PEARLMAN 2025

PEARLMAN

BUILDING RELATIONSHIPS • KEEPING THEM STRONG

Pearlman 2025

On behalf of the Pearlman Association and its incredible Sustaining Members, I want to thank you for joining us for this year's 2025 Pearlman Conference. Once again, the Pacific Northwest is poised to provide us with fantastic weather during our time together. Many of you travel long distances to attend. We've worked hard to put together a tremendous educational program again this year, and we continue to offer our standard extra-curricular activities to help everybody thoroughly enjoy themselves!

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 extraordinary contributions:

The Most Special of Thank Yous to **Lih Hudson**, who once again put together this tremendous conference. Every year, for more than 10 years now, Lih puts in countless hours to organize, plan for, and put on The Pearlman. Her dedication to maintaining such a high standard is what makes the Pearlman what it is – the industry's premier event. **Thank you Lih!**

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 Phillips** of **The Vertex Companies, Inc.** for obtaining CE credits for Texas and Florida, and CLE credits in California and Texas! Thank you also to **Eric Liberman** of **Carney Badley Spellman P.S.** for obtaining Washington CLE credits.

I want to thank **Rachel Charlton** of **Sticky Communications** for her phenomenal efforts in helping The Pearlman communicate more effectively with all of you. **Rachel** designed and created our mailers, PDFs, and advised us on producing our email blasts. Thank you, **Rachel**, for continuing to help us put our best foot forward!

Special thanks also to **Brian Rice** of **RiskScape Strategies** for continuing to assist us in modernizing our Registration process! **Brian** helped us develop a payment portal, allowing all of you to submit payments more easily – and with credit cards! Last year this made me feel so 2024. This year, online payments are making us feel very 2025! **Brian** also provides our day-of IT support and makes sure all PowerPoint presentations run smoothly when needed. Thank you **Brian**!

Schedule of Events

WEDNESDAY SEPTEMBER 3, 2025

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

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

THURSDAY SEPTEMBER 4, 2025

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

All Day Coffee/Beverage Service
Hosted by: Sokol Larkin

Espresso Bar
Hosted by: MPCS

Audio/Video Services for The Pearlman
Hosted by: Fox Rothschild LLP

8:10 – 8:25 **Opening Remarks**
Luis Aragon | Liberty Mutual Insurance Company

8:25 – 8:30 **Program Intro**
Co-Chairs: Jennifer Fiore | Dunlap Fiore LLC
Dennis O'Neill | Beacon Consulting Group, Inc.
Shauna Szczechowicz | Philadelphia Insurance Companies

THE SURETY AS THE GAMBLER

8:30 – 9:15 **PANEL 1: Know When to Hold'Em, Know When to Fold 'Em**
Panelists: Sara Corbello | Berkshire Hathaway Specialty Insurance Company
Myat M. Cyn | Beacon Consulting Group
Rodney J. Tompkins, Jr. | RJT Construction, Inc.
Scott C. Williams | Manier & Herod

9:15 – 10:00 **PANEL 2: Know When to Walk Away, Know When to Run**
Panelists: Michael Cronin | Markel Surety
Scott Olson | Nicholson Professional Consulting, Inc.
Ali Salamirad | SMTD Law LLP
Gene Zipperle | Ward Hocker Thornton PLLC

10:00 – 10:15 **MORNING BREAK**

10:15 – 11:00 **PANEL 3: You Never Count Your Money While You're Sittin' at the Table**
Panelists: Michelle Cumberland | Dunlap Fiore LLP
Stephani Miller | Liberty Mutual Insurance Company
Allegra Perez | Booth, Mitchel & Strange LLP
Brian Rice | RiskScape Strategies, LLC

11:00 – 11:45 **PANEL 4: There'll Be Time Enough for Countin' When the Dealin's Done**
Panelists: Emory Allen | Clark Hill, PLC
Brandon Bains | Bains Law, PLLC
Rob Kelley | Nicholson Professional Consulting, Inc.
Stuart Overton | Skyward Specialty Insurance

11:45 – 1:15 **LUNCH BREAK**
Hosted by: Aperture LLC, Law Offices of James D. Curran, and Weinstein Radcliff Pipkin LLP

1:15 – 2:00 **PANEL 5: The Secret to Survivin' is Knowin' What to Throw Away and Knowin' What to Keep**
Panelists: Patrick Casey | Fox Rothschild
David W. Kash | Koeller Nebeker Carlson & Haluck, LLP
Bill McConnell | The Vertex Companies, LLC
Tom Moses | Hanover Insurance

2:00 – 2:45 **PANEL 6: Every Hand's a Winner and Every Hand's a Loser**
Panelists: Jonathan Bondy | CSG Law
Kim Czap | Philadelphia Indemnity Insurance Company
Christoph Kapp | Liberty Mutual Insurance Company
Steven Rae | Liberty Mutual Global Surety
Chris Wagner | Philadelphia Insurance Companies

2:45 – 3:00 **AFTERNOON BREAK**
Snacks provided by RJT Construction, Inc.

3:00 – 3:10 **Scholarship Presentation**
Mary Lynn Kotansky | Liberty Mutual Insurance Company

3:10 – 4:00 **PANEL 7: The Best You Can Hope for is to Die in Your Sleep**
Panelists: Benjamin Chambers | The Hartford
Adrian D'Arcy | D'Arcy Vicknair, LLC
Jeffrey D. Horowitz | The Horowitz Law Firm, APC
Mike Saba | YA Group

4:00 – 4:10 **Announcements and Adjournment for the Day**

5:00 **Welcome Reception – Sparkman Cellars Winery**
Cocktails and Hors d'oeuvres
Hosted by: Jennings Haug Keleher McLeod Waterfall LLP, Nicholson Professional Consulting, and Sokol Larkin

6:00 **Dinner – Sparkman Cellars Winery**
Hosted by: J.S. Held, LLC, RJT Construction, Inc., and
Watt, Tieder, Hoffar & Fitzgerald, LLP

7:00 **Hold 'Em Tournament – Sparkman Cellars Winery**
Dealers Sponsored by J.S. Held, LLC and Weinstein Radcliff Pipkin, LLP

Cocktails
Hosted by: Krebs Farley, PLLC

FRIDAY SEPTEMBER 5, 2025

7:30 – 8:10 **Registration and Breakfast – Sparkman Cellars Winery**
Hosted by: Carney Badley Spellman P.S., Cashin Spinelli Ferretti, LLC, and Spencer Fane

All Day Coffee/Beverage Service
Hosted by: Guardian Group, Inc.

Bloody Mary Bar
Hosted by: Dry Law, PLLC

Espresso Bar
Hosted by: MPCS

8:10 – 8:20 **Opening Remarks and Program Introduction**
Luis Aragon | Liberty Mutual Insurance Company
Jennifer Fiore | Dunlap Fiore LLC

EVERYTHING'S ALRIGHT

8:20 – 9:15 **PANEL 8: I'm Alright – But is My Principal?**
Panelists: Jim Curran | Law Offices of James D. Curran
Ty Oksuzler | J.S. Held, LLC
Jon Pancio | Arch Insurance
Seti Tesefay | Weinstein Radcliff Pipkin LLP
Angela A. Zanin | Lewis Brisbois

9:15 – 9:45 **PANEL 9: Nobody Worry 'Bout Me – Or Should They?**
Panelists: Paul K. Friedrich | Friedrich & Dishaw, PLLC
Xavia M. Gamboa | Watt, Tieder, Hoffar & Fitzgerald, LLP
Matthew W. Geary | Dysart Taylor
Collin Vincent | Travelers

9:45 – 10:00 **MORNING BREAK**

10:00 – 10:45 **PANEL 10: Why You Got to Give Me a Fight – It's in Everyone's Best Interest to Settle**

Panelists: Judge Chad Allred (Ret.) | JAMS
Daniel Lund, III | Phelps Dunbar LLP
Kimberly A. Steele | Swiss Re Corporate Solutions America
Richard E. Tasker | Sage Associates, Inc.

10:45 – 11:30 **PANEL 11: Can't You Just Let It Be – The Way We Used to Do Things**

Panelists: Ryan Dry | Dry Law PLLC
Sonny Ingram | Travelers
Michael J. Sugar, III | Forcon International Corporation
Douglass F. Wynne, Jr. | Simon, Peragine, Smith & Redfearn, LLP

11:30 – 11:45 **Closing Announcements and Adjournment**
Luis Aragon | Liberty Mutual Insurance Company

FRIDAY AFTERNOON, SEPTEMBER 5TH – GOLF TOURNAMENT

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

12:00 pm **Bus Service to/from The Golf Club at Redmond Ridge and Rainbow Run (Sip 'n Putt)**
Hosted by: Law Offices of Larry A. Rothstein
Bus leaves Willows Lodge at 12:00pm

Box Lunches to be provided at Redmond Ridge

1:00 **Sign in/Warm Up – The Golf Club at Redmond Ridge**

1:30 **Scramble Tournament – Shotgun Start**

Beverage Cart
Hosted by: Ernstrom and Dreste, LLP and
Watt, Tieder, Hoffar & Fitzgerald, LLP

6:30 **Dinner – The Golf Club at Redmond Ridge**
Hosted by: Ward Hocker & Thornton, PLLC

Cocktails

7:00 **Awards**

7:30 **Bus returns to Sparkman Cellars Winery and Willows Lodge**

FRIDAY AFTERNOON, SEPTEMBER 5TH – SIP 'N PUTT

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

12:00 pm — **Bus Service to/from The Golf Club at Redmond Ridge and Rainbow Run (Sip 'n Putt)**
Hosted by: Law Offices of Larry A. Rothstein
Bus leaves Willows Lodge at 12:00pm

(The bus will return to Rainbow Run to pick up anyone who wishes to attend the awards dinner at Redmond Ridge.)

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

Box Lunches to be Provided at Rainbow Run

Beverages to be Provided

SATURDAY, SEPTEMBER 6TH

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

Woodinville Wine Tour

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

JENNIFER A. FIORE

Ms. Fiore is a principal of Dunlap Fiore, LLC. Her diverse commercial litigation, surety, construction, and business practice includes representation of clients in matters involving insurance defense and coverage; suretyship; construction design, defect, delay and payment claims; bid disputes; and premises liability. Ms. Fiore counsels clients on issues regarding environmental, natural resources and coastal law, as well as related administrative, governmental, and constitutional law. Ms. Fiore has experience defending claims for workplace exposure to toxic substances most often involving asbestos exposure.

Ms. Fiore serves as a panel member for the American Arbitration Association in the areas of Commercial and Construction disputes. Ms. Fiore received her Mediation Certificate from the Harvard Law School Program on Negotiation Mediation Intensive and serves as a mediator in a wide variety of claims.

Ms. Fiore represents insurers in first-party property and liability claims and third-party actions involving general and professional liability matters. She also has extensive insurance defense experience with particular skill in management, organization, and development of litigation strategy that results in efficient and effective defense of policyholders under all types of liability policies.

Ms. Fiore represents the State and local governments in regulatory matters, contracting and bid disputes, with experience in handling public assistance claims under the Stafford Act at every stage, including preparation and presentation to FEMA, administrative review, arbitration and federal court litigation. Ms. Fiore's practice also includes a focus on public finance transactions for which she serves as bond counsel for the State of Louisiana and various local governmental issuers, including municipalities, and political subdivisions.

Among other acknowledgments, Ms. Fiore has been recognized by Super Lawyers, and regularly lectures on construction and surety law to industry groups and associations, such as American Bar Association TIPS Fidelity and Surety Law Section, National Bond Claims Association, and the Pearlman Association.

DENNIS O'NEILL

Dennis O'Neill is a true leader in the Construction Consulting / Surety Consulting profession. Prior to founding Beacon Consulting Group, Dennis managed the New York regional office for a large construction services consulting firm. Since opening Beacon's first office in 2003, Dennis has built the company's operations to include offices in New York, Massachusetts and California. Under his leadership, Beacon now works on a diverse range of construction consulting

assignments across North America (including the U.S. and Canada). Beacon's clients include some of the world's leading Surety and Insurance companies, but also includes well-known banks, government agencies, private developers, law firms, and construction companies.

Dennis has extensive construction consulting expertise related to complex surety bond claims and dispute resolution matters. He specializes in assessing conditions associated with troubled construction projects, and recommending/implementing corrective actions to successfully complete these projects. He has over 30 years of experience managing and consulting on construction projects ranging from $100K to more than $100M. His experience includes construction management and consulting on transit projects, schools, courthouses, dormitories, stadiums, police barracks, tunneling projects, bridges, commercial buildings, residential developments, hospitals and hotels.

SHAUNA SZCZECHOWICZ

Shauna Szczechowicz is an Assistant Vice President of Surety Claims for Philadelphia Insurance Companies. Prior to going in-house, Shauna was in private practice in California and handled a wide range of cases for sureties on federal, state, and private construction projects, and commercial probate fiduciary claims.

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.

Emory G. Allen – Member, Clark Hill, PLC

Emory Allen is a Member with Clark Hill, PLC. Emory assists clients in litigation of commercial lawsuits and contract matters with an emphasis on surety, construction, and contract claims. He works with surety companies to resolve complex issues related to construction contracts and bonds from the initial investigation of claims up to and through the negotiation of surety agreements including takeover, tender, and financing agreements.

Judge Chad Allred (Ret.) – Mediator/Arbitrator/Special Master, JAMS

Judge Allred is a mediator, arbitrator, and special master with JAMS, working with parties and counsel throughout the United States. Judge Allred is a member of the JAMS Global Engineering and Construction Group and especially enjoys challenging construction, insurance, business, and commercial disputes. He also has extensive experience in real-property, trust-and-estate, employment, and securities cases. While serving on the Superior Court for the State of Washington, Judge Allred presided over more than 230 trials, as well as numerous appeals from state agencies and courts of limited jurisdiction. He is known for his calm demeanor, reasoned decisions, and strong, fair case management.

Brandon Bains – Founder, Bains Law, PLLC

Brandon Bains is the founder of Bains Law, PLLC. As an attorney licensed in Arkansas, Florida, and Texas, Brandon's practice focuses on construction/surety litigation, commercial disputes, complex bankruptcies, fidelity policies, and landlord/tenant matters.

Jonathan Bondy – Member, CSG Law

Jonathan Bondy's practice is concentrated in the field of commercial litigation, with a focus on construction, surety and contract issues in New York and New Jersey. As a member of the firm, Jon represents and advises sureties with respect to performance and payment bond claims, the defense of prevailing wage claims, affirmative surety claims, loss recovery, bankruptcy issues and contractor workouts.

He represents developers, contractors and building material suppliers in litigation matters, such as claims for breach of contract, applications for injunctive relief, delay claims and payment claims.

Prior to joining the firm, Jon served as an assistant district attorney in Kings County (Brooklyn), New York. He is a graduate of Benjamin N. Cardozo School of Law, where he was a member of the Moot Court Board and the ILSA Journal of International Law.

Patrick Casey – Co-Chair Construction Practice Group, Fox Rothschild, LLP

Patrick Casey is Co-Chair of the Construction Practice Group and the former Managing Partner of the Denver Office of Fox Rothschild. He is seasoned trial attorney and represents owners, builder/vendors, developers, declarants, general contractors and design professionals in all aspects of construction projects. He has deep experience in a wide array of claims, including: construction and design defect; breach of contract and indemnity; recovery and subrogation; constructive changes; delay; acceleration and lost labor productivity; differing site conditions; and defective specification.

Benjamin Chambers – Director, Bond Claims, The Hartford

Benjamin Chambers is Director, Bond Claims and Credit and Political Risk Insurance, for The Hartford. He graduated from Western Washington University with a B.A. in Philosophy and received a J.D. from Seattle University School of Law. He is admitted to practice law in Washington State and a licensed claims adjuster in a number of jurisdictions.

Sara Corbello – Surety Claims Manager, Berkshire Hathaway Specialty Insurance Company

Sara Corbello is Surety Claims Manager at Berkshire Hathaway Specialty Insurance Company. Sara is based in Metro Detroit and oversees claims and legal matters on behalf of BHSI across North America. Prior to joining the surety industry in 2019, Sara spent a decade in private practice representing automotive OEMs and major P&C carriers in complex product liability, construction defect, and coverage litigation. A proud Midwest native, she received her BS from Michigan State University (GO GREEN!) and JD from Western Michigan University Cooley Law School.

Michael Cronin – Claims Attorney, Markel

Michael Cronin has practiced law for eighteen years as a Claims Attorney with Markel Surety, where he is now Director responsible for the avoidance, handling, and resolution of construction-related disputes, as well as providing extensive underwriting and contract support. He also serves as a mediator for primarily construction and insurance disputes, including complex, multi-party disputes.

Michael is a graduate of the University of Texas and the University of Tulsa College of Law, where he served as Managing Editor of the Tulsa Law Review. He is a member of the State Bar of Texas Construction Law Section and serves as Vice-Chair for the Fidelity & Surety Law Committee of the Tort and Insurance Practice Section of the American Bar Association. He is Board Certified by the Texas Board of Legal Specialization in Construction Law (inaugural class), and he obtained his formal training in mediation at the University of Texas Center for Public Policy Dispute

Resolution. Michael is a member of the Association of Attorney-Mediators and teaches a course at the University of Texas in the Construction Engineering Project Management Program called Advanced Legal Concepts.

Michelle Cumberland, MBA, JD – Partner, Dunlap Fiore LLP

Michelle Cumberland is a partner at Dunlap Fiore LLP, where she represents sureties and construction companies in complex litigation matters involving performance and payment bonds, construction disputes, and cyber-related risks. She brings nearly 20 years of litigation and advisory experience to her practice. Michelle also serves as a Cyber Law Judge Advocate with the Louisiana Army National Guard, advising on operational risk and legal authorities during real-world cyber operations. She holds a J.D. from Tulane University Law School, an MBA from the National University, and a B.S. in Biological Sciences with a minor in Chemistry from the University of Southern Mississippi.

James D. Curran – Partner, Law Offices of James D. Curran

James D. Curran is a surety and construction litigator in San Francisco, California. Mr. Curran's practice is primarily devoted to complex commercial litigation, and includes representing contract and commercial sureties, contractors, subcontractors, and other businesses in a wide variety of surety, construction, and business disputes on both the trial and appellate level.

Myat Cyn – Project Manager/Surety Consultant, Beacon Consulting

Myat M. Cyn is a Project Manager and Surety Consultant at Beacon Consulting Group. With over 7 years of experience in project management and construction consulting with respect to surety bonds claims and construction defect investigation, Myat manages projects in all NY area. Prior to joining Beacon, Myat spent 3 years in the construction industry with Payment Application and Change Order management, MEP inspections, and NYC DOB expediting processes. Based in NYC, she received her B.S in Mechanical Engineering from New York Institute of Technology. In her spare time, she enjoys exploring cultural and arts museums in NYC and her go-to karaoke song is Tequila by the Champs.

Kim Czap – Senior Vice President, Philadelphia Indemnity Insurance Company

Kimberly Czap is a Senior Vice President at Philadelphia Indemnity Insurance Company ("PHLY") responsible for leading the Surety Claims and Construction Services teams. She joined PHLY in 2013 as Vice President and was asked to expand a team of claim and construction professionals for the Surety division that launched in 2011. Over the years, the team has grown to include experienced and talented surety examiners, attorneys, engineers, and accountants. The loss control team provides legal and technical support to underwriters in all phases of underwriting; claim investigations; and recovery efforts. In 2016, Kim traveled throughout Japan representing PHLY as a member of the Tokio Marine Middle Global Leadership Development Program. She is a frequent mentor and presenter to PHLY new hires and summer interns.

Over her career, Kim has handled complex surety matters and worked closely with underwriters and accounts on mitigating risks. She is a Vice Chair of the American Bar Association Fidelity & Surety Law General Committee; Board member of Surety Claims Institute and National Bond Claims Association; and committee member for the Surety Fidelity Association of America. Kim is also a frequent presenter at industry conferences.

Kim joined Travelers in 2001 as an insurance litigator before transitioning to surety as a claims counsel and later a managing director. Kim grew up in Collierville, Tennessee, and graduated from the University of Memphis magna cum laude with a degree in Business Administration and a Juris Doctorate. Kim is based in the Bala Cynwyd, PA home office, and spends the majority of her spare time researching and plotting her next travel photography destination.

Adrian A. D'Arcy – Founding Partner, D'Arcy Vicknair, LLC

Adrian A. D'Arcy is a Founding Partner of D'Arcy Vicknair, LLC (New Orleans, Louisiana). After obtaining his undergraduate double honors degree in Economics from the University College Dublin in Ireland, Adrian graduated cum laude from Loyola Law School and has spent the last 21 years primarily practicing in the areas of construction and surety law. Prior to launching D'Arcy Vicknair LLC in 2022, Adrian was a partner at a boutique New Orleans construction law firm for over 12 years and an associate at the firm before then. Adrian also now teaches Construction and Surety Law at Loyola Law School in New Orleans as an adjunct professor.

Ryan Dry – Founding Member, 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.

Paul K. Friedrich – Partner, 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, representation of sureties in bankruptcy and receiverships, and is a frequent speaker and author on surety and construction-related legal issues.

Xavia M. Gamboa – Associate, Watt, Tieder, Hoffar & Fitzgerald, LLP

Xavia M. Gamboa is an associate at Watt, Tieder, Hoffar & Fitzgerald's Irvine office. She concentrates her practice in the areas of suretyship, construction law, and commercial litigation. Xavia effectively represents sureties in all phases of litigation involving payment and performance bond claims, contractor default, indemnity enforcement, and project completion efforts. Xavia is a skilled litigator with experience handling complex cases at all stages of litigation in California federal and state courts. In her free time, Xavia is usually immersed in a true crime documentary or podcast, enjoying the company of her three rescued cats (Winnie, Merlin, and Daisy), or attending live music events of all genres. Xavia is a PADI certified diver with her most recent dive being last summer in Koh Phangan in Thailand.

Matthew W. Geary – Shareholder, Dysart Taylor

Matthew W. Geary is a Shareholder at Dysart Taylor in Kansas City, where his focus is on fidelity and surety litigation, commercial litigation, and insurance coverage. Prior to entering private practice, Matt was a law clerk for the Honorable Patricia Breckenridge of the Missouri Court of Appeals. He is admitted to practice in the state and federal courts of Missouri and Kansas. Matt received a B.A. from William Jewell College, in Liberty, Missouri, and his J.D. from the University of Kansas School of Law, where he was an editor of the Kansas Law Review.

Jeffrey D. Horowitz – Principal, The Horowitz Law Firm, APC

Jeffrey D. Horowitz – Principal of The Horowitz Law Firm, A Professional Corporation, Sherman Oaks (Los Angeles), CA. Mr. Horowitz has been in private practice representing sureties, contractors, and subcontractors, since 2003. Prior to that, he was the Managing Attorney for Frontier Insurance Group, Inc.'s Los Angeles surety claims/legal department, from 1992-2002. He graduated with a B.S. degree in Business Administration from California State University, Northridge in 1986 and received his J.D. degree from Loyola Law School, Los Angeles in 1990. Mr. Horowitz was admitted to the California Bar in 1990 and is admitted to practice in all State and Federal Courts in California.

Sonny Ingram – Assistant Vice President/Counsel, Travelers

Sonny leads Travelers' Surety Claim team in Canada. Sonny joined Travelers in 2021, after years in private practice in Toronto. Sonny's legal practice included both transactional and disputes work where he regularly provided advice on complex bond claims. Sonny previously appeared before all levels of Court in Ontario, at the Federal level and in the Supreme Court of Canada. Sonny is a former instructor of the Construction and Surety Law course offered by the Surety Association of Canada. Sonny is also a frequent guest lecturer on Surety and Construction law matters at Canadian universities. Outside of work, Sonny tries to spend most of his time with his wife chasing their son. When he's not running or skiing, Sonny likes to cook.

Christoph Kapp – Underwriting Officer, Liberty Mutual

Christoph is an Underwriting Officer within Liberty's National Accounts team. This group manages the underwriting for Liberty's largest surety programs. He joined the industry in 2012 as a Contract Surety underwriter. After a decade of front-line underwriting in New England and New York, Christoph was promoted to the Home Office, first assigned to New York City, and then to National Accounts. In his current role, Christoph is actively involved in the Surety programs for the largest General Contractors and CMs in the USA and Canada.

Christoph is a CPCU, AFSB, and an Advisor of Insurance designee. He is an alumnus of both Boston College's Carroll School of Management and Northeastern University, where he captained the Division 1 Rowing Team.

Originally from Germany, Christoph now lives in Boston with his wife and daughter. In his spare time, Christoph is an avid home improvement enthusiast. No job is too big or too small – which would make him a nightmare account for a Surety!

David Kash – Partner, Koeller, Nebeker, Carlson & Haluck, LLP

David W. Kash is a partner in the firm of Koeller Nebeker Carlson & Haluck, LLP in its Phoenix, Arizona office. Mr. Kash received his BSC with honors (Accounting) from DePaul University in 1977 and his JD from Chicago-Kent College of Law with honors in 1981. He is admitted to practice in both Arizona and Illinois, he is AV rated by Martindale Hubbell, he is a member of Arizona Finest Lawyers, is recognized as a Southwest Super Lawyer, and selected to The Best Lawyers in America. He is a trial attorney and his practice includes construction and surety law. He has authored a variety of legal articles and given several presentations. He has been a frequent speaker at Pearlman Association gatherings. Many of his articles can be accessed online or by request to david.kash@knchlaw.com.

Rob Kelley – Senior Vice President, Nicholson Professional Consulting, Inc.

Rob Kelley is a Senior Vice-president at Nicholson Professional Consulting in Atlanta. He's been with Nicholson since 2004 and handles contract surety claims including affirmative claims as an expert witness. He started his construction accounting career as a CPA serving as the CFO of an Atlanta contractor for over 20 years before joining Nicholson in 2004. He attended TCU and received his undergraduate degree from Georgia State University after a stint in the Marines. He received his master's degree from Auburn University. He is licensed as a CPA.

Daniel Lund, III – Partner, Phelps Dunbar LLP

Dan is a Partner in the New Orleans office of the law firm of Phelps Dunbar LLP, and for his 37 years of practice has been engaged in general civil litigation, focusing primarily on construction industry and surety matters, products liability, telecommunications law and zoning. Mr. Lund received his B.A. degree in philosophy from the University of New Orleans, his J.D. degree from

Tulane University, and an M.T.S. degree from Duke University. He serves on the Construction Arbitration Panel of the American Arbitration Association and on the panel of mediators and arbitrators for Perry Dampf Dispute Solutions in New Orleans. Mr. Lund is admitted to practice before all courts in Louisiana and the United States District Courts in Louisiana, as well as the United States District Court for the Northern District of Florida. He serves on the Board of Directors for the Surety Claims Institute, and at the start of 2023, 2024, and 2025, Dan was honored to be named by Louisiana Super Lawyers to its list of "Top 50" attorneys across all practice areas in the state of Louisiana.

William J. McConnell – Co-Founder/Former CEO/Chairman of the Board, The Vertex Companies, LLC

Bill McConnell is a co-founder, former CEO, and Chairman of the Board of The Vertex Companies, LLC, an international forensics and AEC firm. Bill has worked within the surety claims industry for over 30 years and is a seasoned expert witness for domestic and international megaproject disputes. He has testified nearly 250 times, most notably for damages/cost of repair, delay, fault allocation, termination, productivity, and standard of care opinions. He is a published author and a frequent presenter at law and AEC conferences.

Stephani Miller – Commercial Claims, Liberty Mutual

Stephani Miller has over 30 years of claims experience and is celebrating 22 years with Liberty Mutual. Stephani graduated Summa Cum Laude from Washington State University in 2013 with a BA in Social Sciences. Her focus within the Commercial Claims Department is on both Probate and Fidelity matters. Outside of work Stephani enjoys spending time with family and friends, especially her two grandchildren. She also enjoys helping out at a local winery with crush, bottling, and the tasting room.

Thomas Moses – Claims Director, The Hanover Insurance Group, Inc.

Thomas Moses is the claims director at Hanover Insurance, Tom has over 25 years of surety claims experience. His industry experience includes helping develop new commercial products with underwriting to handling a billion-dollar contract defaults. His current area of emphasis includes contract and bond reviews for surety underwriters as well as advising principals of industry trends and strategies for negotiating more favorable risk allocations."

Ty Oksuzler – Technical Consultant, J.S. Held LLC

Ty Oksuzler is a technical consultant with J.S. Held, LLC. assisting surety clients with bond claim investigations and loss mitigation. Prior to his 10 years a consultant, Ty estimated and managed projects for Texas based general contractors.

Scott G. Olson – Executive Vice President, Nicholson Professional Consulting, Inc.

Scott G. Olson is the Executive Vice President of Nicholson Professional Consulting, Inc., headquartered in Austin, Texas. With nearly three decades of experience spanning the surety and construction industries, he brings a well-rounded perspective shaped by deep involvement in both claims management and project execution.

Before joining Nicholson, Mr. Olson spent more than 19 years handling complex contract claims for a national surety. Earlier in his career, he held a variety of positions within the construction sector, equipping him with firsthand knowledge of project delivery, operational challenges, and risk management.

Mr. Olson earned a Bachelor of Science in Industrial Technology from the University of North Texas and completed mediation training at the Straus Institute for Dispute Resolution at Pepperdine University.

Stuart Overton – Senior Director-Surety Claims, Skyward Specialty Insurance

Stuart Overton is the Senior Director, Surety Claims with Skyward Specialty Insurance. He has nearly 20 years of experience handling complex claims related to contract performance and payment bonds, as well as commercial bonds. Stuart is involved with claims nationwide, along with providing support to the underwriting team. He is a graduate of the University of Northern Iowa and the University of Central Oklahoma. He has also obtained the designation of an Associate in Fidelity and Surety Bonding and is a licensed insurance adjuster in numerous states. He has served as a guest speaker at the Northeast Surety and Fidelity Conference, National Bond Claims Conference, and Fidelity & Surety Law Midwinter Conference.

Jonathan Panico – Senior Claims Examiner, Arch Insurance

Jon Panico is a graduate of The Pace University School of Law. He has been working in the surety field for over a decade, and is currently with Arch Insurance.

Allegra Perez – Associate, Booth, Mitchel & Strange, LLP

Allegra Perez is a surety attorney at Booth, Mitchel & Strange. She graduated from UCLA with a BA in European Studies with a concentration in Spanish and attended Southwestern Law School. She has over 15 years of litigation experience and handles matters involving commercial bonds, including for probate and construction bonds. In her free time, Allegra enjoys riding her bicycle with her oversized Doberman, Karma, by her side.

Stephen Rea – General Counsel, Liberty Mutual Global Surety

Steve has served as General Counsel for Liberty Mutual Global Surety since 2007. In this role, he leads the Global Surety Legal Department, providing comprehensive corporate legal and transactional support for the business. His responsibilities include contract and bond analysis,

managing indemnity packages, and collaborating with Liberty Mutual's Public Affairs Department on both domestic and international regulatory and legislative issues. Steve has also played a key role in conducting due diligence and integration efforts for several Global Surety mergers and acquisitions.

He is a frequent speaker on subjects such as public-private partnerships (P3s), federal set-aside programs, financial guaranty insurance regulations, broadband, and innovative surety solutions. Additionally, Steve chairs the Risk & Performance Security Committee of the Association for the Improvement of American Infrastructure (AIAI) and serves on the International Committee and P3 sub-committee of the Surety & Fidelity Association of America (SFAA).

Before becoming General Counsel, Steve was Senior Surety Counsel in Liberty Mutual Global Surety's Claims Department for five years. Prior to joining Liberty Mutual, he was a litigation attorney for ten years, focusing on construction law, employment law, and insurance contract disputes.

Steve is licensed to practice law in the Commonwealth of Pennsylvania, the United States District Court for the Eastern District of Pennsylvania, and the United States Court of Appeals for the Third Circuit. He earned his Juris Doctor from Villanova University School of Law and holds a Bachelor of Arts in Political Science from Penn State 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 RHISE Claims Management, a surety claims management SaaS application aiming to standardize the global surety claims management process. RiskScape specializes in working with law firms, insurance companies, sureties, and professional services firms. Their services include Claims Investigations (Cyber, Fidelity, Surety), Litigation Support, Strategic Risk Management Consulting, Cyber Defense, Security Breach Analysis, ESI (Electronically Stored Information) collections and Data Governance and Compliance, Discovery Support, and Expert Witness services.

Brian 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 2025-2026 term.

Michael Saba – Vice President, YA Group

Michael W. Saba brings over 45 years of fidelity and surety claim management experience to YA Group's staff of surety consultants. Mr. Saba has held senior management positions with major surety companies and in these positions has directed and personally handled numerous

construction defaults and has participated in mediation, arbitration, and litigation of disputed performance and payment bond obligations.

Prior to joining YA Group, Mr. Saba was Vice President for fidelity and surety claims for the Transamerica Insurance Group.

Michael W. Saba received his Bachelor of Science in Business Administration with an emphasis in Finance from Woodbury University and studied law at LaVerne University School of Law.

Ali Salamirad – Founding Partner, SMTD Law LLP

Ali Salamirad is the founding partner of SMTD Law LLP. Mr. Salamirad concentrates his practice in the areas of construction and surety law. For nearly a quarter of a century, Mr. Salamirad has counseled a variety of businesses, contractors and surety bond companies in complex litigation and transactional matters. Many of the nation's leading general and specialty contractors and sureties trust Mr. Salamirad's guidance and counsel when dealing with the myriad of issues that arise in the construction and related industries. Mr. Salamirad is widely recognized for his ability to assist clients when dealing with distressed private development and public works projects.

Mr. Salamirad has successfully handled a wide range of cases including bid protests, subcontractor substitution hearings, labor productivity/inefficiency claims, extra work or change order disputes, delay and acceleration claims, differing site condition claims, adversary proceedings in bankruptcy, competing creditor claims, default terminations, takeover and completion efforts, and structuring multi-million dollar financing deals for sureties and their distressed contractors.

Mr. Salamirad is a recognized leader in construction and surety law and is regularly ranked by the prestigious Chambers and Partners for his excellence in construction law, reflecting his deep industry expertise and commitment to client success.

Kimberly A. Steele – Vice President, Swiss Re Corporate Solutions

Kimberly is Vice President, North America of Swiss Re Corporate Solutions America and serves as a Claims Expert. With over twenty-five years in the surety and construction industry, she founded a national law firm specializing in commercial transactions, construction law, and suretyship, as well as a consulting firm aiding construction companies in risk management and financial stability. Previously, she was corporate counsel and vice president of commercial sales at a New York publicly traded bank. Ms. Steele frequently authors and presents on surety and construction topics, including surety rights in high-value collections and bankruptcy.

Ms. Steele graduated magna cum laude from Elmira College, studied law and economics at Université de la Sorbonne, and earned her Juris Doctor from Albany Law School. Residing in Oswego, New York, she volunteers with Oswego County Hospice, Volunteer Lawyers Project of CNY, Inc., and various animal rescue groups. Her hobbies include competitive sailing, cruising in her 1970 Chevelle SS 454, and playing classical piano.

Michael J. Sugar, III – President, Forcon International Corporation

Michael received his Bachelor of Science in Mechanical Engineering from Boston University and, later, his MBA.

Prior to joining Forcon, Michael spent 6 years with Clark Construction as a Project Manager.

As the President of Forcon, Michael currently oversees the day-to-day operations of the Company and manages a staff of 16 employees and 100+ consultants. He actively consults on Surety projects and serves as an expert witness on various Construction related issues for both Sureties and Contractors.

In his spare time, Michael and his wife (Julie), enjoy travelling the world with their 3 children as well as cheering on the Seminoles, Lightning, Bucs and Rays.

Richard E. Tasker – President, Sage Associates, Inc. and Sage Contractor Services

Rick Tasker is President of Sage Associates, Inc. and Sage Contractor Services. He has been a Construction and Surety Consultant since the mid-1970's and has been involved with hundreds of contractor defaults and construction disputes. He has been designated in many areas of construction including forensic schedule analysis, efficiency and productivity, construction accounting, procurement, means and methods, and standards of care. He is active and often presents at industry functions including ABA, NBCA, SCI, NASBP, Western States Surety Conference, and Pearlman. He is honored to see his many friends and speak again at the 2025 Pearlman.

Seti Tesefay – Associates, Weinstein Radcliff Pipkin LLP

Seti Tesefay is an associate at Weinstein Radcliff and Pipkin LLP in Dallas, Texas. Seti's practice focuses on surety and construction litigation. Prior to joining WRP, Seti practiced international commercial arbitration in Germany, dealing primarily with construction and post-M&A disputes.

Rodney J. Tompkins, Jr. – Vice President/Managing Partner, RJT Construction, Inc., Consulting Services

Rodney J. Tompkins Jr. is Vice President and managing partner of RJT Construction Inc., Consulting Services. Mr. Tompkins is based in Irvine, California and has successfully managed surety claims, completion, and litigation matters in numerous regions for over 20 years. Mr. Tompkins obtained his bachelor's degree at University of San Diego, postgraduate in Construction Management at U.C. Berkley School of Engineering. Mr. Tompkins also earned his Juris Doctorate at Lincoln Law School of Sacramento where he was Editor-In-Chief of the "Voir Dire" and recipient of multiple awards in Moot Court and ADR. He was also chosen to represent the law school at the annual state-wide Negotiations Competition. Mr. Tompkins remains active in industry leadership including the ABA, FSLC, and other professional organizations. He is a

frequent presenter and speaker on topics of surety, construction, project management, claims, damages, and others. He also dedicates his time to his family and youth sports, Boy Scouts of America, and serves on the board of local non-profit youth organizations in Southern California.

Collin Vincent – Claim Counsel, Travelers

Collin Vincent is Claim Counsel with Travelers. Collin works with contractors and obligees from across the United States to investigate and resolve bond claims. Prior to his current position, Collin spent 11 years as a litigator, representing contractors in a wide variety of claim, as well as homeowner associations in construction defect matters. Collin graduated cum laude from the Seattle University School of Law in 2011. Collin spends his free time chasing around his two young daughters, trying to find the fairway at local golf courses, and attempting to paddleboard. Collin currently serves on the Board of Directors for the Northwest Justice Project, dedicated to providing legal assistance to underserved communities.

Chris Wagner – Assistant Vice President – Commercial Surety, Philadelphia Indemnity Insurance Company

Chris joined Philadelphia Insurance Companies in the Summer of 2025. In his role as Assistant Vice President – Commercial Surety he is responsible for underwriting production plans and business development for the Northwest region. Before joining PHLY, Chris was a member of Hanover Insurance Group's commercial surety team for ten years. His background there includes underwriting roles in both the field as well as the Home Office. He earned his Bachelor of Arts in Business Administration (Finance) from the University of Washington.

Scott C. Williams – Principal, Manier & Herod

Scott C. Williams is a principal with Manier & Herod in Nashville, Tennessee, and practices in the areas of surety law, bankruptcy/insolvency, corporate, real estate, and commercial litigation. Scott represents commercial and contract sureties in claim, indemnity, finance, and bankruptcy/restructuring matters in the U.S. and internationally. Scott also serves as Vice Chair of the Underwriting and Risk Management Law Division of the Fidelity & Surety Law Committee of the Tort Trial and Insurance Practice Section of the American Bar Association.

Douglass F. Wynne, Jr. – Partner, Simon, Peragine, Smith & Redfearn, LLP

Douglass F. Wynne, Jr. Is a partner with the law firm of Simon, Peragine, Smith & Redfearn, LLP, in New Orleans, Louisiana, where he practices in the firm's Construction & Surety Practice Group. Mr. Wynne graduated from Tulane University (B.S. 2005) and from Loyola University New Orleans School of Law (J.D. 2008).

