulations. The regulations are not a substitute for shorter time periods in the bond or contract documents. However, the regulations sometimes do provide a time period within which the surety must respond to a claim. Check for any regulations applicable to the jurisdiction in which your project default has occurred. If applicable, calendar the regulatory deadlines to make sure you are compliant.

Note the dichotomy between "default" and "claim" when calculating deadlines. The California regulations that set forth response deadlines refer to *claims*, not defaults. Sureties are required to respond to a proof of claim within 40 days which may be extended unilaterally by the surety in certain instances. Although many bond forms will provide the timing requirements for responding to a bond claim or default, the 40-day requirement sometimes becomes relevant when the bond form requires only a "reasonable" time. Currently, there is no case law that interprets "reasonable" to mean 40 days. However, as a practice pointer, if the California Insurance Commissioner views 40 days as the amount of time needed to respond, it should be complied with to avoid having to argue later in court the unreasonableness of the regulation. Again, the regulation does give the surety a unilateral right to extend.

C. Too Much Time In Court

Notwithstanding the surety's efforts to deliver the promise under the bond and reach a resolution with the obligee, litigation may be unavoidable. Unlike the construction period when every day of time is money, litigation often lasts longer than one hopes for.

Trials are won and lost with evidence and witnesses. Regardless of which option the surety chooses (ie. financing the principal, takeover, paying subcontractors), every step of the surety's efforts to save time, mitigate damages, and deliver the promise of the bond should be clearly documented. This focus should be discussed within the surety team and all of its members. Everyone is a witness so everyone needs to focus upon clear and professional communication, whether writing on letterhead or email. In these days of electronic communication, most documents are discoverable and preserved forever. As a surety professional, insist upon creating and maintaining clear records of the surety investigation process.

The attorney-client privilege is easy to apply in practice. Communications with your attorney that include opinions of the attorney are privileged and not discoverable. However, such communications are limited to only those exchanged between attorney and client. Should anyone outside of the attorney and/or client be carbon copied on correspondence, such communications may be subject to discovery. This is often seen with the Surety Consultant communications. While efforts should be made to protect the communications with the Surety Consultant as work product, she or he will likely become a trial witness and, as a result, their writings may ultimately become discoverable. While the rules of privilege will vary from state to state, be mindful of the possibility that everything written to the Surety Consultant is at risk of discovery. In short, simply including an attorney on communications to a Surety Consultant may not necessarily protect it from discovery. Nothing stated above is intended to concede that Surety Consultant communications are not privileged work product if created at the direction of the attorney in anticipation of litigation. Rather, as a practice pointer, do not assume that everything the Surety Consultant writes (or is communicated in writing with a Surety Consultant) will be privileged work product.

1. Mediation as a Tool to Save Time

Large projects and public projects usually have mediation requirements included in the contract documents. Depending upon the jurisdiction, the mediation requirements may also be applicable to the surety. Mediation is frequently required because it can assist with dispute resolution.

Whether required or not, mediation is a tool that the surety should not hesitate to consider as an option from the pre-default stage until post-trial. Not all cases are good candidates for mediation. Not all parties are emotionally, financially or ministerially capable of compromise. Moreover, some parties need to fight before recognizing mediation as an option. Regardless of the obstacles, whether real or imagined, many or perhaps most cases seem to find a path to mediation before trial.

As a surety, consider mediation as an option to save time, avoid risk, and save expenses. There are many accomplished mediators that find ways to settle impossible cases. Mediators may be more capable of finding out what adversaries really think about the arguments their lawyers include in letters and pleadings, or, similarly, their assessment of their likelihood for success in litigation.

2. Arbitration as a Tool to Save Time

As with mediation, many contract documents provide for arbitration. Depending upon the jurisdiction, arbitration provisions in the contract documents may or may not be applicable to the surety. When arbitration is not required, the surety should nevertheless consider arbitration as a procedure to save years of litigation. Parties are capable of agreeing to arbitration even when the contract documents do not require arbitration.

Arbitration is not suitable for all cases, especially if there are claims of tort. In California, if the parties elect arbitration, they eliminate all appeal rights except in very rare cases. Arbitrators are not required to follow the law absent an arbitration provision to the contrary. Arbitrators are not required to follow the Evidence Code absent a provision to the contrary. Notwithstanding, arbitration may still be a favorable option, over litigation, in order to reach a resolution in a timely manner.

Before deciding whether to proceed with arbitration, certain questions should be asked. Will a judge or jury do better than a trained construction arbitrator? Even though appellate rights are available if a judge or jury commits an error in resolving your dispute, should success be dependent on the outcome of an appeal? Are there ways to resolve the dispute without engage in protracted litigation? The answer to such questions will guide the surety in deciding whether arbitration will be helpful in reaching a timely and cost-effective resolution.

D. <u>Conclusion</u>

Time is an important factor in many decisions made by the surety claims professional. The passage of time during a construction project will usually result in damages that someone (perhaps the surety) will eventually have to pay. Time can also be used as a tool to get the project participants to a place where reasonable solutions can be found. Always focus upon how time affects the decision making and use time to help the surety deliver the promise of the bond.

PANEL 7

Dealing With a Principal's Bad Faith Claims and Defenses by the Principal or Indemnitors

SETTLING THE PRINCIPAL'S CLAIMS

Megan Daily
Krebs Farley/New Orleans, LA

Presented to

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SETTLING THE PRINCIPAL'S CLAIMS

By: Megan Daily
Krebs Farley

I. Introduction

A typical indemnity agreement grants the surety broad rights to demand and receive indemnification, reimbursement and exoneration; authorizes the surety to be the indemnitors' attorney-in-fact; assigns any and all of the indemnitors' rights arising under any contract referred to in any bond; and grants the surety the right to settle any claim against the surety and any indemnitor relating to any bond issued by the surety on behalf of any indemnitor. Under such an agreement, the surety is empowered to resolve or settle claims against itself *and* its principal, and such settlements are binding on the principal. The right of the surety to settle claims is not contingent and does not require the principal to agree with the decision.

However, such actions are usually not well received by indemnitors, and it is common for indemnitors to seek to impose limitations upon the surety's ability to settle, most often arguing that the surety owes the principal and indemnitors a duty of good faith in negotiating a settlement. These arguments are inconsistent with the purpose and intent of the indemnity agreement and should be rejected by the courts, but as discussed below, there is not complete uniformity in applying the rights of the surety pursuant to indemnity agreements.

II. The Indemnity Agreement

The Indemnity Agreement "forms the law between the parties and must be interpreted according to its own terms and conditions."[1] "Indemnity agreements are interpreted like any other contracts."[2] The general rules which govern contract interpretation apply in construing an indemnity contract.[3] "Interpretation of a contract is the determination of the common intent of the parties."[4] When the terms of an indemnity agreement "are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent."[5] In fact, the United States Fourth, Fifth, and Seventh, Circuit Courts of Appeal has ruled that indemnitors are free to be bound to sureties in any manner they choose.[6]

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[1] *Abbott v. Equity Group, Inc.*, 2 F.3d 613, 627 (5th Cir. 1993).

[2] *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, 120 Wash. 2d 573, 580, 844 P.2d 428 (1993) (citing *Jones v. Strom Constr. Co.*, 84 Wash. 2d 518, 520, 527 P.2d 1115 (1974)).

[3] *Great American Ins. Co. v. McElwee Bros., Inc.*, 106 Fed. Appx. 197, 200 (5th Cir. 2004).

[4] La. Civ. Code. Ann. art. 2045.

[5] *Liem v. Austin Power, Inc.*, 569 So. 2d 601, 608 (La. Ct. App. 1990); see also *Martin v. Lyons,* 98 Idaho 102, 558 P.2d 1063, 1066 (Id. 1977) ("It is a well-established principle of surety law in regard to indemnification that the 'surety will ... be permitted to rely on the exact terms of the agreement.'").

[6] *American Ins. Co. v. Egerton*, 1995 U.S. App. LEXIS 15507 ("If the agreement is clear and unambiguous, it should be enforced according to its terms. *Fidelity & Deposit Co. v. Bristol Steel & Iron Works, Inc.*, 722 F.2d 1160, 1163 (4th Cir. 1983) (existence of express indemnification contract requires court to determine surety's rights in accordance with terms of that contract, rather than looking to "general 'indemnity principles'" for guidance). See *Abbott,* 2 F.3d at 627.

A. The Typical Indemnity Agreement Clearly Authorizes the Surety to Settle Claims by and against its Principal.

A surety's right under its indemnity agreement to resolve claims by and against its principal is well settled.[7] Generally, right-to-settle clauses are enforced according to their terms, regardless of whether the principal is ultimately found to be in default, provided that the surety settles in good faith.[8]

The indemnity agreement is an integral part of the surety-principal relationship:

> A surety, its principal and its indemnitors are engaged in a commercial business relationship which establishes, by contract, specific benefits and burdens to the parties. By issuing its bond, the surety takes the risk that the principal will fulfill its obligations. If the principal does not do so, the surety is required to step in and bear the cost of satisfactorily completing the project and/or paying the principal's subcontractors and suppliers. In order to protect itself from potentially substantial losses, the surety invariably requires the principal and indemnitors to enter into an indemnity agreement.
>
> At the heart of the surety-principal relationship is the intention of the parties—clearly established in the indemnity agreement—that the surety will be repaid for all claims paid or expenses incurred as a result of issuing bonds on behalf of the principal.[9]

The specific terms of the indemnity agreement vary from surety to surety, but most agreements seek to accomplish certain common objectives:

> to provide the surety with a contractual right of recovery against the principal and other named indemnitors of all losses, costs, expenses, including counsel fees, incurred as a result of issuing the bonds; to facilitate the handling of bond claims by providing the surety with the discretion to settle and pay such claims; . . . and **to grant the surety the right to settle the principal's own affirmative claims against the bond obligee.**[10]

("[I]n an indemnity contract, the principal and indemnitors can be bound to the surety in any manner they elect in consideration of the surety issuing the bond covering the principal obligation."); quoting *Commercial Union Ins. Co. v. Melikyan*, 430 So. 2d 1217, 1221 (La. Ct. App. 1983); see also *Am. Contractors Indem. Co. v. Galaforo Constr., LLC*, No. CV 20-2860, 2021 WL 5998507, at *5 (E.D. La. Dec. 20, 2021). *Hanover Ins. Co. v. N. Bldg. Co.,* 751 F.3d 788 (7th Cir. 2014) ("If a contract is clear and unambiguous, the court must determine the intent of the parties solely from the plain language of the contract.");

[7] See, e.g., John W. Hinchey, Surety's Performance over Protest of Principal: Considerations and Risks, 22 Tort & Ins. L.J. 133, 146 (1986).

[8] *Id.*

[9] *Andre Const. Assoc., Inc. v. Catel, Inc.*, 681 A.2d 121, 293 N.J. Super. 452, 456-57 (N.J. Super. Ct. Law Div. 1996).

[10] *See* DUNCAN L CLORE, RICHARD E. TOWLE & MICHAEL J. SUGAR, III, Bond Default Manual (3rd Ed. 2005) (Chapter 1, Part VII. General Agreement of Indemnity) (emphasis added).

To achieve these means, the Indemnity Agreement may include an assignment provision by which the principal and the indemnitors assign their rights in the contract to the surety. A typical assignment clause reads as follows:

> **6. Remedies:** In the event of a Default, Indemnitors assign, convey and transfer to [surety] all of their rights, title and interest in Property, and [surety] shall have a right in its sole discretion to: ... (c) assert or prosecute any right or claim in the name of any Indemnitor and to settle any such right or claim as [surety] sees fit.

Such an assignment divests the principal and the indemnitors of all rights in any contract claims against the obligee and the surety becomes the real party in interest as to these claims.[11] In order to give practical effect to the assignment, indemnity agreements typically include attorney in fact clauses as well:

> **11. Attorney in Fact:** Indemnitors irrevocably constitute, appoint and designate [surety] as their attorney in fact with the right, but not the obligation, to exercise all rights of Indemnitors assigned or granted to [surety] and to execute and deliver any other assignments, documents, instruments or agreements deemed necessary by [surety] to exercise its rights under this Agreement in the name of any Indemnitor.

Such an attorney-in-fact clause makes clear that the surety has the authority to exercise all assigned rights and to execute documents in the name of the principal and the indemnitors as their attorney-in fact.[12] These provisions, read together, enable the surety to resolve and to settle claims promptly. They also serve as an important protection for the surety confronted with a situation in which the principal has nothing to lose but the surety's money. The Fifth Circuit and other courts have noted that similar right-to-settle provisions "often have been upheld and are not against public policy."[13]

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[11] *Safeco Ins. Co. of America v. Lake Asphalt Paving & Const., LLC*, No. 4:10-CV-1160 CAS, 2012 WL 234651, at *3 (E.D. Mo. Jan. 25, 2012).

[12] *See Mezzacappa Brothers, Inc. v. City of New York*, No. 03 Civ.0223 NRB, 2003 WL 222801429, at *7 (S.D.N.Y. Nov. 24, 2003)(under terms of indemnity agreement, surety had plain and manifest authority to execute release in the name of principal and indemnitors); *Fireman's Ins. Co. of Newark, N.J. v. Todesca Equip. Co.*, 310 F.3d 32, 35 (1st Cir. 2002) (Holding that indemnity agreements give sureties broad latitude to resolve claims on behalf of their principals.); *U.S. for Use of Int'l Bhd. of Elec. Workers Loc. No. 449, Eighth Dist. Elec. Pension Fund v. United Pac. Ins. Co.*, 697 F. Supp. 378, 381 (D. Idaho 1988) ("Under the terms of the Agreement executed by the parties in this case as quoted in Paragraph Tenth above, the Indemnitors are liable for any expense relating to any claim, demand, suit, or judgment upon the bonds and [the surety] can settle the claims 'on the basis of liability, expediency or otherwise.'").