Angela Zanin – Partner, Lewis Brisbois

Angela A. Zanin is a partner in the Los Angeles office of Lewis Brisbois and a member of the Bad Faith Litigation, Insurance Coverage, Surety, and Italy Practices. Angela focuses her practice on insurance coverage matters. She specializes in surety law, insurance guaranty association law, independent counsel disputes, first and third party policies, and underlying claims related to wild fires, pollution, intellectual property, and construction defects. Angela is active in bar activities, founding and chairing the Los Angeles County Unity Bar, an organization with a mission to diversify the bench. She serves on the Los Angeles County Bar Association Board of Trustees, and is the Past President of the Italian American Lawyers Association.

Gene F. Zipperle, Jr. – Member, Ward Hocker Thornton

Gene F. Zipperle Jr. brings over three decades of litigation experience to surety and insurance matters. Since beginning his legal career in 1988, Gene has established himself as a competent advocate and strategist when dealing with surety and fidelity issues of all kinds and related insurance litigation. Licensed to practice law in Kentucky since 1988 and Indiana since 1989, Gene has litigated across multiple jurisdictions including state and federal courts throughout Indiana, Kentucky, and Ohio, as well as federal courts in Florida and North Carolina. Gene's reputation extends beyond the courtroom through his active participation in professional education and industry seminars and programs. He regularly speaks at conferences and practice seminars to educate experienced claims professionals as well as those just entering the field about best practices in surety and fidelity law. His commitment to advancing the field is further demonstrated through his published articles in numerous trade legal publications that serve the surety and insurance communities.

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 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/.

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 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.

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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 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/.

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.

Elizer Law Group is an Illinois law firm with more than thirty years' experience in commercial debt collection, judgment enforcement, asset and liability investigations and surety law. From our managing partner to our support staff, we are committed to providing the highest quality legal representation and collection services to our clients.

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

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.

Fox Rothschild is a national law firm with 1,000 attorneys coast to coast. You will receive the top-notch client service you would expect from a boutique combined with the robust resources of an Am Law 100 firm. Our 70+ practice groups possess deep industry knowledge. We deliver a full range of legal services to individuals and businesses — public, private, nonprofit, startup, family-run, and multinational.

Ranked among the leading firms in the U.S. for construction law by Chambers & Partners and the top 15 by Construction Executive magazine, Fox Rothschild has one of the nation's deepest construction practices. We help clients mitigate risk and overcome challenges, guiding them through difficult circumstances by harnessing the combined strength of an experienced group of attorneys serving all segments of the construction industry.

With more than 400 litigators, we have the bench strength and flexibility to quickly mount an agile and aggressive response whenever a problem arises. Our depth enables us to handle intensive Multi-District Litigation matters and class actions, as well as the full range of complex commercial cases.

We are known as enterprising, forward-thinking, and results-driven lawyers who anticipate challenges and provide customized solutions with a personal touch. At Fox, solving your problem is our top priority.

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

FRIEDRICH DISHAW

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.

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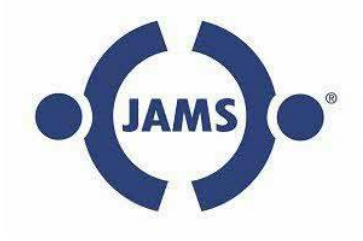
Guardian Group, Inc. is a full-service consulting firm with offices nationwide specializing in surety claims, property and casualty claims, construction management and claims, construction defect claims, fidelity claims, construction risk management, expert witnessing and litigation support.

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.

KNCH
KOELLER ■ NEBEKER
CARLSON ■ HALUCK LLP

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.

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 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 James D. Curran

James D. Curran is a surety and construction litigator in San Francisco, California. Mr. Curran's practice is primarily devoted to complex commercial litigation, and includes representing contract and commercial sureties, contractors, subcontractors, and other businesses in a wide variety of surety, construction, and business disputes on both the trial and appellate level.

Please visit our website at www.curranlawyers.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.mavlawoffice.com.

LEWIS BRISBOIS

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.

LOEWKE BRILL
CONSULTING GROUP, INC

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

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

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.

MDD

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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maximum 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/.

RISKSCAPE STRATEGIES

RiskScape is a boutique consulting firm specializing in litigation support, surety, cyber, commercial crime, and fidelity claims.

We provide insurers, law firms, and corporate clients with forensic review, policy analysis, litigation support, and claims strategy to bring clarity to complex matters.

With deep expertise in fraud, cyber incidents, and financial crime, RiskScape delivers independent insights and practical solutions that support confident decisions and stronger outcomes.

Please visit our website at www.riskscapellc.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 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.

SALAMIRAD, MORROW, TIMPANE & DUNN LLP
ATTORNEYS AT LAW

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

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.

SpencerFane®

Snow Christensen & Martineau

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
ATTORNEYS AT LAW LLP

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.

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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Notes

PANEL 1

Know When to Hold 'Em, Know When to Fold 'Em – A Surety's Performance Decision

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Introduction[1]

An obligee's claim under a performance bond typically demands that the surety cure its principal's default by simply "performing" under the performance bond. A surety faced with such a simple performance demand should always consider that, while a surety's performance options are generally determined by reference to the performance bond, they also derive from a surety's inherent right to perform and its right to mitigate loss. A surety should also remember that the obligee has a corresponding duty to cooperate with the surety, which is also coupled with its own duty to mitigate loss.

This paper examines issues that may arise in connection with two methods by which a surety may elect to perform under its performance bond[2] following the default of its principal and the surety's determination that the default triggers the surety's obligation to perform.[3] Specifically, this paper addresses (i) a surety's takeover and completion of the bonded project and (ii) a surety's tender of a completion contractor to the bond obligee. Assignment of the bonded contract is also discussed as an alternative, or variation, to the tender performance option. The overall perspective of the paper and presentation will be to discuss how the surety's right and the obligee's duty to mitigate may be used to attempt to resolve disputes that arise in the takeover or tender process. From a practical perspective, the paper will also discuss how the performance option chosen by the surety—takeover or tender—should be informed by the status of the project, the nature of the work, along with the estimated costs (and risk of loss) attendant to the means chosen.

I. TAKEOVER WITHOUT A WRITTEN AGREEMENT

Sureties often prefer to take over a bonded contract in lieu of other performance options because it allows the surety greater control over completion. What happens if the obligee will not sign a written Takeover Agreement? In the absence of such an agreement, the surety must be aware of several potential issues. Most importantly, without a written takeover agreement, the

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[1] An expanded version of this paper is titled "*Variations on the Theme of Takeover: Surety Takeover from Dafault through Dispute Resolution"* and was first published in 2016, in connection with the Fidelity and Surety Law Subcommittee Spring Program.

[2] The terms of the performance bond and the surety's inherent right to perform generally provide the surety with the following performance options: (i) to takeover and complete, (ii) to tender a new contractor, (iii) to finance the principal, (iv) to indemnify the obligee, and (v) to buy-back its bond. The surety also may deny liability.

[3] This paper assumes that the principal is in default under the bonded contract and that all conditions precedent to triggering the surety's obligation to perform have occurred.

surety may lose the protection of the penal sum of the bond.[4] Second, in the absence of a written takeover agreement, the surety must complete the work with no clear, written promise from the obligee to pay remaining contract balances to the surety as the work progresses (separate from any obligation imposed by the direct language of the performance bond). Third, the obligee and the surety (who has retained a completion contractor to prosecute completion of the project) are forced to operate without any formal structure for payment of contract funds, dispute resolution or dealing with contract changes. Finally, without a written takeover agreement, there is no formal confirmation that the parties are proceeding under a full reservation of rights.

An obligee under a performance bond is entitled to no more than the performance it bargained for under the bonded contract.[5] Generally, unless the bond provides otherwise,[6] a surety has the right to choose the means and methods of performance[7] so long as the obligee is made

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[4] *See, e.g.,* Caron v. Andrew, 284 P.2d 550 (Cal. App. Ct. 1955); Allegheny Cas. Co. v. Archer-Western/Demaria Joint Venture III, 2014 WL 4162787, at *10-12 (M.D. Fla. August 21, 2014).

[5] *See* Aetna Cas. and Surety Co. v. United States, 845 F.2d 971, 973-74 (Fed. Cir. 1988) (a performance bond surety guarantees completion of the project and that the [obligee] will not pay more than the contract price) citing United States v. Munsey Trust Co., 332 U.S. 234 (1947); Morrison Assurance Co., Inc. v. United States, 3 Cl. Ct. 626 (1983) ("Performance bond protects the [obligee] by making sure that it is not left with a partially completed project . . ."); Trinity Universal Ins. v. United States, 382 F.2d 317 (5th Cir. 1967) (the purpose of a performance bond is to "assure that the government has a completed project for the agreed contract price.").

[6] Some Courts have held that the A311 Performance Bond restricts the surety's means and methods of performance. National Fir. Ins. Co. of Hartford v. Fortune Constr. Co., 320 F.2d 1260 (11th Cir. 2003) (surety did not have the option under the AIA-A311 performance bond to not perform and tender the completion costs to the obligee). Note that some courts have held that a surety's performance options may also be subject to the provisions in the bonded contract. *See* Commercial Cas. Inc. Co. of Georgia v. Maritime Trade Ct. Builders, 572 S.E.2d 319, 320-21 (Ga. App. 2002) (surety not discharged by obligee's failure to comply with the bond's notice and termination provisions where obligee's actions against principal were in accordance with the notice and termination provisions in the contract); *compare* Solai & Cameron, Inc. v. Plaintfield Comm. Consol. Sch. Dist. No. 202, 871 N.E.2d 944 (Ill. Ct. App. 2007) (reaching contrary result).

[7] Courts have construed Miller Act performance bonds to permit performance by any method the government agrees to accept. 40 U.S.C. § 3131-3134 (2009); Aetna Cas. and Surety Co. v. U.S., 845 F.2d 971, 975 (Fed. Cl. 1988) (surety may complete performance or assume liability for the costs for completing in excess of the contract price, a surety may finance an insolvent contractor); see also Granite Computer Leasing Corp. v. Travelers Indem. Co., 894 F.2d 547, 551 (2d Cir. 1990); Island Co. v Hawaiian Foliage & Landscape, Inc., 288 F.3d 1161, 1170 (9th Cir. 2002); Morrison Assurance Co., Inc. v U.S. 3 Cl. Ct. 626, 632 (1983). Courts have also found that sureties have broad performance options under common law bonds. Bd. of County Supervisors of County of Henrico v. Ins. Co. of N. Am., 494 F.2d 660, 668-69 (4th Cir. 1974); Biomass One, L.P. v. S-P Constr., 799 P.2d 152, 156-57 (Or. Ct. App. 1990); Standard Accid. Ins. Co. v. Rose, 234 S.W.2d 728, 730 (Ky. Ct. App. 1950). Sureties have also been discharged under AIA bonds in which the obligee failed to allow the surety to pursue its available performance options. *See* Elm Haven Constr. Ltd. v. Neri Constr., 376 F.3d 96, 100-01 (2d Cir. 2004); Enterprise Capital,

whole.[8] The right to choose its means and methods has been interpreted as a *right* of the surety to mitigate damages.[9]

The surety is probably not going to have a right to demand a written takeover agreement because, as already mentioned, the obligee is not going to be required to sign such an agreement. Can the surety, instead, simply choose another performance option? Perhaps, depending on the language of the performance bond at issue. The A312 Performance Bond – 2010, for instance, gives the surety right to "take one of the following actions": (i) finance the principal, (ii) take over completion using a completion contractor, (iii) tender a completion contractor, or (iv) waive or dispute its right to perform.

Even with performance options, a surety may prefer to take over completion of the project and must do so with or without a takeover agreement. In such case, a surety should examine its rights and duties absent the written takeover agreement. Two big issues are completion costs and the penal sum of the bond. Once a surety undertakes a takeover of the work in question, it is liable for all costs of completion unless the obligee agrees otherwise in the takeover agreement, and where the cost to complete exceeds the bond penalty plus the available contract balance at the time of default, the surety's liability <u>*may*</u> exceed the penal sum of the bond.[10] Furthermore, the subcontractors and suppliers who enter into direct contracts with the completing contractor expect

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Inc. v. San-Gra Corp., 284 F. Supp. 2d 166, 176-77 (D. Mass. 2003); Dragon Constr., Inc. v. Parkway Bank & Trust, 678 N.E.2d 55 (Ill. App. Ct. 1997); Seaboard Sur. Co. v. Town of Greenfield, 266 F. Supp. 2d 189 (D. Mass. 2003).

[8] Id.

[9] *See* St. Paul Fire & Marine Ins. Co. v. City of Green River, 93 F. Supp. 2d 1170 (D. Wyo. 2000) (obligee's action surety divested the surety "of its ability to minimize its liability by selecting the lowest cost option and directing the construction or participating in the contractor selection process" rendering "the bond null and void."); *see* Dragon Constr., Inc. v. Parkway Bank & Trust, 678 N.E.2d 55 (Ill. App. Ct. 1997) (owner action stripped surety of the right to limit its liability); Seaboard Sur. Co. v. Town of Greenfield, 266 F. Supp. 2d 189 (D. Mass. 2003) (surety allowed reasonable time to investigate before selecting available performance option); School Bd. of Escambia County v. TIG Premier Ins. Co., 110 F. Supp. 2d 1351, 1354 (N.D. Fla. 2000) (obligee's failure to provide notice deprived surety of its right to mitigate damages)); *see also* Tishman Westside Constr. LLC v. ASF Glass, Inc., 33 A.D.3d 539, 540 (N.Y. App. Div. 2006) (surety discharged by obligee failure to allow surety an opportunity to exercise options under its bond).

[10] *See* Employers Mut. Cas. Co. v. United Fire & Cas. Co., 682 N.W.2d 452 (Iowa Ct. App. 2004) ("When a surety takes over performance of a contract, the surety's liability is no longer limited by the amount of the bond.") *But see* Egyptian Am. Bank, S.A.E. v. United States, 13 Cl. Ct. 337, 341 (Cl. Ct. 1987) ("Under the Federal Procurement Regulations, a surety may complete the contract itself or allow the government to find a new contractor and pay the government the expense of completion. . . . Whatever its choice, a surety is responsible for the expense of completion *up to the applicable bond limit*.") (emphasis added); People ex rel. Ryan v. Environmental Waste Res., Inc., 782 N.E.2d 291, 296-97 (Ill.3d Dist. Ct. App. 2002) ("[W]e hold that [the Surety]'s liability, should it choose to perform closure and post-closure activities, is limited to the amount of the penal sum of the bond.).

their full contract price to be paid by the completing surety without regard to any limitations on the bond amount.[11] Consequently, in the absence of a written takeover agreement, the surety risks exposure beyond the penal sum of the bond. To avoid such a result, some performance bonds explicitly provide that the penal sum will continue to apply to the surety's performance.[12] Again – why it is always important to read the bond.

The risks of taking over completion of a bonded contract absent a written agreement are highlighted by the American Institute of Architect's changes in the A312 Performance Bond – 2010. The A312 Performance Bond – 1984 is vague on how the penal sum may be impacted or exceeded in the event the surety elects a particular performance option. The American Institute of Architects sought to remedy possible confusion when drafting the A312 Performance Bond – 2010. Section 8 of the A312 Performance Bond – 2010 provides "[i]f the Surety elects to act under Section 5.1 [financing], 5.3 [tender] or 5.4 [waive or deny], the Surety's liability is limited to the amount of the Bond." To the complete dismay of the surety practitioner, the American Institutes of Architects failed to include Section 5.2 [takeover] in this Section. Accordingly, a surety can *deny* a performance claim and limit its exposure to the penal sum of the bond, but may be risking exceeding the penal sum by taking the so-called "higher ground" and completing the bonded contract via a takeover.

Of course, if the projected cost to complete clearly will not approach the penal sum of the bond, the surety may be less concerned about having a written agreement which protects the penal sum. Even in those instances, however, the surety should remain wary, as there is always a risk of unforeseen circumstances which may drive the cost to complete much higher than anticipated. Surety practitioners know all too well that such circumstances are always possible.

In addition to the surety's risk of losing the protection of the penal sum of the bond, a surety taking over completion faces several additional risks. By entering into completion contracts with contractors and suppliers, the surety becomes exposed to the risk of construction claims, for which it may have a duty.[13] Additionally, without a written takeover agreement, there is no document

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[11] Payments to subcontractors and suppliers via the completion contractor in furtherance of a takeover compose a part of the completion costs and are generally filed under performance bond loss.

[12] *See* Ward and Wager, Takeover, in Bond Default Manual, Fourth Ed. 440 (2015).

[13] *See* APAC Carolina, Inc. v. Town of Allendale, S.C., 41 F.3d 157 (4th Cir. 1994) (the owner's implied warranty obligation runs from the general contractor who issued the owner's design information to its subcontractors); D.H. Blattner & Sons, Inc. v. Firemen's Ins. Co. of Newark, New Jersey, 535 N.W.2d 671 (Minn. Ct. App. 1995) (takeover surety's completion contractor sued surety for defective plans furnished by the governmental owner after recourse against the owner was barred and court ruled that owner's implied warranty of design adequacy does not cause a takeover surety to be liable for their deficiencies); Gemma Development Co., L.L.C. v. Fidelity & Deposit Co. of Maryland, 1 A.D.3d 152, 767 N.Y.S.2d 413 (1st Dep't 2003) (holding a takeover surety not liable to its completion contractor for alleged misrepresentations regarding the amount of materials remaining at jobsite for completion of work, because the contractor was obligated under completion contract to provide all materials and the contractor was a "sophisticated business entity that knew how to protect itself"); Aniero Concrete Co., Inc. v.

defining the future rights and obligations of the surety and obligee or establishing a clear understanding of the scope of remaining work to be completed.[14] Although the oblige would have communicated grounds for default and termination to the surety, a more definitive statement regarding the adequacy of work completed and identification of work in need of remediation is often useful. A clear definition of the scope of the remaining work helps to define the surety's liability and aids in creating a definition of the scope of work for inclusion in the contract with the completing contractor.[15]

The surety may also want to consider its current relationship with the obligee when determining whether to proceed without a written takeover agreement. If the relationship between the surety and obligee is already strained, a carefully written takeover agreement may help to ease some tension by carefully delineating the responsibilities of both parties. Then again, such an agreement may also encourage the parties to engage in more contentious behavior by fighting about whether the takeover agreement has been strictly adhered to. In such cases, one might make the argument that, without a formal agreement, parties will be forced to work together to find solutions to the problems that arise.[16]

II. TAKEOVER UNDER A SUBCONTRACTOR PERFORMANCE BOND

The takeover performance option has an added twist when the obligee is the general contractor, not the owner, and the principal is a subcontractor. In such a scenario, the general contractor obligee is often at the mercy of the owner in determining how to handle and approach

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New York City Const. Authority, 308 F. Supp. 2d 164 (S.D. N.Y. 2003) (awarding quantum meruit claim of completing contractor against takeover surety); Lyndon Property Ins. Co. v. Kentucky Automatic Sprinkler Co., LLC, 2004 WL 1948677 (Ky. Ct. App. 2004) (takeover surety found liable to subcontractor of completing contractor, even though the bond language expressly provided coverage only for the defaulted principals, subcontractors and suppliers).

[14] *See* Concra v. International Fidelity Ins. Co., 860 F. Supp. 13 (N.D. N.Y. 1994) (holding takeover agreement modified payment provisions of bonded contract).

[15] *See* H & S Corp. v. U.S. Fidelity & Guar. Co., 667 So. 2d 393 (Fla. Dist. Ct. App. 1st Dist. 1995) (holding takeover surety agreement with its completing contract placed the risk of differing site conditions upon the contractor).

[16] *See* Daily and Kazlow, Takeover and Completion, in Bond Default Manual, Third Edition 223, 224 (2005), explaining:

> The ease of dealing with the obligee is [a] factor to consider. Some general contractors have a reputation, as do some owners, of being very difficult. Even an owner or a general contractor who does not have a reputation for being pugnacious can have a particular project manager or engineer who can make life on that job site particularly difficult. A war of faxes is often waged with such obligees. Constant blame is being assessed, "claims" are being set up, requests for change orders are held up or routinely denied, pay requisitions are slow in being processed, and in general, no one at such an obligee wants to be responsible for a difficult decision. Such obligees are a nightmare at best for contractors, but for sureties are a trip to the nether world.

its performance bond claim. There exists an inherent tension between a surety's performance rights and a general contractor's desire to complete the terminated work as expeditiously as possible. For example, in many subcontracts, the default clause provides that the general contractor shall have the right to (i) supplement the work of a non-performing subcontractor and (ii) correct defective work, after a short notice period. Why? Because the general contractor, unlike a traditional owner/obligee, is actually in a position to fully understand and appreciate the subcontractor's scope of work on the bonded project. Courts have reached differing results regarding how such provisions impact a surety's ability to assert its express performance rights under the A312 Performance Bond.[17]

Furthermore, the performance bond (and the surety's performance options) are unlikely to be governed by statute.[18] Assuming that no public works statutes apply and the performance bond is not otherwise considered a "statutory bond," interpretation of the bond will be a matter of contract interpretation under applicable law.[19] The explicit provisions of the bond, read together with the bonded contract, are of upmost importance when a surety finds itself preparing for a takeover under a subcontractor performance bond.

Subcontractor bonds are most commonly required on large construction projects, which may serve to complicate completion efforts for the surety.[20] When deciding whether to take over and complete, the surety will generally want to get an accounting of the contract funds remaining, the status of change orders, the scope of remaining work, and the process for resolution of outstanding claims.[21] Significantly, the obligee's confirmation of the balance of funds available to complete the bonded contract acknowledges the absence of offsetting claims or other liabilities. For this reason, general contractor obligees may be hesitant to provide the accounting to the completion surety. In such situations, the parties may agree to have the takeover agreement provide for the obligee to give the surety written notice of its intention to pay any claims against the contract balances.

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[17] Compare Solai & Cameron, Inc. v. Plainfield Comm. Consol. Sch. Dist. No. 202, 871 N.E.2d 944 (Ill. Ct. App. July 10, 2007) (finding that surety's express performance options defeated competing contractual right to complete by obligee) with Commercial Cas. Ins. Co. of Ga. v. Maritime Trade Ctr. Builders, 572 S.E.2d 319, 320-21 (Ga. App. 2002) (reaching contrary result).

[18] Of course, this is not always the case. For example, in Massachusetts, if a public building construction project is estimated to cost $10,000,000 or more, therefore requiring prospective general contractors and subcontractor to participate in a prequalification process, a subcontractor is obligated to furnish a performance and payment bond. *See* 57 Mass. Prac., Construction Law § 4:19; M.G.L.A. c. 149, § 44B.

[19] *See, e.g.*, Colorado Structures, Inc. v. Ins. Co. of the W., 161 Wash. 2d 577, 588, 167 P.3d 1125, 1131 (2007) ("A bond is a contract that governs the surety's liability to the obligee. It is interpreted using general principles of contract construction and performance.")

[20] *See* Vollbrecht and Lewis, Creation of the Relationship, in The Law of Performance Bonds, Second Edition 14 (2009).

[21] 4A Bruner & O'Connor Construction Law § 12:80. Truly, it is ALWAYS good practice for the surety to get this information, regardless of its chosen performance option.

The surety should be extremely concerned of any attempts by the obligee to attempt to condition payment of contract balances on its receipt of funds from the owner – so-called "pay-when-paid" and "pay-if-paid" clauses. While these provisions are often found in subcontract agreements (and may be relied upon by a surety in adjusting a payment bond claim), they are abhorrent to the completing surety. They may also conflict with the express language of the performance bond, particularly in the case of an A312 Performance Bond. The surety must seek assurances that the obligee, despite being a general contractor, will make the full contract balances available to the surety for completion of the project, regardless of any payment issue between the obligee and the owner.

The takeover agreement should also establish the surety's completion date, taking into consideration existing and potential change orders, excusable delays to the contract, and any potential liquidated damages to be assessed for inexcusable delays. Both parties usually reserve all rights with respect to items that cannot be compromised and settled in the takeover agreement. The completing surety under a subcontractor bond must also contend with all of the issues that the principal faced as a subcontractor. For example, the subcontractor is obligated to comply not only with the subcontract but also, most times, with the prime contract, which is often incorporated into the subcontract. For that reason, the surety practitioner will want to obtain and carefully review the prime contract before drafting the final terms of a takeover agreement.

Finally, a subcontractor bond may also cause problems for a project owner, who will typically be unable to obtain direct enforcement against the subcontractor surety unless the owner has been expressly named as a dual obligee or there are express provisions providing conditional assignment consents by the surety and the subcontractor.[22]

III. SURETY TAKEOVER USING CONSTRUCTION MANAGER IN LIEU OF COMPLETION CONTRACTOR

Another performance option available to a surety is hiring a construction manager to finish a project instead of a completion contractor. With this method of completion, the construction manager commits to takeover and complete a project on a cost-plus contract negotiated between the surety and construction manager. Oftentimes, a construction manager will simply oversee the completion of a project by managing subcontractor bids and performance, and, when necessary, obtaining its own bids for different components left on a project. Depending on circumstances, construction managers can also perform construction remaining on a project (assuming the construction manager is a duly licensed and insured contractor).

A construction manager has an incentive to manage and control costs, and therefore act in both the surety's and obligee's best interests, because if the construction manager fails to justify and provide evidence that the costs were related to the project then it faces the financial liability for those costs. Because of this, a construction manager is more of an owner advocate and takes the burden off of the surety and obligee to ensure the proper management and coordination of the

[22] *See, e.g.*, S. Patrician Associates v. Int'l Fid. Ins. Co., 191 Ga. App. 106, 106, 381 S.E.2d 98, 98 (1989).

completion of a project. A construction manager's services are akin to professional services with the main purpose not to construct the project but to manage the construction of the project. This focus on management can add value to the project while reducing risk to the obligee and surety.

A. When is a construction manager appropriate?

Whether or not the use of a construction manager is appropriate is largely dependent on a project's estimated cost-to-complete model developed by consultants, architects, accountants, and the obligee, as well as the amount of work remaining. Simply put, if a construction manager is the most cost-efficient way for a surety to complete a project, it should be the choice of the surety. As mentioned above, an arrangement with a construction manager usually consists of a cost-plus-fee contract. Typically, a construction manager does not self-perform the required work but instead coordinates with the general contractor and subcontractors to ensure completion at the lowest cost. Depending on circumstances, a construction manager may be able to bid as both a construction manager and as a subcontractor (on tasks like electric work and paving, for instance).

1. Cost-Plus Contracts

In the construction manager setting, a cost-plus contract refers to an agreement where the construction manager is paid for all expenses related to the construction project. Some cost-plus arrangements can set a maximum cost amount to prevent the construction manager from exceeding that specific amount. The construction manager must justify all costs and present evidence that the costs are related to the job. Costs are usually denied where there is a negligent act or other relevant error attributable to the construction manager.

The two main components of costs in a cost-plus contract are direct costs (labor, materials, supplies, equipment, and professional consultants) and overhead or indirect costs (business related expenses necessary to complete a project, like office rent, insurance, office supplies, communication expenses, mileage, and drawing, printing, or reproduction). Typically, construction managers are more likely to incur indirect costs. The most common variation of a cost-plus contract used with construction managers is a cost-plus fixed fee arrangement, although there are several other types.[23]

A cost-plus fixed fee contract allows a construction manager to focus on quality of work instead of costs and also reduces its risks since all costs will typically be covered. The surety is faced with some uncertainty because final costs are not easy to determine but the construction

[23] Other kinds of cost-plus contracts include the following: cost-plus incentive fee (A cost-plus contract that provides for incentive fees where the incentive fees are based on performance with the amount and type depending on the milestone achieved.), cost-plus award fee (A cost-plus award fee contract provides for award fees predetermined and set forth in the contract's provisions where the fee could be a penalty or gratitude fee.), cost-plus fixed rate (A cost-plus fixed rate contract sets predetermined labor rates based on the construction manager's history as well as labor costs, usually used when actual costs are unknown.), and cost-plus profits (A cost-plus profit contract simply allows for the construction manager to earn a predetermined percentage profit usually based on labor costs directly associated with the project.).

manager does have to devote resources and management to justify all costs. A cost-plus fixed fee arrangement can provide an incentive for the construction manager to complete the project quickly as costs not covered under the contract will cut into the construction manager's profit. A surety can assure itself additional security if it arranges for the construction manager to provide a guaranteed maximum price. This allows for a surety to be confident in the cost necessary to complete a project and gives the construction manager an additional incentive to quickly and efficiently finish work since coming in under the maximum price will result in additional profits.

2. Timing of Project

A construction manager is most often used when there is only a small amount of work left on a project (i.e. 80% or more complete). When only a punch-list remains before a project is finished, it is easier for a construction manager to coordinate and manage the completion and process final payments to subcontractors. In contrast, if only 5% of a project is done, it will likely be in the surety's best interest to re-bid the job for a lump sum. A construction manager is also appropriate when a general contractor is not self-performing most of the work. If subcontractors are already performing a substantial portion of the work required to complete a project, it is easier for a construction manager to step in and coordinate/manage the job. Finally, when the defaulting general contractor is itself a construction manager and already has subcontractors in place, hiring another construction manager to complete the project often makes sense.

B. Management Services

1. Subcontractors/Suppliers – Ratification

Most of a construction manager's responsibilities and duties will be focused on working, contracting, and coordinating with subcontractors and suppliers to ensure completion of a project. A significant part of this process includes entering into ratification and fee arrangements and satisfying all bonding requirements. Generally, a construction manager will need to require ratification agreements with all subcontractors working on a project and make each subcontractor's account current in order to affirm the subcontractors will perform the same work they originally contracted to complete, at the same price called for in the original contract, for the construction manager instead of the defaulting general contractor/construction manager/etc. Ratification agreements should be utilized in all takeover/tender arrangements, including the use of a construction manager to complete a project, as a loss mitigation tool. Ratification agreements are between a surety and subcontractor so they will need to be assignable to the construction manager to allow for the proper management, supervision, and coordination of the subcontractor by the construction manager.

While ratification agreements should be used in all takeover/tender arrangements to guarantee subcontractors will remain on the job, a surety's arrangement with a construction manager may not require it to use ratified subcontractors to finish a project. Instead of using a ratification agreement to retain prior subcontractors, a construction manager may prefer to use a lower cost subcontractor or a more expensive subcontractor that it has a strong relationship with. However, if a construction manager hires a subcontractor that costs more than the one retained by

the defaulting general contractor, the price differential comes out of the construction manager's price to the surety, thereby reducing the construction manager's profits.

2. Payment Terms

A surety may prefer to retain a construction manager on a time and material basis. Using time and material basis/fee arrangements may be appropriate if the project is nearing completion, it is not necessary to obtain bids, or if, at the beginning of a project, the construction manager cannot procure bids on a complicated aspect of the job and needs time to determine a lump sum price. A variation to this approach could be to have subcontractors performing work on earlier stages of a project operate on a time and material basis/fee arrangement for 60-90 days at a guaranteed maximum lump sum price for all remaining time and materials necessary to complete a project.

C. Use of Consultants as Construction Managers

A surety is permitted to hire a consultant as the construction manager to complete a project but there may be licensing, insurance, and bonding issues that need to be addressed. A surety may be inclined to use a consultant with prior experience on the job to replace a defaulting general contractor if its goal is to bring on a trusted construction manager that is already familiar with the project in an effort to promote an easier and more efficient transition. The use of a consultant as construction manager also may be desirable when the project is near completion, when the remaining work is not complicated, where the cost to complete is difficult to ascertain, or when the project demands immediate action to ensure completion. Using a consultant that already has experience in takeover/tender situations as a consultant to a completion contractor can also be beneficial to the surety. Lastly, a surety could choose to finance the defaulting general contractor and keep the general contractor on the contract while simultaneously retaining a consultant to oversee the general contractor's completion of the project.

For instance, if it becomes apparent that a general contractor will not be able to complete a project unless provided with additional support, a surety and an obligee can reach an accord with the following parameters: The obligee would agree to rescind any termination of the contractor if the surety agrees to provide construction management services in the form of a consultant to help the contractor finish the project. Instead of formally terminating the contractor and having the surety take over and complete the project, the consultant construction manager would oversee and ensure the contractor completes the job. When using this approach, it is crucial to clearly delineate what is a performance loss, what is a payment loss, and what is an expense.

Generally, a payment loss is a payment bond claim filed prior to default for work performed before the surety became involved. A performance bond loss includes payments to a completion contractor or construction manager to finish a job following a contractor's default. The completion contractor or construction manager will usually pay the subcontractors and suppliers and charge the surety and/or obligee a markup, which is preferred so that costs do not escalate. Expenses usually refer to attorneys' fees and/or costs of consultants to assist with completion and collect bids to find a replacement contractor.

Consultants can take on a number of functions when used as a construction manager. In this role, consultants would manage the project much like a general contractor. A surety and obligee can also choose to fund a joint account for the consultant to manage, from this account the consultant could cut checks to pay itself for its consulting and accounting services and its role as construction manager. The consultant would also use the joint account to directly pay subcontractors and suppliers. When joint accounts like this are utilized, it is critical to clearly define which payments to the consultant were for consulting services and which were for its role as construction manager. If the payments made from the joint account to the consultant are not closely documented, then, when the accounting is reviewed, it will appear that the consultant was paid an astronomical consulting fee when in actuality it is a combined total of expense payments, payment bond losses, and performance bond losses (as well as the consulting fee).

V. TENDER vs. TAKEOVER AND THE BASIC DIFFERENCES

Tendering a completion contractor is perhaps the second most utilized performance option of any surety and may provide the best "alternative" to a takeover depending on the circumstances. Tendering a new contractor requires the surety to solicit bids from potential completion contractors, select the lowest responsible bidder, and "tender" the completion contractor to the obligee. The bond obligee will then contract directly with the tendered completion contractor, with the surety either paying the difference between the bonded contract balance and the completion price (if any) or "buying back its bond" (i.e., paying something close to or at the penal sum).

A. Does the Surety Have a Right to Tender under the Bond?

Because tendering places a lot of responsibility back onto the shoulders of the obligee, most bond forms do not explicitly provide for a tender performance option. So a surety will not often have the ability to tender as a matter of right. As noted by other surety practitioners, "tender agreements with obligees are generally the product of skillful negotiation and thoughtful analysis."[24]

In contrast to the normal, the AIA Performance Bonds expressly allow the surety the option to tender a completion contractor. The A311 Performance Bond, for instance, provides that the surety may remedy the default of the principal or shall:

> 2) Obtain a bid or bids for completing the Contract in accordance with its terms and conditions, and upon determination by Surety of the lowest responsible bidder, or, if the Owner elects, upon determination by the Owner and the Surety jointly of the lowest responsible bidder, arrange for a contract between such bidder and Owner, and make available as Work progresses (even though there should be a default or a succession of defaults under the contract or contracts of completion arranged this paragraph) sufficient funds to pay the costs of completion loess the balance of the contract price…

[24] *See* E.A. "Seth" Mills, Jr. and Bradford R. Carver, Tender, in Bond Default Manual, Fourth Ed. 440 (2015).

Likewise, the A312 Performance Bond – 1984 provides that, after the obligee satisfies certain prior conditions, the surety shall:

> 4.3 Obtain bids or negotiated proposals from qualified contractors acceptable to the Owner for a contract for performance and completion of the Construction Contract, arrange for a contract to be prepared for execution by the Owner and the contractor selected with the Owner's concurrence…

Both the A311 Performance Bond and the A312 Performance Bond – 1984 provide that the surety shall "arrange for a contract" between the obligee and completion contractor, but the A312 Performance Bond – 1984 further clarifies that the surety shall "arrange for a contract *to be prepared for execution*" by the owner and the completion contractor, thereby implying that the surety is responsible for drafting the tender agreement (emphasis added).

The AIA Performance Bond allow the surety to tender a completion contractor to the obligee, but does that mean that the surety have an absolute right to insist upon utilizing that option for performance? In *St. Paul Fire & Marine Ins. Co. v. City of Green River, Wyoming*,[25] the U.S. Court of Appeals for the Tenth Circuit held that the surety was discharged under an A312 Performance Bond – 1984 when the obligee prohibited the surety from exercising its contractual right to perform or to participate in the selection of a completion contractor. Likewise, in *St. Paul Fire & Marine Ins. Co. v. VDE Corp.*,[26] the U.S. Court of Appeals for the First Circuit affirmed a summary judgment granted in favor of a surety holding that the surety was discharged from liability under an A312 Performance Bond – 1984 after the obligee prohibited the surety from utilizing the principal to complete the bonded project. Accordingly, AIA Performance Bonds will generally offer far greater protections to the surety should it choose a performance option that is disfavored by the obligee.

B. Factors to Consider in Takeover vs. Tender

Determining whether tender is the best available completion option requires consideration of a number of factors. Tendering is best utilized in particular circumstances which are not always present when a surety suddenly becomes aware of a defaulting principal. The type of construction project, for instance, may have significant impact on whether tendering is a feasible option. If the project is susceptible to latent defects, requires a number of design-build elements or is otherwise complex, the surety may find it advantageous to retain control over completion of the project, particularly depending on the suitability of available completion contractors. On the other hand, a surety may wish to pass off the risks of this type of work to the obligee, who is better equipped to handle the sudden and unknown issues that arise from complex construction projects.

[25] 6 F. App'x 828, 2001 WL 369831, (10th Cir. 2001).
[26] 603 F. 3d 119 (1st Cir. 2010).

1. Status of Progress of Work

The most important factor in determining whether to tender a completion contractor is the status of project completion. The surety will find that, almost always, tendering is a more reasonable option the earlier in the project. A completion contractor will have more incentive to perform under a tender arrangement at the early stages in project completion, as the completion contractor will appreciate that (a) the work that typically gives rise to latent defect claims has not been performed, (b) the completion contractor will have more control to choose its subcontractors and suppliers, and (c) potential issues with the obligee have not had an opportunity to arise. The surety will be less likely to face an exorbitant cost premium charged by the completion contractor in exchange for assuming liabilities. Delays associated with the principal's default will also have less impact on a tender early in the project.

The stage of project completion factor goes hand in hand with the availability of prior bidders. Assuming the project remains in its early stages, the surety can look to the original project bidders in potentially selecting a completion contractor. The likelihood that the original bidders can quickly mobilize and begin performing work on the project increases the closer the project is to its initial bidding phase. Bidders are likely to be familiar with the project, having recently reviewed the scope of work, obtained subcontractor/supplier bids, and made its own assessment on how best to complete the project. They are in position to immediately begin performance – something that may persuade an otherwise hesitant obligee to agree to a tender arrangement.

Moreover, if the completion contractor is an original bidder, the surety may be able to rely on many of the numbers contained in the original bid in reviewing the reasonableness of a bid to complete the work. Because the bidders feel compelled to rely on prior bids, the surety can be better assured that the completion contractor is not increasing its costs and taking advantage of the surety's precarious situation. As briefly mentioned, the issues that lead to exorbitant completion costs – latent defects, delay damages, liquidated damages – are less likely to be a concern (and a charge to the surety) in the earlier stages of a project.

2. Demeanor/Relationships of Obligee

The demeanor of the obligee, as well as its relationship with the surety, the principal and any potential completion contractor, will also be a factor in determining whether tendering is appropriate. Unless the surety is operating under an AIA Performance Bond, the option to tender a completion contractor may boil down to the willingness of the obligee to accept the arrangement. Much like the surety and the completion contractor, the obligee will also be more willing to consider accepting a tender in the earlier stages of the project. The obligee will also be more open to the concept of a tender if the obligee is in good graces with the surety, who the obligee may (wrongly) be concerned is trying "back out" of its performance obligations, and the principal, who may be inclined to assert wrongful discharge claims against the obligee. Accordingly, the surety will want to be friendly, but persuasive and consistent, when discussing a tender arrangement with an obligee.

The surety should emphasize the benefits of tendering a completion contractor when negotiating with the obligee. For starters, the obligee will have greater control over the project

under a tender. Not only can the obligee control its own team of professionals, but the obligee can operate without fear of discharging any obligations under the performance bond. Depending on whether competitive bidding is a concern, the obligee may actually propose a completion contractor to finish the project. Regardless, the obligee will generally be more inclined to accept a tendered completion contractor with whom the obligee is familiar or already has a relationship.