[13] *Engbrock v. Fed. Ins. Co.*, 370 F.2d 784, 786 (5th Cir. 1967). *See also Mezzacappa Bros., Inc. v. City of N.Y.*, 2003 WL 22801429, at *7 (S.D.N.Y. Nov. 24, 2003) (holding that, under terms of indemnity agreement, surety had plain and manifest authority to execute release in the name of principal and indemnitors) (citing *Hutton Constr. Co. v. Cnty. of Rockland,* 52 F.3d 1191, 1192 (2d Cir. 1995) (holding that unambiguous assignment and attorney-in-fact clauses of indemnity agreement gave surety the authority to settle all claims on behalf of the assigning contractor)); *see also Fireman's Ins. Co. v. Todesca Equip. Co.*, 310 F.3d 32, 35 (1st Cir. 2002) (holding that indemnity agreement gave surety broad latitude to resolve claims on behalf of its principals); *U.S. for Use of Int'l Bhd. of Elec. Workers v. United Pac. Ins. Co.*, 697 F. Supp. 378, 381 (D. Idaho 1988) ("Under the terms of the Agreement [of Indemnity] executed by the parties in this case ... the Indemnitors are liable for any expense relating to any claim, demand, suit, or judgment upon the bonds and [the surety] can settle the claims 'on the basis of liability, expediency or otherwise.'").

In *HRH Construction, LLC v. Fidelity and Guaranty Ins. Co.*,[14] the United States District Court for the Southern District of New York considered motions brought by a surety and an obligee seeking dismissal of claims asserted against the obligee by the principal and its indemnitors. Pursuant to the surety's rights under the indemnity agreement, the surety and the obligee entered into a settlement agreement in which the surety gave the obligee a release of any claims brought against it by the principal and its indemnitors.[15] The obligee and surety asserted that the principal's claims and the indemnitor's claims had been released under the settlement agreement and that these claims had been assigned to the surety under the terms of the indemnity agreement such that the principal and indemnitors were no longer the real parties in interest with respect to the claims.[16]

Interpreting those provisions, the *HRH* court determined that the obligee's notice of default on the bonded contract and the subsequent termination of that contract constituted events of default under the terms of the indemnity agreement.[17] As a result, the surety was empowered to release the principal's claims against the obligee.[18] The court explained that "where a surety has exercised its powers under an indemnity agreement releasing its principal's affirmative claims against another party, that settlement agreement is binding on the principal."[19] The court granted the motions to dismiss the principal's claims based on the settlement agreement.[20]

Relying on *HRH Construction, LLC* case, the United States District Court for the Eastern District of Louisiana held: "[W]here a surety has exercised its powers under an indemnity agreement by executing a settlement agreement releasing its principal's affirmative claims against another party, that settlement agreement is binding on the principal."[21]

In *Fucich,* after several years of litigation, the surety, acting on its own behalf and as attorney-in-fact for the principal and indemnitors reached a settlement with the obligee, the design professional, the design professional insurer, and a supplier to settle the claims among them, including claims asserted by and against the principal. This resolution was reached at a mediation attended by all parties, including the principal and indemnitors. The principal and indemnitors refused to reach an agreement with any party and objected to the settlement.

Following the settlement, the principal and indemnitors filed their First Supplemental Counterclaim Complaint ("Supplemental Counterclaim"). Throughout this Supplemental Counterclaim, the Indemnitors allege that the surety acted in bad faith by settling the principal and indemnitors' affirmative claims, by failing to take principal and indemnitors' best interests into account, and by failing to protect principal and indemnitors' interests in confecting the settlement.

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[14] No. 04 CIV. 1606 (PKC), 2005 WL 8168375 (S.D.N.Y. July 8, 2005).
[15] *Id.* at *1.
[16] *Id.*
[17] *Id.* at *3.
[18] *Id.*
[19] *Id.* at *4.
[20] *Id.* at *6.
[21] *Fucich Contracting, Inc. v. Shread-Kuyrkendall & Assocs.*, 2022 U.S. Dist. LEXIS 197233, at *78 (E.D. La. Oct. 31, 2022) citing *HRH Constr., LLC v. Fid. & Guar. Ins. Co.*, 2005 U.S. Dist. LEXIS 13737, 2005 WL 8168375, at *4 (S.D.N.Y. July 8, 2005) (discussing and applying *Hutton*, 52 F.3d at 1192).

The *Fucich* court held that the surety did not act in bad faith by settling principal and indemnitors' affirmative claims since the indemnity agreement authorizes the surety to do so in its sole discretion and specifically empowers the surety to act as the principal and indemnitors' attorney-in-fact to settle claims as the surety sees fit.[22]

In short, there is strong authority that the indemnity agreement enables the surety to settle claims on the behalf of itself and the principal. However, as discussed in more detail below, indemnitors have had varying success opposing and challenging the terms of the indemnity agreement.