C. Advantages of Tendering

Tendering has its advantages and disadvantages, most which tie in neatly with the factors to consider when determining whether tendering is the best option. The primary advantage to the surety is that it may relinquish control to the obligee, thereby limiting its monitoring costs and expenses, while also keeping its loss fixed and certain. Under most tender arrangements, the surety, after procuring a price from the completion contractor, will agree to pay the obligee the difference between the balance of the contract and the completion price. Whether the surety pays this sum upon execution of a tender agreement or upon completion of the project is subject to negotiation; however, paying the price differential earlier, rather than later, allows the surety to establish a concrete reserve and provides the obligee with early cash to keep the project flowing. The surety will be able to fix or cap its total loss while also seeking a discharge under the performance bond.

Under a tender arrangement, the surety should be able to limit its exposure for future damages. Because tendering is often used in the early stages of the project, the surety and the obligee will both be less concerned about allocating financial responsibility for liquidated and actual damages. In the best scenario, liquidated and actual damages will not have accrued or been incurred. Either way, the surety can resolve the liquidated and actual damages by paying the obligee a final settlement or allowing for a fixed deduction from the available contract balances. The obligee cannot later look to the surety for additional liquidated or actual damages in the event said damages accrue as a result of the completion contractor's work.

By tendering a completion contractor and seeking a release of obligations, the surety also avoids the unexpected and potentially costly contingencies that may arise during completion of a construction project (i.e., warranty claims or defective work claims against the completion contractor and/or its subcontractors). The surety's obligations under the performance bond will have been released by the time these contingencies arise. Accordingly, the completion contractor and its surety may be responsible for any future warranty claims or defective work claims, not the tendering surety.

The surety may also avoid the administrative and transactional expenses associated with having its professional team – i.e., its consultants and attorneys – monitor the progress of work on the project. A surety's continued involvement in a construction project necessarily means expending the time and resources of its in-house personnel, as well as outside counsel and consultants. Administrative and transactional resources are greatly diminished or eliminated once the surety tenders a completion contractor and receives a discharge under its performance bond. The obligee may also find that its administrative costs are greatly reduced under a tender arrangement, as the surety is cut out of (and no longer required for) every transaction and operation.

Accordingly, the surety may find it economically advantageous to tender a completion contractor to the obligee.

D. Disadvantages of Tendering

Tendering has many advantages, but also has a number of downsides that are exacerbated depending on the factors discussed above. A surety must weigh its advantages and disadvantages, which vary depending on the circumstances, when considering whether tendering a completion contractor is a viable performance option. For instance, because the surety will generally settle its performance bond claim by offering a single, lump sum to the obligee, the surety must be financially prepared to make a considerable payment to the obligee. The surety will have less standing to negotiate interim payments to the obligee based on milestone developments in construction.

Moreover, the obligee's damages may be unliquidated at the time of a tender. This is particularly concerning if work on the project has commenced far enough to determine that delays and defective work may be an issue, but not far enough to determine what the resulting damages may be. The surety may be forced to negotiate a settlement of these potential damages, without having the benefit of their liquidity, in order to receive a discharge under its performance bond. Because the damages are uncertain, the obligee will be more likely to seek a settlement that overcompensates for these damages to account for the uncertainties. In such instances, it may actually be economically disadvantageous for the surety to satisfy its performance obligations by tendering a completion contractor.

A primary disadvantageous to a surety is the time and expense associated with procuring a completion contractor to tender to the obligee. First, the surety will need to conduct a thorough investigation of the project to determine what potential costs may be lying under the surface as well as to acquire an appreciation of the progress of work made by the principal prior to default. Second, the surety will need to retain a consultant and a legal team to assist in the bidding process. The surety will need to expend its own resources review, analyzing and assembling the various bids. Third, the surety will need its professional team to assist with awarding the contract to a completion contractor and negotiating and perhaps drafting an agreement between the completion contractor and obligee at the same time the surety needs to negotiate and clarify the rights obligations flowing between the surety and the obligee. All of these items take time, something that the surety may not have when faced with a pushy obligee. These items all cost money, something that the surety is looking to minimize when utilizing any performance option.

A wary obligee, particularly a public obligee, may also have extreme hesitations in allowing for a tender. The surety often does not have a right to a tender arrangement, so the surety has to negotiate with and convince the obligee that tendering is the best option for all parties involved. If the obligee sees a complicated road to a tender, one littered with administrative costs, complicated re-bidding and time consuming contract negotiation and drafting, the obligee may steadfastly decline any suggestion of a tender. The public obligee may also have genuine reservations related to public bidding laws and similar restrictions. Sometimes tendering is simply not an option with certain public obligees, as tendering requires the obligee to release the surety.

The factors that are advantageous to the surety may also be disadvantageous to the obligee, who will be releasing the surety from defective work and liquidated damages claims. If the project takes a turn for the worst, the obligee will be unable to seek relief from the original surety. When faced with an obligee expressing such hesitations, a surety should remind the obligee of the availability and existence of completion bonds ensuring the performance and payment obligations of the completion contractor.

VI. ASSIGNMENT OF CONTRACT

One of the themes of this paper is that, generally, the rights and obligations among the surety, its principal, and the obligee under the relevant contact and performance bond are matters of contract. Accordingly, it follows that one of the means and methods by which a surety may consider arranging for performance is by assignment of the underlying contract. The following addresses from a topographical perspective some of the benefits of utilizing this method, issues for consideration as you consider this method, as well as assignment of contract in bankruptcy.

A. The Benefits of Assignment/When Appropriate

An assignment of the existing contract to a completion contractor, particularly with the principal's consent,[27] may be an efficient means by which to arrange for completion because doing so could avoid the potential application of competitive bidding laws and otherwise simplify the negotiation process. For instance, in the assignment of contract model, the assignor principal assigns its rights in the bonded contract to a third party assignee, who agrees to complete the remaining work for the remaining contract balance or the remaining contract balance plus additional funds provided either by the principal (using its own funds, loaned funds, or surety financing) or the surety (as financing or as performing surety). The third party assignee assumes all performance obligations of the principal to the obligee, typically to the extent arising post-assignment, and typically agrees to indemnify the principal from and against all obligations arising post-assignment. Typically, assignee does not assume the principal's liabilities arising prior to the assignment. In many, assignment of contract scenarios, the obligee will not release the principal's performance obligation but otherwise "consents" to the delegation and/or assignment of that obligation to the assignee so long as both the principal and the assignee are jointly and severally bound to the obligee.

[27] Most, if not all, surety indemnification agreements contain provisions in which the principals and/or indemnitors irrevocably appoint the surety as attorney-in-fact to exercise the principal's rights assigned and transferred to the surety under the indemnification agreement. Those rights typically include the principal's contracts and in many cases subcontracts relating to the applicable bond. But, in some cases the exercise of the surety's rights may be predicated upon the principal's default. So, counsel and the surety claims professional should carefully review the applicable indemnification agreement before utilizing any power-of-attorney granted in such document to exercise the principal's assignment right, if any, under the bonded contract. Further, in many instances, the bond obligee will request indemnification from the surety for claims by the principal arising as a result of the assignment.

As you can see, an assignment can be relatively straightforward, however, complexities arise (i) in the delineation between the "assumed liabilities" to be taken by the assignee, and the excluded liabilities/obligations" to be retained by the principal, and (ii) in that delineation is much easier to make for contracts at the early stages of completion. Further, some contracts, including federal contracts, may be awarded with bid options associated with phases to be performed at later stages as funds are appropriated by the public authority. In many instances, the principal has agreed to perform the later phased work even though funds have not been appropriated. An assignment of contract method may be preferable, particularly for the later-phased work, because the "natural break" between phases and/or bid options makes it easier to allocate liability assumption for work that has yet to be performed.

The assignment of contract method is also useful in a circumstance in which the principal is having financial difficulties but is not otherwise in default. In most assignments, the principal typically remains bound under the original contract, but it has agreed with a third party that the latter will complete the original contract. Under the assignment model, aside from the entity that will actually complete the work, the contract itself is unaffected by the assignment. So, an assignment of contract allows the parties to "cure" a potential default before it occurs and, provided that the assignee is acceptable to the obligee and the surety, can result in the seamless completion of the project by the third party assignee.

B. Anti-Assignment Provisions; Federal Assignment of Claims Act

Generally, contract and contract rights are assignable unless certain circumstances apply. For instance, the Restatement (Second) of Contract provides:

> (2) A contractual right can be assigned unless
>
> (a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him, or
>
> (b) the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy, or
>
> (c) assignment is validly precluded by contract.[28]

[28] Restatement (Second) of Contracts § 317; see also, Decatur North Associates, Ltd. v. Builders Glass, Inc., 350 S.E.2d 795, 797-98 (Ga. Ct. App. 1986) (stating that while "'contract rights and duties are generally assignable and delegable . . . , duties may not be delegated where performance by the delegate[sic] would materially vary from the performance required by the original obligor" and that '[c]ontract rights coupled with liabilities, or involving a relation of personal confidence between the parties, cannot be transferred to a third person by one of the parties to the contract without the assent of the other.' ") quoting Dennard v. Freeport Minerals Co., 297 S.E.2d 222, 226 (Ga. 1982) and Cowart v. Singletary, 79 S.E. 196 (Ga. 1913); see also Safelite Glass Corp. v. Fuller, 807 P.2d 677, 682-83 (Kan. Ct. App. 1991) (Kansas case law has

Most, if not all, construction contracts contain anti-assignment provisions requiring obligee consent to any purported assignment. Thus, notice of and consent to the assignment is typically required to effect an assignment of contract.

A key concern for a takeover surety on any project is obtaining an accounting of the remaining contract balance and a commitment from the owner that those funds will be used for completion of the bonded contract. The assignment of those funds to someone other than the contractor, in addition to the assignment of the underlying contract, is particularly problematic in federal contracts because of the Anti-Assignment Act. The relevant statutes prohibit assignments except to financial institutions as defined by the Act, and sureties are not deemed to be financial institutions.[29] The Federal Assignment of Claims Act, or the Anti-Assignment Acts generally void any assignment of a government contract or claim against the government.[30] As indicated above, in connection with federal contracts, the principal should be a party to the takeover agreement and that document should address the surety's right to assert the principal's pre-takeover claims against the government.[31] The courts interpreting the Anti-Assignment Act consistently hold that "[the Anti-Assignment Act] was enacted for the benefit of the United States and if the United States recognizes the assignment, the parties are not in a position to object."[32] Given the Government's

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long supported free assignability of contract rights, except those involving personal and confidential relations to which liabilities are attached) citing Standard Chautauqua System v. Gift, 242 P. 145 (Kan. 1926); Beattie v. State ex rel. Grand River Dam Authority, 41 P.3d 377, 380-81 (Okla. 2002) (contracts are assignable unless the parties expressly provide otherwise); Central Union Bank of South Carolina v. New York Underwriters' Ins. Co., 52 F.2d 823, 824 (4th Cir. 1931) (Most rights under contracts are assignable unless those rights are coupled with liabilities); see also Green v. Camlin, 92 S.E.2d 125, 133 (S.C. 1956); see also Crim Truck & Tractor Co. v. Navistar Intern. Transp. Corp., 823 S.W. 2d 591 (Tex. 1992) (all contracts assignable unless contract relies on skill, character or credit of the parties and may not be assigned without consent).

[29] *See* 31 U.S.C. § 3727(c); 41 U.S.C. § 15(b).

[30] *See* 31 U.S.C. § 3727 and 41 U.S.C. § 15.

[31] *See* 48 C.F.R. § 49.404(d) ("The contracting officer should consider a triparty agreement among the Government, the surety, and the defaulting contractor to resolve the defaulting contractor's residual rights, involving assertion to unpaid prior earnings"). See also Fireman's Fund Ins. Co. v. England, 313 F.3d 1344 (Fed. Cir. 2002) (denying the surety's right to assert, on the basis either of assignment or subrogation, the principal's pretakeover claims against the government, because exercise of the surety's rights were proscribed by the Federal Anti-Assignment Act (41 U.S.C.A. § 15(a)) and Assignment of Claims Act (31 U.S.C.A. § 3727(a)(1)(B)), and by the Contract Disputes Act, under which the claimant must be the "contractor."); Compare In re Safeco Ins. Co. of America, 3-2 B.C.A. (CCH) ¶32341, 2003 WL 21783795 (Armed Serv. B.C.A. 2003) (holding that the government could consent to assignments otherwise barred by the anti-assignment acts, and that such consent was implicit in the government's conduct in failing to object during years of negotiations and audits to the surety's pretakeover claims assigned by the principal).

[32] United Pac. Ins. Co. v. Timber Access Industries Co., 277 F. Supp. 925, 928-29 (D. Or. 1967).

authority to consent notwithstanding the Anti-Assignment Act's provisions, the surety may be able to arrange for the Government to send checks directly to the surety.

Any proposed assignment of a contract for the construction of a Federal project requires more than simply the agreement of the principal contractor and the completing contractor to the assignment with the consent of the owner. The assignment must also comply with that Anti-Assignment Act that prohibits the transfer of government contracts to a third party.[33] The Federal Acquisition Regulation ("FAR") sets out three situations when the government may consent to the transfer of a government contract by approving a novation: (1) the sale of all of a contractor's assets, or the entire portion of the assets involved in performing a contract with a provision for assuming liabilities; (2) the transfer of assets incident to a merger or a corporate consolidation; and (3) the incorporation of a proprietorship or partnership, or formation of a partnership.[34] The first situation is the situation that is generally applicable when a surety is involved in the proposed assignment. As is noted by the language in the FAR, it is not necessary that all of the contractor's assets be transferred to the completion contractor, but that the entire portion of the assets involved in performing a contract be transferred to the completion contractor, which would include all equipment and other hard assets required to perform the contract. Although it is not specifically stated, the Federal government will also look upon a proposed novation more favorably when the employees of the principal contractor will remain on the project as employees of the new completion contractor.

Unfortunately, due to the provisions of the FAR, it can be a lengthy and time consuming process to comply with all of the technical requirements to obtain the consent of the Federal government to the transfer by novation of the contract to a new completion contractor.[35] However, if the parties have a good relationship with the contracting officer on the project and the contracting officer is cooperative, then the procedure can be substantially less burdensome than if the contracting officer requires technical compliance with each and every provision of the FAR for novation. Despite the procedure required to obtain the approval of government to a transfer, the advantages of a novation will often warrant going through this process as it will hopefully allow for the work on the project to continue without any work stoppage, which will reduce delay in completion of the project and the costs incurred by the surety to complete the project. Whether the principal contractor will be released from its obligations under the contract with the government will depend on the facts of the particular situation.

C. Assignment of Contracts under the Bankruptcy Code

The principal's conduct leading up to a performance bond claim, such as failure to satisfy payables, delayed performance on the project and disputes with vendors and the owner, may also lead to the principal filing a voluntary petition for bankruptcy relief. The principal may choose to file under chapter 7 or chapter 11 of the Bankruptcy Code, but in either case, the immediate result for the surety is the same – the project comes to a halt due to the application of the Bankruptcy

[33] *See* 31 U.S.C. § 3727 and 41 U.S.C. § 15.
[34] FAR 42.1204(a)(1)-(2).
[35] *See* FAR 42.1200, *et. seq.*

Code's automatic stay.[36] The automatic stay is a broad injunction which arises immediately upon the filing of a bankruptcy petition and acts to protect the property of the bankruptcy estate from the exercise of remedies by a creditor or a contract counterparty. A creditor seeking relief from the automatic stay must seek permission from the Bankruptcy Court. All property interests of the entity or person filing bankruptcy become property of the bankruptcy estate upon a bankruptcy filing. Consequently, contracts that are not fully completed prior to the bankruptcy filing become property of the debtor's estate and are subject to the automatic stay. The unfinished contract is considered an executory contract, defined by most courts as an agreement where "the obligations of both the bankruptcy and the other party are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other."[37]

Unsurprisingly, a bankruptcy filing may cause a great deal of frustration for the non-debtor parties to an executory contract. The owner-obligee cannot terminate the bonded construction contract and call on the surety to takeover and complete post-petition. The general contractor-obligee may find itself facing significant work disruptions, as the subcontractor-debtor's work will inevitably grind to a halt after the bankruptcy filing, and the path to completion is uncertain. The surety also faces problems as the project delay continuously increases the surety's exposure for liquidated damages and other consequential losses.[38] Consequently, an obligee with a legitimate fear that a defaulted contractor is headed down the path to bankruptcy may be wise to terminate the contract.

Of course, while the unfinished, non-terminated contract clearly constitutes an executory contract, the contract which has been terminated by the non-debtor party may also sometimes be treated as an executory contract. To escape treatment as an executory contract, the termination "must be complete and not subject to reversal, either under the terms of the contract or under state law."[39] Therefore, where termination notice has been given prepetition, but the cure or termination period was set to expire at some point after the bankruptcy filing occurs, courts may treat the underlying contract as an executory contract.[40] Moreover, 11 U.S.C. § 365 of the Bankruptcy Code provides that clauses terminating an executory contract upon a bankruptcy filing or insolvency, often referred to as "ipso facto" clauses, are generally unenforceable. Thus, the parties involved in these contracts must proceed in accordance with the rules set forth in the Bankruptcy Code. To avoid the issues caused by a cure period which has not expired at the time of a bankruptcy filing, the obligee may wish to negotiate with the contractor for a voluntary default and waiver of the cure period.[41]

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[36] 11 U.S.C. § 362.

[37] N.L.R.B. v. Bildisco & Bildisco, 456 U.S. 513 (1984).

[38] *See, e.g.,* 4A Bruner & O'Connor Construction Law § 12:111.

[39] Moody v. Amoco Oil Co., 734 F.2d 1200, 1212 (7th Cir. 1984).

[40] In re Masterworks, Inc., 100 B.R. 149 (Bankr. D.Conn. 1989); In re C.W. Mining Co., 422 B.R. 746 (10th Cir. BAP 2010).

[41] *See* Leo, *Surety Takeover and the Bankruptcy of the Principal*, ABA Tort & Ins. Prac. Section, 2002 Spring Meeting, at 5–6 (May 9, 2002) ("It is unlikely that anyone would challenge the future debtor's waiver of the cure period in the event there is an involuntary bankruptcy filing during what would have been the cure period without the waiver.")

Where the parties are left with an executory contract, the non-debtors to the contract are required under the Bankruptcy Code to perform their obligations under the contract pending assumption, assignment, or rejection of the contract by the debtor. *In re Leslie Fay Companies, Inc.*, 166 B.R. 802 (Bankr. S.D.N.Y. 1994). In a Chapter 7 liquidation, executory contracts are generally rejected sixty (60) days into the bankruptcy case absent special relief from the bankruptcy court, but in a Chapter 11 case, the decision to reject or assume a general executory contract is typically not made until a Chapter 11 plan is confirmed or until the division, assets, or entity which the contract relates to is sold or liquidated.

Section 365 of the Bankruptcy Code governs assumption or rejection of an executory contract. Rejection essentially declares the debtor's intent not to perform its remaining obligations under an executory contract. Upon rejection, the debtor can no longer be compelled to perform, leaving the non-debtor with a breach of contract claim against the bankruptcy estate, which ordinarily will constitute only a general unsecured claim as of the petition date. The end result for the non-debtor in this situation is generally a payment of pennies on the dollar. A debtor may not chose to reject in part and assume in part. Thus, in situations where the executory contract is found to form a part of a series of related agreements, all the agreements will be deemed to constitute a single integrated transaction, requiring that all of such agreements either be assumed or rejected as a group.[42] Bankruptcy courts review the debtor's decision to reject under the business judgment standard. There are two methods by which a debtor may elect to assume an executory contract: (1) by providing notice and an opportunity for the non-debtor counterparty to be heard and obtaining an order from the bankruptcy court permitting assumption; or (2) by confirming a Chapter 11 plan of reorganization providing for assumption upon the effective date of the confirmed plan. If the contract is in default at the time the debtor seeks to assume it, the debtor must promptly cure all monetary defaults and provide adequate assurance of future performance of the debtor's obligations under the contract before assumption will be permitted. Upon assumption, the bankruptcy estate becomes bound by the contract, and all amounts owed by the debtor under the contract thereafter will constitute administrative expense claims, which are generally entitled to be paid in full. A non-debtor counterparty can also file a motion to seek to compel an assumption or rejection of the contract but such relief is extremely difficult to obtain.[43]

Upon assumption, the debtor may assign an executory contract to a third party provided there is adequate assurance of future performance by the assignee of the executory contract. It is the bankruptcy court that ultimately determines whether the proposed assignee meets the standards, not the nondebtor counterparty.[44] Consequently, the construction contract may be

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[42] In re Atlantic Computer Systems, Inc., 173 B.R. 844 (S.D.N.Y. 1994); In re Grede Foundries, Inc., 440 B.R. 497 (Bankr. W.D. Wis. 2010).

[43] 11 U.S.C. § 365(d)(2); In re Physicians Health Corp., 262 B.R. 290 (Bankr. D. Del. 2001).

[44] The use of contract balances by the debtor following assumption is beyond the scope of this paper. However, protecting the money is of great concern to the surety, who may want to obtain an order protecting its rights. This may be done, for example, through a cash collateral order providing that bonded contract funds are trust funds for the benefit and payment of all persons to whom the debtor owes an obligation to under the bonded contract, and providing that if the surety discharges any of those obligations, it has a right to assert a claim of that person to the trust funds.

assigned by the debtor following assumption. On the other hand, the surety bonds are non-assumable financial accommodations and they are not property of the Debtors or their estates.[45]

The bond is non-assignable because the surety has no obligation to assure performance of any party other than its bond principal. The surety issued its bonds in consideration of its principal's agreement to pay premium and to indemnify the surety from all losses and costs incurred by reason of having issued the bonds. The entire burden of payment and performance of the bonded obligation therefore remains with the bond principal, and any arrangement shifting that burden from the bond principal (or otherwise increasing the surety's risk or impairing the surety's rights), by way of an involuntary substitution of principal or otherwise, constitutes a cardinal change in the underlying risk and discharges the bonds.[46]

Despite the fact that bonds are non-assignable financial accommodations, there is a split of authority over whether a surety must move to lift the automatic stay before cancelling the bond. One school of thought believes there is no need to involve the courts because the financial accommodation is non-assumable.[47] The other school of thought finds that although financial accommodations, the bonds may only be cancelled upon a motion to lift the automatic stay.[48] Thus, a surety should seek court approval whenever there is any doubt as to how the Bankruptcy Court would rule on the question.

VII. CONCLUSION

As indicated above, the authors intend by this paper to provide a high level survey of the various issues that may arise in the takeover, tender and assignment process, particularly from the perspective of the duty and/or right to mitigate damages. The obligee is entitled to no more than the performance it bargained for under the bonded contract (subject to the terms of the bond), and the surety is entitled to minimize its liability by selecting the lowest cost method of performance within the limited period of time within which it has to investigate the claim. These perspectives should guide both claims professionals and counsel in determining the means and method of performance, and in negotiating issues that arise in the takeover, tender or assignment process. If the surety and the obligee approach any performance demand from these perspectives, they may be more likely to achieve a construction solution that mitigates loss to both parties and minimizes the number of legal issues for disposition at project close-out and beyond.

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[45] *See* 11 U.S.C. § 365(c)(2); *see* In re Wegner Farms Co., 49 B.R. 440, 4440 (Bankr. N.D. Iowa 1985); *See also* Matter of Edwards Mobile Homes Sales, Inc., 119 B.R. 857, 859 (Bankr. M.D. Fla. 1990) (surety bonds are financial accommodations and cannot be assumed); See Matter of Lockard, 884 F. 2d 1171, 1177 (9th Cir. 1989); In re Mansfield Tire and Rubber Co., 660 F. 2d 1108, 1115 (6th Cir. 1981) (the surety bonds not property of the estate); In re McLean Trucking Co., 74 B.R. 820, 826 (Bankr. W.D.N.C. 1987) (surety bond is not property of the debtor's estate).

[46] *See* Restatement (Third) of Suretyship & Guaranty, § 37, 41.

[47] *See* In re Sun Runner Marine, Inc., 945 F.2d 1089 (9th Cir. 1991).

[48] *See* Matter of Edwards Mobile Home Sales, Inc., 119 B.R. 857 (Bankr. M.D. Fla. 1990).

PANEL 2

Know When to Walk Away, Know When to Run – Strategic Use of Surety Defenses

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“Know When to Walk Away, Know When to Run”

Strategic Use of Surety Defenses

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Every surety professional eventually faces the same moment: the bond claim arrives, the clock starts ticking, and the pressure to respond builds. It’s not unlike sitting at a poker table and being dealt a hand except instead of cards, you’re looking at project records, contract documents, and hastily prepared demands. Some hands are strong, some are weak, and most are somewhere in between. The challenge isn’t just knowing what you’re holding, it’s knowing how to play it.

Sureties are often expected to make fast, defensible decisions under imperfect conditions. The statutory and contractual frameworks governing bond claims don’t always allow for nuance or delay. Yet, the decision to assert a defense, especially a denial of liability, can be the first move in a long, costly game. It may trigger litigation, harden the other side’s position, or force the surety into a posture that becomes difficult to unwind later. Like an early bet at the table, it sends a message and commits resources, sometimes before you know what the rest of the board looks like.

This paper is about how to play that hand wisely. Drawing from recent experience across a range of claims and jurisdictions, we offer practical guidance on evaluating and asserting surety defenses with strategic judgment. We look at when to speak up, when to hold back, and how to avoid overplaying weak positions. From spotting issues early, to managing discovery, to making the most of summary judgment and understanding when you’re “pot-committed,” our goal is to help sureties and their counsel make more informed, disciplined decisions.

Defenses are vital, but they're not without cost. Winning in surety litigation isn't just about being right on the law, it's about playing the game with patience, precision, and purpose. Because in this business, knowing when to walk away, and when to run, can make all the difference.

1. Spotting the Defense Early Is Critical

The earlier a surety identifies potential defenses, the more leverage it retains to resolve the claim efficiently. Early recognition allows the surety to engage in focused investigation, seek indemnitor cooperation, and potentially shape the project narrative.

An essential first step in identifying viable defenses is to carefully read the bond itself. While this may seem elementary, the specific language of the bond, whether it's an AIA, federal Miller Act, state statute-compliant or custom form, can dramatically alter the surety's obligations and available defenses. Courts construe surety bonds strictly, and nuances in notice requirements, performance triggers, and incorporated contract terms can make or break a defense. A clear understanding of what the bond does and does not cover is critical to any early evaluation and should never be assumed or glossed over.

Over time, the surety claims professional encounters common early indicators of potential defenses, including:

- Timing/notice issues
- No declaration of default/termination (where required)
- Failure of conditions precedent
- No bond coverage
- Improper claimant
- Obligee breach

Because these defenses are often unique to the surety, reliance on the bond principal for an analysis of possible defenses is not recommended.

As with poker, the real challenge isn't just identifying a viable defense (or a good hand), it's deciding when and how to assert it (or play that hand). Timing and tone are everything. Assert a defense too late, and you risk being accused of "sandbagging" or withholding information to gain leverage. Assert it too early, especially alongside a settlement offer, and you may be accused of acting in bad faith, using a denial as a pressure tactic. These conflicting dynamics highlight the importance of strategic judgment and careful communication when raising defenses in surety claims.

Experience teaches that deciding to assert a surety defense does not always result in closing a claim file. Indeed, denial letters are often met with lawsuits, which is an additional factor that needs to be considered when analyzing potential surety defenses.

2. Developing the Defense Is Costly

While asserting a defense in a denial letter may seem straightforward, developing that defense into a litigable position often proves expensive. Surety lawyers tend to charge lower than market hourly rates, however, even reasonable fees can prove to be more expensive than the claim warrants.

Turning a theoretical defense into a viable litigation strategy typically involves retaining an attorney, consultants or expert witnesses, conducting forensic schedule analysis, reviewing voluminous project records, and taking fact and expert depositions. These efforts come with significant legal fees and resource demands.

As a result, sureties and their counsel must engage in a candid cost-benefit analysis before proceeding down that path. Consider not only the likelihood of success but also the financial exposure if the defense fails, the potential for adverse findings that may undermine other defenses, and whether the defense meaningfully improves the surety's negotiating posture. In many cases, the marginal value of developing a defense may be outweighed by

the cost and complexity of pursuing it. Disciplined decision-making at this stage is essential to avoid over-litigating positions that are more strategic than substantive.

3. Assertion of Defenses Escalates Conflict

Denying a claim on substantive grounds nearly always hardens the claimant's position. The moment a surety takes a firm stance, particularly on a performance bond claim, it reframes the relationship from cooperative problem-solving to adversarial positioning. This effect is magnified when the claimant is a public agency or large general contractor, entities that often operate under political pressure, procurement constraints, or internal policies that discourage compromise once formal positions are taken.

In many cases, a substantive denial, no matter how defensible, can prompt the obligee to accelerate litigation, stop cooperating, or even declare the principal in default if it hasn't already. This escalation is not always tied to the strength or weakness of the underlying defense, but rather to the optics and institutional momentum that follow a denial.

For the surety, this dynamic creates a significant litigation risk: asserting a legitimate defense too early can close off practical avenues for resolution, escalate tensions, and make it more difficult to obtain information that could clarify the dispute or even strengthen the surety's position. However, it's important to recognize that the timing and form of a claim denial are often dictated by state regulatory frameworks, including statutory deadlines and mandatory response formats. These rules may leave little room for nuance or delay, and failure to comply can itself create exposure or be framed as evidence of bad faith.

This paper focuses primarily on litigation strategy, how and when to develop and assert defenses in a way that supports a favorable resolution, minimizes cost, and preserves credibility in front of a judge, arbitrator, or jury. Where timing is discretionary, sureties and counsel should carefully consider not just the legal merit of the defense, but the broader consequences of asserting it, particularly in disputes involving public entities or politically sensitive projects. In such cases, it may be more effective to reserve formal defenses,

continue gathering facts, and explore resolution options through informal dialogue, striking a balance between protecting rights and maintaining flexibility.

4. Winning on Summary Judgment Is a Coin Toss

Summary judgment is often viewed as the holy grail of surety litigation, a means to short-circuit expensive discovery and trial by obtaining early judicial relief. In theory, it offers a clean opportunity to test the legal sufficiency of the claimant's position and narrow the issues in dispute. In practice, however, prevailing at summary judgment is the exception, not the rule.

Success hinges on multiple factors: the nature of the defense, the evidentiary record, the procedural posture of the case, and the tendencies of the court or arbitrator handling the matter. Depending on the jurisdiction, trial courts are often hesitant to grant dispositive motions in cases involving nuanced performance issues or disputes that turn on credibility, especially where public entities or equitable considerations are involved. Arbitrators, for their part, often view summary judgment as incompatible with the flexible and informal spirit of arbitration, and may deny motions outright or defer ruling until after the hearing.

Courts also tend to resist granting summary judgment in favor of a surety based on technical defenses such as notice requirements, failure to satisfy conditions precedent, or arguments hinging on ambiguous contract terms—particularly where the practical effect would be to deny a claimant their day in court. Even in federal court, where procedural rules are more favorable to early disposition, judges often prefer to let factual disputes around delays, performance quality, or project mismanagement play out at trial or hearing.

Although the odds of prevailing on a summary judgment motion are slim, particularly in performance or payment bond disputes involving contested facts, the procedural act of filing such a motion can serve a powerful strategic function in litigation. A well-timed and well-supported motion forces the claimant to organize and disclose the evidentiary foundation of their case, often surfacing weaknesses or inconsistencies that were not

previously apparent. This process can reset expectations, reframe the dispute, and create momentum toward resolution.

Even if the motion is ultimately denied, or not ruled upon until later in the proceeding, it can provide meaningful leverage. The mere existence of the motion may apply pressure on the claimant, challenge assumptions about the surety's willingness to litigate, and force internal discussions about litigation risk. In some cases, it prompts a reassessment of inflated damage models or weak causation theories. In others, it encourages narrowing of claims or constructive engagement in mediation.

From the surety's perspective, the motion may also have tactical value in signaling seriousness, shifting the tone of negotiation, and preserving issues for appeal. Importantly, summary judgment should not be viewed solely through the lens of winning or losing the motion, but rather as a procedural device that can materially influence the course and cost of litigation.

5. Being "Pot-Committed" Post-MSJ Can Be Painful

The denial of a summary judgment motion often marks a strategic inflection point in surety litigation, one that rarely favors the surety. By the time the motion is fully briefed and argued, substantial legal fees have been incurred, internal resources expended, and expectations set. The surety may feel "pot-committed" or stuck playing a losing hand because folding seems like throwing good money after bad.

A denial can have the psychological effect of validating the claimant's theory of recovery, emboldening their posture, and solidifying their intent to take the matter through trial or arbitration. From a negotiation standpoint, this often marks the point of maximum entrenchment.

For the surety, the sunk costs are just the beginning. If extensive discovery has already taken place, there may be limited strategic flexibility left. Worse, the adverse ruling may have clarified weaknesses in the surety's position or validated certain aspects of the claimant's case, shifting the balance of leverage. Once a surety has "shown its hand" through

dispositive motion briefing, it may be difficult to walk back those arguments or pivot without undercutting credibility.

Additionally, post-MSJ settlements tend to come at a premium. Claimants often recalibrate their expectations upward following a favorable procedural outcome, making compromise more difficult. The recalibration often involves the inclusion of fees and costs that were not previously part of the claimant's demands.

The surety, having invested heavily in litigation and now facing the looming cost of trial or arbitration, may feel compelled to overpay simply to limit further damage. The net result is a frustrating paradox: the parties are closer to trial than ever, but further from resolution.

6. Lessons from the Field: Defenses Worth Watching

While many surety defenses are well-established in theory, their real-world application requires creativity, fact development, and a clear understanding of how courts and arbitrators are currently treating them. Some defenses continue to evolve or gain traction depending on jurisdictional trends, project delivery models, and shifting claimant strategies. Our panel has identified several defenses that, while not novel in name, continue to present rich opportunities, or hidden pitfalls, when deployed strategically.

- **Material Breach by the Obligee:** A performance bond is not an insurance policy, it is a conditional obligation. A growing number of courts are willing to entertain the surety's argument that material breaches by the obligee (such as overpayment or improper payments, hindrance, material alteration of the contract/cardinal change, lack of notice or opportunity to cure, or failure to meet bond and/or contractual preconditions) may discharge or limit the surety's obligations. Proving material breach, however, requires a detailed record and often expert support. This defense is fact-intensive and must be carefully developed to survive dispositive motion or trial scrutiny.
- **Damages:** An often overlooked but potent defense centers on challenging the amount and legitimacy of the claimed damages. Many bond claims are

supported by lump-sum demands, inflated completion costs, or soft cost categories that are difficult to verify. Sureties should scrutinize damage models, verify causal links, and require the claimant to prove up its numbers with admissible evidence. This can lead to significant reductions in exposure, even if liability is ultimately established.

- **Wrongful Termination:** In performance bond claims, a principal's termination is the trigger event for the surety's liability. When that termination is arguably pretextual, premature, or executed without compliance with contractual default procedures, the surety may be able to assert wrongful termination as a complete or partial defense. Courts vary in how they apply this doctrine, and the surety may still face an obligation to investigate or mitigate. But where supported by the record, this defense can reframe the dispute and shift liability back onto the obligee.
- **Licensure Defenses**: Particularly relevant in states like California, where unlicensed contractors are statutorily barred from recovering compensation for work performed without proper licensing. These defenses can be dispositive and raise questions not only about the principal's standing, but also whether the underlying contract is void or voidable. The scope of work covered by the license, the timing of licensure, and whether exemptions apply can all become critical issues.

Each of these defenses has appeared in recent cases we've handled, and each has its own legal, procedural, and strategic considerations. Our goal in highlighting them is not just to flag legal theories, but to share lessons learned about what worked, what didn't, and what may be worth trying again under different circumstances.

Conclusion: Playing the Hand You're Dealt

Surety litigation, like poker, is a game of incomplete information, evolving strategy, and calculated risk. The best surety professionals are not just technicians of contract law or

masters of procedural rules, they are card players at heart, reading the table, managing risk, and knowing when to press and when to fold.

Sometimes, you're dealt a strong defense like clear notice failures, improper claimants, or a textbook license violation. Other times, you're holding a marginal hand: a colorable material breach argument or a damages theory that requires real investment to develop. In both cases, success depends not only on the cards, but on how, and when, you play them.

Raise too soon with a denial letter, and you may spook the other side into litigation. Wait too long, and you risk losing credibility or missing a strategic opportunity to settle. Make a bold move with summary judgment, and you might gain leverage, or find yourself pot-committed, with no good exit.

This paper does not suggest that sureties should bluff or shy away from asserting valid defenses. On the contrary, we believe the defense playbook is essential to protecting the surety's interests. But defenses are tools, not trophies. Winning in this space requires discipline, timing, and the humility to fold a weak position when the odds don't justify the bet.

The goal is not to win every hand, but to play smart over the course of the dispute, minimize unnecessary losses, and walk away with more chips than you started with. Knowing when to walk away, and when to run, is what separates a skilled professional from a reckless one.

We hope this discussion helps refine your instincts, sharpen your analysis, and ultimately improve your results at the surety litigation table.

PANEL 3

You Never Count Your Money While You're Sittin' at the Table –

Targeted and Exposed:
The Growing Cyber Threat to Sureties in the Age of BEC

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Targeted and Exposed: The Growing Cyber Threat to Sureties in the Age of BEC

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July 9, 2025

Introduction

Business Email Compromise (BEC) is one of the most rapidly evolving and financially devastating forms of cyber-enabled fraud—and sureties are increasingly in the crosshairs. These schemes exploit the very traits that define surety practice: trust, relationships, and the exchange of sensitive financial and project-related information. Rather than relying on brute-force hacking or software vulnerabilities, BEC attacks are rooted in psychological manipulation, email spoofing, and social engineering—subtle tactics designed to infiltrate routine communication and redirect funds or confidential data into the hands of criminals.

Sureties occupy a uniquely vulnerable position in this cyber landscape. As trusted intermediaries, sureties often facilitate communications between contractors, obligees, lenders, and consultants. That trust—so essential to performance and payment bonding—can also make sureties prime targets. A compromised email or falsified instruction from a surety can trigger a cascade of damages, not only to the surety itself, but to all parties relying on its representations. According to the FBI's Internet Crime Complaint Center (IC3) and the National Association of Insurance Commissioners (NAIC), BEC scams are among the most financially damaging cybercrimes reported in the United States—and the risk to sureties is real and growing.

These bad actors don't need to break through firewalls—they rely on timing, access, and trust. And their tactics are becoming more sophisticated by the day. BEC schemes no longer stop at forged emails. Criminals now employ deepfake audio and video, AI-generated identities, and cloned voices to impersonate executives, attorneys, and project stakeholders—making traditional "call-to-confirm" protocols increasingly unreliable.

For sureties, the consequences go far beyond the redirection of funds. Trade secrets, payment instructions, internal communications, and privileged project documentation are all at risk. Moreover, the compromise of a surety's communications platform can be used to attack others—placing additional legal and reputational exposure on the surety. Even when the surety is not the primary target, it can suffer collateral damage when a contractor, obligee, or third-party consultant is breached and bond-related information is stolen.

Cyber risk is reshaping the rules of engagement in the surety industry. It is no longer enough to rely on long-standing practices and personal relationships. Sureties must now proactively address these threats by educating staff, hardening systems, scrutinizing communications, and developing modern verification protocols. In today's digital environment, cyber-related issues are not a peripheral concern—they are a core operational risk. And prevention remains the surety's best line of defense.

Understanding Business Email Compromise

A typical BEC attack begins with a phishing email containing a malicious attachment or link. Phishing allows a bad actor to gain access to your computer primarily through social engineering—tricking you into taking an action that opens the door to malware or credentials theft. For example, you receive an email that appears to be from a trusted source—your bank, a colleague, or a service like Microsoft or DocuSign. It contains a link (often urging urgent action, such as "click here to verify your account"). When clicked, the link may lead to (1) a fake login page designed to harvest your credentials, or (2) a website that automatically downloads malware onto your system (known as a drive-by download) Phishing emails may include attachments labeled as invoices, contracts, or reports (e.g., PDF, Word, Excel, ZIP files). When you open them, they exploit software vulnerabilities (e.g., in Adobe Reader or Microsoft Office), run hidden macros or scripts that install malware, deploy Remote Access Trojans or keyloggers to monitor your activity or give full system access to the bad actor If your login credentials are harvested, the bad actor can log in to your email account, move laterally to access other internal systems, and impersonate you to compromise your organization further. Once the bad actor has access he may create Outlook rules to monitor ongoing communications without detection, such as to hide or redirect emails, install backdoors for persistent access, sync your entire email inbox and outbox, create privileges to gain access to sensitive systems, and begin reconnaissance to time their next move (like inserting themselves into an ongoing financial transaction).

After identifying a financial transaction, the bad actor intervenes, impersonating a trusted party and providing fraudulent wiring instructions. Often, the bad actor uses a lookalike domain name to avoid suspicion (e.g., @3brothers.com instead of @threebrothers.com). These messages are timely, polished, and frequently AI-enhanced to mimic legitimate internal correspondence, significantly increasing their believability. The fraudulent wiring instructions typically arrive in what appears to be a routine and credible email, sent from what the recipient believes is a trusted vendor, law firm, or executive. The message may even include a professional-looking signature block with a phone number "for questions." If the recipient calls that number, someone may actually answer, impersonating the known contact and verbally confirming the wire instructions. Increasingly, AI-based voice cloning tools are being used to mimic the voices of CEOs, financial officers, or attorneys with remarkable accuracy, further reinforcing the illusion. Trusting what seems to be a legitimate confirmation from a familiar contact, the victim wires the funds to the account provided in the message. It is often only days later, when the real vendor or partner inquires about a missed payment, that the fraud is discovered. By then, the funds have typically been transferred through multiple accounts, often overseas, and are impossible to recover. Most banks are unable to reverse the transaction once the wire has been processed, especially if it is not reported immediately through law enforcement channels.

While theft of funds through fraudulent wire transfers is one of the most visible and well-publicized outcomes of a BEC attack, it is by no means the only—or even the most damaging—form of loss. In many cases, bad actors use the same techniques to access and

exfiltrate intellectual property, proprietary pricing information, project documentation, or confidential communications. These types of breaches can be just as harmful as financial fraud, particularly in the surety context, where exposure of sensitive bid data, indemnity agreements, or claim strategy may compromise entire projects or trigger broader liability. The loss of trust, reputational damage, and strategic disadvantage caused by such breaches can leave lasting impacts that extend well beyond the immediate incident. For sureties, recognizing the full scope of BEC risk—including non-monetary data theft—is essential to implementing effective defenses.

Financial Impact

In 2024 alone, BEC scams resulted in over $2.77 billion in reported losses across more than 21,000 complaints, according to the FBI's Internet Crime Complaint Center. However, this figure likely represents only a fraction of the true financial impact. Many incidents—particularly those involving reputational damage or internal failures—go unreported due to embarrassment, lack of legal recourse, or concerns over liability. As a result, the actual losses attributable to BEC schemes are believed to be significantly—if not exponentially—higher than what official data reflects.

Expanding Threat Vectors: Beyond Email to Deepfakes and Real-Time Deception

BEC schemes have become increasingly sophisticated, expanding beyond email to exploit real-time communication platforms such as WhatsApp, Zoom, Microsoft Teams, and similar tools. Cybercriminals now leverage artificial intelligence to create synthetic media—including deepfake audio and video—that convincingly impersonate trusted individuals. These evolving tactics undermine traditional verification methods, requiring sureties and their partners to adopt more resilient, multi-layered cybersecurity strategies.

AI-driven impersonation enables threat actors to clone voices using just a few audio samples, making it possible to place phone calls or send voice messages that sound strikingly authentic. Video deepfakes have also been used to stage fraudulent video conferences, during which employees are misled into authorizing wire transfers or disclosing sensitive information. In one high-profile incident, a Hong Kong employee was duped into transferring $25 million after participating in a video call featuring deepfaked likenesses of senior executives.

As these threats continue to evolve, effective defense demands more than technological upgrades. Sureties must ensure that policies, training protocols, and communication procedures are regularly updated—and that personnel are trained to recognize subtle anomalies in tone, behavior, or context that could indicate fraud. Vigilant human oversight, combined with secure infrastructure, remains critical to detecting and disrupting deception in real time.

BEC Threats in Surety Practice: Where the Risks Lie

Sureties operate in a communication-heavy, document-intensive environment that involves a wide network of stakeholders—principals, obligees, subcontractors, consultants, completion contractors, lenders, and vendors. This volume of interaction creates multiple points of exposure to BEC schemes. The risk is not theoretical; it is real, persistent, and growing more sophisticated by the day.

Sureties are particularly vulnerable in several ways:

- Impersonation of subcontractors or vendors: BEC actors may send fraudulent invoices or payment requests, appearing to come from trusted subcontractors or suppliers. These may include updated banking instructions or other subtle deviations that, if not caught, result in misdirected funds.
- Manipulation of post-default communications: When managing completion funds or disbursing progress payments after a principal's default, sureties often rely on email communications for payment instructions, lien waivers, and invoice approvals. A single compromised email account—whether from a consultant, owner of the project, project manager, or contractor—can derail the process and result in significant financial loss.
- Interception or falsification of bond claim correspondence: During the investigation and resolution of a bond claim, the surety may exchange critical documents, directives, and payment approvals with multiple parties. Email impersonation or compromised accounts can lead to the transmission of fraudulent documents or misdirection of funds.
- Use of the surety as an attack vector: Cybercriminals may also exploit the trust placed in the surety's identity and communications to infiltrate other parties in the project chain. A compromised surety account or spoofed domain can be used to impersonate the surety, thereby gaining access to attorneys, consultants, obligees, or contractors who might otherwise be difficult to breach. In this way, the surety becomes an unwitting conduit for expanding the scope and success of the attack.

Practical Risk Mitigation Strategies for Sureties

Given the evolving nature of BEC threats, cybersecurity is no longer an optional consideration for sureties—it must be fully integrated into claims handling, project administration, and internal operations. Protecting against cyber fraud requires both technical safeguards and process-driven protocols that extend across the surety's internal team and its network of consultants, vendors, and indemnitors.

One of the most alarming developments is the erosion of traditional verification safeguards. Historically, a simple phone call—"call to confirm"—was considered a gold standard when validating wire instructions or sensitive communications. That safeguard, however, is now under direct attack. Cybercriminals have begun to deploy deepfake voice and video technology to impersonate executives, attorneys, or project managers. With just a few seconds of publicly available audio—often taken from voicemail greetings, webinars, or prior conversations—AI tools can replicate a trusted voice and place a convincing phone call to confirm fraudulent wire instructions.

This type of deception is designed specifically to defeat the very verification protocols that were implemented to prevent fraud. In today's environment, voice confirmation is no longer sufficient unless it comes from a contact who has been verified through independent means, completely separate from the original email request. Calling the phone number provided in a suspicious or last-minute email change—no matter how familiar it appears—may only serve to further the scheme.

To mitigate these evolving risks, sureties must adopt layered, modernized protocols that go beyond traditional practices. The following strategies are essential components of a comprehensive cyber risk mitigation plan:

1. Verification Protocols: Always require out-of-band confirmation for any changes to payment or wire instructions. Maintain a list of independently verified contacts whose identities and phone numbers have been confirmed outside of email. Never rely on contact information provided within an email requesting the change.
2. Dual Authorization: Require dual approval for all significant financial transactions, especially in takeover scenarios or high-risk claim environments.
3. Employee Training and Awareness: Provide regular cybersecurity training, including phishing simulations and threat awareness briefings, to ensure personnel can recognize suspicious behavior and understand evolving BEC tactics.
4. Device and Account Security: Enforce strong password policies, multi-factor authentication (MFA), regular software patching, and endpoint protection tools across all devices accessing sensitive surety systems or communications.
5. Data Protection Measures: Encrypt sensitive files both in transit and at rest, and implement secure, scheduled backups to reduce the risk of data loss or ransom demands.
6. Network Integrity: Ensure that all team members use secure, password-protected routers and avoid public Wi-Fi when accessing sensitive systems or communicating about bonded projects.
7. Contractual Safeguards: Revisit and revise consultant, vendor, and completion agreements to include specific definitions of cyber events, indemnity for cyber-related losses, and notification requirements. Likewise, update General Indemnity Agreements (GAIs) to explicitly address cyber fraud and social engineering schemes.
8. Third-Party Risk Management: Vet the cybersecurity protocols of all outside parties with access to bond-related information—this includes consultants, attorneys, IT vendors, and project participants. Confirm that they have controls in place and that their practices align with industry standards.

By embedding these practices into their operational framework—and by abandoning reliance on outdated verification methods—sureties can significantly reduce their exposure to BEC-related losses and strengthen their resilience in an increasingly deceptive and technology-driven threat landscape.

A Shifting Legal Landscape

As BEC incidents increase in frequency and complexity, courts are increasingly being asked to determine how liability for fraudulent wire transfers should be allocated among the parties involved. These determinations are highly fact-specific, with courts applying a form of comparative fault analysis—similar to tort law—that examines which party was best positioned to prevent the fraud. This equitable framework goes beyond traditional negligence or contract doctrines, focusing instead on each party's practical ability to detect red flags, prevent compromise, and mitigate loss.

Sureties—for example, when managing project funds, administering completion contracts, or responding to bond claims—are no exception. Courts will judge sureties under this same "best positioned to prevent" lens. In doing so, courts frequently evaluate:

1. Did the surety or its representatives educate staff and consultants about phishing risks and suspicious communications?

2. Did a failure in cybersecurity training result in unauthorized access to email accounts or confidential claim information?

3. Were adequate technical safeguards in place to detect malware or prevent email spoofing?

4. If the surety's systems were compromised, was there prompt notice given to potentially affected parties?

5. Did the surety or another party issue a timely warning when a risk of fraudulent ACH or wire instructions became known?

6. Were there indicators in the fraudulent communication—such as inconsistent email domains or altered tone—that should have triggered concern?

7. Did anyone involved receive conflicting instructions but fail to verify them through an independent and secure method (not relying on information within the questionable email)?

8. Were established verification protocols followed, or did someone deviate from internal safeguards?

Courts are increasingly unwilling to excuse parties that fail to implement and follow reasonable verification procedures or basic cybersecurity measures. This legal standard rewards vigilance—and penalizes complacency. For sureties, that means robust training, documented protocols, and strict adherence to best practices are not only prudent risk management—they may also serve as critical defenses against liability in a post-fraud lawsuit.

Illustrative Case Law

1. *Arrow Truck Sales, Inc. v. Top Quality Truck & Equipment, Inc.,* 2015 WL 4936272 (M.D. Fla. 2015).

In *Arrow Truck Sales v. Top Quality Truck & Equipment*, the U.S. District Court for the Middle District of Florida addressed a contract dispute arising from a business email compromise that resulted in Arrow wiring $570,000 to a fraudster rather than to Top Quality for the purchase of twelve semi-trucks. Both parties' email accounts were infiltrated during the transaction, and fraudulent wiring instructions were sent from seemingly legitimate email addresses. Arrow mistakenly followed the bogus instructions and later sued Top Quality for breach of contract, fraud, and negligence after Top Quality refused to deliver the trucks due to nonpayment. After a bench trial, the court found that Arrow, not Top Quality, bore the loss and denied all of Arrow's claims. Applying UCC § 3-404(d) and the "imposter rule," the court held that the party in the best position to prevent the fraud must suffer the loss. The court concluded that Arrow's agent, Lombardo, had more opportunity to detect the fraud based on obvious red flags—such as changes in the payee name, bank, location, and account details—and failed to verify the wire instructions, even after receiving legitimate instructions later that same day. In contrast, the court found that neither Lombardo nor Top Quality's agent (Gelfo) had been negligent in maintaining their email accounts, and both were victims of sophisticated third-party fraud. Further, the court held that Top Quality did not act fraudulently in sending preliminary titles or in structuring the deal, as this practice was consistent with industry norms. The court also found that Top Quality mitigated its damages by reselling the trucks at the same price to another buyer shortly after the fraud. Thus, while Arrow breached the contract by failing to make proper payment, Top Quality suffered no damages as a result. The court entered a final judgment in favor of Top Quality and against Arrow.

This decision is often cited for its comparative fault framework in BEC disputes, underscoring that failure to verify conflicting wire instructions can be a decisive factor in allocating losses in cases of fraud-induced payments.

2. *Beau Townsend Ford Lincoln, Inc. v. Don Hinds Ford, Inc.,* 759 F.App'x 348 (6th Cir. 2018).

In *Beau Townsend v. Don Hinds Ford*, the Sixth Circuit reversed the district court's grant of summary judgment in favor of Beau Townsend in a case involving a business email compromise that caused a $736,225 payment to be diverted to a fraudster. The dispute arose after Don Hinds purchased twenty Ford Explorers from Beau Townsend, but, due to fraudulent wire instructions sent from a hacker who had infiltrated Beau Townsend's email system, wired the funds to a third party. Although Don Hinds believed it had been paid, Beau Townsend never received the funds. The district court awarded summary judgment to Beau Townsend on the breach of contract claim, finding Don Hinds liable to pay a second time. However, the Sixth Circuit held that the district court erred by failing to properly analyze the complex factual and legal issues. The appellate court emphasized that the loss allocation hinged on factual questions that a factfinder should resolve. Specifically,

the factfinder must assess whether either party failed to exercise ordinary care and whether such failure contributed to the success of the fraud. The court discussed principles of mutual mistake, comparative fault under the UCC (particularly Articles 3-404 and 3-406), and agency by estoppel, all of which support allocating losses to the party best positioned to prevent the fraud. It found there was evidence that both Beau Townsend and Don Hinds may have acted negligently—Beau Townsend in failing to detect the compromised email account, and Don Hinds in not verifying unusual wire instructions. Because these issues involve credibility and factual disputes, including conflicting testimony about prior communications and the legitimacy of wire instructions, summary judgment was inappropriate. The case was remanded for trial so that a jury could determine comparative fault and apportion liability based on the parties' respective roles in enabling the fraud.

3. *Jetcrete N. Am. LP v. Austin Truck & Equip.,* 484 F. Supp. 3d 915 (D. Nev. 2020)

In *Jetcrete v. Austin Truck & Equipment*, the District of Nevada held a bench trial to resolve whether a seller (Austin) or a buyer (Jetcrete) should bear the loss when a hacker used a compromised email account to send fraudulent wire instructions, leading Jetcrete to wire $512,124.18 to a third party unknowingly. Although Jetcrete sought to hold Austin liable for breach of contract, negligence, and agency by estoppel, the court entered judgment in favor of Austin, finding that Jetcrete was in the best position to avoid the loss. The court acknowledged Jetcrete's entitlement to an adverse inference—due to Austin's failure to preserve key data that might have shown how the hacker accessed its email system—but ultimately found that Austin had taken reasonable security steps, such as hiring an IT consultant and hosting its email platform with a third-party provider. The court emphasized that even if Austin's conduct was negligent, Jetcrete also failed to exercise ordinary care. Jetcrete received conflicting wire instructions—one legitimate and one fraudulent—within minutes of each other and did not verify the updated instructions by phone, despite warning signs such as grammatical errors and formatting inconsistencies. The court applied principles from UCC § 3-404 and the "best-position-to-prevent-the-loss" rule, concluding that Jetcrete bore primary responsibility for the loss due to its failure to confirm payment details. The court also rejected Jetcrete's "agency by estoppel" theory, finding that Austin did not intentionally or carelessly lead Jetcrete to believe the hacker was its agent. Because Jetcrete failed to prove Austin breached the contract or acted negligently under Nevada law, the court entered judgment in favor of Austin on all claims.

4. *J.F. Nut Co. v. San Saba Pecan, LP,* 2018 WL 7286493 (W.D. Tex. 2018)

In *J.F. Nut v. San Saba Pecan*, the U.S. District Court for the Western District of Texas denied both parties' motions for summary judgment on a contract dispute arising from a business email compromise scam. J.F. Nut, a Mexican wholesale nut supplier, claimed that a hacker infiltrated its email and sent fraudulent revised wiring instructions to San Saba, a Texas-based pecan reseller. San Saba, unaware of the fraud, wired over $1 million to the wrong account. J.F. Nut never received the funds and sued for breach of contract and related claims, while San Saba countered with a conditional negligence claim. The court acknowledged that the pecan sales were governed by an enforceable contract and that San

Saba had accepted the goods. However, the central question was who should bear the loss for the misdirected payments. The court found that traditional contract principles and Texas's version of the UCC did not clearly resolve the issue. Relying on persuasive out-of-state precedent, including *Arrow Truck Sales v. Top Quality Truck & Equipment*, the court concluded that liability should be allocated based on comparative fault—i.e., which party was in the best position to prevent the fraud by exercising reasonable care. Because this fact-intensive inquiry involves disputed issues—such as whether J.F. Nut had constructive knowledge of the hack or failed to take adequate steps to secure its system—the court held that the question must be submitted to a jury.

5. *Galaxy Int' l v. Merchants Distributors,* 2023 WL 4949864 (W.D. Pa. 2023).

In *Galaxy International, Inc. v. Merchants Distributors, LLC*, the U.S. District Court for the Western District of Pennsylvania denied Galaxy's motion for summary judgment in a case involving a business email compromise that led Merchants to send payment to a fraudster's bank account. Galaxy claimed Merchants breached their contract by failing to verify new ACH instructions sent from a compromised Galaxy email account. However, the court held that numerous genuine disputes of material fact precluded summary judgment and must be resolved by a factfinder. Specifically, the jury must determine: (1) whether Galaxy had sufficient email security; (2) when Galaxy knew or should have known about the email compromise, given an earlier similar incident involving Shuler Meats; (3) whether Galaxy acted reasonably by not alerting Merchants until nearly a week later; (4) whether Merchants should have verified the ACH instructions before paying; (5) whether Merchants had a relevant internal policy for verifying such instructions; and (6) whether Merchants' actions were reasonable in light of its knowledge of similar fraud schemes affecting a related entity. The court also declined to apply the UCC's "imposter rule," noting its inapplicability to ACH transfers and emphasizing that Pennsylvania law requires these fact-intensive issues—such as reasonableness, notice, and mitigation—to be resolved at trial.

Outpaced by Innovation: Legal Precedent Lags Behind Sophisticated Cybercriminals

While cases like *Arrow Truck Sales v. Top Quality Truck & Equipment*—along with the other illustrative decisions discussed above—offer useful guidance on how courts have historically allocated liability in BEC-related disputes, they reflect a legal framework that is rapidly being outpaced—not only by technological advancements, but also by the ingenuity and adaptability of the individuals carrying out these schemes. Courts have traditionally focused on whether a party took reasonable steps—such as verifying wire instructions by phone or recognizing red flags in email communication. But today's cybercriminals are not simply relying on off-the-shelf tools. They are studying organizational behavior, anticipating verification procedures, and designing attacks to bypass even the most diligent protocols.

Armed with artificial intelligence, voice-cloning software, and deepfake technology, these actors are crafting personalized, high-stakes deception campaigns. They mimic writing styles, infiltrate real email threads, and now convincingly replicate the voices and faces of

trusted executives or legal counsel. The result is an attack that doesn't just slip past firewalls—it defeats the very human processes courts have long viewed as reasonable safeguards.

What happens when a party does everything "right"—calls to confirm, follows internal protocols—and is still deceived by a synthetic voice indistinguishable from the real thing? That question remains unanswered. As courts continue to rely on precedent grounded in less sophisticated threats, they have not yet fully addressed how to assign fault in this new environment.

Sureties and their counsel must recognize that legal standards are in flux. The definition of "reasonable care" is evolving—faster than many court decisions can keep up.

Cyber Insurance Considerations for Sureties

The National Association of Insurance Commissioners (NAIC) identifies BEC schemes as one of the leading drivers of cyber-related insurance claims. As these attacks increase in frequency and sophistication, cyber insurance is becoming a more common risk management tool—not just for contractors and vendors, but also for sureties who may find themselves entangled in the aftermath of a cyber event. Whether administering bonded funds post-default, handling claims, or coordinating with obligees and consultants, sureties need to understand the role and limitations of cyber insurance in mitigating financial losses. Many cyber insurance policies provide coverage for fraudulent wire transfers caused by BEC or phishing attacks. However, that coverage is often conditioned on the insured's implementation of minimum cybersecurity protocols—such as multi-factor authentication, employee phishing training, and internal payment verification procedures. As a result, policyholders may face denied claims if these safeguards were not in place or not followed.

The legal landscape surrounding insurance coverage for BEC losses remains unsettled. Courts have interpreted similar policy language in markedly different ways, creating significant uncertainty for both policyholders and insurers. Insureds typically seek reimbursement under either (1) standalone cyber insurance policies or (2) traditional crime insurance policies that contain a "computer fraud" provision. While cyber policies are specifically designed to address modern threats, crime policies often include restrictive definitions and require a showing of direct causation, which can complicate coverage for BEC-related claims.

For example, federal courts remain split on whether phishing and BEC schemes qualify as "computer fraud" under crime policies:

- The Fifth and Ninth Circuits have denied coverage, reasoning that employee involvement in the wire transfer process breaks the chain of causation. See *Apache Corp. v. Great Am. Ins. Co.*, 662 F. App'x 252 (5th Cir. 2016); *Taylor & Lieberman v. Fed. Ins. Co.*, 681 F. App'x 627 (9th Cir. 2017).
- The Second and Sixth Circuits have reached the opposite conclusion, finding that spoofed emails and credential theft do meet the definition of computer fraud. See

Medidata Sols., Inc. v. Fed. Ins. Co., 729 F. App'x 117 (2d Cir. 2018); *Am. Tooling Ctr., Inc. v. Travelers Cas. & Sur. Co. of Am.*, 895 F.3d 455 (6th Cir. 2018).

- The Eleventh Circuit has taken a more nuanced approach, with different outcomes depending on the facts. Compare *Interactive Commc'ns Int'l, Inc. v. Great Am. Ins. Co.*, 731 F. App'x 929 (11th Cir. 2018) (denying coverage) with *Success Healthcare, LLC v. Zurich Am. Ins. Co.*, 2015 WL 11439019 (S.D. Fla. Mar. 20, 2015) (allowing claim to proceed under a "but-for" causation standard).

For sureties, the uncertainty surrounding coverage creates additional risk—particularly when handling bonded project funds, making post-default payments, or responding to fraudulent communications. The availability (or denial) of insurance coverage may affect a principal's ability to recover losses, reimburse the surety, or fund completion costs. In some cases, sureties themselves may consider cyber insurance as part of their own enterprise risk management strategy.

The lack of standardized policy language and inconsistent judicial interpretations also pose challenges. Some insurers now offer social engineering fraud endorsements to address this gap, but even these may contain nuanced exclusions or require compliance with specific internal protocols. In today's threat environment, parties must carefully review coverage terms and understand what is—and is not—covered in the event of a BEC-related loss. Sureties should encourage their principals and indemnitors to assess their cyber insurance coverage, particularly when bonded obligations involve electronic fund transfers, cloud-based project management systems, or sensitive communications. While insurance can play a valuable role in mitigating losses, it is not a substitute for sound cyber hygiene, clear protocols, and ongoing vigilance across all parties involved.

Conclusion

Business Email Compromise is no longer a fringe risk confined to email spoofing and isolated fraud—it is now a pervasive, adaptive, and highly targeted threat that strikes at the heart of surety practice. As this paper has shown, sureties operate in an environment uniquely susceptible to BEC schemes, where trust, document exchange, and financial transactions are constant and often urgent. With the rise of AI-enhanced deception, deepfake impersonation, and increasingly sophisticated attack methods, traditional safeguards such as "call-to-confirm" are no longer sufficient.

At the same time, the legal and insurance landscapes are struggling to keep pace. Courts continue to apply comparative fault principles, asking which party was best positioned to prevent the fraud—but those analyses are complicated by the evolving reality that even diligent, protocol-following entities can be victimized. Meanwhile, insurance coverage for BEC-related losses remains fragmented and unpredictable, underscoring the need for clarity in both policy language and internal controls.

For sureties, the path forward requires a proactive, layered approach to cyber risk management. This includes strengthening internal systems, modernizing verification protocols, tightening contractual protections, and ensuring that all personnel—from in-

house staff to third-party consultants—are prepared to recognize and respond to cyber threats. Prevention is not only the best defense—it may be the only defense when courts and coverage fail to provide a clear remedy.

Ultimately, cyber risk is not a technology issue alone—it is a business continuity and liability issue that demands boardroom-level attention. Sureties that fail to adapt may find themselves not just facilitating loss, but bearing it. Those that do act decisively can position themselves as trusted, resilient partners in an increasingly digital and deceptive construction environment.

PANEL 4

There'll Be Time Enough for Countin' When the Dealin's Done – Indemnity and the Indemnity Agreement

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THERE'LL BE TIME ENOUGH FOR COUNTIN' WHEN THE DEALING'S DONE:

INDEMNITY AND THE INDEMNITY AGREEMENT

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I. Introduction

Sureties are generally to be held harmless with multiple common law rights at their disposal for indemnification against a nonperforming principal.[1] Indemnity agreements are unilateral contracts commonly entered into in favor of sureties by prospective principals and provided to a surety as consideration for issuance of certain bonds.[2] The indemnity agreement, and the surety's right to indemnification, is the core of the surety relationship with its principal. In fact, the indemnity agreement is the surety's primary tool for spelling out and strengthening the surety's well established legal rights, and oftentimes extends those rights past the reaches of common law to other third-parties beyond the principal. Those third-parties are frequently the primary source of recovery for the surety when faced with an indemnity issue. An understanding of the surety's indemnity agreement is imperative to recovery. This paper, while not intended to be all encompassing, will address several of the surety's valuable tools in the surety toolbelt as well as various sources from which a surety may be entitled to obtain recovery.

II. Indemnitors

Before diving further into some of the strongest provisions commonly found in the indemnity agreement, understanding of *who* the surety may recover from is an important first step. Presently, most contract surety relationships are subject to an indemnity agreement – if they are not, a mistake was likely made. As such, the surety should first look to the parties who were a part of the indemnity agreement. Nevertheless, if there is no indemnity agreement, the principal will still be liable under common law indemnity or subrogation rights for reimbursement to the surety.

a. Principal

The principal is the party with primary responsibility under the bond.[3] In addition to the obligations outlined in a written indemnity agreement, common law also imposes liability on the principal for any losses the surety incurs on the principal's behalf.[4] Principals can take many forms, ranging from individuals to small businesses and large corporations.[5] Principals are generally obligated by law to reimburse the surety for its loss. However, indemnity agreements often broaden this duty, extending liability to additional parties and incorporating further obligations to protect and hold the surety harmless.

b. Other Indemnitors

Unlike principals, without a signed indemnity agreement (or some valid claim for alter ego/piercing the corporate veil), other parties will not be held liable at common law for the surety's indemnity. This was a largely contributing factor to the development of the modern-day indemnity

[1] *Fidelity and Deposit Company of Maryland v. Slurry Systems, Inc.*, 2016 WL 3940087, *3-4 (N.D. Ill. 2016).
[2] *See e.g., Hanover Ins. Co. v. Northern Bldg. Co.*, 751 F.3d 788, 790 (7th Cir. 2014).
[3] Black's Law Dictionary (11th ed. 2019), Principal.
[4] *See* Adam Friedman & Patrick Kingsley, *Ch. II, Creation of the Relationship Among the Surety, the Principal, and the Indemnitors – Who and How,* THE SURETY'S INDEMNITY AGREEMENT: LAW AND PRACTICE, 29-30, Mike F. Pipkin, Marilyn Klinger, George J. Bachrach, & Tracey L. Haley, 3rd ed., Am. Bar Ass'n (2023); RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY (1996) § 22; *Lori-Kay Golf, Inc. v. Lassner,* 460 N.E.2d 1097 (N.Y. 1984); *W. Coach Corp. v. Roscoe*, 650 P.2d 449 (Ariz. 1982).
[5] *See* Friedman & Kingsley, *supra* note 4.

agreement to provide additional paths for recovery and security for a surety.[6] Third-party indemnitors often include the principal's individual owners, their spouses, or any other person or entity willing to leverage their credit to support the principal in securing surety credit—something commonly seen in joint venture arrangements. Like principals, third-party indemnitors can vary widely, ranging from individuals to business entities. These third-party indemnitors, under an indemnity agreement, generally agree to be held jointly and severally liable to the surety for any losses incurred as a result of issuing bonds on behalf of the principal. Oftentimes, these third-party indemnitors are the primary source of recovery for a surety.

c. Related Parties

In addition to the principal and other signatories to an indemnity agreement, there can be other related parties which the surety can seek indemnity. For example, related companies, joint venturers, subsidiaries, or completely new entities which were formed after execution of the indemnity agreement. Whether or not the surety may be able to recover from these related parties is typically held in the definition of "indemnitor" in the indemnity agreement. In fact, it is not uncommon for an indemnity agreement to expand the definition of "indemnitor" to all present, future, direct, and indirect subsidiaries, affiliates, and parent companies of the signatories to the indemnity agreement.[7]

As a general rule, indemnity agreements are interpreted as any other contract–by its four corners.[8] If the definition of "indemnitors" encompasses non-signatories, that argument should be clearly presented to the court along with a compelling explanation of why this broader interpretation matters.[9] Judges can be mindful of the context, and when an individual attempts to evade responsibility by forming new entities, courts are often willing to interpret the indemnity agreement in accordance with its intended purpose and language.

III. The Surety's Indemnity Agreement Rights

Although the rights of a surety under an indemnity agreement have remained relatively stable over time, a thorough understanding of those rights is essential. With such understanding, a surety is better equipped to address complex or unexpected challenges. A fundamental rule—regardless of one's experience in the surety field—is to always read the entire indemnity agreement carefully.

The indemnity agreement serves as a vital tool for the surety, allowing it to protect, secure, and enforce its rights. The surety's protection under the indemnity agreement comes in various forms including, but not limited to, contractual indemnification and exoneration, collateral, and access to books and records, to secure the indemnitors' obligations and protect the surety from liability due to potential defaults in performance by the bonded principal. This is achieved in part through the principal's express assignment to the surety of various rights and claims, which may also support the surety's subrogation rights. While the agreement reflects many long-established common law principles, its provisions frequently intersect with those found in both common law and statutory

[6] *Id.*, 30.
[7] *See e.g., Travelers Cas. & Sur. Co. of Am. v. Dirtworks, Inc. of Vicksburg,* 375 F. Supp. 3d 680, 684 (S.D. Miss. 2019).
[8] *Id.*; *Travelers Lloyds Ins. Co. v. Pac. Employers Ins. Co.,* 602 F.3d 677, 681 (5th Cir. 2010); *Alki Partners, LP v. DB Fund Services, LLC*, 4 Cal. App. 5th 574, 600, 209 Cal. Rptr. 3d 151, 171 (Ct. App. 2016).
[9] *See Ace American Ins. Co. v. Wendt, LLP,* 724 F. Supp. 2d 899, 903 (N.D. Ill. 2010).

frameworks, such as subrogation rights to bonded contract proceeds. Additionally, the indemnity agreement may grant the surety expanded rights—beyond those available at law—including access to the principal's and indemnitors' property, claims, or other assets. These rights enable the surety to recover losses or hold collateral to protect against future exposures.

a. Indemnification

The right of a surety to strictly and summarily enforce indemnity agreements is well-settled throughout the country. When there is an express contract for indemnity, the rights of the surety are to be determined by the letter of the contract for indemnity.[10] The primary purpose of the indemnity agreement is to spell out the surety's rights to indemnification and be held harmless, and any discussion of the indemnity agreement without addressing the indemnification provision would be amiss.

Typically, the indemnitors agree to compensate the surety for any loss, as that term is often defined, sustained or for any liability which the surety incurs.[11] The specific language of the indemnity agreement governs whether the surety is entitled to indemnification for liability, actual loss, damage, or a combination of these.[12] More common than not, the surety's indemnification provision will provide rights to indemnity for both liability and actual loss. Without an indemnity agreement, and without this provision, the surety's right to reimbursement arises under common law or statutory law. Such rights to recovery are generally limited to the surety's payments under its bonds, not nearly as encompassing as the indemnity agreement's indemnification provision or the definition of "loss" in most indemnity agreements.[13]

b. Collateralization

Most, if not all, contract surety indemnity agreements contain certain clauses for collateralization. Generally, these provisions provide that if at any time, the surety is threatened with liability, receives a claim against a bond, or believes it may incur liability, the indemnitors will immediately upon demand, pay the surety an amount the surety deems is necessary to protected itself from loss. As a general rule, these provisions also include, or are paired with, a specific performance provision which stipulates the indemnitors' failure or refusal to comply with a demand for collateralization irreparably harms a surety. The right of a surety to strictly and summarily enforce indemnity agreements is well-settled throughout the country. When there is an express contract for indemnity, the rights of the surety are to be determined by the letter of the contract for indemnity.[14]

[10] *See Hanover Ins. Co. v. Northern Bldg. Co.,* 751 F.3d 788 (7th Cir. 2014); 74 AM. JUR. 2d *Suretyship* § 122 (Feb. 2019 supp.).
[11] Samuel Williston, WILLISTON ON CONTRACTS, § 2:19(c); SURETY AND INDEMNITY BONDS (4th ed. 1990), citing *Howell v. Comm'r of Internal Revenue*, 69 F.2d 447 (8th Cir. 1934); Daniel R. Gregerson, Ali Salamirad, & Scott Williams, *Ch. IV, Liability of the Principal and Indemnitors to Indemnify and Reimburse the Surety,* THE SURETY'S INDEMNITY AGREEMENT: LAW AND PRACTICE, 29-30, Mike F. Pipkin, Marilyn Klinger, George J. Bachrach, & Tracey L. Haley, 3rd ed., Am. Bar Ass'n (2023).
[12] *Id.*; *see also Lindsey v. Jewels by Park Lane, Inc.* 205 F.3d 1087, 1093 (8th Cir. 2000); *Long v. McAllister-Long,* 221 S.W3d 1, 11 (Tenn. Ct. App. 2006).
[13] 74 AM. JUR. 2D *Suretyship* § 22 (1974).
[14] 74 AM. JUR. 2d *Suretyship* § 122 (Feb. 2019 supp.).

This commonly holds true for the indemnity agreement's collateralization provision as well.[15] Frequently, the collateralization provision is the basis for a preliminary injunction against unobliging indemnitors.[16]

c. Books & Records

As with the right to collateral, most indemnity agreements also entitle the surety to access to the indemnitors' books and records, and most courts across the country likewise routinely provide sureties with injunctive relief in the form of specific performance to review the books and records of its indemnitors. For Instance, in *Hanover Ins. Grp. v. Singles Roofing Co.* the indemnitors agreed to provide the surety, via the indemnity agreement, with full and free access to the books and records.[17] The indemnitors refused and failed to provide access to their books and records.[18] The surety's current exposure was estimated to be in the millions coupled with its exposure for future claims.[19] The court enforced the specific performance remedy under the reasoning that specific performance allowed the surety to protect itself from future liability and there was not an adequate remedy if this provision of the indemnity agreement was held to be remedied only by subsequent monetary damages.[20] The court ultimately issued a preliminary injunction which required indemnitors to turn over its books and records to surety.[21] Other courts have enforced similar books and records provisions in indemnity agreements, requiring indemnitors to provide a surety with access to their books and financial records as a matter of injunctive relief.[22]

[15] *U.S. Fire & Cas. Co. v. Coggeshall Constr. Co.,* No. 91-3159, 1991 WL 169147, at *2 (C.D. Ill. June 28, 1991); *Travelers Cas. & Sur. Co. v. Ockerlund,* No. 04 C 3963, 2004 WL 1794915, at *5-6 (N.D. Ill. Aug. 6, 2004); *Dominion Video Satellite, Inc. v. Exhostar Satellite Corporation,* 356 F.3d 1256, 1266 (2d Cir. 2004); *Dickey's Barbeque Rest., Inc. v. GEM Inv. Grp, No.* 3:11–CV–2804–L, 2012 WL 1344352, at *4 (N.D. Tex. Apr. 18, 2012); *Fucich Cont., Inc. v. Shread-Kuyrkendall & Assocs., Inc.,* No. 18-2885, 2019 WL 1755525, at *10 (E.D. La. Apr. 19, 2019); *Hartford Fire Ins. v. 3i Constr. LLC,* No. 3:16-CV-00992-M, 2017 WL 3209522, at *3-4 (N.D. Tex. May 18, 2017); *Liberty Mut. Ins. Co. v. Aventura Eng'g & Const. Corp.*, 534 F. Supp. 2d 1290, 1306 (S.D. Fla. 2008) *citing Hutton Constr. Co. v. County of Rockland,* 52 F.3d 1191 (2d Cir. 1995).

[16] *See U.S. Fire & Cas. Co. v. Coggeshall Constr. Co.,* No. 91-3159, 1991 WL 169147, at *2 (C.D. Ill. June 28, 1991) (granting plaintiff specific performance of collateral security agreement); *Travelers Cas. & Sur. Co. v. Ockerlund,* No. 04 C 3963, 2004 WL 1794915, at *5-6 (N.D. Ill. Aug. 6, 2004).

[17] *Hanover Ins. Grp. v. Singles Roofing Co.,* No. 10 C 611, 2012 WL 2368328 *3, (N.D. Ill. June 21, 2012).

[18] *Id*.

[19] *Id*.

[20] *Id*. at 14.

[21] *Id*. at 16.

[22] *See, e.g., Colonial Surety Company v. A&R Capital Associates*, 2017 WL 1229732 *48-49 (E.D. N.Y. 2017) (indemnity agreement to require the principal to give the surety full access, not partial, to its books and records until the surety's obligations have been discharged or fully indemnified); *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"); *Colonial Sur. Co. v. Eastland Constr., Inc*., 2009 N.Y. Slip Op. 31756(U), 2009 WL 2440307 (N.Y. Sup. Ct. July 30, 2009) (same); *Revenue*

d. Prima Facie Clause

The *prima facie* evidence clause is arguably one of the most powerful provisions in an indemnity agreement. Designed to facilitate the surety's prompt recovery of losses, this clause permits the surety to present payment vouchers or other documentation—verified by an authorized representative—as prima facie evidence of both the existence and amount of the indemnitors' liability.[23] Together with other provisions in the Indemnity Agreement, such as the right-to-settle clause, the *prima facie* clause shifts the initial burden of proof to the indemnitors, requiring them to demonstrate that the surety's payments were made fraudulently.[24] A rare occasion, which if otherwise not met by the indemnitors, will more often than not entitle a surety to summary judgment.

Typically, *prima facie* clauses state that affidavits or other evidence of payment by the surety are *prima facie* evidence of the indemnitors' liability or the surety's right to recover those losses. This almost includes attorneys' fees as "Loss." Accordingly, courts should, and most often do, award attorneys' fees pursuant to the unambiguous terms of the *prima facie* clause in the indemnity agreement.[25] Nevertheless, this is commonly something which must be addressed with a court as to prevent having to jump through the hoops of supporting "reasonable and necessary" loss.[26]

e. Power of Attorney

Most indemnity agreements grant sureties broad-ranging power-of-attorney (or attorney-in-fact) rights over the affairs of principals and, depending on the specific language of the agreement, indemnitors.[27] The provision is often cited by courts to support a surety's decision to settle the claims brought against and, in some instances, by the principal.[28] Oftentimes, however, the sureties are reluctant to exercise those rights outside of the accompanying "right to settle" provision. However, business decisions do not mean a right does not exist. A careful reading of a typical indemnity agreement broadens the reach of sureties' rights under the power-of-attorney clause.[29] As with the other rights identified in this Section III, the relationship between principal and surety is governed by the terms of the contract, specifically the language of the bond.[30] This means that the provisions are

Mkts. Inc. v. Amwest Sur. Ins. Co., 35 F. Supp. 2d 899 (S.D. Fla. 1998), *aff'd in part*, *vacated in part*, 209 F.3d 725 (11th Cir. 2000); *U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, 219 F. Supp. 2d 403 (S.D.N.Y. 2002), aff'd in part, vacated in part, 369 F.3d 34 (2d Cir. 2004).