B. Claim Settlement Clauses

In addition, the surety may have the right to settle claims by and against its principal pursuant to a claim settlement clause in the indemnity agreement. An indemnity agreement grants the surety the right to settle claims against the surety and the principal related to any bond issued to the principal. An example of a claim settlement provision in an indemnity agreement is below:

> 4. **Claim Settlement:** [the surety] shall have the right, in its sole discretion, to determine for itself and Indemnitors whether any claim, demand or suit brought against [the surety] or any Indemnitors in connection with or relating to any Bond shall be paid, compromised, settled, tried defended, or appealed, and its determination shall be final binding and conclusive upon the Indemnitors.[23]

It is important to note that the indemnity agreement does not contain language that imposes an obligation to favor the indemnitors when settling claims. Instead, clauses in indemnity agreements typically grant the surety—in its sole discretion—the right to settle claims against itself and its principal related to any bond issued to the principal.

In *Bond Safeguard Insurance Co. v. Wisteria Corp.*, both the principal and the surety refused to pay the obligee after it alleged that the principal breached conditions of its contract to cut and remove trees.[24] Before a lawsuit was filed, the surety settled the claim with the obligee pursuant to this clause in the indemnity agreement:

> The Company shall have the exclusive right to determine for itself and the Indemnitors whether any claim or suit brought against the Company or the Principal

[22] *Id.*
[23] *Am. Contractors Indem. Co. v. Galaforo Constr., LLC*, No. CV 20-2860, 2021 WL 5998507, at *5 (E.D. La. Dec. 20, 2021) (Holding that a similar indemnity agreement gave the surety 'sole and absolute discretion' to settle any claims arising in connection with the Bonds issued to [the contractor]."); *Devs. Sur. & Indem. Co. v. Cercontec, L.L.C.*, No. CV 18-1379, 2020 WL 1271603, at *4 (W.D. La. Mar. 13, 2020); (Holding that the indemnity agreement gave the surety "**the absolute discretion** to 'pay, compromise, defend, settle, investigate, appeal, or otherwise handle" any claims arising out of the bonds.'") (Emphasis added).
[24] 173 Wash. App. 1026 (2013).

upon any such bond shall be settled or defended, and its decision shall be binding and conclusive upon the Indemnitors.[25]

The surety then sued the principal for indemnification of the payment to obligee, and in response, the principal argued that it was exempt for payment because the surety had breached its duty of good faith by not properly investigating the defenses set forth before settling.[26]

The court rejected the principal's argument, even in the face of the contention that the obligee's claim was meritless, because it determined that the surety was within its right to settle pursuant to the contract.[27] The court arrived at this conclusion in part because the principal provided no evidence of its compliance with the contract, and as such could not prove it would have fared better without the settlement.[28] The court found that, given the information provided, the surety properly investigated and settled the claim before a lawsuit could be filed, and therefore was within its right to seek indemnification.[29]

III. Equitable Subrogation

In addition to the powers, rights, remedies and assignments granted to the surety under the indemnity agreement, the surety is also equitably subrogated to the principal and indemnitors' property, including any claim asserted against a bond.[30] As the Fifth Circuit noted, "[s]ubrogation requires (1) the party to have paid a debt to a third party on behalf of the other party and (2) that he must have been compelled to do so, such as by a surety agreement."[31] When a surety settles a claim against the bond, the surety is paying its principal's debt—albeit at a discounted rate—pursuant to the bond issued on behalf of the principal. The surety is equitably subrogated to the claims of its principal and the indemnitors. As a result, the surety is empowered to settle claims to which it is equitably subrogated.[32]

IV. Additional Remedies Available to the Surety

Likewise, indemnity agreements typically contain a "**Remedies**" provision that in the event of "Default," the indemnitors "assign convey and transfer all of their rights, title and interests in [any contract]." Once a Default has triggered the assignment of the principal's rights in a contract to the surety, "the surety shall have a right in its sole discretion to: . . . assert or prosecute any right or claim in the name of any Indemnitor and to settle any such right or claim as [the surety] sees fit."

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[25] *Id.* at *1.
[26] *Id.* at *2.
[27] *Id.* at *3.
[28] *Id.* at *4.
[29] *Id.*
[30] *Fucich Contracting, Inc. v. Shread-Kuyrkendall & Assocs.*, 2022 U.S. Dist. LEXIS 197233, at *78 (E.D. La. Oct. 31, 2022) citing *HRH Constr., LLC v. Fid. & Guar. Ins. Co.*, 2005 U.S. Dist. LEXIS 13737, 2005 WL 8168375, at *4 (S.D.N.Y. July 8, 2005) (discussing and applying *Hutton,* 52 F.3d at 1192). 46 *Id.* at *31 at 107, *46 at 157, *69 at 241 and *70 at 244.
[31] *Id*; citing *Prairie State Nat. Bank v. United States,* 164 U.S. 227, 231, 32 Ct.Cl. 614, 17 S.Ct. 142 41 L.Ed. 412 (1896); *see also Nance,* 577 So.2d at 1240–41 (noting that "[s]ubrogation is the substitution of one person in place of another, whether as a creditor or as the possessor of any rightful claim").
[32] See also *Harris County Flood Control Dist. v. Great American Ins. Co.,* 359 S.W.3d 736 (Tex. App. 2011).

Pursuant to the terms in the indemnity agreement, a termination letter or communication containing a "declaration of contractor default" would constitute a Default, which would trigger the "**Remedies**" provision of the indemnity agreement, which assigns to the surety all of the principal's rights, title and interests in its contracts and grants the surety the right to settle any claim in the name of any indemnitor as the surety sees fit.

In *U.S. Specialty Ins. Co. v. Strategic Plan. Assocs., LLC*, the court granted the surety's motion to dismiss the indemnitors' claims for bad faith breach of the indemnity agreement and held that, pursuant to the terms of the indemnity agreement the surety was enabled to settle claims against itself and the indemnitors.[33] The court also held that the surety owed no obligations to the indemnitors and, thus, the indemnitors have not stated a claim for bad faith breach of that agreement:

> Here, in executing the General Indemnity Agreement, the defendants gave USSIC 'the right, **in its sole and absolute discretion**, to ... settle ... any claim, demand, suit, award, assessment, or judgment in connection with any Bond, Bonded Contract, or Contract.' Because USSIC has the right, in its sole and absolute discretion, to settle SPA's claims, it follows that USSIC owes no fiduciary duty to SPA in carrying out that right. Because USSIC owes no fiduciary duty to SPA or the Burnells, the defendants have failed to state a claim against USSIC for bad faith breach of a fiduciary duty.[34]

Per the plain reading of indemnity agreements, the surety can settle claims in its sole discretion and owes no obligation to the indemnitors.

It should be noted that some indemnity agreements may mention a good faith duty in relation to establishing a reserve. However, the indemnitors cannot apply the duty of good faith for establishing reserves to the other rights and powers granted to the surety in the indemnity agreement. Under general principles of contract interpretation, the failure to impose a good faith duty in exercising these powers must be considered intentional by the parties.

V. Case Law Development

A. Settlement Done in Good Faith?

In *Travelers Cas. & Sur. Co. of Am. v. Flawless Walls LLC*, a court held that the indemnification agreement did allow the surety to settle claims for itself and its principal; however, the court imposed a good faith obligation upon the surety and denied its motion for summary judgment.[35]

In March 2022, the surety received a claim for payment from a general contractor in the amount of $753,154.40 against a Performance Bond issued to the subcontractor. There were

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[33] No. CV 18-7741, 2019 WL 296864, at *6-8 (E.D. La. Jan. 23, 2019).
[34] *Id.* at *7 (emphasis in original).

[35] 2024 U.S. Dist. LEXIS 2994.

allegations of material cost overruns and supplementation costs. The general contractor filed suit, but the surety and general contractor were able to mediate and settle the bond claim for $325,000. After the settlement was paid, the surety requested indemnification from the indemnitor. However, the indemnitors refused and argued that while the surety has “discretion” to compromise claims, it is not unfettered.

The surety asserted that it exercised its right under the indemnity agreement to resolve the general contractor’s claims and was owed indemnification for the amount paid in the settlement.[36] The principal and the indemnitors did not dispute the existence of the indemnity agreement, nor that it was breached. Instead, they asserted that in settling the underlying claim, the surety violated its duty of good faith and fair dealing.[37]

The principal and indemnitors asserted that this covenant requires parties to "cooperate with each other so that each may obtain the full benefit of performance."[38] According to the principal and the indemnitors, the surety did not negotiate the settlement in good faith because the underlying claim lacked merit, and therefore they are relieved from indemnifying the surety.

The indemnitors also argued the settlement went far beyond obtaining a release of the bonds. The release was “not limited to claims, damages and losses related to [subcontractor’s] performance under the Subcontract,” but specifically included “tort” claims, whether “known and unknown,” and claims “arising out of or related in any way to the facts and circumstances underlying and/or alleged in connection with the Action . . . and/or the Bonds.” The surety also purported to release any claim of the subcontractor that the surety could assert, if any, against the general contractor.

The court acknowledged that the indemnity agreement gave the surety sole discretion "under the belief it was necessary or expedient" to settle claims for itself and the principal and indemnitors. Additionally, the court refused to read any ambiguity into this provision, as this specific language had been upheld by courts in other jurisdictions.[39] However, the court did find that questions of fact still remain as to whether the surety breached a duty of good faith to the principal and indemnitors in settling the underlying lawsuit with the general contractor. In interpreting Washington contract law, the Ninth Circuit has determined that "[g]ood faith limits the authority of a party retaining discretion to interpret contract terms; it does not provide a blank check for that party to define terms however it chooses."[40]

Thus, the Court could not definitively say if the settlement for $325,000 was done in good faith such that each party receives the "full benefit of performance."[41] The terms of the surety