[23] *Common indemnity agreement provisions in aid of surety's recovery rights*, 3 BRUNER & O'CONNOR CONSTRUCTION LAW § 10:133.

[24] *Id*. at §10:108; *Fallon Elec. Co. v. Cincinnati Ins. Co*., 121 F.3d 125, 128 (3d Cir. 1997); *Engbrock v. Federal Ins. Co*., 370 F.2d 784, 786 (5th Cir. 1967); *Transamerica Ins. Co. v. Bloomfield*, 401 F.2d 357, 362-363 (6th Cir. 1968); *RLI Ins. Co. v. Bennett Composites, Inc*., 2005 U.S. Dist. LEXIS 26465 (E.D. Pa. 2005); *United States ex rel. Dotens' Constr. v. JMG Excavating & Constr. Co.,* 2005 U.S. Dist. LEXIS 26732 (D. ME 2005).

[25] *See, e.g., Travelers Cas. & Sur. Co. of Am. v. Winmark Homes, Inc.*, 11-15950, 2013 WL 2150920 (11th Cir. May 20, 2013); *Anderson v. U.S. Fid. & Guar. Co.*, 267 Ga. App. 624, 628, 600 S.E.2d 712, 716 (Ga. Ct. App. 2004); *Ideal Elec. Sec. Co. v. Int'l Fid. Ins. Co.*, 129 F.3d 143, 151 (D.C. Cir. 1997); *Transamerica Premier Ins. Co. v. Nelson*, 878 P.2d 314, 318 (Nev. 1994); *U.S. v. D Bar D Enterprises Inc.,* 772 F.Supp. 1167, 1173 (Nev. 1991).

[26] *Fallon Elec. Co. v. Cincinnati Ins. Co.*, 121 F.3d 125, 128 (3d Cir. 1997); *Guarantee Co. of N. Am. USA v. SBN Enterprises, Inc.*, 2011 WL 3205318, at *3 (D.N.J. July 27, 2011).

[27] *See Liberty Mut. Ins. Co. v. Aventura Eng'g & Const. Corp.*, 534 F. Supp. 2d 1290, 1306 (S.D. Fla. 2008) *citing Hutton Constr. Co. v. County of Rockland,* 52 F.3d 1191 (2d Cir. 1995).

[28] *Hutton Const. Co. v. Cnty. of Rockland*, 52 F.3d 1191, 1192 (2d Cir. 1995).

[29] *See, e.g.*, *Safeco Ins. Co. of Am. v. M.E.S., Inc.*, 2010 WL 5437208, at *13 (E.D.N.Y. Dec. 17, 2010).

[30] *Colonial Am. Cas. & Sur. Co. v. Scherer*, 214 S.W.3d 725, 730 (Tex. App. 2007).

strictly construed, and the surety's rights and obligations are determined by the indemnity agreement and bond's explicit terms.[31]

IV. Conclusion

Clearly, the value of the indemnity agreement is apparent. While not the sole mechanism for the surety's recovery of indemnity, the surety's indemnity agreement is vital to full protecting the surety and identifying and expanding upon its rights to recovery. A surety should not overlook the varying rights it has under its indemnity agreement, or the varying sources of recovery it may have under its indemnity agreement. However, one must remain mindful of the laws from jurisdiction to jurisdiction and how those laws may affect the interpretation of the surety's indemnity agreement and indemnification rights. Hopefully, this paper has provided the reader with general knowledge of how the basics of indemnity under the common indemnity agreement may assist the surety, as well as a review of some of the indemnitors which may be liable to the surety for reimbursement.

[31] *Id.; Collins v. Noltensmeier,* 2018 IL App (4th) 170443, ¶ 30, 103 N.E.3d 495, 50.

PANEL 5

The Secret to Survivin' is Knowin' What to Throw Away and Knowin' What to Keep –

Insurance Recovery and the Surety

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The Secret to Survivin' is Knowin' What to Throw Away and Knowin' What to Keep – Insurance Recovery and the Surety

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I. Introduction

Common defaults on construction projects often stem from delays, substandard work, nonpayment to subcontractors or suppliers, and contractor insolvency.[1] Default notices typically cite several of these issues.[2] When a project owner demands that a surety fulfill a contractor's remaining obligations under a performance bond, the surety's options to reduce losses are usually limited to recovery from indemnitors. However, when the default arises from defective design or workmanship, the surety's exposure may overlap with insurance policies that cover the disputed work—offering a valuable opportunity for risk mitigation.

Pursuing mitigation through insurance coverage benefits both the surety and its indemnitors. While indemnitors are not responsible for reimbursing insurance carriers for covered claims, they are fully liable to repay the surety for all costs incurred in satisfying bonded

[1] McConnell, W. (2022). *Fundamentals of Construction Claims*. Wiley.

[2] Based on the authors' experience in hundreds of construction projects involving notice of default letters—and consistent with standard industry practices outlined in AIA, EJCDC, and ConsensusDocs forms—default events typically include schedule delays, payment failures, code violations, and other material breaches.

obligations. As a result, both the surety and the indemnitors have a shared interest in identifying situations where insurance coverage may offset loss.

This paper is intended to provide surety claims professionals and their advisors with a general framework for recognizing and pursuing applicable insurance coverage. By understanding how insurance and surety responsibilities intersect, claims personnel can more effectively identify policy coverage and manage the claims process to reduce the financial burden associated with contractor default.

II. Insurance Policies on Construction Projects

Construction agreements between owners and contractors typically outline insurance requirements for both parties. The same holds true for owner-designer agreements. Subcontract agreements between contractors and subcontractors often follow the insurance requirements identified in the prime owner-contractor agreement. Standard contract forms published by the American Institute of Architects ("AIA") allow for drafters to stipulate specific insurance requirements as an attachment to the main contract. For example, AIA form A101—2017, *Standard Form of Agreement Between Owner and Contractor where the basis of payment is a Stipulate Sum*, includes Exhibit A, *Insurance and Bonds*, which outlines each party's insurance obligations. This contract form is typically used on large construction projects and is similar to other standard contract forms from EJCDC and ConsensusDocs.

A. Owner Insurance Requirements

Owners are generally required to obtain two insurance policies for construction projects. First, Exhibit A mandates that the project owner shall maintain a "usual" general liability insurance policy for the ownership group. Limits for this policy are typically not stipulated.

Second, and more importantly, Exhibit A requires the owner (unless this obligation is placed on the contractor) to procure property insurance written on "builder's risk "all-risks" completed value or equivalent policy form sufficient to cover the total value of the entire project on a replacement cost basis." Exhibit A notes that the project owner shall maintain this policy through substantial completion and up until the expiration of the one-year warranty period defined in the A201 general conditions. Importantly, Exhibit A requires that this insurance "include the interests of the Owner, Contractor, Subcontractors, and Sub-subcontractors in the Project as insureds."

Section A.2.3.1.1, *Causes of Loss*, notes that the builder's risk policy shall cover direct physical loss or damage, and include risk for events such as fire, explosion, theft, vandalism, malicious mischief, collapse, earthquake, flood, and windstorm. It should also include coverage for "ensuing loss or resulting damage from error, omission, or deficiency in construction methods, design, specifications, workmanship, or materials" (emphasis added). This latter requirement—if followed—provides surety companies with a path for recovery through the builder's risk policy.

§ A.2.3 Required Property Insurance

§ A.2.3.1 Unless this obligation is placed on the Contractor pursuant to Section A.3.3.2.1, the Owner shall purchase and maintain, from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located, property insurance written on a builder's risk "all-risks" completed value or equivalent policy form and sufficient to cover the total value of the entire Project on a replacement cost basis. The Owner's property insurance coverage shall be no less than the amount of the initial Contract Sum, plus the value of subsequent Modifications and labor performed and materials or equipment supplied by others. The property insurance shall be maintained until Substantial Completion and thereafter as provided in Section A.2.3.1.3, unless otherwise provided in the Contract Documents or otherwise agreed in writing by the parties to this Agreement. This insurance shall include the interests of the Owner, Contractor, Subcontractors, and Sub-subcontractors in the Project as insureds. This insurance shall include the interests of mortgagees as loss payees.

§ A.2.3.1.1 Causes of Loss. The insurance required by this Section A.2.3.1 shall provide coverage for direct physical loss or damage, and shall not exclude the risks of fire, explosion, theft, vandalism, malicious mischief, collapse, earthquake, flood, or windstorm. The insurance shall also provide coverage for ensuing loss or resulting damage from error, omission, or deficiency in construction methods, design, specifications, workmanship, or materials. Sub-limits, if any, are as follows:

(Indicate below the cause of loss and any applicable sub-limit.)

Causes of Loss	Sub-Limit

Exhibit A also identifies specific coverages that should be included in the builder's risk policy, such as loss or damage to falsework, other temporary structures, and building systems. Moreover, it notes the coverage shall include additional costs for items such as debris removal, demolition, compensation for designers and constructors, and claim preparation expenses. Exhibit A further makes the owner responsible for payment of deductibles or retentions.

If the work involves remodeling an existing structure or adding an addition to an existing structure, Exhibit A also requires the owner to procure addition "all-risks" property insurance to cover the losses noted above to the existing structure.

B. Contractor Insurance Requirements

Exhibit A requires the contractor to procure: (1) commercial general liability ("CGL") insurance, where the required limit may be achieved with a combination of primary and excess insurance; (2) automobile liberty insurance; (3) workers' compensation insurance; (4) employer's liability insurance; (5) professional liability insurance (if the contractor is required to provide professional services as part of the work); and (6) other insurance depending on the nature the work (maritime liability, pollution liability; etc.). Exhibit A also identifies whether payment and performance bonds are required for the project.

C. Insurance Requirements Under Wrap-Up Policies

A wrap-up insurance policy provides broad, project-specific coverage for multiple parties involved in a construction project under a single insurance program. The purpose of these programs is to streamline insurance, reduce duplication of coverage, potentially lower costs, and improve risk management across all enrolled contractors and subcontractors. Wrap policies typically cover general liability insurance, workers' compensation, excess/umbrella liability,

completed operations coverage, and sometimes builder's risk coverage. Wrap-up policies are well suited for large-scale projects.

AIA contract forms do not contemplate the use of wrap policies such as Owner-Controlled Insurance Programs ("OCIP") or Contractor-Controlled Insurance Programs ("CCIP"). However, the AIA contract forms allow for modification, so users of these forms that work on projects with wrap-up policies can modify Article 11 of the A201 General Conditions, *Insurance and Bonds*, to identify project specific requirements.

D. Contractor Insurance Requirements Post Construction

Exhibit A requires the contractor to provide the owner with a certificate evidencing continuation of commercial liability coverage—including completed operations—with its final application for payment. Completed operations insurance in construction contracts refers to liability coverage that protects contractors and other insured parties against claims for bodily injury or property damage that occur after the construction work is completed and the project is handed over to the owner. Typically, the completed operations policy covers claims arising from the contractor's work after project completion, usually during the statute of repose or a defined policy period.

Completed operations insurance is commonly made part of a CGL policy and is defined under the "Products-Completed Operations Hazard" definition under standard Insurance Services Office ("ISO") forms.[3] The coverage is included automatically unless it is explicitly excluded via endorsement.[4] Note that there is often a separate aggregate limit for products-completed

[3] Stanovich, C. (Mar. 6, 2019). *The Hazards of Products and Completed Operations: Understanding the Fundamentals*, IRMI, https://www.irmi.com/articles/expert-commentary/the-hazards-of-products-and-completed-operations-understanding-the-fundamentals.
[4] Id.

operations claims.[5] Coverage usually lasts as long as the policy is in force and for the statute of repose period (often 2 to 10 years after completion).[6]

III. Coverage Considerations

Insurance policies such as CGL, builder's risk, and professional liability can help mitigate a surety's exposure following contractor default or performance issues. Each policy type offers distinct coverage for risks like property damage, construction defects, or professional negligence. Surety professionals must understand the scope, exclusions, and legal interpretations of these policies to determine their applicability to a claim. This overview provides a practical framework for evaluating insurance coverage and identifying recovery opportunities that may reduce bonded losses.

A. CGL

CGL insurance policies are typically written on standardized forms developed by the Insurance Services Office (ISO), which set forth the terms, conditions, coverages, exclusions, and obligations under the policy. These policies generally provide coverage for the insured's liability due to bodily injury or property damage caused by an "occurrence." Under ISO definitions, "property damage" typically includes physical injury to tangible property and any resulting loss of use.[7]

A central challenge in seeking recovery under a CGL policy is establishing that qualifying "property damage" occurred within the meaning of the policy. Courts differ on what

[5] Id.
[6] Id.
[7] *Property Damage (PD)*, IRMI, https://www.irmi.com/term/insurance-definitions/property-damage (last visited July 17, 2025).

constitutes property damage in the context of defective construction work.[8] Some courts hold that the mere incorporation of defective work into a larger structure does not amount to property damage unless the defect causes actual physical injury to other tangible property.[9] Other courts, however, have found that incorporation alone—such as installing a defective component into a larger system—may constitute property damage. Still others have concluded that if defective work must be removed or replaced to comply with building codes or health and safety regulations, and its presence alone is a physical injury, since the defective work has become physically integrated into the structure.

Of particular significance is how CGL policies apply to claims involving third-parties that caused defective construction, especially with respect to coverage for the insured's work and completed operations. Whether defective workmanship constitutes an "occurrence" under a CGL policy is a heavily litigated issue and often turns on the specific facts of the case. If property damage results from the work of a subcontractor or from an unrelated third party, courts are more likely to find that an "occurrence" has taken place. However, where the damage stems directly from the insured's own faulty workmanship, the availability of coverage is less certain.[10]

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[8]See Saxe Doernberger & Vita, P.C., *Defective Construction as an "Occurrence"* (Sept. 19, 2024), https://www.sdvlaw.com/surveys/defective-construction-as-an-occurrence/ (surveying how courts across jurisdictions differ in interpreting whether defective construction work constitutes "property damage" under CGL policies).

[9] See *F & H Constr.*, 118 Cal. App. 4th 364, 372 (2004) (citing *St. Paul Fire & Marine Ins. Co. v. Coss*, 145 Cal. Rptr. 836 (Ct. App. 1978)); *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 889 (Fla. 2007) (holding that structural damage to completed homes caused by subcontractors' defective work constituted "property damage" under a CGL policy because it resulted in physical injury to otherwise nondefective property); but see *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 589 Pa. 317, 908 A.2d 888, 899 (2006) (holding that claims based solely on faulty workmanship to the insured's own work product do not constitute an "occurrence" under a CGL policy because they lack the fortuity required of an "accident").

[10]See *Skanska USA Bldg. Inc. v. M.A.P. Mech. Contractors, Inc.*, 505 Mich. 368, 952 N.W.2d 402, 410 (2020) (holding that damage caused by a subcontractor's faulty work constituted an "occurrence" under a commercial general liability policy, distinguishing it from damage caused by the insured's own defective workmanship).

Recent case law shows a trend toward interpreting "occurrence" to include unintended damage to non-defective property caused by poor workmanship.[11] Nonetheless, some courts continue to hold that damage to a contractor's own work due to defective performance is not a covered occurrence under a CGL policy. Ultimately, the question of coverage often hinges on the facts of the case and governing jurisdiction.[12]

For surety claims personnel, it is critical to evaluate both the specific facts of the claim and the governing legal jurisdiction when determining whether coverage under a particular CGL policy may reduce the surety's exposure. In appropriate cases, surety providers should consider engaging counsel with specialized expertise in pursuing recovery under CGL policies. Additionally, given the potential costs and time involved in prosecuting such claims, the surety should explore contingency fee arrangements with law firms retained to pursue these recoveries.

The business risk doctrine is a legal principle in insurance law that holds that commercial CGL insurance does not cover a contractor's own faulty workmanship, because the risk of performing defective work is a business risk, not an insurable fortuitous event. The doctrine says that a contractor's liability for repairing or replacing their own defective work is not covered by insurance—it's considered a normal cost of doing business. The key concept here is that CGL insurance is meant to cover accidents or damages caused by faulty work, not the faulty work itself. If the contractor's work damages other property or causes bodily injury, that may be

[11]See *Acuity v. M/I Homes of Chi., LLC*, 2023 IL 129087 (holding that negligent construction resulting in damage to non-defective portions of a home constituted both "property damage" and an "occurrence" under a CGL policy); *Admiral Ins. Co. v. Tocci Bldg. Corp.*, No. 22-1462, 2024 WL 6281234 (1st Cir. Nov. 8, 2024) (acknowledging a trend toward recognizing unintended damage to non-defective property as an "occurrence" under CGL policies, though denying coverage based on policy exclusions).

[12] See 9A Steven Plitt et al., *Couch on Insurance* § 129:4 (3d ed. 2024) (noting that insurance coverage disputes often turn on the specific facts of the case and the jurisdiction's interpretation of policy language).

covered. But correcting defective work—replacing poor concrete, fixing a bad roof, etc.—is typically excluded.

For example, if a contractor installs a defective roof and the roof later leaks and damages the building's interior, repair to the building interior will likely be covered. If the contractor just needs to replace the roof due to the defective work, coverage will likely be in question due to the business risk doctrine. Courts across the U.S. vary in how they follow this doctrine—some states are more contractor-friendly and interpret CGL policies more broadly.

Greater coverage is generally available in faulty workmanship cases where the insured is a general contractor and the defective work was performed by a subcontractor, particularly in a completed operations context. As a result, disputes often arise over whether the insured's work was considered complete at the time the damage or injury occurred. This distinction is important because coverage typically does not extend to defective work during the course of construction. In general, courts have held that CGL policies do not cover the cost to repair or replace defective work itself, but may provide coverage for the resulting damage or injury caused by that defective work.

B. Builder's Risk

As noted above, AIA Exhibit A requires the builder's risk policy to cover "resulting damage from error, omission, or deficiency in construction methods, design, specifications, workmanship, or materials." While this language may suggest broad protection, most builder's risk policies are designed to cover only physical damage to a construction project during the course of construction, typically caused by events such as fire, theft, vandalism, certain weather conditions, or accidental physical loss. They generally exclude coverage for the cost to repair or

replace defective work, including faulty materials, poor workmanship, or design errors. Because builder's risk policies are not standardized, careful review of the specific policy language is essential to understand which risks are excluded.

Many builder's risk policies, however, include a "resulting damage" or "ensuing loss" exception, which is critical to understanding the actual scope of coverage. This provision typically allows for coverage of damage caused by defective work, even though the defective work itself is not covered.[13] For instance, if a subcontractor installs defective plumbing, the cost to repair the plumbing is excluded, but water damage to other completed portions of the building, such as drywall or electrical systems, may be covered. Whether this resulting damage is insured depends heavily on the policy's wording and any applicable endorsements.

To further address coverage gaps, insurers may offer endorsements which may alter the treatment of defective work and clarify whether and to what extent related damage is covered. These endorsements can significantly impact coverage determinations. As a result, it is crucial to thoroughly review the policy's exclusions, exceptions, and endorsements to assess the extent of protection available for defective construction and any resulting losses.

C. Professional Liability

Professional liability insurance provides coverage for professionals—such as architects, engineers, design-builders, construction managers, and general contractors—against claims arising from alleged errors, omissions, or mistakes in the performance of their professional

[13] See Gregory N. Ziegler et al., *Builders Risk Insurance: Construction Defect Cases – Finding the Oasis in the Desert*, MACDONALD DEVIN, P.C., https://www.eagle-law.com/wp-content/uploads/Paper-G.Ziegler-R.Alcanta-BuildersRisk-Insurance.pdf (explaining that while builder's risk policies exclude coverage for defective work, they often include an "ensuing loss" clause that restores coverage for resulting damage caused by the defect, such as water damage from faulty plumbing).

services. This type of insurance is designed to cover liability for damages sustained by third parties as a result of the insured's professional negligence, particularly in the context of providing design or other specialized services.

Coverage under these policies is typically limited to negligent acts, errors, or omissions committed by the named insured in the course of their professional duties. It does not generally extend to intentional misconduct or non-professional activities. The primary focus of professional liability insurance is to protect against financial losses suffered by others due to a failure to meet the accepted standard of care in professional practice.[14] Thus, expert testimony is often required industry professionals in order to address issues of negligence.[15]

IV. Surety Recovery Against Insurance Policies

While surety bonds and insurance policies are intended to address different types of risk, their obligations can sometimes overlap. For example, if defective work was performed by one of the principal's subcontractors, a CGL policy may provide coverage for the resultant corrective work. It is not uncommon for an obligee to file a lawsuit against both the principal and the surety. In such cases, the CGL policy may include a duty to defend the principal if the claim involves property damage. If the obligee sues only the surety, the surety should consider naming the principal as a third party, as the principal's CGL policy may extend its duty to defend to the surety in connection with the claim.

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[14] See *ISO's New Miscellaneous Professional Liability Program*, Int'l Risk Mgmt. Inst., https://www.irmi.com/articles/expert-commentary/isos-new-miscellaneous-professional-liability-program (explaining that professional liability insurance is designed to cover claims alleging failure to meet the standard of care in professional services, resulting in financial loss).

[15] See *KOKO Dev., LLC v. Phillips & Jordan, Inc.*, discussed in Ashley P. Cullinan et al., *Expert Witnesses Are Crucial in Court; Don't Lose One on a Technicality*, Am. Soc'y of Civil Eng'rs (Aug. 29, 2024), https://www.asce.org/publications-and-news/civil-engineering-source/article/2024/08/29/expert-witnesses-are-crucial-in-court-dont-lose-one-on-a-technicality (noting that the court dismissed a construction defect case because the plaintiff failed to designate expert witnesses to support claims involving technical construction issues).

To help facilitate coverage under the principal's CGL policy, the surety can encourage the principal to submit a claim and should also request copies of all relevant insurance policies. Whether the surety can make a direct claim depends on the terms of the policy, the nature of the coverage, and the facts of the case, including the extent and cause of the alleged damage. Coverage under CGL policies is often triggered when defective work is discovered or alleged. In such instances, the surety may look not only to the principal and their insurance coverage but also to the insurance policies of any subcontractors or suppliers whose work may have contributed to the defect.

When post-construction issues emerge during the warranty period, the surety should evaluate whether recovery is available under relevant insurance policies, particularly those that include completed operations coverage. Because some insurance protections extend beyond project completion, it is essential for the surety to thoroughly assess all potential avenues of recovery in order to reduce its financial exposure.

A. Surety's Equitable Subrogation Rights

Surety providers retain subrogation rights through indemnity agreements and common law. When a surety fulfills its obligations under performance and payment bonds, it may assert a claim to remaining contract funds under the doctrine of equitable subrogation.[16] In addition, the surety may be subrogated to the rights of other parties, such as the owner, principal, or unpaid laborers and material suppliers, whose claims the surety has satisfied.[17]

[16] Marina S. De Rosa, *Equitable Subrogation: No Court Order, No Surety Indemnity Under Principal's CGL*, Surety Bond Q. (Mar. 10, 2023), https://www.suretybondquarterly.org/2023/03/10/equitable-subrogation-no-court-order-no-surety-indemnity-under-principals-cgl/.
[17] Id.

In the insurance context, subrogation rights are typically defined by express agreements, which establish the insurer's ability to pursue the insured's claims against third parties. In the surety context, however, subrogation is governed by the principles of equitable subrogation, which entitle the surety to reimbursement for fulfilling its bonded obligations. Equitable subrogation allows the surety to step into the shoes of the creditor—in this case, the obligee, principal, or a claimant—to assert their rights in relation to the debt or loss.[18]

Accordingly, when a surety performs under its bonds, it may pursue recovery under applicable insurance policies to which the principal or other parties are entitled. For example, standard CGL and builder's risk policies generally do not preclude a surety from asserting a subrogated right to the principal's coverage under those policies. This legal framework supports the surety's ability to seek reimbursement and mitigate losses resulting from its performance under the bonds.

B. Surety's Assignment Rights

The indemnity agreement between the surety, its principal, and any additional indemnitors provides another potential pathway for the surety to pursue recovery under insurance policies. These agreements typically include provisions in which the principal assigns certain rights to the surety, including rights related to insurance claims.[19] As previously noted, a surety's subrogation rights arise once it has fulfilled its obligations under the bonds. However, through its assignment rights under the indemnity agreement, the surety may be able to seek coverage from the principal's insurer even before it incurs an actual loss.[20] In such cases, the surety may

[18] Id.
[19] Michael Pitkin, Charles Smith, Thomas Vollbrecht & Brian Wilcox, *Bond Default Manual* ch. 11 (4th ed. May 2015).
[20] Id.

proactively assert the principal's rights to insurance proceeds in order to mitigate potential exposure. Leveraging assignment rights in this way can strengthen the surety's position and expand recovery options beyond traditional subrogation.[21]

VI. Surety as Additional Insured

When a surety provider retains a completion contractor, it generally requires the contractor to designate the surety and the obligee as additional insureds. In this instance, the surety has a direct contractual relationship with the insurer and can make claims accordingly.

VII. Conclusions

Surety providers face substantial financial exposure when called upon to perform under payment or performance bonds, particularly in the context of contractor default stemming from defective design or construction. However, as this paper has explored, a range of insurance policies commonly maintained on construction projects—including commercial general liability, builder's risk, professional liability, and wrap-up policies—may provide overlapping coverage that can reduce or offset a surety's losses. Understanding the interplay between these policies and the surety's rights is essential to identifying potential avenues for recovery.

To effectively pursue mitigation through insurance, sureties must carefully examine the facts of the default, obtain and analyze relevant insurance policies, and consider both subrogation and assignment rights available under indemnity agreements. Particular attention should be paid to policy exclusions, resulting damage clauses, and the legal interpretations of "occurrence" and

[21] Id.

"property damage" within the applicable jurisdiction. Timely coordination with the principal, their insurers, and qualified counsel is often necessary to maximize recovery.

Ultimately, insurance coverage should not be viewed merely as a backstop but as an integral part of a surety's risk management strategy. By proactively identifying and leveraging applicable insurance, surety personnel can significantly reduce financial exposure, protect indemnitors, and fulfill bonded obligations more efficiently. This requires not only familiarity with common policy forms and endorsements but also a coordinated approach that anticipates how insurance and surety obligations intersect over the lifecycle of a construction project.

PANEL 6

Every Hand's a Winner and Every Hand's a Loser

An Agency Overview: An Agent By Any Other Name

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AN AGENCY OVERVIEW: AN AGENT BY ANY OTHER NAME

By: Jonathan Bondy

The principles of agency are often litigated in a variety of contexts, as the authority to bind (or the ability to blame) are critical concepts in the law. Did that individual have the power to sign that contract, and covenant to certain rights and duties? Who is responsible for the actions taken by another? Actions on behalf of large corporations are undertaken by individuals, and their authority is crucial to understanding whether an action was authorized, or the corresponding contract was validly entered and binding. Many jurisdictions have clear general principles that an agent, particularly an exclusive agent, works for the insurance company and its actions are those of the insurer, or surety. A broker, on the other hand, is generally considered an agent of the insured. Of course, things are never quite that simple, and the law recognizes several exceptions (and knows no bounds for new and exciting scenarios). This paper will review the basic concepts surrounding agency through an overview of the myriad provisions of the Restatement (Third) of Agency. The statutory and common law of several jurisdictions, including New York, New Jersey, and California, will then be reviewed in order to consider different examples of the application of agency principles in the surety context.

I. Who is Your Agent?/Agency 101

A. Agency Defined

The Restatement (Third) of Agency defines agency as follows:

> Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.[1]

[1] Restatement (Third) Of Agency § 1.01 (2006).

If two parties agree that one should act on behalf of the other, subject to the other person's control, an agency relationship is born. In other words, if Maria tells Klaus that he can execute bonds on Maria's behalf up to $1,000,000,000.00 Kroner, and Klaus agrees to do so, they have created an agency relationship. Klaus has become Maria's agent for purposes of executing bonds. Maria and Klaus can agree either in writing or spoken words or other conduct.[2] Whether Maria and Klaus actually described their agreement as an agency relationship, or use the buzz words, is not critical.[3] If there is that manifestation of assent by both parties that one will act for another, the beginning of a beautiful agency relationship is formed.

B. Agents in Surety/Why Does This Matter?

Of course, the language of agency is indelible in the law of surety, as everyone is constantly describing one's principal or agent or broker. As described above, however, that does not make anyone an agent without the other elements present, and the law of agency is generally applicable to suretyship:

> Unless inconsistent with the rules in this Restatement, all other principles of law and equity, including the law of contracts and the law relating to capacity to contract, **principal and agent**, estoppel, fraud, misrepresentation, duress, coercion, and mistake, are applicable to the transactions resulting in suretyship status.[4]

In a fascinating case during Prohibition out of the Second Circuit, the admissions of an employee of the principal—regarding the perfumery company's receipt of 1240 wine gallons of denatured alcohol—were held as evidence against the surety regarding a duty to which it was bound.[5]

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[2] Restatement (Third) Of Agency § 1.03 ("A person manifests assent or intention through written or spoken words or other conduct.").
[3] *Id*. at § 1.02 ("An agency relationship arises only when the elements stated in 1.01 are present. Whether a relationship is characterized as agency in an agreement between parties or in the context of industry or popular usage is not controlling.").
[4] Restatement (Third) of Suretyship & Guaranty § 5 (1996) (emphasis added). There is also a carve-out from the Statute of Frauds involving a promise by an obligee's agent "that a purchase of the obligee's goods or services through the agent will pay the price of the goods to the obligee" does not come within the Statute of Frauds. Restatement (Third) of Suretyship & Guaranty § 11 (1996).
[5] *United States v. Am. Sur. Co. of New York*, 56 F.2d 734, 735 (2d Cir. 1932).

While that is an unusual case on any number of levels, the law of agency certainly applies in the surety context, and as the case law reviewed below will demonstrate, provides much fodder for litigation.

C. Duties in Agency

In the simplest of articulations, an agent generally works for an insurer, and a broker generally works for the insured. The duties correspondingly follow one's employment. An agent has a variety of fiduciary duties to its principal, including to act loyally for the principal's benefit, and maintain confidentiality.[6] In other words, an agent should not compete with its principal: Klaus should not choose Maria's competitors over here unless their agreement expressly anticipates that it is not exclusive, or there will be multiple principles.[7]

Duties are also not one-sided, and a principal has certain duties to the agent. The extent of those duties is generally dependent on the language of the agency contract.[8] However, unless the contract expressly carves this out, there is a general duty of indemnification by the principal of the agent where the agent makes a payment within the scope of its actual authority, or is beneficial to the principal, or "when the agent suffers a loss that fairly should be borne by the principal in light of their relationship."[9] If that language does not seem ripe to initiate litigation, there is also of course that inveterate duty of good faith and fair dealing governing the relationship.[10] There are few duties that give rise to more litigation than that of good faith.

D. Authority of Agents

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[6] Restatement (Third) of Agency §§ 8.01-8.05. An agent should also not obtain a material benefit for herself or himself as part of actions taken for the principal. Restatement (Third) of Agency § 8.02.
[7] Restatement (Third) of Agency § 8.06.
[8] Restatement (Third) of Agency § 8.13.
[9] Restatement (Third) Of Agency § 8.14.
[10] Restatement (Third) of Agency § 8.15.

A critical concept in the law of agency is what, or how much, authority an agent has to undertake certain actions. The clearest, and most powerful, is actual (true) authority, which can be express or implied. The Restatement defines it as follows:

> An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act.[11]

The power of attorney is a classic example of an express authorization of authority. If the power of attorney sets forth a certain level of authority, that is the authority that the agent has unless and until it is amended and communicated to the agent.[12] The next level of authority is apparent, or ostensible, authority, which occurs "when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations."[13] The example provided by the Restatement is of a customhouse broker, A (let's say Albus), is retained by P (call him Percival), an importer, to import steel that Percival shipped from Brazil.[14] Typically a bond is obtained for customs duties, and Albus arranges with T (let's say, Third Insurance Co.) to post the bond with customary terms for the duties on Percival's steel.[15] Third Insurance Co. is not aware of Percival's existence, and has no communications with Percival.[16] Albus has apparent authority to arrange for Third Insurance Co. to post the bond, as Percival put Albus "in a situation in which a reasonable person in [Third Insurance Co.'s] position would be justified in assuming that [Albus] had authority to arrange a bond."[17]

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[11] Restatement (Third) Of Agency § 2.01.
[12] *Id*. (reviewing example of express authority still existing if amended power of attorney is not sent/communicated).
[13] Restatement (Third) Of Agency § 2.03.
[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] *Id*.

Authority may also be given after an action has taken place, through ratification, sometimes called Post-Hoc Authority, which the Restatement defines as:

> (1) Ratification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority.
> (2) A person ratifies an act by
> (a) manifesting assent that the act shall affect the person's legal relations, or
> (b) conduct that justifies a reasonable assumption that the person so consents.
> (3) Ratification does not occur unless
> (a) the act is ratifiable as stated in § 4.03,
> (b) the person ratifying has capacity as stated in § 4.04,
> (c) the ratification is timely as stated in § 4.05, and
> (d) the ratification encompasses the act in its entirety as stated in § 4.07.[18]

Essentially, if one expressly or impliedly assents to the actions of an agent after they have been undertaken, the agent had the authority to undertake those actions.

E. Liability of Agents and Principals Oh My

There are a variety of scenarios under which an agent may be liable to a third party, including, of course, if a party is harmed by the agent's tortious conduct.[19] That is not different from liability generally, but is noteworthy that an agent is liable even if acting with actual or apparent authority, or within the scope of the employment.[20] Correspondingly, a principal may also be liable to a third party harmed by the agent's conduct when "the agent acts with actual authority or the principal ratifies the agent's conduct" and either the agent's conduct is tortious or it is conduct that would have subjected the principal to liability if undertaken by the principal.[21] In other words, if an agent exceeds its authority in executing a certain level of bond,

[18] Restatement (Third) Of Agency § 4.01.
[19] Restatement (Third) Of Agency § 7.01.
[20] *Id*. An agent may not be liable to a third party for its breach of a duty to the principal, however, as the duty must be owed to the third party. Restatement (Third) Of Agency § 7.02.
[21] Restatement (Third) Of Agency § 7.03.

but the surety accepts the premiums and later pays out on the bond, it has ratified the excess bond.[22] A principal may also be subject to liability if it fails to adequately supervise an agent, or negligently hires an agent,[23] or delegates a duty of care to an agent by which an agent fails to abide.[24]

There is also that critical concept of vicarious liability, where a principal can be liable for actions of an agent in harming a third party where the agent is an employee and was acting in the scope of its employment, or the agent commits a tort when acting with apparent authority or allegedly on behalf of the principal.[25] Everyone is familiar with the concept of *respondeat superior*, [26] which translates to "let the superior [or principal] be liable." The classic case of a delivery driver getting into an accident with a third party while delivering groceries comes to *mind. If one really wants to bring out the Latin, qui facit per alium facit per se really rolls off the* tongue, which roughly translates to: "he who does an act through another is deemed in law to do it himself."[27] The best way, of course, to review all of these concepts, is in their application through the case law and relevant statutes.

II. Case Law and Relevant Statutes

A. New York

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[22] For instance, ratification might occur of an employee/agent's procurement of a bid bond where the company/principal/contractor later accepted its benefits. *See RLI Ins. Co. v. Athan Contracting Corp*., 667 F. Supp. 2d 229, 235–37 (E.D.N.Y. 2009) (holding that forged signature by contractor's employee was later ratified by manifestations of assent by company and principal, including acceptance of benefits).
[23] Restatement (Third) Of Agency § 7.05.
[24] Restatement (Third) Of Agency § 7.03.
[25] Restatement (Third) Of Agency § 7.03.
[26] *See Meyer v. Holley*, 537 U.S. 280, 285–89 (2003) (reviewing principles of *respondeat superior* or vicarious liability of a corporation, as opposed to its president or COO, for the acts or its agents or employees within the scope of their employment under a discrimination case under the Fair Housing Act).
[27] *Wallace v. John A. Casey Co*., 132 A.D. 35, 40–41, 116 N.Y.S. 394, 399–400 (2d Dep't 1909) (reviewing maxim that appears to only apply to an act that is actually, but not impliedly, authorized, and reviewing other concepts of vicarious liability).

New York Insurance Law expressly defines an insurance agent and insurance broker as follows:

> (a) In this article, "insurance agent" means any authorized or acknowledged agent of an insurer, fraternal benefit society or health maintenance organization issued a certificate of authority pursuant to article forty-four of the public health law, and any sub-agent or other representative of such an agent, who acts as such in the solicitation of, negotiation for, or sale of, an insurance, health maintenance organization or annuity contract, other than as a licensed insurance broker, except that such term shall not include: [subject to exceptions]
>
> . . .
>
> (c) In this article, "insurance broker" means any person, firm, association or corporation who or which for any compensation, commission or other thing of value acts or aids in any manner in soliciting, negotiating or selling, any insurance or annuity contract or in placing risks or taking out insurance, on behalf of an insured other than himself, herself or itself or on behalf of any licensed insurance broker, except that such term shall not include: [subject to exceptions].[28]

As the Eastern District of New York recognized, however, the use of the terms "broker" and "agent" has been a source of confusion, and it depends on the facts of the case, but "the general rule is that an insurance broker is regarded as agent for the insured."[29] When the broker is employed by the insured to obtain insurance, the duties of the broker include disclosure of material information as part of the general duty "to exercise reasonable care, skill, and diligence."[30]

There are, of course, exceptions to every rule, such as dual agency or "Special Agent" where one is operating as a limited agent for the insurer and general agent for the insured:

> An insurance broker sometimes acts as agent for the insurer so that the broker's acts are treated as the acts of the insurance company itself . . . . In addition, an insurance broker

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[28] N.Y. Ins. Law § 2101(a), (c) (McKinney).
[29] *B & A Demolition & Removal, Inc. v. Markel Ins. Co*., 941 F. Supp. 2d 307, 316 (E.D.N.Y. 2013) (citing *Riedman Agency, Inc. v. Meaott Constr. Corp.,* 90 A.D.2d 963, 964, 456 N.Y.S.2d 553, 555 (4th Dep't 1982)).
[30] *Evvtex Co. v. Hartley Cooper Assocs. Ltd*., 102 F.3d 1327, 1331–33 (2d Cir. 1996).

> can act as agent for both the policyholder and the insurer if doing so creates no conflict of interest[.][31]

In addition, an insurance broker may be considered an agent of the insurer where exceptional circumstances exist, such as where the agent's role "went far beyond that of solicitor of the liability policy, and included responsibilities such as collecting premiums, issuing the policy, and being designated as an 'agent or broker' for the insurer."[32] The agreement between the broker and insurer then becomes material, and the duties and rights of the broker with respect to cooperating in the investigation, adjustment, or settlement of a claim, as well as collecting premiums, and maintaining records becomes critical.[33] The issues involving agents or brokers and their authority are often considered mixed questions of law and fact.[34]

B. New Jersey

New Jersey defines an insurance broker as "a person who, for a commission, brokerage fee, or other consideration, acts or aids in any manner concerning negotiation, solicitation or effectuation of insurance contracts as the representative of an insured or prospective insured."[35] New Jersey law[36] also creates a limited agency relationship between a broker and an insurer with regard to the collection of premiums by the broker.[37]

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[31] *Guardian Life Ins. Co. of Am. v. Chem. Bank*, 727 N.E.2d 111, 115 (N.Y. 2000) (holding that broker acted as agent of insurer and not bank as part of fraud scheme for forged check endorsements so loss attributable to insurer) (citing UCC § 3-405 regarding imposter signatures).
[32] *Philadelphia Indemnity Ins. Co. v. Horowitz, Greener & Stengel, LLP,* 379 F.Supp.2d 442, 457 (S.D.N.Y.2005) (citations omitted).
[33] *See Erie Painting & Maint., Inc. v. Illinois Union Ins. Co*., 876 F. Supp. 2d 222, 229 (W.D.N.Y. 2012) (reviewing express provisions of agreement between broker and Illinois Union in terms of authority of broker to accept notices of claim, but determining that it involves questions of material fact).
[34] *Id*. at 230.
[35] N.J.S.A. § 17:22A–2f.
[36] N.J.S.A. § 17:22–6.2a.
[37] *See Millner v. New Jersey Ins. Underwriting Ass'n*, 657, 475 A.2d 653, 655 (N.J. App. Div. 1984) ("The scope of the statutory agency is limited to the collection of premiums on the insurer's behalf 'which is due on such contract at the time of its issuance or delivery.'").

Actual authority, which can be express or implied is defined as "when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act."[38] The focus is on the belief of the agent in that instance, as opposed to apparent authority, which focuses on the reasonable belief of a third party.[39]

In a case that can readily be described as a broker gone bad, where the broker would submit inflated invoices to a third party from the invoices it received from the surety, it was determined that the broker was not acting with actual or apparent authority on behalf of the surety, and therefore was not its agent.[40]

C. California

California has codified many aspects of agency, including actual or ostensible authority, and ratification.[41] Interestingly, actual authority in California can be found based on a quasi-negligence standard, allowing for it to rely upon a "want of ordinary care": "Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess."[42] The standard for notice on the part of both principal and agent uses similar language:

> As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other.[43]

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[38] *New Jersey Lawyers' Fund for Client Prot. v. Stewart Title Guar. Co*., 1 A.3d 632, 639 (N.J. 2010).

[39] *Id*. (defining apparent authority as "when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.")

[40] *Sylvan Learning Sys., Inc. v. Gordon*, 135 F. Supp. 2d 529 (D.N.J. 2000).

[41] Cal. Civ. Code § 2295 *et seq*. (West)

[42] Cal. Civ. Code § 2316 (West).

[43] Cal. Civ. Code § 2332 (West).

Correspondingly, if an agent exceeds his authority, the principal is bound by the agent's unauthorized actions unless they can be clearly delineated (or "plainly separated") from authorized acts.[44]

If one had a nickel for every case involving bail bonds in California, nickels would abound. Ostensible or apparent authority in California is created through the actions of the principal and not the agent.[45] A surety was not held liable, for instance, on bail bonds written by an agent whose power of attorney had been revoked several years prior to the execution.[46] With respect to knowledge and notice, based on the statutory provisions above, in an unpublished opinion, the Ninth Circuit affirmed the imputation of knowledge of an agent to the surety where Safeco had executed a power of attorney appointing agent to execute fidelity and surety bonds and otherwise bind it.[47]

D. Texas

Moving south, one is an agent of the insurer when:

> (b) Regardless of whether the act is done at the request of or by the employment of an insurer, broker, or other person, a person is the agent of the insurer for which the act is done or risk is taken for purposes of the liabilities, duties, requirements, and penalties provided by this title or Chapter 21 if the person:
>
> (1) solicits insurance on behalf of the insurer;
>
> (2) receives or transmits other than on the person's own behalf an application for insurance or an insurance policy to or from the insurer;
>
> (3) advertises or otherwise gives notice that the person will receive or transmit an application for insurance or an insurance policy;
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> (4) receives or transmits an insurance policy of the insurer;

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[44] Cal. Civ. Code § 2333 (West).
[45] *People v. Sur. Ins. Co*., 186 Cal. Rptr. 385, 389 (Cal. Ct. App. 1982) (citing Civ. Code § 2317).
[46] *Id*.
[47] *Com. Money Ctr. v. Safeco Ins. Co. of Am*., 605 F. App'x 609, 611 (9th Cir. 2015) (citing Cal. Civ. Code §§ 2332, 2333).

> (5) examines or inspects a risk;
>
> (6) receives, collects, or transmits an insurance premium;
>
> (7) makes or forwards a diagram of a building;
>
> (8) takes any other action in the making or consummation of an insurance contract for or with the insurer other than on the person's own behalf; or
>
> (9) examines into, adjusts, or aids in adjusting a loss for or on behalf of the insurer.[48]

Under the common law, however, apparent authority is based on estoppel, but only focuses on the actions of the principal:

> Apparent authority, we have said, is based on estoppel, arising "either from a principal knowingly permitting an agent to hold [himself] out as having authority or by a principal's actions which lack such ordinary care as to clothe an agent with the indicia of authority, thus leading a reasonably prudent person to believe that the agent has the authority [he] purports to exercise." . . . We have further noted that the principal's full knowledge of all material facts is essential to establish a claim of apparent authority based on estoppel. . . . Moreover, when making that determination, only the conduct of the principal is relevant. . . . Finally, the standard is that of a reasonably prudent person, using diligence and discretion to ascertain the agent's authority.[49]

The Texas Supreme Court, in applying the principles of apparent authority, found that a soliciting agent for surety bonds did not render them agents for the purpose of investment counseling:

> Apparent authority arises through acts of participation, knowledge, or acquiescence by the principal that clothe the agent with the indicia of apparent authority. *See NationsBank, N.A. v. Dilling,* 922 S.W.2d 950, 952–53 (Tex.1996) (per curiam); *Southwest Title Ins. Co. v. Northland Bldg. Corp.,* 552 S.W.2d 425, 428 (Tex.1977) ("Only the conduct of the *principal,* leading one to suppose that the agent has the authority he purports to exercise, may charge the principal through the apparent authority of an agent."). We must look

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[48] Tex. Ins. Code Ann. § 4001.051 (West).

[49] *Gaines v. Kelly*, 235 S.W.3d 179, 182–83 (Tex. 2007) (holding that broker's representation that lender would make a loan could not be attributed to principal as there was no actual or apparent authority) (citations omitted).

> beyond the permission INA gave Ace and Gunnels to collect and transmit INA's applications and bonding fees, which itself was insufficient to bestow apparent authority to provide investment counseling services about the Overlord programs.[50]

E. Florida

Florida has a variety of statutes regarding the appointment and licensing of agents, including the prohibition of furnishing supplies to an unlicensed agent, such as "blank forms, applications, stationery, or other supplies" to effectuate contracts of insurance.[51] And of course, the authority of an agent is lost upon the termination or expiration of the agency relationship.[52]

In Florida, an insurance broker "may act in the dual capacity of broker for the insured and agent of the insurer" and an insurer may be accountable for "the actions of those whom it cloaks with apparent agency[.]"[53] The Florida Supreme Court described the test that it generally applies:

> Recent cases have applied a three-prong test under general agency law in order to determine the existence of apparent agency: first, whether there was a representation by the principal; second, whether a third party relied on that representation; and, finally, whether the third party changed position in reliance upon the representation and suffered detriment.[54]

Like Texas, Florida also focuses on the actions of the principal, and invokes equitable principles in terms of whether there was reliance to one's detriment.

There are innumerable issues that arise in the law of agency as it applies to sureties, and different states treat the issues with some nuances, as demonstrated above. The common themes become readily apparent, however, and making sure that the principal acts consistently with its grants of express authority is critical. The rogue agent or broker are the rare cases, and making

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[50] *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 672–73 (Tex. 1998).
[51] *See, e.g*., Fla. Stat. Ann. §§ 626.342, 626.451.
[52] Fla. Stat. Ann. § 626.431 (West).
[53] *Almerico v. RLI Ins. Co.*, 716 So. 2d 774, 776–77 (Fla. 1998).
[54] *Id*. (citations omitted).

sure agreements are clear in terms of the grant and limitation of authority is imperative. In an industry based on trust and integrity, and reliant upon the word and guarantee of sureties, clear communication and grants of authority are the norm. Whatever one might call one's agent or broker, the power to bind the surety is not in its name, but does have the utmost force on the surety's good name.

PANEL 7

Every Hand's a Winner and Every Hand's a Loser – An Agency Overview: An Agent By Any Other Name

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Ethical Considerations when a Surety Tenders its Defense to its Principal

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I. Introduction

Tendering defense can be an attractive option for sureties and principals who wish to reduce costs and attempt to streamline the litigation process. The decision to seek joint representation is often made because at the outset it may seem that the surety's and principal's interests are aligned and it is convenient and cost efficient for the principal. Ethical pitfalls, however, exist for the practitioner who accepts a tender of defense. Joint representation of both the surety and the principal is by no means impossible, but it must be undertaken carefully. In this paper, we discuss some of the risks that should be considered and the ethical considerations that should guide the attorney before, during, and after the joint representation. Because a surety's liability is commensurate with the principal, the surety and principal's interests will generally align. But, because of the indemnity agreement and the existence of certain defenses that are available to one but not the other, a conflict of interest could arise during the course of the representation.

A. Disadvantages and Dangers of Tendering Defense

The most obvious disadvantage of the joint representation is that it could result in the attorney ultimately needing to withdraw from both representations when a conflict arises. If the two clients take adverse positions in the litigation, the attorney must then withdraw from the representation of both parties. But other risks exist.

A surety may subject itself to increased damages, bad faith penalties, an adverse attorney fee award if either a surety defense is not asserted or the surety entangles itself in unnecessary litigation. Also, a surety may end up being represented by an attorney unfamiliar with surety defenses (and obligations) or too aligned to the principal.

For example, in *Karton v. Ari Design & Construction, Inc.*,[1] the plaintiffs sued their general contractor on their house project for overages they paid to the contractor. Importantly, the bond principal Ari Design & Construction, Inc. ("Ari Design"), was not properly licensed as required by California law[2] and therefore was liable to the plaintiffs for *all* of the compensation Ari Design had received, pursuant to California's disgorgement statute[3]. Nevertheless, significant litigation followed while Ari Design attempted to fight a losing lawsuit. Ari Design had obtained its state-mandated license bond in the penal sum of $12,500[4] from the surety, who the plaintiffs also sued. The surety tendered its defense to its principal's attorneys. The most concerning issue for the surety was whether it was obligated to pay the $90,000 in attorney's fees that the general contractor/principal was obligated to pay, despite the amount of attorney's fees dwarfing the amount of the bond and given the surety's argument that no statute or contract provided for an award of attorney's fees against the surety. Because the appellate court found that "a surety's liability is commensurate with that of the principal" both under relevant statutory law and the terms of the bond, Wesco was responsible for the $90,000 in plaintiff's attorney's fees to the same extent as its principal.

The court held that the surety was responsible for legal fees pursuant to a statute, California Code of Civil Procedure § 1029.8, which allows for recovery of legal fees against an unlicensed person who causes damage or injury to another as a result of providing good or services for which a license is required. Because Ari Design was found to be unlicensed, and was subject to legal fees pursuant to this statute, the court held that the surety, based on its status as a litigant, and not for

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1 61 Cal.App.5th 734 (2021).

2 Apparently because the principal lacked workers compensation insurance as required under California law.

3 California Business and Professions Code § 7031(b).

4 California Business and Professions Code § 7071.6(a). The penal sum of this license bond has since been increased to $25,000.

breach of a condition of the bond, was also subject to the legal fees as recoverable costs in favor of plaintiff.[5] The cautionary point is that "[w]hen a surety decides to fight a lawsuit, it can make itself liable for the costs of that litigation in excess of the face value of its bond."[6] Would this have happened if the surety had not tendered its defense to its principal? The court in *Karton* suggested that the surety could have protected itself either by settling directly with the plaintiff, or by interpleading.[7] A tender attorney may not think about trying to settle a case only for the surety, and may not be familiar with or think about a possible interpleader to lessen the risk to his or her surety client.[8] However, the decision to interplead by the surety client may create a conflict with the principal client as the principal will likely need to obtain a new bond and disclose to future potential sureties that its prior surety suffered a loss (assuming they do not promptly repay the surety).

Additionally, the surety may not be able to assert a defense that its principal has, especially if the issued bond is a statutory bond. For example, while a principal's right to rely upon a "pay-if-paid" defense is upheld in the vast majority of the states, the surety in many states may not rely upon that defense.[9] In *Southern Env't Mgmt. & Specialties, Inc. v. City of New Orleans*,[10] the general contractor, principal, entered into a contract with the public entity for a construction project under Louisiana's Public Works Act. A subcontractor, Southern Environmental Management and

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5 *Karton v. Ari Design & Construction, Inc.* (2021) 61 Cal.App.5th 734, 752.

6 *Karton v. Ari Design & Construction, Inc.* (2021) 61 Cal.App.5th 734, 753.

7 *Karton v. Ari Design & Construction, Inc.* (2021) 61 Cal.App.5th 734, 753.

8 The court in *Karton* suggested an interpleader, even though plaintiff Karton was the only claimant against the bond. Typically an interpleader requires double or multiple claims that in the aggregate exceed the penal sum of the bond or stake at issue in the case. California Code of Civil Procedure § 386(b).

9 *Sureties and Pay-if-Paid Clauses: Balancing Subcontractor Protection with Freedom to Contract*, Adrian A. D'Arcy and Ashley B. Robinson, The Brief, American Bar Association, Winter 2025, Vol 54, No. 2.

10 22-0018, (La. App. 4 Cir. 5/11/22), 339 So.3d 1234.

Specialties, Inc. ("SEMS") had a payment dispute with the general contractor, made a claim, filed a statement of claim against the property, and then filed suit against the public owner, the general contractor, and the surety.[11] The surety tendered its defense to the general contractor's counsel and despite the only defense to SEMS claim being a pay-if-paid defense which the surety could not rely upon pursuant to Louisiana law at the time, the surety did not pay the claim. SEMS filed a motion for summary judgment against the surety on the payment bond claim and also asserted a bad faith damages claim against the surety.[12] The surety lost a motion for summary judgment on the payment bond claim but, then, after retaining separate counsel for the surety, was successful in arguing that bad faith damages were not appropriate in the situation at hand.[13] Would this whole debacle have occurred if the surety had not tendered its defense to its principal?

B. Advantages of Tendering

War stories aside, there are some advantages to the surety tendering its defense to the principal. The obvious advantage of joint representation is that legal costs will be significantly reduced for the principal. The principal avoids bearing the costs of separate representation both in attorney's fees and costs. Also, the surety avoids paying up front for separate representation and the dollar amount for any subsequent indemnity claim would be lessened. In addition, as the principal is very involved in the defenses, the surety's grounds for indemnity may be stronger. Furthermore, from a practical standpoint with joint representation, the surety may end up with better access to project records, facts, and witnesses. Moreover, a tender can serve as a tool to help

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11 *Id*. at 1236.

12 *Id.* at 1235.

13 *Id*. at 1242. The reason that the court did not award bad faith damages was because it ruled that, as the payment bond was a statutory bond that the Louisiana Public Works Act and not Louisiana's Insurance Code was the exclusive remedy and bad faith damages are not recoverable under the Louisiana Public Works Act. Since this case, Louisiana law has changed and now the surety can rely upon its principal's "pay-if-paid" defense.

the principal to engage seriously in settlement efforts or cooperate to resolve the dispute. Finally, tendering defense may preserve a good relationship with the surety's client - the principal. As such, in certain circumstances and with the right counsel, tendering defense may be the best decision for the surety.

II. Ethical Considerations

The ethical implications of a joint representation require consideration of the applicable ethical rules and practical application in the surety and principal context when considering whether to accept a tender of defense during the representation, and when the matter has concluded. While references are made here to the ABA Model Rules for Professional Conduct throughout, each state's ethical rules may differ from these Model Rules, so the applicable state ethical rule needs to be thoroughly examined.

As the possible consequences of unmanaged conflicts are high for outside counsel engaging in joint representation (*i.e.*, either or both clients may assert claims of malpractice or breach of fiduciary duty, ethical violations may result in disciplinary sanctions, and litigation strategy being compromised, prejudicing both clients *etc*.), outside counsel needs to be very careful before, during, and after representation.

On the surety side, conflicts of interest concerns raised by the joint representation, the surety's decision to pursue or not pursue the principal's claims, possible indemnity disputes, and confidentiality issues are just some of the important ethical issues that the surety claims representative needs to consider before agreeing to a tender/joint representation and needs to continue to monitor throughout the joint representation should the surety tender.

A. Before Tender – Competence and Conflicts

The undertaking of a joint representation is a multi-step process that requires caution by all involved and on the ethical front by the attorney that might provide the joint representation. First, the attorney must be competent to represent both the principal and surety and then the conflict of interest and potential conflict of interest needs to be addressed.

1. Competence

First and foremost, an attorney is required to provide competent representation to a client.[14] As such, potential tendered counsel is ethically bound to determine if he or she is competent enough in surety law to provide a defense to the surety.[15] This may not always be the case. Even a practitioner very competent in construction law may not have the requisite experience with the nuances of a surety's rights and obligations and surety law to provide a competent defense. In this situation, the proposed joint representation attorney, if in fact not competent enough to handle the situation at hand, must decline the joint representation. Should this scenario arise, a creative solution rather than the surety hiring its own counsel with the principal footing the bill, would be the surety possibly agreeing to a tender of defense but requiring that the principal find new counsel, acceptable to the surety, with the requisite experience to be able to competently represent both the principal and surety.[16]

2. Conflicts of Interest

Under the rules of ethics, attorneys cannot jointly represent parties with adverse interests.[17] Model Rule 1.7, unless one of the exceptions applies, prohibits an attorney from representing a

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14 ABA Model Rule 1.1

15 Of course, the surety should examine counsel's competency on surety defenses too before agreeing to a tender of defense.

16 And, it should be an attorney/firm who has never represented either the surety or the principal.

17 ABA Model Rule 1.7(a).

client if that representation involves a concurrent conflict of interest.[18] And a concurrent conflict of interest exists under this rule if the representation of one client will be directly adverse to another client; or if there is a significant risk that the representation of one or more clients will be materially limited by the attorney's responsibilities to another client, a former client or a third person or by a personal interest of the attorney.[19]

Inherent in the surety principal relationship, given the likely indemnity agreement in place obligating the principal to reimburse the surety for its losses, the general statutory law throughout the fifty states obligating the principal to reimburse the surety, and sometimes with the surety's unique defenses (*e.g.*, overpayment) and the surety's possible lack of defenses (*e.g.,* not being able to assert a paid-if-paid defense), a potential – if not actual - conflict of interest always exists despite how the surety's principal's interests may currently align as regards the claim being litigated. The North Caolina Bar recognized these looming ethical conflicts when it issued an opinion regarding the possible conflicts when an attorney represents both a principal and surety jointly.[20] It noted the inherent conflict with a principal's wish to assert certain, possible not successful defenses and to delay the case with a surety's obligation to pay valid claims:

> [i]f the lawyer believes that an appropriate defensive action taken on behalf of the general contractor would interfere with a legal duty the surety owes to the claimant/supplier, such that the surety could be exposed to a bad faith claim, a conflict arises. In this situation, the lawyer must withdraw from the representation of both parties and may only continue with the representation of the general contractor with the consent of the surety.[21]

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18 *Id.*

19 *Id.*

20 2003 N.C. Eth. Op. 1 (Adopted April 18, 2003)

21 *Id*.

ABA Model Rule 1.7(b), however, permits joint representation if the attorney reasonably believes competent and diligent representation can be provided to both, the representation is not prohibited by law, the clients are not directly adverse in the same proceeding; and both clients give informed consent, confirmed in writing.[22] As such, under the Model Rules, under certain circumstances, the conflict can be waived with the written, informed, consent of both the surety and the principal.

Regardless, at the outset and before taking on the joint representation, the attorney must engage in a conflict analysis that goes beyond checking off the box regarding a lack of current, direct adversity. The attorney must look for subsurface, potential conflicts which may exist or may arise during the course of the representation.

The attorney needs to communicate these potential conflicts to both the surety and the principal in writing before agreeing to the joint representation and reduce the clients' informed consent to writing. As the burden of establishing disclosure and informed consent is on the attorney and any doubts will be resolved in favor of the client, attorneys would be wise to include all conflicts and include all foreseeable possible scenarios in the disclosure. A detailed engagement letter containing all such disclosures, summarizing the advantages and disadvantages of common representation, detailing the attorney's obligations regarding communications,[23] detailing who is responsible for the attorney's fees,[24] verifying that informed consent was achieved, and memorializing what will happen if and when the interests of the surety and principal diverge (*i.e.*, the attorney must withdraw and cannot represent either party) should be provided and signed by

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22 ABA Model Rule 1.7(b). Again, practitioners need to review the applicable state court rule.

23 *See* discussion below.

24 *See* discussion below.

the attorney and representatives of both the principal and surety. Also, a detailed joint representation agreement may be a good idea to set client expectations.

B. During Tender

Once a tender has been agreed to and the attorney is representing both the surety and principal, the attorney representing both the principal and surety has important ethical obligations which he or she must adhere. The attorney must abide by the rules of communication and confidentiality applicable to both the principal and surety, raise conflicts of interest prohibiting further representation of both immediately, and make sure that both surety and principal informed consent before any settlement is confected.

1. Client Communications and Confidentiality

In the pre-engagement disclosures, the attorney must make clear to both the principal and surety that their communications with the attorney are not confidential as to each other. Regular updates should be given to both parties, as neither should be preferred over the other when receiving information regarding the status of the litigation and the need for decision-making. ABA Model Rule 1.4 outlines an attorney's duty to communicate with the client and ABA Model Rule 1.6 covers the attorney's duty of confidentiality.

As regards communications, in the context of joint representation, attorneys must remember they have a continuing ethical responsibility to keep each client reasonably informed about the status of a matter. An attorney must avoid the misperception that a surety or indemnitee client is merely an "accommodation" or a "token" representation based on their derivative liability. In fact, while the surety may not want to be inundated with correspondence regarding the litigation, it may be wise, unless expressly told otherwise, to copy the surety on all communications to the principal pertinent to the subject matter of the joint litigation.

As regards the duty of confidentiality, Comment 30 to Model Rule 1.7 provides guidance as to how joint representation may affect confidential and privileged information:

> A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.[25]

Also, Comment 31 to Model Rule 1.7 states that "continued common representation will almost certainly be inadequate if one client asks the attorney not to disclose to the other client information relevant to the common representation."[26] According to the comment, this is because the attorney has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the attorney will use that information to that client's benefit.[27]

In the informed written disclosure before the joint representation is confected the attorney should, as part of the process of obtaining each clients' written consent, advise both the principal and the client that information will be shared and that the attorney will have to withdraw from the representation of both if one client decides that some matter material to the representation should be kept from the other.

The attorney's dilemma may arise when for instance, the principal starts inquiring about indemnity defenses. The attorney should immediately advise the principal of the conflict and make clear that the attorney is not to be consulted as to issues that may jeopardize the attorney's obligations to the surety. Likewise, if the surety seeks information regarding the principal's

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25 ABA Model Rules, Rule 1.7, Cmt. 30 (2025)

26 ABA Model Rules, Rule 1.7, Cmt. 31 (2025)

27 *Id.*

financial situation, the attorney should make clear that it is not authorized to disclose this confidential information. For these types of common potential conflict scenarios, the best practice is to address these issues in the engagement letter and/or Joint Representation Agreement.

2. Ethical Issues and Attorney Fees

Standard practice is that, when a surety tenders its defense, it will typically require the principal/indemnitors to be responsible for the attorney's fees and costs incurred in the case. However, under ABA Model Rule 1.8 (f), an attorney shall not accept compensation for representing a client from one other than the client unless the client gives informed consent; there is no interference with the attorney's independence of professional judgment or with the attorney-client- relationship; and information relating to representation of a client is protected as required by Rule 1.6. Because the attorney will not be receiving payment from one of the clients – the surety – to avoid a possible ethical violation, the joint representation agreement should make it clear that the requirements of Model Rule 1.8(f) are met.

3. Ethical Issues with Settlement of Claims

While the joint representation may appear to be 100% aligned at the outset, the surety and principal may, ultimately, have differing goals with respect to claims resolution and, as such, conflicts of interest can arise. While the principal may believe that it has valuable affirmative claims and strong defenses to the adverse parties' claim, things sometime change and conflicts may arise during the representation when one of the jointly represented parties favors settlement and the other does not.

Generally, the surety already has an indemnity agreement, executed by the principal/ indemnitors, giving the surety the broad discretion to settle claims. Generally, under these same indemnity agreements, a surety is entitled to reimbursement for any payments made by it in a good

faith belief that it was required to pay.[28] While the surety's power of to settle claims has been consistently upheld by the courts,[29] in a joint representation situation the power of the surety to unilaterally settle claims can create serious conflicts of interests between the parties and ethical implications for counsel.[30]

Specifically, the comment to Rule 1.8 provides that a "lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients…unless each client gives informed consent, in a writing signed by the client."[31] The lawyer's disclosure shall include the existence and nature of all the claims … involved and of the participation of each person in the settlement.[32]

Per this rule, if the surety wants to settle over the principal's objections, the joint representation attorney needs to withdraw from the representation of both the surety and the principal,[33] and the surety and principal would need to obtain new separate counsel. In addition, this surety decision may affect future indemnity claims by the surety against the principal. The quagmire of conflicting obligations and rights (*i.e.*, the attorneys' ethical obligations under ABA Model Rule 1.8 and the surety's power to settle under the indemnity agreement) is one of the reasons that this potential conflict should be disclosed by the attorney before the joint representation begins.

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28 *Aventura Eng'g & Constr. Corp*., 534 F. Supp. at 1304 relying on *Thurston v. Int'l Fidelity Ins. Co.*, 528 So. 2d 128, 129 (Fla. Dist. Ct. App. 1988).

29 *See, e.g.*, *Hutton Constr. Co. v. County of Rockland*, 52 F.3d 1191 (2nd Cir. 1995); *Marcelli Constr. Co. v. City of Lapeer*, No. 258314, 2006 Mich. App. LEXIS 860 (Mich. Ct. App. March 23, 2006); and J*ames McKinney & Son, Inc. v. Lake Placid 1980 Olympic Games, Inc*., 462 N.E.2d 137 (N.Y. 1984).

30 ABA Model Rules, Rule 1.8, Cmt. 16 (2025)

31 *Id.*

32 *Id.*

33 The surety may consent to the attorney to continue to represent the principal.

C. Post Representation Issues

The most obvious situation in the surety/principal context in which an attorney is most likely disqualified from further representation is where, after representing both the principal and surety on a tender of defense, the surety subsequently files suit against the principal for indemnity. Representing either party in that circumstance could violate Rule 1.9's prohibition on representing a client in the "same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client." ABA Model Rule 1.7(b)(4) and Rule 1.9(a) make reference to "informed consent, confirmed in writing" from the affected client or former client, as the case may be. The ethical pitfalls are numerous for an attorney in that circumstance. Thus, when deciding whether to accept a surety's tender of defense, the attorney should understand at the outset that representing either party in a subsequent indemnity matter is likely impossible and so inform the principal and the surety. From the surety's perspective, requesting that the attorney agree to not represent either party in a subsequent related suit may be advisable.

D. Court Decisions

1. Conflict did not Prohibit Representation

In *Travelers Cas. & Sur. Co. of Am. v. J.O.A. Constr. Co*.,[34] the principal, JOA Construction ("JOA") appealed a grant of summary judgment arguing that its attorney's joint representation of it and Travelers, as the surety, in a collateral arbitration, caused its attorney to fail to oppose the motion for summary judgment filed in the federal litigation at issue, and sought relief under Fed. R. Civ. Proc. 60(b)(3) and 60(b)(6)[35], which required JOA to show that the "adverse party

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34 479 Fed Appx. 684 (6th Cir. 2012

35 Fed. R. Civ. Proc. 60(b) provides "Grounds for Relief from a Final Judgment, Order, or Proceeding;" (b)(6) specifies "fraud (whether previously caused intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party", and (b)(6) for "another other reason that justifies relief."

committed a deliberate act that adversely impacted the fairness" of the proceeding. In January 2007, the attorney, John Grylls, began his joint representation of JOA and Travelers in the arbitration related to claims made by bondholders. Travelers claimed that its interests aligned with JOA in that dispute because both parties were named as defendants in the arbitration. Grylls' initial letter to Travelers indicated that JOA had selected him to represent Travelers. But, in July 2007, Travelers filed suit against JOA, demanding collateral pursuant to the terms of the bond, with Grylls representing Travelers. Grylls sent a letter to both parties to alert them to the potential conflict and requesting consent from both to the simultaneous representation. Only Travelers expressly consented but Grylls continued his joint representation in the arbitration and his sole representation of Travelers in the federal litigation. The conflict letter noted that should Travelers use Grylls' firm in future actions that involved JOA, consent would waive the right to disqualify his firm. Grylls continued the joint representation without objection while also representing Travelers separately in the related federal litigation.

The court found that Grylls had not knowingly withheld or misrepresented his joint representation. JOA did not present evidence that there was an "actual conflict," that Grylls "actively represented conflicting interests" or that he used JOA's confidential information against them. Ultimately, because Grylls had made disclosures to all parties, received no objections, and there was no evidence he used confidential information to the detriment of a client, the Sixth Circuit disagreed with JOA that Grylls' representation of Travelers prevented him from responding to the motion for summary judgment.

2. Representation Prohibited

A contrary result was reached in *Philadelphia Indem. Ins. Co. v. P.C. Contractors, LLC*.[36] Philadelphia Indemnity moved for the disqualification of the attorney representing P.C. Contractors in the case which was based on the indemnity agreement between P.C. Contractors as principal and Philadelphia Indemnity as surety. P.C. Contractors' attorney had defended both parties as tender counsel in a separate bond claim lawsuit. The court disqualified the attorney, finding that the matters were "substantially related to this lawsuit inasmuch as plaintiff seeks to be indemnified for bond claims including those made…in the Payment Bond Suit." While the attorney alleged that there was a conflicts waiver, the court found it referred only to the potential conflicts arising from the joint representation (and presumably not subsequent representation).

The court in *Caravousanos v. Kings County Hosp.*[37] found the relationship of the two cases at issue less clearcut but nonetheless led to the disqualification of the attorney. There, the obligee Kings County Hospital, demanded that the surety Nova Casualty Company ("Nova") complete a subcontract where the principal, AWL Industries, Inc. ("AWL") defaulted. Later, the completion contractor, Nelson Air Device Corp. ("Nelson"), filed suit against the obligee, the surety, and the principal. In the *Nelson* case, the attorney, Neil Connelly represented AWL and Nova under a tender of defense. While representing AWL in that case, and without obtaining AWL's consent, Connelly represented Nova in the *Caravousanos* matter arising out of a personal injury claim on the same project. Connelly protested that he did not receive confidential information from AWL in the *Nelson* suit and argued that, at the time that AWL tendered its defense, it knew that Connelly represented Nova in "many other related actions." But, under New York's rules, the court inferred

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[36] No. 4:20-CV-211-A, 2020 U.S. Dist. LEXIS 263323 (N.D. Tex. July 21, 2020)

[37] 27 Misc. 3d 237 (Sup. Ct. 2010)

a "reasonable probability of disclosure of confidences" based on the nature of the representation. The *Nelson* case was a claim for payment pursuant to its role as the completion contractor and was therefore related to the performance bond. The *Caravousanos* case was about a personal injury, but the suit included a third party claim by AWL against Nova for indemnity for negligence arising from the work performed by Nelson. The court found that the terms of the performance bond were at issue in each case. Notably, Connelly had withdrawn from both representations in the *Nelson* suit because "certain information emerged as to the possibility of conflicting claims or defenses as between Nova and AWL." When both parties share a common interest and the information divulged by each is not construed as confidential as to the jointly represented parties, the adversity of the parties was evident in the *Nelson* lawsuit itself, because of "differing position with respect to contract issues" that existed between Nova and AWL. Therefore, Connelly was disqualified.

3. Summary of Court Decisions

While in *Travelers* the attorney was not disqualified or found to have committed any fraud or misrepresentation regarding his separate representation of the surety in a related matter, the entire appeal was its own risk that could have been avoided. Making sure that he received acknowledgement from JOA about the conflict may have helped to avoid the situation or he simply could have declined represent Travelers in that specific litigation. *Philadelphia Indem.* is a cautionary example where all conflicts, both during the joint representation and after, must be considered by the attorney and a waiver sought if the attorney wants to represent one in a subsequent suit in a substantially related matter. And *Caravousanos* shows that careful consideration must be made when representing one party in a superficially unrelated matter, because closer analysis can uncover a disqualifying conflict.

E. Summary and Conclusion

There are quite a few ethical pitfalls in a surety's tender of its defense to its principal. With the underlying possible subsurface conflicts barely below ground, the surety, the principal, and most importantly the attorney needs to think hard and long about accepting to represent both the surety and the principal on a tender of defense as the consequences of an improper representation may be harsh.

Before accepting the tender, the surety and principal should be fully aligned on the claim, the likelihood of cross-claims or indemnity disputes should be minimal, a full investigation of any conflicts or potential conflicts must be undertaken, the attorney must explain the nature of potential conflicts and consequences to both the surety and the principal, and make sure to receive their informed consent in writing with a comprehensive joint representation including provisions addressing communications, confidentiality, attorney's fees, the surety's right to settle, future conflicts, and what happens if the conflict becomes unwaivable being the recommended best practice. And, during the joint representation, counsel must understand and adhere to the obligations to both clients, not favor either, and withdraw from representation if the conflicts become untenable.

A surety tendering its defense to its principal can work in certain situations and tendering may keep the surety and principal's relationship strong. The key to its success is an alignment of interest, the competency of the counsel involved, a full understanding up front by all involved of the attorneys' respective ethical obligations to both the surety and the principal and an understanding that the attorney may have to withdraw from representation. This may work with a tender to the principal's counsel or possibly to new counsel who can represent both the surety and the principal in the matter.

PANEL 8

I'm Alright – But is My Principal?

Warning Signs That a Bond Applicant May Not Be a Good Bonding Candidate

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2025

WARNING SIGNS THAT A BOND APPLICANT MAY NOT BE A GOOD BONDING CANDIDATE

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WARNING SIGNS THAT A BOND APPLICANT

MAY NOT BE A GOOD BONDING CANDIDATE

The factors that a surety should consider in determining whether a bond applicant is or is not a good bonding risk are manifold and are vitally important in ensuring that the surety is not unnecessarily exposed to financial losses that can be avoided. Making the wrong choice and bonding what turns out to be a negligent, irresponsible, or incompetent contractor can result in serious financial consequences for the surety. One claim on a construction project can easily result in tens of millions of dollars in losses to the surety. Consequently, appropriate vetting of the principal in terms of its potential as a good bonding candidate is critical.

The warning signs that a contractor may not be a good bonding risk, or may not be able to complete a construction project, include the following factors of consideration.

Past Performance Issues and the Bad Reputation of the Business

Contractors with a poor reputation in the industry and a history of failing to complete projects on time while being significantly over budget are definitely indicators of a bad bonding risk. A contractor's history of failing to complete projects on time or abandoning projects can be a significant warning sign.

In *Denny Const., Inc. v. City and County of Denver ex rel. Bd. of Water Com'rs* (Colo. 2009) 199 P.3d 742, the court stated:

> [S]urety bonding is a careful, rigorous, and professional process that produces the following end product: an analysis of the potential risk of contractor default." *Id.* at 408 (citation and quotation omitted); *see also id.* ("Surety companies pre-qualify contractors and then assure project owners that these contractors will perform on schedule.") (citation and quotation omitted). The factors considered by the surety include the contractor's financial situation, character and reputation for integrity, competence and experience, workload capacity, and areas of expertise.

Id. at p. 747.

In assessing the bond applicant's past performance and reputation, sureties should consider the following factors:

- How long the contractor has been in business and its reputation in the industry.
- The experience and reputation of key management personnel.
- The contractor's management structure and organization chart, the length of time current management has been in place, and the experience and track record of the managers.
- Financial management issues such as an inability to forecast cash flow, slow turnover of receivables, and constant borrowing to credit limit.
- The contractor's management skills or lack thereof.
- A poor track record for fulfilling contracts.
- An inadequate accounting system lacking financial controls and reporting capabilities.
- Lack of project management processes and workforce capabilities, as well as inadequate supervision also signal trouble.
- Inability to explain any prior claims and lawsuits against it.

Contractors with a poor reputation and that are lacking in terms of the aforesaid criteria may be poor bonding risks.

Financial Instability

Financial instability is another key indicator that a contractor may not be a good bond risk. Contractors who have inadequate assets, overdrawn funds, or have significant unpaid bills can pose a risk of being unable to complete the project.

For example, in *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, Cates had overdrawn $276,730 and had unpaid mechanics' liens amounting to over $935,000. These financial issues contributed to the project's foreclosure and significant damages awarded against the surety. *Id.* at pp. 36-39.

In *Alaska Nat. Bank of the North v. Gwitchyaa Zhee Corp*. (1981) 639 P.2d 984, the court emphasized that the surety's first inquiry is into the contractor's financial position, as this determines whether the contractor can be financed for less than the bond amount and whether it would cost less to complete the project with the contractor than to bring in another contractor. *Alaska v. Gwitchyaa, supra*, 639 P.2d at p. 989. Sureties should therefore assess the contractor's overall financial health, including its financial resources and ability to manage project funds.

In assessing the applicant's financial health, sureties should review the applicant's financial statements, including balance sheets, income statements, and cash flow projections. This evaluation helps gauge the applicant's ability to fulfill their obligations under the bond. Factors such as liquidity, profitability, debt levels, liquidity ratios, profitability, overall solvency and overall financial management practices should be scrutinized to ascertain the applicant's capacity to perform. Additional financial risk indicators may include:

- The principal being placed in funds control.
- A general contractor or obligee requiring the use of joint checks.
- The principal assigning away the right to future proceeds from a bonded contract.
- A principal's inability or continued reluctance to provide annual audits or timely financial information.

A surety should also investigate the contractor's net worth, amount of uncompleted work, cash flow, accounts receivable, and accounts receivable aging information. Looking at the contractor's credit history, working relationships with subcontractors and suppliers, and bank account information is also helpful. A surety should evaluate all of a contractor's capital assets as a way of learning the financial strength of the contractor. It should also require that individual indemnitors have sufficient assets to secure their promise to indemnify the surety in the event claims are made against the bond.

Weaknesses in financial stability may indicate that the bond applicant may not be able to financially complete the construction project, and may not be a good bonding risk.

Creditworthiness and Personal Guarantees

In some cases, the personal credit history of the applicant and their willingness to provide personal guarantees may be factors in underwriting. Personal guarantees indicate a commitment to fulfill obligations if the business fails to do so. Refusal to provide a personal guarantee may indicate a lack of commitment and possibly awareness that the applicant may not be able to complete the project. Personal guarantees provides insights into the applicant's financial responsibility and ability to manage debt, though it typically carries less weight than the financial stability of the business itself.

Statistically Low Bid Relative to Competitors

Low bids in excess of 10% lower than those of the next closest competing bids on a given bid package can be a harbinger of impending financial struggles within a given project that could have detrimental effects on the overall financial health of the contractor. Successive iterations of excessively low bids in a short span of time are even greater cause for concern as they indicate a pattern of risky behavior. A desire to gain a competitive edge over their competitors might explain statistically low bids but they should be evaluated to determine if they are so low as to be unrealistic.

In *Green River Gas Co., Inc. v. U. S. Fidelity & Guaranty Co.* (Ky. Ct. App. 1977) 557 S.W.2d 428, 430, the surety declined to issue a performance bond, even though it had issued a bid bond, when the spread between the principal's bid and the next lowest bid was significantly more than 10%.

Inadequate Cost Control

Healthy contractors employ routine period financial reports and systems of checks and balances to assure cost controls during the project's life cycle. Development of a realistic budget based on the initial cost estimate at the start of the project is paramount as is updating and tracking actual costs against initial estimated costs. Procurement logs should be maintained to

assure that all services and materials are procured timely to support the construction schedule. Contractors should engage in periodic projected cost reports to forecast final construction costs which track both committed costs, self-performance costs, and soft costs. Actual soft costs and self-performance costs to date should inform future remaining costs and actual and pending change orders should be tracked within the cost control system to properly forecast remaining committed costs to subcontractors and suppliers. Approving and entering costs into the contractor's accounting system should be done through a collaborative effort between the field management, office project management, and accounting teams. Failure to maintain a consistent and disciplined approach to cost controls by both field and home office staff are warning signs.