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[36] *Flawless* at *9.
[37] *Colorado Structures, Inc. v. Ins. Co. of the W.*, 161 Wash. 2d 577, 588, 167 P.3d 1125 (2007); *Bond Safeguard Ins. Co. v. Wisteria Corp.*, 173 Wash. App. 1026 (2013); *Frank Coluccio Const. Co. v. King Cnty.*, 136 Wash. App. 751, 764, 150 P.3d 1147 (2007).
[38] *Badgett v. Sec. State Bank*, 116 Wash. 2d 563, 569, 807 P.2d 356 (1991) (internal citations omitted).
[39] *Travelers Cas. & Sur. Co. of Am. v. Highland P'ship Inc.*, No. 10CV2503 AJB DHB, 2012 U.S. Dist. LEXIS 167458, 2012 WL 5928139, at *7 (S.D. Cal. Nov. 26, 2012); *Travelers Cas. & Sur. Co. of Am. v. Dunmore*, No. CIV S-07-2493LKK/DAD, 2009 U.S. Dist. LEXIS 47322, 2009 WL 1586936, at *2 (E.D. Cal. June 5, 2009).
[40] *Scribner v. Worldcom, Inc.*, 249 F.3d 902, 910 (9th Cir.2001).
[41] *Badgett*, 116 Wash.2d at 569.

agreement were only triggered if the principal failed to perform the work under the subcontract, or if it was found in default for failure to perform. The principal and indemnitors raised a question of material fact as to whether they upheld their end of the surety agreement relating to the subcontract, and thus have been denied the full benefit of that contract with the surety.[42] Given the discretionary power that the surety had over the settlement of the claim and the question of fact remaining as to whether conditions of the surety agreement were triggered, the court ruled that summary judgment was not proper.[43]

B. Recognizing the Surety's Rights but not Acknowledging the Result

In *The Gray Casualty & Surety Company v. Cerbat Excavation, Inc., et al.,* the surety filed a motion for summary judgment on the principal and indemnitors' counterclaim that the surety breached the implied covenant of good faith and fair dealing by settling a claim.[44]

In the *Cerbat* matter, the principal was awarded the subcontracts for a construction project. During the project, various subcontractors and suppliers of the principal were not paid for their work performed on the project. Subsequently the principal was declared in default by the obligee. Upon declaring the principal in default, the obligee made demands and claims upon the surety under the bonds to cure the deficiency or defaults of the principal.

The surety investigated the claim and demand upon the bond. The investigation revealed that the principal had indeed not paid its subcontractors. The surety made a demand for the principal and indemnitors to post collateral or additional security. The principal and indemnitors refused.[45] The now unsecured surety was now potentially subject to greater damages, attorney's fees and a claim of bad faith by the obligee if it did not take action to rectify its principal's default.[46] The surety paid out $1,254,144.36 under the bonds.

In addition, the surety settled the principal's claims against the obligee, which exceeded $2,000,000 for approximately $40,000. The court reasoned that the indemnity agreement not only vested wide discretion in the surety being able to settle underlying claims,[47] it also provided the principal with a mechanism to avoid the same. As previously specified, Paragraph 12 of the indemnity agreement vested in the surety the right and sole discretion to compromise and settle claims whether liability existed or not.

The principal argued that the surety breached the implied covenant because it was solely looking to its financial interest and not the protection of the principal. However, the court rebutted this assertion based on the reasoning in *United States Fidelity & Guaranty Co. v. Feibus*:

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[42] See *Rekhter v. State, Dep't of Soc. & Health Servs.*, 180 Wash. 2d 102, 113, 323 P.3d 1036 (2014) (finding that the duty of good faith only attaches to express terms of a contract).
[43] *Flawless* at *19.
[44] Case No. 642, Sup. Court of Ariz. Mohave (2014).
[45] *Id.*
[46] *Id.*
[47] In accord with *PSE Consulting, Inc. v. Frank Mercede and Sons, Inc.*, 267 Conn. 279, 838 A.2d 135, 146 (Conn. 2004).

> . . . the principal under a surety agreement is 'bound not simply to indemnify the surety but to keep it unmolested, and this before the surety has paid the principal's debt.' [Cite omitted.][48]

The *Cerbat* court fully recognized that the indemnity agreement imposed a duty upon the principal and indemnitor to hold the surety harmless.[49]

Furthermore, the principal and the indemnitors failed to post any security. The *Cerbat* court acknowledged that a principal's failure to deposit collateral security, in violation of a surety agreement, weighs against the finding that the surety acted in bad faith in settling claims.[50]

The principal and indemnitors final argument was that there had been insufficient time or notice from the surety by which to file its Complaint for lien foreclosure. However, the *Cerbat* court recognized that the indemnity agreement did not require the surety to consult with the principal and indemnitors before settling the claim.[51]