Substandard Work

A contractor's substandard work is a significant indicator that it may not be able to complete the project and is a poor bonding risk.

In *Tellis v. Contractors' State License Bd.* (2000) 79 Cal.App.4th 153, 163, the court found that the contractor's substandard work constituted a material failure to complete the project, even though the cost of repairs was substantially less than the contract price. The contractor had 17 instances of substandard work, including improper installation of sinks, showers, and toilets, unlevel floors, water leaks, and the use of improper materials. Additionally, any material substandard work existing when the contractor requested and received payment in full for the project violated the Business and Professions Code section proscribing material failure to complete a project. *Id.* at p. 164. Failure to correct defects in substandard work after being repeatedly requested to do so also supports a finding of material failure to complete the project. *Id*. Such failure is a clear sign that the contractor may not be a good bonding candidate.

Failure to Perform and Adhere to Contractual Obligations

Failure to adhere to contractual obligations is a strong indicator that a contractor may not be able to complete the project and is a poor bonding risk.

In *Monson v. Fischer* (1931) 118 Cal.App. 503, 520-522, the court found that the contractors' failure to perform the work or furnish materials in accordance with the contract and specifications, and the neglect to proceed pursuant to the plans and specifications after notice, constituted sufficient grounds for the termination of the contract. These factors are also grounds to reject a bond applicant because faithful adherence to contractual obligations is mandatory for a successful project.

In *Buck Run Baptist Church, Inc. v. Cumberland Sur. Ins. Co., Inc.* (1998) 983 S.W.2d 501, the court noted that surety bonds are issued based on a fact-specific evaluation of the contractor's capacity to perform a given contract, with no losses expected. *Buck Run*, *supra*, 983 S.W.2d at p. 505.

Similarly, in *Stano v. Soldo Const. Co.* (1983) 187 N.J.Super. 524, 537, the surety's sole concern was the reliability and financial solvency of the subcontractor, emphasizing that these factors are critical in bonding decisions.

Delays and Disruptions

Delays and disruptions in the progress of the work can also indicate that a contractor may not be a good bonding risk.

Courts in California have not hesitated to find sureties contractually liable for damages attributable to their principals' delay in performing construction contracts. *Bird v. American Surety Co.* (1917) 175 Cal. 625, 631; *Tally v. Ganahl* (1907) 151 Cal. 418, 424; *Pacific Employers Ins. Co. v. City of Berkeley (1984)* 158 Cal.App.3d 145, 156-157 (surety liable for liquidated damages which included amounts occasioned by a principal's delay); *Amerson v. Christman* (1968) 261 Cal.App.2d 811, 825; accord, *Downingtown Area School Dist. v. International Fidelity Ins. Co.* (Pa.Commw.Ct.1996) 671 A.2d 782, 786 (finding that similar bond language may support surety's liability for delay damages.

Contractors who fail to stay on schedule may be considered poor bonding risks. These risk indicators can manifest in different ways, including but not limited to:

- Difficulty with supplying the necessary labor to project sites to keep pace with the project schedule.
- Delays on projects on which the projected profit has been extracted.
- The principal having difficulty formally closing projects out after the bulk of the scope has been complete.

Engagement in New Project Types and/or Too Many Projects

Another area for concern is when a contractor engages in new project types that are outside of their historical portfolio of project types.

For example, a contractor that has a long and successful history in constructing schools could encounter challenges incorporating healthcare or multi-family residential projects into their backlog. Such expansions into new project types should be executed strategically and cautiously. The more dissimilar the expansion into new project types the more carefully the contractor should tread.

Similarly, doubling or tripling the contractor's project volume over a short span of time can be precarious for a contractor to attempt with new hires that may not be compatible with the company's culture and methodologies. Steady growth is obviously less risky than explosive growth.

A surety must decide how much work a contractor can perform profitably in order to set a bonding limit for that contractor. The capacities of the contractor's available equipment and personnel are factors in reaching this decision. Considering these and other factors, a surety will set an upward dollar limit for a maximum individual project that it will bond, and an upward dollar limit for the total of all projects it will bond for that contractor. A surety's interest is to prevent the contractor from becoming over-extended by taking on more work than the contractor can handle. A contractor that has ventured into new types of projects and has too many projects going on simultaneously is a warning sign that the applicant may be a poor bonding risk.

Inappropriate Behavior

Contractor behavior during the project, such as threatening to abandon the project or failing to communicate effectively with the surety and obligee, can be warning signs of a poor bonding risk.

For example, in *Cates Construction, Inc. v. Talbot Partners*, Cates threatened to abandon the project unless additional amounts were paid, and eventually did abandon the project. *Cates*, *supra*, 21 Cal.4th at p. 35. This behavior indicates a lack of commitment to fulfilling contractual obligations and can lead to project delays and increased costs for the surety.

In summary, warning signs that a contractor may not a good bonding risk and may not be able to complete a construction project include past performance issues and bad reputation, financial instability, substandard work, creditworthiness and unwillingness to provide personal guarantees, statistically low bid relative to competitors, inadequate cost control, failure to perform and adhere to contractual obligations, causing delays and disruptions, engagement in new project types and/or too many projects, and inappropriate behavior during the project.

Applicable Statutes and Regulations

A review of whether the contractor is in compliance with applicable statutes and regulations, including but not limited to licensing laws, is helpful in determining whether the contractor is a good bonding risk.

For example, California Public Contract Code section 6703, which sets forth the criteria a public entity can use to select a construction manager or general contractor, are equally applicable in helping a surety determine whether the contractor is a poor bonding risk, if the contractor fails to possess the specified criteria. Public Contract Code section 6703 states in pertinent part:

> Construction Manager/General Contractor method projects shall progress as follows:

(a)(1) The department shall establish a procedure for the evaluation and selection of a construction manager through a request for qualifications (RFQ). The RFQ shall include, but not be limited to, the following:

(A) If the entity is a partnership, limited partnership, or other association, a list of all of the partners, general partners, or association members known at the time of the bid submission who will participate in the Construction Manager/General Contractor method contract, including, but not limited to, subcontractors.

(B) **Evidence that the members of the entity have completed, or demonstrated the experience, competency, capability, and capacity to complete projects of similar size, scope, or complexity, and that proposed key personnel have sufficient experience and training to competently manage and complete the construction of the project**, as well as a financial statement that assures the department that the entity has the capacity to complete the project, construction expertise, and an acceptable safety record.

(C) The **licenses, registration, and credentials required to construct the project**, including information on the revocation or suspension of any license, registration, or credential.

(D) Evidence that establishes that **the entity has the capacity to obtain all required payment and performance bonding, liability insurance, and errors and omissions insurance**.

(E) **Any prior serious or willful violation of the California Occupational Safety and Health Act of 1973**, contained in Part 1 (commencing with Section 6300) of Division 5 of the Labor Code, or the federal Occupational Safety and Health Act of 1970 (Public Law 91-596), **settled against any member of the entity, and information concerning workers' compensation experience history and a worker safety program**.

(F) Information concerning **any debarment, disqualification, or removal from a federal, state, or local government public works project. Any instance in which an entity, its owners, officers, or managing employees submitted a bid on a public works project and were found to be nonresponsive, or were found by an awarding body not to be a responsible bidder**.

(G) **Any instance in which the entity, or its owners, officers, or managing employees, defaulted on a construction contract**.

(H) **Any violations of the Contractors' State License Law (Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code), excluding alleged violations of federal or state law including the payment of wages, benefits, apprenticeship requirements, or personal income tax withholding, or of the Federal Insurance Contributions Act (26 U.S.C. Sec. 3101, et seq.) withholding requirements settled against any member of the entity**.

(I) Information concerning the **bankruptcy or receivership** of any member of the entity, including information concerning any work completed by a surety.

(J) Information concerning **all settled adverse claims, disputes, or lawsuits between the owner of a public works project and any member of the entity during the five years preceding submission of a bid pursuant to this section, in which the claim, settlement, or judgment exceeds fifty thousand dollars ($50,000)**. Information shall also be provided concerning any work completed by a surety during this period. (Emphasis added)

California Public Contract Code § 6703 (emphasis added).

Other Factors Not Necessarily Related To The Bond Applicant, But Which May Be Considered When Bonding A Project

Bond Amount and Type

The specific details of the bond being applied for play a significant role in underwriting. Sureties evaluate the bond amount requested and the type of bond (e.g., bid bond, performance bond, payment bond). Each type of bond carries different risks and requirements.

Project Details and Risk Assessment

Underwriters carefully review the specifics of the project or contract for which the bond is required. This includes assessing the scope of work, contract terms, timelines, and potential risks involved. Factors such as the complexity of the project, the reputation of the project owner, and external economic factors impacting the project are all considered.

Industry and Market Conditions

External factors such as economic conditions, industry trends, and market volatility can impact underwriting decisions. Industries experiencing growth and stability may present lower risks, whereas those facing economic downturns or regulatory changes might pose higher risks.

Sureties should set their underwriting criteria based on these external factors to manage overall risk exposure.

Collateral and Indemnity

Depending on the risk assessment, sureties may require collateral or indemnity agreements as part of the underwriting process. Collateral can include cash deposits, marketable securities, real property, or other assets that provide a financial cushion in case of default.

Long-Term Relationship Potential

Underwriting decisions also consider the potential for a long-term relationship between the surety and the applicant. Building trust and demonstrating reliability over time can lead to favorable terms and conditions for future bonds. Sureties value applicants who prioritize transparency, communication, and ethical business practices.

SUMMARY

The factors that indicate a bonding applicant may not be a good bonding risk are numerous, but no one factor is determinative. The totality of factors considered together creates the best picture of whether the principal will perform well and reduce the risk of bond claims against the surety. Though the time necessary to adequately vet a bond applicant is significant, the investment at the outset can pay huge dividends in the future in terms of reducing the probability of costly claims being made against the bond and the surety.

PANEL 9

Nobody Worry 'Bout Me – Or Should They?

New Case Law and Legislation Impacting the Surety

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NOBODY WORRY 'BOUT ME – OR SHOULD THEY?
New Case Law And Legislation Impacting The Surety

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I. INTRODUCTION

This paper provides curated summaries of cases and legislative developments throughout the United States from this year (2025) and the prior year (2024). The authority chosen illuminates the direct or indirect implications on a surety's rights, obligations, risks, and/or defenses in the legal realm.

II. CASE LAW

The cases discussed in detail herein are separated into three topics – Indemnity; Bonds; and Cautionary Tales.

Indemnity – *International Fidelity Insurance Company v. TA Partners, LLC* (C.D. Cal., July 29, 2024) 2024 WL 3915175

This case provided a successful roadmap for a surety wanting to enforce a collateral demand through a preliminary injunction. Two sureties initiated an action against their bond principal and indemnitors for breach of contract, specific performance, and quia timet. The sureties sought a mandatory preliminary injunction, ordering the defendants to post collateral security under the terms of the indemnity agreements. The district court granted the motion.

The court began its analysis indicating that the sureties would likely succeed on the merits for their breach of contract and specific performance claims. The court found that the sureties satisfied the elements for a breach of contract claim by submitting the indemnity agreements, which included a provision requiring the defendants to post collateral when demanded by the sureties; proof of the issuance of the bonds; proof of the demand for collateral; and proof that the defendants had not obliged with the sureties' demand. Additionally, the court found that the sureties provided sufficient evidence that they would suffer damages for defendants' breach based on the fact that there are at least three claims pending against the bonds that would have to be paid out of their own funds if defendants did not post the demanded collateral. Similarly, the court found that the sureties are entitled to specific performance because the defendants failed to fulfill their obligations under the collateral security clauses of the indemnity agreements. The court found that the sureties demonstrated "not only that they are likely to succeed on the merits, but that the law and facts clearly favor their position."[1]

Regarding the factor of likelihood of irreparable harm, the sureties argued that if it is not granted the preliminary injunction, then it would "forever lose its right to contractual exoneration if Defendants are allowed to avoid posting the requested collateral."[2] More importantly, the sureties pointed to the foreclosure

[1] *International Fidelity Insurance Company v. TA Partners, LLC* (C.D. Cal., July 29, 2024) 2024 WL 3915175 at *5.
[2] *Id*., at *6.

sale of the project sites at issue by the defendants' lenders and the defendants' failure to produce requested balance sheets/income statements as evidence that the defendants are insolvent and will be unable to properly compensate the sureties in the future. The court agreed. The court observed that damages available after trial and judgment "are of little use to [the sureties] when they are responsible for investigating, defending, and potentially paying claims on bonds in the present."[3] As such, protection against these risks is "exactly what the collateral security clauses were meant to secure."[4] The court also noted that the defendants' potential insolvency would irreparably damage the sureties – a harm that "the collateral security provisions are designed to avoid."[5]

As for the remaining factors analyzed – balance of hardships and public interest – the court found those factors to favor the sureties. The injunction would enforce the sureties' rights under the indemnity agreements and would not create a new obligation of the defendants thereunder. As such, the court reasoned that "[c]ompelling the defendants' compliance with its existing legal obligations does not create hardship."[6] Whereas, the court noted, that absent an injunction, the sureties would lose their ability to enforce some of their indemnification rights. As for the last factor (public interest), the court mentioned that "[t]here is a public interest in the enforcement of contracts, 'especially those between sureties and their indemnitors'" because the "public benefits from the predictability in commercial settings that is created by the enforcement of written agreements such as indemnity agreements."[7] Finally, the court considered that failure to enforce a surety's indemnification rights in the context of construction bonds would undermine the public works bonding process, "impeding the progress of significant and important public works projects."[8]

Thus, the district court found all factors weighed in favor of the sureties and granted their motion for a preliminary injunction, requiring the defendants to post the demanded collateral.

Indemnity – *Liberty Mutual Insurance Company v. Atain Specialty Insurance Company* (4th Cir. 2025) 126 F.4th 301

In this indemnity action brought by an appeal bond surety, the district court analyzed and rejected the defense based on the theory of equitable estoppel, entered summary judgment in favor of the surety, and denied reconsideration. The court of appeal affirmed.

Liberty Mutual Insurance Company ("Surety") and Atain Specialty Insurance Company ("Indemnitor") had a longstanding indemnity agreement under which Surety would issue appeal bonds for Indemnitor's insureds ("Indemnity Agreement"). In 2018, a jury verdict for racial discrimination was obtained against Indemnitor's insured ("Insured"). The Insured sought an appeal bond to stay entry of judgment. As the general liability insurer for the Insured, the Insured reached out to Indemnitor for issuance of the appeal bond; however, shortly after the jury verdict was received, Indemnitor filed a declaratory judgment action seeking a declaration that the Insured's insurance policy did not cover damages resulting from acts of racial discrimination. As such, Indemnitor requested that Surety issue a $1 million appeal bond on the Insured's behalf. Surety agreed and the appeal bond was posted with the court.

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[3] *Ibid*.
[4] *Ibid*.
[5] *Ibid*.
[6] *Id*., at *7.
[7] *Ibid*.
[8] *Ibid*.

Shortly thereafter, in 2019, Indemnitor won its declaratory relief action, which determined that Indemnitor no longer had a duty to defend or indemnify Insured in the underlying action or the appeal. In December 2019, Indemnitor informed Surety that it would not be renewing the appeal bond since it was successful in is declaratory relief action and that the appeal bond should be closed. Surety confirmed that the bond had been cancelled.

In October 2020, the judgment against Insured was affirmed, triggering Insured's obligation to the pay the judgment. Surety reached out to Indemnitor to inform them that of their obligation to pay the judgment per the appeal bond. Indemnitor disputed its responsibility to pay the appeal bond. Surety abided by its obligation and paid the $1 million. Thereafter, Surety initiated an action against Indemnitor alleging breach of the Indemnity Agreement. In response, Indemnitor "argued that Surety was estopped from recovery because Indemnitor reasonably relied, to its detriment, on Surety's misrepresentation that the Appeal Bond was closed after the judgment issued in the [declaratory relief] action."[9] The district court granted summary judgment in favor of Surety and denied Indemnitor's motion for reconsideration. Indemnitor appealed.

On appeal, the court analyzed a singular issue: "whether the district court correctly rejected Indemnitor's equitable estoppel defense to Surety's breach of contract claim."[10] The court answered in the affirmative.

"The party asserting estoppel must show with respect to itself: (1) lack of knowledge of true facts; (2) reliance upon the conduct of the party estopped; and a (3) prejudicial change in its position."[11] Indemnitor argued that it understood the appeal bond had been closed by Surety and relied upon that information to its own detriment. The court noted that Indemnitor's defense crumpled at the first element – lack of knowledge of true facts. Under New York law, a party "cannot assert lack of knowledge of the true facts where it failed to exercise reasonable diligence that would have led it to the facts in question." In this instance, the court found that Indemnitor had "access to all the information that it needed to understand that it was still on the hook for the Appeal Bond"[12] which included the express terms of the Indemnity Agreement. Additionally, the court opined on the fact that Indemnitor was a sophisticated and represented party, which knew (or could have known through reasonable diligence) that the declaratory relief action was separate and apart from the underlying racial discrimination action and would not have extinguished the appeal bond. Finally, the court rejected Indemnitor's argument that Surety should have better notified and/or advised Indemnitor because, again, Indemnitor had access to all the information it needed to take any necessary steps to protect its interests.

Indemnity – *Lexon Insurance Company v. Justice* (M.D. Tenn., Dec. 3, 2024) 2024 WL 4960006

This case involved a dispute arising out of an indemnity agreement, including amendments thereto ("Agreement") and a personal guaranty that guaranteed payment of bond premiums and collateral obligations, including amendments thereto ("Guaranty"). Lexon Insurance Company (the "Surety") issued surety bonds on behalf of several companies ("Principals") owned by the same individual (the "Guarantor"),

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[9] *Liberty Mutual Insurance Company v. Atain Specialty Insurance Company* (4th Cir. 2025) 126 F.4th 301, 306.
[10] *Id*.
[11] *Id*., at 307.
[12] *Id*., at 308.

who personally guaranteed payment of premiums and collateral, if Principals defaulted. When Principals defaulted on their payments in 2020, the Surety demanded over $26 million from the Guarantor under the Guaranty. Guarantor failed to pay, resulting in Surety filing a lawsuit for "breach of contract – collateral and premium obligations" ("Count I"), "breach of contract – attorneys' fees and other enforcement related costs" ("County II"), and "declaratory judgment – indemnification" ("Count III"). Surety moved for summary judgment on all three Counts. The court granted summary judgment as to Guarantor's liability under the breach of contract claims (Counts I and II); denied as to County I's damages; and granted as to Count III.

The court found the Agreement and Guaranty to be valid and enforceable, determined that Principals/Guarantor materially breached the Agreement/Guaranty by not paying upon demand, and held that a genuine dispute of material fact existed as to the amount of indebtedness owed by Guarantor to Surety. In rendering its decision as to the element of damages, the court identified the applicable damages provisions in the contracts, which provided two categories of damages: (1) collateral in the total sum of $20,000,000.00 and (2) premiums in the amount of $8,378,775.94. In total, Surety was requesting $28,378,775.94 in damages. Guarantor argued that this amount was overinflated because Surety failed to take into consideration payments made in the amount of $5,750,000.00 in collateral and $5,555,000.00 in premiums to Surety. Surety did not dispute that the $5,750,000.00 in collateral had been paid, but instead argued that this amount should not be applied because Guarantor had a flawed interpretation of the Guaranty. The court disagreed. It determined that it was undisputed that Guarantor had paid $5,750,000.00 in collateral, thereby reducing its obligation to Surety to $14,250,000.00 (rather than the full $20,000,000.00). However, as to the premiums, Surety did dispute that the $5,555,000.00 in premiums had been paid and implied that the evidence presented by Guarantor was unreliable. The court stated that it "is not the proper party to judge the credibility or truth of this evidence" and viewed the evidence "in the light most favorable to the [Guarantor]."[13] In so doing, it found that there was a genuine dispute of material fact as to the total damages owed by Guarantor to Surety and denied the summary judgment motion as to Count I's damages.

Bonds (Performance) – *JDS Dev. LLC v. Parkside Construction Builders Corp.* (N.Y.App.Div. 2024) 231 A.D.3d 223

The court in this case reenforced the express terms of an AIA Document A312 performance bond, specifically the unambiguous conditions precedent that would trigger a surety's obligation to perform. JDS Dev. LLC ("Manager") sued Parkside Construction Builders Corp. ("Principal"), and Allied World Insurance Company ("Surety") for delay damages because Principal completed the bonded work one year after the contractual completion date. Surety moved for summary judgment, which the court granted. The court held that the Manager failed to fulfill the conditions precedent "until long after the principal had completed, and had been paid for, the portion of the work covered by the bond"[14] and thus, could not "prevail on its claim against the surety under the A312 bond for damages caused by delays in the principal's performance of the covered portion of the work[.]"[15] The court of appeal affirmed.

The issue before the court of appeal was whether the procedures set forth in the bond constituted conditions precedent to Manager's recovery of delay damages from Surety, and if so, whether Manager satisfied those conditions. Notably, New York law and paragraph 3 of the bond require "notice that default

[13] *Lexon Insurance Company v. Justice* (M.D. Tenn., Dec. 3, 2024) 2024 WL 4960006 at *11.
[14] *JDS Dev. LLC v. Parkside Construction Builders Corp.* (N.Y.App.Div. 2024) 231 A.D.3d 223, 224.
[15] *Id*.

is being considered, an offer to confer, notice of default, termination, and agreement to pay the contract balance" as "precursor[s] to [a surety's] liability under the bond."[16] Unless those procedures are strictly complied with, then a surety's obligation to perform under the bond has not been triggered.

In response to the foregoing, Manager tried arguing that those procedures were only applicable to require a surety to complete defaulting contractor's work and should not be considered conditions precedent in an instance where a beneficiary was solely seeking delay damages. The court was unpersuaded. The court noted that neither the bond nor any precedent provided such a narrow interpretation of the conditions precedent in paragraph 3 of the bond. The court emphasized that a surety may be held liable for delay damages where the beneficiary of the bond appropriately complied with the conditions precedent of the bond.

Manager additionally argued that it did comply with the conditions precedent when it sent multiple correspondences to Principal and Surety. But, according to the court, these correspondences were inapt because they were transmitted after Principal had already completed the work. Thus, Manager never invoked its rights under the bond while the bonded work it covered was in progress and therefore, slept on its rights.

Bonds (Payment) – *United States for use and benefit of Timberline Construction Group, L.L.C. v. APTIM Federal Services, L.L.C.* (M.D. La., Feb. 6, 2025) 2025 WL 418511

This case arose out of a payment bond dispute involving a federal construction project. Timberline Construction Group, a second-tier subcontractor ("Sub-Subcontractor"), performed work under a subcontract with APTIM Federal Services, LLC ("Sub Contractor"), which was a member of a joint venture—Brice-APTIM JV (BAJV)—that served as the prime contractor on the project ("General Contractor"). Sub-subcontractor initiated an action against Subcontractor, General Contractor, and its sureties, Liberty Mutual Insurance Company and Berkley Insurance Company ("Sureties"), alleging non-payment for work performed.

In response, the Sureties and General Contractor brought a motion to dismiss pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6), arguing that Sub-Subcontractor failed to comply with the procedural requirements of the Miller Act. Specifically, they asserted that Sub-Subcontractor failed to provide the requisite notice as set forth under 40 U.S.C. section 3133(b)(2). Section 3133(b)(2) requires 90-day notice be provided to a general contractor, where the claimant is not in direct contractual privity with the general contractor. The court noted the purpose of this statutory section is to "alert a general contractor that payment will be expected directly from him, rather than from the subcontractor with whom the materialman dealt directly."[17] The Sureties and General Contractor argued that the Sub-Subcontractor only provided a "Notice of Claim" to the Subcontractor – not the General Contractor, thereby failing to comply with the requisite notice procedures. The court agreed.

Despite the Sub-Subcontractor's assertion of multiple arguments in opposition to the motion to dismiss, including that it had sufficiently complied with the notice requirements by giving notice to Subcontractor which was a member of General Contractor (a limited liability company), the court strictly

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[16] *Id*., at 232.

[17] *United States for use and benefit of Timberline Construction Group, L.L.C. v. APTIM Federal Services, L.L.C.* (M.D. La., Feb. 6, 2025) 2025 WL 418511 at *6.

construed section 3133(b)(2). The court found that Sub-Subcontractor did not put General Contractor on notice that it would be seeking payment directly from it or making a claim on its payment bond. Additionally, the court rejected Sub-Subcontractor's request for leave to amend considering it had amended its complaint three times already and no amendment could cure the fact that it failed to provide 90-day notice. Thus, the court dismissed the Sub-Subcontractor's Miller Act claim.

Cautionary Tales – *Gose v. Native American Services Corporation* (11th Cir. 2024) 109 F.4th 1297

In this case, the United States Court of Appeals for the Eleventh Circuit considered a qui tam action brought under the False Claims Act ("FCA") by relators Dennie Gose and Brent Berry ("Relators"), owners of DWG & Associates, Inc. ("DWG"). Relators alleged that Great American Insurance Company ("Surety"), DWG's bond surety, and Native American Services Corporation ("Partner"), DWG's partner, knowingly submitted false claims for payment under federal contracts designated for participants in the Small Business Administration's 8(a) Business Development Program.

Under the Minority Small Business and Capital Ownership Development Program, commonly referred to as the 8(a) program, "contractors are subject to various requirements [including] the obligation to notify the Small Business Administration (SBA) when contractors no longer satisfy the requisite ownership or control thresholds for inclusion in the program."[18] DWG, while initially certified under the 8(a) program, had graduated after exceeding applicable size standards but continued performing on previously awarded contracts. Following financial distress, DWG underwent a change in ownership and control, with Surety and Partner assuming effective control of the company. This change in control was not disclosed to the SBA, nor was the required waiver obtained, despite DWG (now under Surety and Partner's control) continuing to bid on jobs and submitting claims under the contracts.

The district court dismissed the complaint, holding, among other things, that DWG was no longer an "8(a) participant" following graduation and therefore not subject to the program's control and ownership restrictions. The district court further concluded that Relators had failed to allege a viable theory of FCA liability because any alleged misrepresentations occurred after the contract was awarded, rather than at the time of award. It also rejected the Relators' fraudulent inducement theory, reasoning that post-award conduct did not give rise to FCA liability absent a clear false representation directly connected to payment requests.

The court of appeal reversed. The court of appeal scrupulously analyzed the district court's holding that DWG was not considered an "8(a) participant" by interpreting the plain language of the applicable regulations, including the definition of "participant." In so doing, the court of appeal held that an entity remains an "8(a) participant" for purposes of performance and compliance as long as it continues to bid on or perform contracts awarded during its period of program eligibility. Accordingly, the court found that the SBA's ownership and control requirements remain applicable to the performance of such contracts, even after a participant has technically graduated.

The court of appeal further concluded that Relators had plausibly alleged, with sufficient particularity, that Surety and Partner submitted false claims and made material omissions by failing to disclose the change in control while continuing to pursue payment on contracts reserved for 8(a) participants. Indeed, "[Surety] and [Partner] know the details of the alleged fraud, the precise contracts at

[18] *Gose v. Native American Services Corporation* (11th Cir. 2024) 109 F.4th 1297, 1302.

issue, the places of performance, and the alleged date DWG became ineligible to bid [and] [n]othing prevents [Surety] and [Partner] from reviewing the specific bids, task orders, and payment claims associated with those contracts to prepare a defense."[19] Thus, Relators' allegations comply with Federal Rule of Civil Procedure 9(b).

In recognizing the viability of a fraudulent inducement theory under these circumstances, the court of appeal emphasized that FCA liability may attach where post-award payment claims are predicated on concealed noncompliance with eligibility requirements material to the government's continued payment. Accordingly, the case was remanded for further proceedings consistent with the opinion.

Cautionary Tales – *International ProcessPlants and Equipment Corp. v. First Standard Asurety, LLLP* (E.D. Pa. Mar. 6, 2025) 2025 WL 725254

This is a rare case involving alleged Racketeer Influenced and Corrupt Organizations Act ("RICO") violations under 18 U.S.C. sections 1961-1968, as well as, common law fraudulent inducement and conversion against a private surety. International ProcessPlants and Equipment Corp. ("General Contractor") hired Metro Industrial Wrecking & Environmental Contractors, Inc. ("Subcontractor") to perform demolition work on a project to dismantle a former chemical manufacturing plant. To secure Subcontractor's demolition obligations, Subcontractor was required to obtain performance and payment bonds for General Contractor's benefit. Subcontractor obtained the required bonds from First Standard Asurety LLLP ("Surety"), which was not a surety company authorized by the U.S. Treasury Department, but was a private surety. Additionally, the bonds issued by Surety were allegedly underwritten by a third-party entity and backed by collateral held in trust. Ultimately, Subcontractor breached the subcontract and Surety denied General Contractor's claim against the performance bond. General Contractor initiated an action against Surety ("Breach of Contract Action"), which was compelled into arbitration.

As the parties were arbitrating the Breach of Contract Action, the U.S. Department of Justice indicted the owner and the Chief Operating Officer of the third-party entity for issuing fraudulent surety bonds that were not backed by assets or underwriting. The Chief Operating Officer entered a guilty plea admitting that the bonds were fraudulent. As a result, General Contractor brought a separate action alleging RICO, fraudulent inducement, and conversion claims against Surety, Surety's owner, Subcontractor, Subcontractor's owner, and the third-party entity and its owner ("RICO Action").

The arbitrator in the Breach of Contract Action ultimately determined that Subcontractor materially breached the subcontract and awarded General Contractor nearly $2 million in damages. However, the arbitrator found that General Contractor breached the performance bond, thus discharging Surety's obligations. The arbitrator did not consider Surety's potential liability to General Contractor on any issues other than under the provisions of the bond.

Based on the arbitrator's findings and holdings in the Breach of Contract Action, Surety moved to dismiss the RICO Action, arguing, among other things, that General Contractor was collaterally estopped from pursuing its claims because an arbitrator had already determined that Surety was not liable under the bond. The district court disagreed, finding that the arbitrator had only considered and ruled on issues concerning whether the subcontract and bond were breached and not any issues of fraud as alleged in the

[19] *Id*., at 1319.

RICO Action. The district court likewise found that General Contractor's complaint had sufficiently pled all elements of a RICO violation and accordingly denied Surety's motion to dismiss.

III. LEGISLATION

There are two recent legislative developments that will impact sureties across the United States: (1) the Federal Acquisition Regulatory Council's ("FAR Council") new requirement for Project Labor Agreements ("PLA") on federal construction projects with an estimated value of $35 million or more; and (2) the U.S. Small Business Administration's ("SBA") issuance of a final rule that increased the contract limits for the Surety Bond Guarantee Program.

A. New Requirement for Project Labor Agreements ("PLAs") on "Large Scale" Federal Projects

On December 22, 2023, the FAR Council finalized a new regulation mandating the use of PLAs for "large-scale" federal construction projects—defined as those with an estimated value of $35 million or more.[20] The imposition of this rule was in accordance with the Biden Administration's Executive Order 14063, which required PLAs for federally funded construction projects that cost the government $35 million or more.[21] PLAs are collective bargaining agreements established before hiring, negotiated between construction contractors and labor unions. These agreements set employment terms and conditions for the duration of the project. The rule took effect on January 22, 2024, and generally requires contractors working on major federal construction jobs to enter into such agreements, with limited exceptions.

According to the new rule, all stakeholders in a qualifying construction project—including subcontractors—must comply with the terms of a PLA negotiated by the project's primary contractor. These agreements must fulfill certain criteria, such as incorporating dispute resolution mechanisms and assurances against work stoppages like strikes or lockouts.

The imposition of this new regulation can positively and negatively impact sureties. On the one hand, the PLAs may promote labor stability and reduce the risk of delays caused by labor disputes, thereby potentially mitigating the likelihood of performance bond claims. On the other hand, the PLAs may also result in increased labor costs and heightened regulatory compliance obligations, causing a strain on a contractor's financial capacity, thereby increasing the risk of default and, consequently, the exposure of sureties to bond claims.

B. U.S. Small Business Administration ("SBA") Issued Final Rule Increasing Contract Limit Under the Surety Bond Guarantee Program[22]

In a significant move to support small businesses, the SBA has announced an increase in the contract

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[20] PLA Final Rule – Federal Acquisition Regulation: Use of Project Labor Agreements for Federal Construction Projects, 88 Fed. Reg. 88708 (Dec. 22, 2023) (effective Jan. 22, 2024).
[21] EO 14063: Use of Project Labor Agreements for Federal Construction Projects, 87 Fed. Reg. 7363 (Feb. 9 2022).
[22] Final Rule – Small Business Administration: Adjustment of Alternative Size Standard for SBA's 7(a) and CDC/504 Loan Programs for Inflation; and Surety Bond Limits: Adjustments for Inflation, 88 Fed. Reg. 48739 (July 28, 2023) (effective Mar. 18, 2024).

limits for its Surety Bond Guarantee Program. As of March 18, 2024, the SBA began guaranteeing bid, performance, payment, and ancillary bonds up to $9 million for all projects and up to $14 million on federal contracts – up from $6.5 million and $10 million, respectively. The SBA is authorized to guarantee bonds on federal contracts over $9 million when accompanied by a federal contracting officer's signed certification, or when located in a major disaster area.

This expansion will increase the pool of larger projects accessible to small businesses, thereby enabling sureties to underwrite higher-value bond opportunities backed by the SBA. However, this also elevates potential loss exposure, requiring sureties to conduct more rigorous credit underwriting – such as verifying audited financial statements, review of working capital adequacy, and prior project experience.

IV. CONCLUSION

The legal landscape for sureties continues to evolve. The developments discussed herein can reshape the risks imposed upon sureties, alter indemnity enforcement strategies, reenforce the rights held by sureties, and influence underwriting and claims-handling practices throughout the country. Staying informed of ongoing changes in the legal realm is essential for sureties to protect their interests and effectively navigate emerging challenges.

PANEL 10

Why You Got to Give Me a Fight – It's In Everyone's Best Interest to Settle

Dispute Resolution Strategies in Construction Projects: The Case for Settlement

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Dispute Resolution Strategies in Construction Projects: The Case for Settlement

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Table of Contents

Dispute Resolution Strategies in Construction Projects: The Case for Settlement

I. Introduction: Purpose and Scope of this Paper

In the complex and dynamic field of construction projects, disputes are almost inevitable. These disputes often involve multiple parties, significant financial stakes, and intricate contractual obligations. The construction industry is particularly susceptible to conflicts due to its fragmented nature, complex contractual arrangements, and the inherent uncertainty in project execution.[1] Research indicates that approximately 30% of construction projects experience some form of dispute that requires formal resolution processes.[2]

The purpose of this paper is to explore various dispute resolution strategies available in the construction industry, with a particular focus on the advantages and challenges of settlement. The evolution of dispute resolution methods in construction has shifted from adversarial approaches toward more collaborative and efficient alternatives.[3] By examining litigation, arbitration, and mediation, this paper aims to provide a comprehensive understanding of these processes and advocate for settlement as a preferable strategy. Findings indicate that early settlement approaches can reduce resolution costs by up to 60% compared to traditional litigation while preserving business relationships that are crucial for future projects.[4]

II. Overview of Dispute Resolution Methods

Construction projects frequently encounter disputes due to their multifaceted nature, involving issues such as delays, cost overruns, and quality concerns. Traditionally, litigation and arbitration have been the go-to methods for resolving such disputes, providing a structured and formal avenue for adjudication. Over the years, the industry increasingly embraced alternative dispute resolution (ADR) methods, including arbitration and mediation, to address the limitations of litigation.[5] These methods offer distinct processes and benefits, making them attractive options for stakeholders seeking efficient and effective resolutions. Research indicates that utilizing appropriate dispute resolution methods can reduce resolution costs by up to 15% compared to conventional litigation.[6]

a. Litigation

Traditional court-based resolution with formal procedures and public proceedings. Litigation typically takes 28-42 months to resolve construction disputes, with average costs exceeding 30% of the disputed amount.[7] The process provides definitive judgments with established appeal mechanisms but often damages ongoing business relationships.

b. Arbitration

Fundamentally, arbitration is binding resolution with appointed experts (often attorneys and retired judges) serving as decision-makers. According to the AAA,[8] construction arbitrations are typically resolved “faster, smarter and more efficiently” than comparable court cases. Arbitration offers greater flexibility, confidentiality, and industry-specific expertise, though it has increasingly adopted litigation-like procedures, potentially diminishing its efficiency advantages.[9]

c. Mediation

Mediation is facilitated negotiation with a neutral third party helping parties reach agreement. Mediation resolves approximately 80% of construction disputes when attempted, typically within 3-4 months.[10] Additionally, mediation preserves relationships and allows parties to develop creative solutions addressing underlying interests rather than solely legal positions.

d. Settlement

Direct negotiated resolution between parties can sometimes be the most efficient option. Principled negotiation focusing on interests rather than positions yields optimal settlements.[11] Early settlements in construction disputes save an average of 65% of resolution costs compared to adjudicated outcomes, while maintaining critical business relationships.[12]

III. Importance of Efficient Dispute Resolution

Efficient dispute resolution is crucial in the construction industry due to the high costs and time pressures associated with projects. Disputes can absorb 3-5% of total project value when not addressed promptly.[13] Also, delays in resolving disputes can lead to significant financial losses, project standstills, and strained business relationships.[14] Therefore, selecting the appropriate dispute resolution method is critical to minimizing disruptions and ensuring project continuity. By resolving disputes efficiently, parties can allocate resources more effectively and maintain focus on project completion.[15]

This paper posits that settlement is often the most advantageous resolution strategy in construction disputes due to its efficiency and cost-effectiveness. A comprehensive study found that direct settlements typically cost 65% less than arbitration and 85% less than litigation.[16] However, achieving settlement can be challenging due to various psychological factors that influence negotiation dynamics.

Research identifies cognitive biases, including overconfidence and reactive devaluation, as significant barriers to effective negotiation.[17] Understanding these psychological elements (for example, as examined by Guthrie (2000)[18] in his work on judgment and decision-making in legal contexts), is essential for overcoming barriers to settlement and fostering successful negotiations.

a. The Arbitration Process

In contrast to litigation, arbitration offers a more private and expedited alternative. Here, parties agree to submit their dispute to one or more arbitrators – (presumably) experts chosen for their knowledge and impartiality.

Arbitration's growing popularity stems from its procedural flexibility and expertise-driven approach. The arbitration process is defined by its flexibility. Unlike the rigid structure of litigation, arbitration allows parties to tailor procedures to their needs, resulting in a faster resolution. This adaptability allows complex disputes to be resolved in roughly half the time of conventional litigation.[19]

The arbitration process begins with an agreement to arbitrate, followed by the selection of arbitrators. Arbitration hearings are less formal than court trials, providing a more relaxed environment for presenting evidence and arguments.

The arbitrators' decision, or award, is binding and enforceable, lending finality to the process.

While arbitration boasts confidentiality and the expertise of arbitrators, it also has limitations. A 2019 study revealed that the discovery process in arbitration is typically more restricted, and the grounds for appealing or attacking an arbitration award are limited, which can be a disadvantage for parties seeking a more comprehensive exploration of the issues.[20] This trade-off between efficiency and thoroughness remains arbitration's most significant consideration.[21]

b. The Mediation Process

Mediation, on the other hand, is a process that emphasizes collaboration and mutual agreement. It is a voluntary, non-binding method where a neutral third party, the mediator, facilitates negotiation between the disputing parties.

The mediator's role is not to decide the case but to assist the parties in reaching a settlement that satisfies both sides. This collaborative approach has gained significant traction in construction disputes, with studies showing a 46% increase in mediation clauses in construction contracts between 2004-2014.[22]

The mediation process begins with an agreement to mediate and the selection of a mediator, chosen for their expertise, neutrality, and communication skills – qualities that are particularly important in the construction and surety disputes context.