Despite the acknowledgements and recognition by the *Cerbat* court of the surety's rights and the obligations of the principal and the indemnitors, the court concluded that even under this analysis, fact issues remain as to whether the investigation was done reasonably and whether the settlement of the principal's claim was reasonable.[52] Ultimately the surety's motion for summary judgment was denied because it could not definitively determine if the investigation and settlement were unreasonable. Thus, the court observed that the surety's actions could be evidence of an improper motive or of breaching the covenant of implied faith and fair dealings by settling a claim.[53]

C. A Peach of a Result

In *CDM Constructors Inc. v. Randall Mech. Inc.*, the surety filed a motion to dismiss and represented that it had authority to settle all claims asserted by the principal.[54] The Georgia Northern District Court agreed.[55]

The surety had issued a bond for a subcontractor, the principal, in connection with an environmental mitigation project. The principal was declared in default, but the surety felt

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[48] 15 F.Supp.2d 579, 585 -6 (M.D. Pen. 1998).
[49] *Cerbat*, p. 2.
[50] *Feibus*, 15 F.Supp.2d at 586.
[51] (in accord *Feibus*, 15 F.Supp.2d at 586).
[52] *Cerbat*, p. 7.
[53] *Id.*

[54] 2023 U.S. Dist. LEXIS 198096.

[55] *Id.*

comfortable with the principal's financial condition, capability and its ability to return to the project and complete the work.

Three years after the declared default and the commencement of litigation, the surety became concerned about the principal and indemnitors' financial condition. The surety was not receiving current financial records but wanted them and was entitled to this information under the terms of the indemnity agreement.[56] The surety continued to request the financial information and the principal provided a multitude of excuses. Thereafter, the surety made a collateral demand in the sum of $2,892,672, the amount of the damages sought in the litigation. The principal responded to the collateral demand by stating "Good luck with that! Not happening."[57] The surety never received the financial information requested or any collateral.

Following the failed mediation of all parties in this case, the surety made the determination that it would exercise its rights under the indemnity agreement to settle all claims in this matter.

The *Randall* court found that the indemnity agreement provided to the surety was valid and enforceable.[58] Further, Georgia law generally permits parties to assign contractual rights.[59] Here, the principal assigned its cause of action to the surety per the assignment terms of the indemnity agreement which stated:

> Effective on the earlier of the date of this Agreement or the date on which [surety] first Underwrites a Bond to, at the request of or on behalf of any Indemnitor, all Indemnitors irrevocably assign, transfer and convey the following to [surety];
>
> (b) All rights of the Indemnitors in, arising from, or related to Bonds or any bonded or unbonded contracts, subcontracts and subcontract bonds and any extensions, modifications, alterations or additions thereto; and
>
> * * *
>
> (e) Any and all accounts receivable, accounts, chattel paper, documents of title, intangibles, **claims**, judgments, choses in action, purchase orders, bills of lading, federal or state tax refunds, tort claims, premiums, deferred payments, refunds, retainage or retainage account in which the Indemnitors have an interest.

In addition, the indemnity agreement gave the surety the right to settle claims:

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[56] *Id.* at *9.
[57] *Id.*
[58] *Liberty Mut. Ins. Co. v. Ra-Lin & Assocs.*, No. 3:08-CV-105-JTC, 2010 U.S. Dist. LEXIS 150446, at *8-9 (N.D. Ga. Feb. 5, 2010) (holding that "[t]he terms of the General Agreement of Indemnity are clear and unambiguous and do not violate any rules of law"); *Reliance Ins. Co. v. Romine*, 707 F. Supp. 550 (S.D. Ga. 1989), aff'd, 888 F.2d 1344 (11th Cir. 1989) (holding that an indemnity agreement provided in conjunction with the issuance of surety bonds was valid and enforceable).
[59] O.C.G.A. § 44-12-22.

> [Surety] shall have the absolute right to adjust, settle, dispute, litigate, appeal, finance, or compromise any claim, demand, suit, judgment or exposure relating to any Underwriting activities or Bonds without affecting the Indemnitors' liability under this Agreement and [surety's] determination shall be binding upon the Indemnitors....

The *Randall* court held the surety had both the right to settle claims against the bond and an assignment of the principal and the indemnitors affirmative claims against the obligee. These two rights gave the authority to the surety to resolve this entire case. Moreover, the principal and the indemnitors failed to post collateral security which could have been provided to secure the surety. This justifies the surety's settlement of the claims under the powers granted to it in the indemnity agreement.[60]

VI. Conclusion

The terms in the indemnity agreement should be enforced as clear and unambiguous. A surety's ability to settle claims on behalf of itself and its principal is a bargained-for right that is necessary to induce a surety to provide bonds. Indemnitors' attempts to limit and impose additional obligations should be rejected by the courts. However, there is a potential for courts with limited experience with the surety relationship to misconstrue the indemnity agreement and be hesitant to acknowledge the surety's right to settle and act as attorney in fact for itself and the indemnitors.

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[60] *Id.* at 14.