Mediation sessions are designed to foster open dialogue, allowing parties to explore creative solutions that might not be possible through litigation or arbitration. Mediated settlements in construction disputes result in 67% higher satisfaction rates among stakeholders compared to adjudicated outcomes.[23] The ultimate goal in mediation is to reach a settlement agreement that resolves the dispute amicably.

One analysis demonstrated that mediation's strengths lie in its cost-effectiveness and its ability to preserve business relationships, offering a platform for parties to find common ground.[24] However, its non-binding nature means that success depends on the willingness of both parties to negotiate in good faith and actually "ink" a deal, with a 2017 article noting that approximately 30% of construction mediations fail to reach full resolution during the initial session, though many achieve partial agreements that narrow the scope of conflict.[25]

c. The Case for Settlement: Cost-Benefit Analysis

At its core, the appeal of settlement lies in its promise of financial prudence and efficiency, along with finality and closure.

Litigation and arbitration, with their drawn-out processes and procedural complexities, often lead to escalating costs that can strain even the most robust budgets. In contrast, settlement offers a more streamlined path, allowing parties to allocate resources more effectively. Legal scholars Henderson and Eisenberg note that the "litigation premium" – the additional costs associated with proceeding to trial – has increased substantially over the past decade, making settlement increasingly attractive from an economic perspective.[26]

Early settlement correlates not only with direct cost savings but also with reduced project delays and higher likelihood of maintaining business relationships. By sidestepping the protracted battles of courtrooms and hearing rooms, stakeholders can achieve resolutions that are not only cost-effective but also timely, ensuring that projects remain on track and within budget while preserving valuable business relationships.

IV. Risk Management Through Settlement

The unpredictability of litigation or arbitration outcomes can weigh heavily on the minds of those embroiled in disputes. The inherent uncertainty of relying on a judge, jury, or panel of arbitrators to decide one's fate can be a daunting prospect.

Settlement, however, places the reins firmly in the hands of the parties involved. By negotiating terms that are mutually agreeable, stakeholders can exert greater control over the resolution process, crafting outcomes that reflect their specific needs and priorities. This proactive approach to risk management can mitigate potential pitfalls and foster a sense of security and stability.

A comprehensive study of corporate dispute resolution showed that organizations increasingly recognize settlement as a strategic risk management tool rather than merely a dispute resolution mechanism. That research indicated that 86% of corporations cite risk reduction as a primary motivation for pursuing settlement over litigation.[27] Additional research shows that settlement agreements have higher voluntary compliance rates than court judgments, resulting in more efficient implementation of resolutions.[28]

a. Preservation of Business Relationships

In the construction industry, where collaboration and partnership are key to success, the preservation of business relationships may be an important consideration. The adversarial nature of litigation can drive a wedge between parties, souring relationships and jeopardizing future collaborations.

Settlement, on the other hand, encourages a spirit of cooperation and mutual respect. By working together to find common ground, parties can maintain and even strengthen their professional relationships, paving the way for future projects and joint ventures. Construction firms utilizing settlement processes were 3.5 times more likely to engage in subsequent collaborations than those who pursued litigation to judgment.[29]

The confidentiality and privacy offered by settlement may also play a significant role. The public exposure inherent in litigation, and to a lesser degree in arbitration, can be a double-edged sword,

revealing sensitive business information and strategies to competitors. Settlement offers a more discreet alternative, allowing parties to resolve their disputes away from the prying eyes of the public and the press. This confidentiality not only protects business interests but also preserves reputations, allowing stakeholders to move forward without the shadow of public scrutiny. Research by the Construction Industry Institute shows that confidential settlements help preserve company valuation, with publicly litigated disputes causing an average 12% decrease in share price for publicly traded construction firms, compared to only 3% for those resolving disputes through confidential settlement processes.[30]

V. Case Studies in Construction Dispute Settlement

History is replete with examples of successful settlements in the construction realm, where parties have navigated the complexities of their disputes with skill and diplomacy. Those case studies serve as powerful reminders of the efficacy of settlement, illustrating how amicable resolutions can be achieved even in the most challenging circumstances.[31] Conversely, lessons learned from protracted litigation or arbitration underscore the potential pitfalls of adversarial approaches, reinforcing the value of settlement as a strategic choice. A 2014 study confirmed that settlement approaches consistently yield superior outcomes in construction disputes.[32] Fenn, O'Shea, and Davies' longitudinal study of infrastructure projects confirms that settlement approaches in public-private disputes reduce resolution timeframes by an average of 60% compared to adjudicated outcomes.[33]

VI. Human Psychology in Negotiation

Negotiation, at its core, is a human endeavor, deeply influenced by the psychological makeup of the parties involved. As Fisher, Ury, and Patton articulate in *Getting to Yes*,[34] effective negotiation requires moving beyond positions to focus on underlying interests. This shift in perspective helps negotiators identify shared goals and explore options for mutual gain. Those authors' principle of "Focus on interests, not positions" encourages parties to probe deeper, asking "why" to uncover motivations rather than remaining fixated on stated demands.

However, cognitive biases often impede this process. Anchoring, for instance, can cause parties to fixate on initial offers, skewing their perception of value and fairness. The "framing effect," another bias noted by Kahneman and Tversky,[35] influences how options are evaluated based on their presentation. Overcoming such biases requires a deliberate effort to remain open-minded and flexible, fostering an environment where creative solutions can emerge.

Emotional intelligence is another critical factor in negotiation. Emotions can serve as both obstacles and catalysts in the negotiation process. Fisher and his colleagues emphasize the importance of "separating people from the problem," allowing negotiators to address emotional issues without derailing the substantive discussions. Their insight that "perception is reality" in negotiation highlights how different interpretations of the same situation can lead to conflict. The authors advocate for active listening techniques and perspective-taking to bridge these gaps in understanding. By acknowledging and validating the emotions of all parties, negotiators can build rapport and trust, setting the stage for more productive interactions. As Fisher, Ury, and Patton

suggest, negotiators should "be hard on the problem, soft on the people," maintaining respect for relationships while rigorously addressing the substantive issues at hand.

a. Perceived Reciprocity in Negotiation

Reciprocity is a powerful motivator in human interactions, and its role in negotiation cannot be overstated. Cialdini's exploration of reciprocity in *Influence: The Psychology of Persuasion* highlights how the expectation of *quid pro quo* can drive parties to make concessions and cooperate.[36]

Cialdini's research demonstrates that the rule of reciprocity—the obligation to repay what another person has provided—is one of the most potent weapons of influence in society. In negotiation contexts, this principle manifests as a deeply ingrained sense of fairness that compels individuals to respond in kind when offered a concession. Cialdini notes that reciprocity creates a sense of indebtedness that can be leveraged strategically to advance the negotiation process.

Mnookin, Peppet, and Tulumello, in *Beyond Winning*,[37] explore the concept of creating value in negotiation, noting that "[t]o the extent and value creation demands accurate and nuanced information exchange, these communication uncertainties may compound the difficulty of finding and exploring creative solutions to a problem." The authors discuss the concept of the "negotiation dance." This metaphor is used to describe the dynamic process of negotiation, where parties engage in a back-and-forth exchange to explore options and move toward an agreement. The "dance" involves both cooperative and competitive elements, as negotiators work to create value collaboratively while also seeking to claim value for themselves.

By focusing on interests rather than positions, negotiators can identify areas of mutual benefit and expand the pie, rather than merely dividing it. The authors emphasize that successful reciprocity requires transparency about interests and a willingness to engage in joint problem-solving. This approach not only leverages reciprocity but also aligns with the broader goal of achieving sustainable and satisfactory settlements for all parties involved.

Additionally, Mnookin and colleagues discuss the importance of managing the tension between creating and claiming value. They argue that effective negotiators must balance the cooperative aspects of value creation with the competitive elements of value distribution. By understanding the psychological dynamics of reciprocity, negotiators can strategically sequence concessions to maximize joint gains while protecting their own interests.

b. Psychological Barriers to Settlement

Despite the clear advantages of settlement, psychological barriers often stand in the way of reaching an agreement. Cognitive biases, such as loss aversion and reactive devaluation, can lead parties to reject reasonable offers.[38] In his work "Psychological Impediments to Mediation Success," Korobkin further identifies the "status quo" bias and the effect of current ownership of something as significant obstacles, where parties overvalue current positions and possessions, making them reluctant to embrace change even when objectively beneficial.[39]

Bazerman and Neale, in *Negotiating Rationally*, provide strategies to counteract these biases, advocating for the use of objective criteria and standards to evaluate offers.[40] They specifically recommend perspective-taking exercises where party negotiators deliberately adopt the viewpoint of their counterparts to identify value-creating opportunities. Their research demonstrates that party negotiators who focus on the other side's interests achieve settlements 68% more often than those fixated solely on their own positions. By grounding negotiations in objective measures, parties can reduce the influence of biases and make more rational decisions. Additionally, fostering an atmosphere of open communication and transparency can help parties overcome mistrust and engage more constructively.

Chris Voss, in *Never Split the Difference*, introduces the concept of tactical empathy as a tool for overcoming psychological barriers.[41] Drawing from his FBI hostage negotiation experience, Voss details the "7-38-55 rule," which suggests that during emotional communications, only 7% of meaning comes from spoken words, while 38% derives from tone of voice and 55% from body language. By actively listening and demonstrating an understanding of the other party's perspective, negotiators can create a sense of connection and reduce defensiveness. Techniques such as mirroring – repeating key phrases to show understanding—and labeling—acknowledging emotions explicitly – can help diffuse tension and pave the way for more collaborative negotiations. Voss also emphasizes the power of "calibrated questions" that begin with "how" or "what" to guide counterparts toward problem-solving without triggering defensive reactions.

Moreover, the psychological concept of "face-saving" plays a crucial role in negotiations. Parties are often concerned with maintaining their reputation and standing, both internally and externally. Research by Pruitt and Kim in *Social Conflict: Escalation, Stalemate, and Settlement* identifies that face-saving concerns become particularly acute in disputes with public visibility or where negotiators represent larger organizations.[42] Creating an environment where parties can make concessions without losing face is essential for fostering agreement. This can be achieved by framing concessions as collaborative solutions rather than capitulations, allowing all parties to emerge from the negotiation with dignity intact. As Fisher, Ury, and Patton note in *Getting to Yes*, providing "yesable propositions" that address substantive interests while protecting symbolic concerns allows negotiators to satisfy both practical and psychological needs.[43]

VII. Conclusion: The Strategic Imperative of Settlement

As we draw the curtain on our exploration of dispute resolution strategies within the construction industry, it becomes clear that the path to settlement is not merely a pragmatic choice but a strategic imperative. In the intricate and high-stakes environment of construction projects, where time and resources are of the essence, settlement emerges as a beacon of efficiency and foresight.

Throughout this paper, we have journeyed through the traditional corridors of litigation, the private chambers of arbitration, and the collaborative spaces of mediation. Each method offers distinct advantages, yet it is settlement that consistently rises to the forefront as the most advantageous strategy. Research demonstrates that settlements in construction disputes result in significant cost savings compared to traditional litigation, and additional analysis reveals significantly higher satisfaction rates among parties who resolve disputes through negotiated settlements rather than adjudication.[44]

The psychological dimensions of dispute resolution, as illuminated by Korobkin's research on psychological impediments, offer profound insights into the human factors that influence negotiation outcomes. His work on reactive devaluation demonstrates how parties unconsciously devalue proposals from opponents, a bias that can be overcome through structured settlement frameworks.[45] Bazerman and Neale's research in *Negotiating Rationally* further emphasizes how framing decisions as potential gains rather than losses can circumvent the powerful influence of loss aversion.[46] By understanding and addressing these cognitive biases, leveraging the power of reciprocity,[47] and employing tactical empathy,[48] negotiators can transform potential impasses into opportunities for mutual gain.

Fisher and Ury's pioneering "principled negotiation" approach from *Getting to Yes* reinforces the value of focusing on interests rather than positions, providing a theoretical foundation that continues to guide effective settlement strategies in construction disputes.[49] Similarly, bargaining in the shadow of the law explains how settlement outcomes are influenced by parties' expectations about potential litigation results, highlighting the importance of realistic case evaluation in the settlement process.[50]

As we consider the broader implications of these findings, it is evident that encouraging settlement as a strategic choice aligns with the best interests of all parties involved. Interest-based resolution methods consistently outperform rights-based or power-based approaches in terms of satisfaction, relationship preservation, and transaction costs. Research by Ury, Brett, and Goldberg's in *Getting Disputes Resolved* provides a compelling framework for prioritizing settlement in construction disputes, where ongoing relationships often hold substantial economic value.[51]

In conclusion, the case for settlement in construction disputes is compelling and clear. The scholarly evidence consistently demonstrates that by embracing this approach, stakeholders can achieve resolutions that are efficient, cost-effective, and conducive to maintaining strong business relationships. Settlement is not merely an alternative to other dispute resolution methods; it is a strategic choice that aligns with the interests of all parties, offering a path to resolution that is both pragmatic and forward-looking.

As we look to the future, it is incumbent upon industry professionals to prioritize settlement in their dispute resolution strategies, harnessing the insights and tools explored in this paper to navigate the complexities of their disputes with greater acumen and effectiveness. In doing so, they will not only enhance their own outcomes but also contribute to a more harmonious and productive construction industry.

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[45] Korobkin, "Psychological Impediments to Mediation Success: Theory and Practice." 281-327.

[46] Bazerman and Neale, *Negotiating Rationally*.

[47] Cialdini, *Influence: The Psychology of Persuasion*.

[48] Voss and Raz, *Never Split the Difference: Negotiating As If Your Life Depended On It*.

[49] Fisher, Ury, and Patton, *Getting to Yes: Negotiating Agreement Without Giving In*.

[50] Robert H. Mnookin and Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," *Yale Law Journal* 88, no. 5 (1979): 950-997.

[51] William Ury, Jeanne M. Brett, and Stephen B. Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (San Francisco: Jossey-Bass, 1988).

PANEL 11

Can't You Just Let It Be – The Way We Used to Do Things

AI Transformation in Surety: Opportunities, Challenges, and Implications

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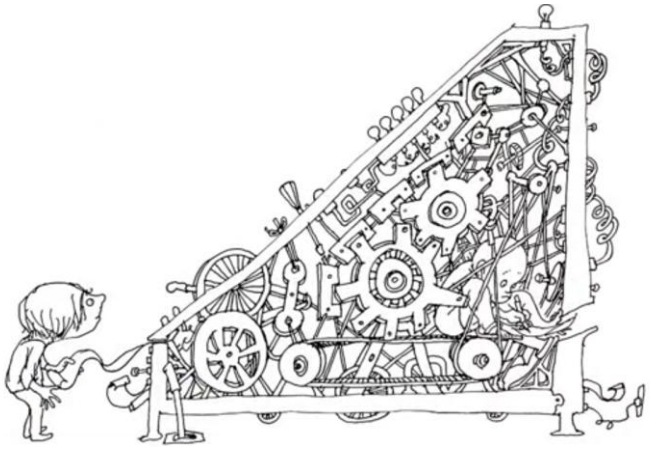
The Homework Machine

By Shel Silverstein

The Homework Machine,
Oh, the Homework Machine,
Most perfect
contraption that's ever been seen.
Just put in your homework, then
drop in a dime,
Snap on the switch, and in ten
seconds' time,
Your homework comes out, quick
and clean as can be.
Here it is— 'nine plus four?' and the
answer is 'three.'
Three?
Oh me . . .
I guess it's not as perfect
As I thought it would be.



AI TRANSFORMATION IN SURETY: OPPORTUNITIES, CHALLENGES, AND IMPLICATIONS

RYAN DRY, MICHAEL SUGAR, AND DOUGLASS F. WYNNE, JR.

The Homework Machine has evolved considerably since Shel Silverstein's 1981 poem. Yet today, artificial intelligence offers the same allure—and the same potential for astonishingly wrong results. From underwriting automation to risk modeling and claims processing, AI presents powerful tools that could transform the surety industry. But like all transformative technologies, its promise must be approached with caution.

This paper explores the expanding role of AI in surety practice, highlighting both its most promising applications and the ethical, legal, and operational pitfalls that practitioners must navigate. By examining emerging regulatory frameworks, real-world use cases, and strategic considerations, we aim to outline a path toward responsible and effective AI integration.

The surety and bonding industry stands at a critical inflection point as artificial intelligence transforms from experimental technology to an essential business capability. With 60% of bonding professionals already implementing AI or automation in their processes and 43% trusting AI tools to be more accurate than traditional models, the industry is experiencing an unprecedented digital transformation.[1] This shift represents not only a technological upgrade but a fundamental reimagining of how surety companies assess risk, serve customers, and compete in an evolving marketplace.

[1] Lance Surety Bonds, "60% of bonding pros use AI, but are outdated workflows still holding the industry back?" Surety Bonds Blog, https://www.lancesuretybonds.com/blog/future-of-surety-bonds-ai-automation

The convergence of AI capabilities with surety operations creates significant opportunities for enhanced efficiency, improved risk assessment, and superior customer experiences. However, this transformation also introduces complex challenges around attorney ethics, regulatory compliance, and operational integration. As the surety market projects growth from $22.3 billion in 2024 to $33.1 billion by 2032, those companies able to successfully navigate AI adoption while simultaneously maintaining ethical standards and regulatory compliance will secure competitive advantages in this expanding market.[2]

I. Surety Attorney Ethical Concerns and Professional Responsibility

a. The ABA Framework for AI Ethics

The American Bar Association established the foundational framework for AI ethics in legal practice through Formal Opinion 512, issued July 29, 2024.[3] This opinion provides the first comprehensive guidance on generative AI use by attorneys, establishing core principles that directly impact surety practice. The opinion emphasizes that attorneys must maintain competence under Model Rule 1.1, requiring a reasonable understanding of AI capabilities and limitations without the necessity that they become technical experts.

Key ethical obligations include strict confidentiality protection under Model Rule 1.6, mandatory client communication under Rule 1.4, prohibition against false statements under Rules 3.1 and 3.3, proper supervision under Rules 5.1 and 5.3, and reasonable fee practices under Rule 1.5. These requirements create a comprehensive framework that surety attorneys must navigate while leveraging AI technologies for enhanced service delivery.

State bar associations have rapidly developed supplementary guidance, with 24 states adopting specific AI ethics frameworks as of 2025.[4] The degree of specificity varies. Some bar associations have adopted relatively basic guidelines focusing on confidentiality and competent practices, while other jurisdictions like California and New York have gone much farther, with New York in particular issuing an 85-page task force report providing detailed implementation recommendations.[5]

b. Confidentiality and Data Security in Surety Practice

Surety practice presents unique confidentiality challenges when implementing AI systems. Bond information involves highly sensitive financial data, including credit reports, business financial statements, and proprietary project details which require enhanced protection. The multi-party nature of surety relationships—involving principals, obligees, and surety companies—only further

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[2] Maximize Market Research, "Surety Market: Industry Analysis and Forecast (2025-2032)," https://www.maximizemarketresearch.com/market-report/surety-market/185094/

[3] American Bar Association, "ABA issues first ethics guidance on a lawyer's use of AI tools," July 29, 2024, https://www.americanbar.org/news/abanews/aba-news-archives/2024/07/aba-issues-first-ethics-guidance-ai-tools/

[4] Clio, "AI Ethics Opinions: A Guide to Bar Association Recommendations," https://www.clio.com/blog/ai-ethics-opinion/

[5] Justia, "AI and Attorney Ethics Rules: 50-State Survey," https://www.justia.com/trials-litigation/ai-and-attorney-ethics-rules-50-state-survey/

complicates traditional attorney-client privilege considerations and creates additional layers of confidentiality obligations.[6]

Critical risks include data leakage through AI systems that may retain client information, training data concerns where client data might be accessible to other users, and third-party access issues when AI providers have potential access to confidential surety information. Moreover, increasing regulatory compliance requirements like those being promulgated under the General Data Protection Regulation of the European Union ("GDPR"), and the California Consumer Privacy Act ("CCPA"), add additional layers of complexity to data protection obligations—and we can expect this to only increase as governing authorities try to keep up to the speed at which AI technologies are developing.[7]

With that stated, best practices for confidentiality protection include using enterprise-grade AI platforms with robust security protocols, implementing data anonymization before AI input, establishing clear data retention and deletion policies, conducting regular security audits of AI providers, and maintaining comprehensive confidentiality agreements with AI vendors. Critically, technical safeguards should prioritize "closed" AI systems that don't train on user data, implement zero data retention options, and maintain audit trails for all AI-assisted work.[8]

c. Competence and Supervision Requirements

The technological competence standard requires attorneys to develop a reasonable understanding of AI capabilities and limitations without becoming technical experts. For surety practice, this means understanding AI's role in bond underwriting and risk assessment, recognizing the limitations of AI in legal research and document drafting, maintaining competency in reviewing AI-generated surety agreements, and understanding potential bias in financial and credit analysis.[9]

The supervision requirements under Rules 5.1 and 5.3 extend naturally to AI-assisted legal work, requiring firms to develop thoughtful governance structures that address the unique challenges of surety practice. Managing attorneys should consider implementing written policies that delineate appropriate AI use parameters, particularly given the multi-party nature of surety relationships and the sensitive financial information routinely processed. [10] These policies might address matters such as which AI platforms meet security standards for handling bond applications, when senior attorney review becomes necessary, and how AI-assisted work product should be documented in client files.

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6 Bloomberg Law, "Generative AI Use Poses Threats to Attorney-Client Privilege," https://news.bloomberglaw.com/business-and-practice/generative-ai-use-poses-threats-to-attorney-client-privilege

7 SecurePrivacy, "AI and Personal Data Protection | Navigating GDPR and CCPA Compliance," https://secureprivacy.ai/blog/ai-personal-data-protection-gdpr-ccpa-compliance

8 IPWatchdog, "AI Prompts Do Not Compromise Attorney Confidentiality Obligations," https://ipwatchdog.com/2023/12/28/ai-prompts-not-compromise-attorney-confidentiality-obligations/id=171078/

9 Ethical AI Law Institute, "Exploring ABA Formal Opinion 512: AI Guidance for Lawyers," https://ethicalailawinstitute.org/blog/understanding-the-abas-formal-opinion-512-guidance-on-generative-ai-tools/

10 Joseph Hollander, "Competence and the Lawyer's Use of GenAI: ABA formal opinion 512," https://josephhollander.com/news-blog/competence-and-the-lawyers-use-of-genai-aba-formal-opinion-512/

Beyond policy development, effective supervision encompasses ongoing training and quality control measures tailored to surety practice realities. Staff members utilizing AI tools should understand both the technology's capabilities and its limitations, particularly regarding the preservation of principal-obligee confidentiality and the verification of AI-generated legal analysis. Documentation practices become especially critical, as firms must maintain clear records of AI assistance to demonstrate compliance with ethical obligations and support any subsequent review of work product quality. This framework allows firms to harness AI's efficiency benefits while maintaining the professional standards that surety clients expect and deserve.

d. Disclosure Obligations and Client Communications

Mandatory disclosure situations include client inquiries about AI use, retainer agreements requiring AI technology disclosure, proposals to input confidential information into AI tools, and circumstances where AI use affects fee basis or reasonableness.[11] Surety practice complicates these requirements through multi-party notification obligations, potential disclosure requirements to both principals and obligees, communication needs regarding AI use in bond underwriting analysis, and transparency requirements for AI assistance in regulatory compliance matters.

For practicing attorneys, recommended practices include incorporating AI use provisions in engagement letters, providing clear explanations of AI capabilities and limitations, obtaining informed consent for AI use with confidential information, and maintaining comprehensive documentation of client communications regarding AI use. Sample engagement language should address AI assistance in legal research and document preparation, attorney review and verification of AI-generated content, and client confidential information protection through secure AI platforms.

Sureties using AI to analyze financial data during the bond underwriting process should consider implementing disclosure protocols regarding AI usage and obtaining appropriate contractor consent for such technological review and evaluation methods

e. Malpractice and Liability Considerations

AI-related malpractice risks manifest in several distinct categories. The most publicized risk involves "hallucination," where AI systems generate entirely fictitious case citations or legal precedents that appear legitimate but do not exist. Recent cases demonstrate these risks, as shown in a recent federal case out of New York, *Mata v. Avianca* (2023), which resulted in $5,000 sanctions after it was discovered that a party's brief contained ChatGPT-generated case citations to a number of cases that didn't actually exist.[12]

Surety attorneys also face exposure when AI tools provide inaccurate analysis of complex surety law principles, potentially leading to flawed advice on bond obligations or indemnity rights. Confidentiality breaches present another significant concern, particularly when AI platforms

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[11] 2Civility, "Breaking Down the ABA's Guidance on Using Generative AI in Legal Practice," https://www.2civility.org/breaking-down-the-abas-guidance-on-using-generative-ai-in-legal-practice/

[12] CNBC, "AI: Judge sanctions lawyers over ChatGPT legal brief," June 22, 2023, https://www.cnbc.com/2023/06/22/judge-sanctions-lawyers-whose-ai-written-filing-contained-fake-citations.html

inadvertently disclose sensitive client information through data retention or cross-user contamination. Finally, practitioners risk missing critical deadlines when they over-rely on AI tools for case management without maintaining independent calendaring systems.[13]

Professional liability mitigation in the AI context requires a multi-layered approach centered on verification and documentation. Firms should consider implementing systematic verification protocols for all AI-generated work product, with particular attention to case citations, statutory references, and regulatory interpretations. Professional liability carriers increasingly scrutinize AI-related coverage, making it essential to confirm that existing policies explicitly address AI-assisted legal services or to obtain appropriate riders. Documentation standards should capture not only the AI tools utilized but also the specific verification steps undertaken, creating an auditable trail that demonstrates reasonable care.

Surety practice presents unique malpractice exposures beyond general AI risks. Bond form errors amplified by AI automation can trigger cascading liability across multiple transactions, while flawed risk assessments may damage long-standing surety relationships and underwriting credibility. The multi-party nature of surety arrangements creates heightened conflict concerns when AI systems process information across different client matters. Additionally, regulatory compliance failures—particularly in state-specific bond requirements—may escape detection when firms rely too heavily on AI systems trained on generic or common law legal principles rather than jurisdiction-specific surety regulations.

II. Practical AI Applications in Surety Operations

a. Current AI Applications in Underwriting and Risk Assessment

The surety industry has embraced AI most significantly in underwriting and risk assessment, with 54% of professionals using AI for applicant risk assessment.[14] These systems provide automated data processing and analysis capabilities that transform traditional underwriting workflows. AI systems excel at risk pattern recognition by analyzing disparate data sources including public information, financial statements, photographs, and email communications. These algorithms identify patterns in seemingly unrelated entities that may indicate fraud risk, providing real-time analysis of external data sources, internet scanning, and third-party predictive indicators. Multimodal.dev case studies show 95% accuracy in automated data extraction with processing times reduced to under 15 seconds per document.[15]

Predictive default modeling represents another significant application, with AI systems forecasting potential defaults by analyzing financial statements, project progress, and external data.[16]

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13 UC Davis Mabie Law Library, "Risks, Limitations, and Professional Responsibility," https://libguides.law.ucdavis.edu/c.php?g=1386929&p=10257661

14 Lance Surety Bonds, supra note 1.

15 Multimodal, "Automating Insurance Underwriting with Customized AI Solutions," https://www.multimodal.dev/customer-stories/insurance-underwriting-ai

16 Risk Strategies, "AI and Surety Bonds: A Comprehensive Guide for Business Leaders," https://www.risk-strategies.com/blog/ai-and-surety-bonds-guide-for-business-leaders

These models integrate macroeconomic trends and real-time project updates for enhanced risk assessment, with machine learning algorithms processing company financial statements combined with predictive indicators from multiple sources to achieve over 90% accuracy in risk prediction models.[17]

b. AI in Claims Processing and Fraud Detection

Claims processing automation in particular has achieved remarkable results, with Sprout.ai, a burgeoning claims automation software platform, settling over 60% of claims in real-time with 96% accuracy rates.[18] These systems use pattern recognition to detect patterns in disparate transactions, identifying entities that appear unrelated but share common ownership or addresses.

Real-time monitoring capabilities provide continuous analysis of claims data as submitted, while document analysis using OCR and NLP technologies extract data from claim forms, medical records, and supporting documents to identify inconsistencies.[19] The quantifiable benefits include significant cost reductions, with insurance fraud costing $6 billion annually and AI reducing exposure by 10% of premium collection.[20] Processing speeds improve from days to minutes for routine claims, with 96% accuracy rates in automated claim decisions.[21]

Fraud detection systems achieve impressive results, with the U.S. Treasury's implemented AI systems preventing and recovering $4 billion in fraud during FY2024.[22] These systems analyze disparate data sources to identify suspicious patterns, provide real-time alerts for unusual activity, and support complex claims triage through AI-powered summarization capabilities.[23]

c. Efficiency Gains and Cost Savings

Document processing improvements show dramatic efficiency gains, with processing times reduced from 60 minutes to as low as under 15 seconds, while maintaining 95% accuracy in data extraction and processing.[24] As a result, manual labor requirements decrease significantly, which allows employees to redirect their efforts toward higher-value work.

Claims processing efficiency improvements include real-time settlement of 60% of claims, with complex claims triage enhanced through AI-powered summarization.[25] The industry impact

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17 Tinubu, "The Impact of AI on Surety Now and in the Future," https://www.tinubu.com/blog/mitchell-wein-ai-and-surety

18 Sprout.ai, "AI powered claims automation and fraud detection for insurance providers globally," https://sprout.ai/

19 Risk Strategies, supra note 16.

20 AutomationEdge, "Insurance Claim Fraud Detection Using Automation and AI," https://automationedge.com/blogs/insurance-claim-fraud-detection-using-ai-automation/

21 Sprout.ai, supra note 18.

22 U.S. Department of the Treasury, "Treasury Announces Enhanced Fraud Detection Processes," https://home.treasury.gov/news/press-releases/jy2650

23 Risk Strategies, supra note 16.

24 Multimodal, supra note 15.

25 Sprout.ai, supra note 18.

addresses significant challenges, with 70% of small business owners indicating they would switch providers for AI-powered 10-minute bonding processes.[26]

While many of these successes lie primarily in the general insurance industry rather than the surety industry itself, it is inevitable that successful strategies will be quickly adopted for use by surety companies.

III. Regulatory Landscape and Compliance Framework

a. State Insurance Department Guidance

The National Association of Insurance Commissioners (NAIC) Model Bulletin on AI Use by Insurers, adopted in December 2023, provides the most comprehensive regulatory framework affecting surety companies.[27] This bulletin requires insurers to develop, implement, and maintain written AI programs for responsible AI use in regulated insurance practices. Key requirements include governance frameworks with senior management oversight accountable to boards, comprehensive risk management throughout AI system lifecycles, third-party oversight with due diligence requirements, and consumer protection processes for AI use notification.[28]

Twenty-four states have adopted the NAIC Model Bulletin with minimal modifications, including Alaska, Connecticut, District of Columbia, Illinois, Kentucky, Maryland, Nebraska, Nevada, New Hampshire, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin.[29] State-specific approaches vary, with Colorado enacting comprehensive AI legislation effective February 1, 2026, California issuing bulletins on "Big Data" use and bias investigation, New York proposing circular letters on underwriting and pricing, and Texas reminding entities of data accuracy responsibilities.[30]

b. Federal Oversight and Emerging Regulations

While no specific federal AI regulations exist for surety companies, several federal initiatives affect the industry. Executive Order 14110 (October 2023) is aimed at AI technologies and directs federal agencies to ensure AI compliance with existing laws and address financial stability risks.[31] The Federal Trade Commission has increased enforcement focus on AI-related bias and discrimination, demonstrated through the Rite Aid facial recognition settlement.[32] The Treasury Department's

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26 Lance Surety Bonds, supra note 1.

27 NAIC, "NAIC Members Approve Model Bulletin on Use of AI by Insurers," https://content.naic.org/article/naic-members-approve-model-bulletin-use-ai-insurers

28 NAIC Model Bulletin, https://content.naic.org/sites/default/files/cmte-h-big-data-artificial-intelligence-wg-ai-model-bulletin.pdf.pdf

29 Quarles, "Nearly Half of States Have Now Adopted NAIC Model Bulletin on Insurers' Use of AI," https://www.quarles.com/newsroom/publications/nearly-half-of-states-have-now-adopted-naic-model-bulletin-on-insurers-use-of-ai

30 McDermott Will & Emery, "State Regulators Address Insurers' Use of AI," https://www.mwe.com/insights/state-regulators-address-insurers-use-of-ai-11-states-adopt-naic-model-bulletin/

31 Exec. Order No. 14,110, 88 Fed. Reg. 75,191 (Nov. 1, 2023).; see also Skadden, "How Regulators Worldwide Are Addressing the Adoption of AI in Financial Services," https://www.skadden.com/insights/publications/2023/12/how-regulators-worldwide-are-addressing-the-adoption-of-ai-in-financial-services

32 *Id.*

Request for Information on AI use in financial services (2024) seeks to understand opportunities and risks, while the Small Business Administration's Surety Bond Guarantee Program undergoes modernization to streamline processes.[33]

c. Data Privacy and Security Requirements

Federal privacy considerations include the Gramm-Leach-Bliley Act (GLBA) applying to financial institutions, including surety companies, requiring customer financial information safeguards when processed by AI systems.[34] The California Consumer Privacy Act (CCPA/CPRA) amendments effective January 2025 specifically address AI systems containing personal information, with new provisions for automated decision-making technology and requirements for AI system transparency and consumer rights.[35]

Key privacy compliance requirements for AI include data minimization by collecting only necessary data for AI training and operations, purpose limitation ensuring data use only for disclosed purposes, consent management for AI processing of personal data, transparency informing consumers about AI use in decision-making, and data retention implementing appropriate periods for AI-related data.[36]

IV. Future Trends and Strategic Implications

a. Technology Evolution and Market Dynamics

The surety industry is experiencing unprecedented transformation driven by AI adoption, with current adoption rates of 60% expected to accelerate significantly.[37] Emerging technologies including blockchain integration for smart contracts and automated compliance verification, IoT integration for real-time project monitoring and risk assessment, and enhanced predictive analytics for project delays and cost overruns will reshape industry operations.[38]

In the near term, underwriting presents the most promising application for artificial intelligence in the surety industry. AI systems can significantly enhance the analysis of financial statements, project specifications, and historical performance data to improve risk assessment and predict project outcomes with greater accuracy than traditional methods alone.

Industry transformation timeline projections indicate widespread automated underwriting adoption for standard bonds by 2025-2027, integration of real-time data streams for dynamic risk pricing by 2028-2030, and a complete shift from "detect and repair" to "predict and prevent" models

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33 Federal Register, "Request for Information on Uses, Opportunities, and Risks of Artificial Intelligence," https://www.federalregister.gov/documents/2024/06/12/2024-12336/

34 SecurePrivacy, supra note 7.

35 Byte Back, "California Privacy and AI Legislation Update: October 7, 2024," https://www.bytebacklaw.com/2024/10/california-privacy-and-ai-legislation-update-october-7-2024/

36 SCORE, "Data Privacy in the Age of AI: Navigating CCPA, GDPR, and Beyond," https://www.score.org/utah/resource/eguide/data-privacy-age-ai-navigating-ccpa-gdpr-and-beyond

37 Lance Surety Bonds, supra note 1.

38 PCMS, "A Surging Demand for Surety Bonds," https://www.pcmstech.com/post/a-surging-demand-for-surety-bonds

by 2030+.[39] These changes require substantial technological infrastructure including cloud-based platforms for scalable AI processing, data integration systems for unified internal and external data sources, API ecosystems for seamless third-party integration, and enhanced cybersecurity frameworks.

b. Strategic Implications for Industry Transformation

The industry faces significant disruption potential, with traditional underwriting potentially becoming obsolete for most standard products as early as 2030.[40] New product categories enabled by AI include micro-coverage and usage-based bonding products, while value chain reconfiguration shifts from transaction-based to relationship-based service models. Market structure changes may include consolidation as AI capabilities become competitive differentiators.

Economic impact projections suggest productivity gains of 30-40% reduction in operational costs through AI implementation, market expansion through improved accessibility, innovation acceleration with faster product development cycles, and employment transformation rather than elimination.[41] Customer impact includes enhanced accessibility making surety bonds available to SMEs and emerging markets, personalization through customized products based on individual risk profiles, speed improvements with near-instantaneous bond issuance, and transparency providing clear explanations of pricing and risk factors.

Investment patterns indicate substantial commitment to AI transformation, with 73% of surety companies planning digital platform investments and 40% of consulting projects now AI-related.[42] Corporate investment priorities focus on digital transformation for modernizing core systems, data analytics for predictive modeling and risk assessment, customer experience technology for digital platforms, and talent acquisition for AI specialists and data scientists.[43]

V. Everyday AI Tools for Surety Attorneys

While much of the discussion around artificial intelligence focuses on high-level operational transformations—automated underwriting, predictive risk modeling, or fraud detection—the most immediate and impactful benefits often appear in the everyday tasks of legal practitioners. Within the surety industry, attorneys are increasingly turning to AI tools for tasks that blend strategic thinking with practical efficiency.

a. Collaborative Wordsmithing and Precision Editing

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39 McKinsey & Company, "Insurance 2030—The impact of AI on the future of insurance," https://www.mckinsey.com/industries/financial-services/our-insights/insurance-2030-the-impact-of-ai-on-the-future-of-insurance

40 McKinsey & Company, supra note 40.

41 WTW, "Insurance Marketplace Realities 2024 Spring Update – Surety," https://www.wtwco.com/en-us/insights/2024/05/insurance-marketplace-realities-2024-spring-update-surety

42 Medium, "How AI is Redefining Strategy Consulting: McKinsey, BCG, and Bain," https://medium.com/@takafumi.endo/how-ai-is-redefining-strategy-consulting-insights-from-mckinsey-bcg-and-bain-69d6d82f1bab

43 IEEE Spectrum, "The State of AI 2025: 12 Eye-Opening Graphs," https://spectrum.ieee.org/ai-index-2025

One of the most unexpectedly valuable uses of AI has been in drafting and editing—what might be called "digital wordsmithing." Tools like ChatGPT offer a collaborative space where lawyers can test different phrasings, debate sentence structure, and explore multiple tones for complex communications. Whether it's refining the language in a denial letter, clarifying indemnity obligations, or tightening the logic in a motion to dismiss, having a neutral, fast, and articulate tool can serve as a highly effective second set of eyes.

That said, the quality of AI output is highly dependent on how it's used. If a practitioner asks AI to draft an entire pleading or denial letter from scratch, the result can be just as baffling as "nine plus four equals three." But if the practitioner instead asks AI to improve a sentence, paragraph, or transition, the outcome improves dramatically. Used correctly, AI becomes a tireless writing partner—capable of generating dozens of formulations in seconds and identifying clunky transitions or ambiguous phrases that might otherwise go unnoticed.

b. Simulated Judicial Review

Another powerful application is simulated adversarial review. By feeding pleadings, draft motions, or internal memos into an AI system and prompting it to "act like a skeptical judge," practitioners can test the strength of their arguments in a low-risk, high-value way. This approach often surfaces:

- Logical gaps or weak analogies,
- Conclusory statements in need of factual support, and
- Potential counterarguments the opposing party might raise.

For surety attorneys handling complex, multi-party disputes or regulatory matters, this kind of digital "moot court" offers a valuable early filter. It enables lawyers to pressure-test their work before submitting it to a court, regulator, or client—essentially catching weaknesses before they become liabilities.

This process can even be conducted audibly. ChatGPT's mobile application, for example, allows users to hold real-time conversations with AI—giving attorneys valuable practice in articulating arguments, responding to questions, and refining their delivery. For attorneys preparing for oral argument, mediation, or even a negotiation, this kind of interactive Q&A simulation offers a dynamic and low-pressure way to rehearse and improve.

c. Workflow Enhancement and Junior Training

AI tools are also proving useful in workflow optimization and attorney development. Some firms now integrate AI into their document review process, allowing junior attorneys to receive immediate feedback before partner-level review. Others use AI to summarize pleadings, draft responses to standard discovery requests, or map out preliminary litigation strategy based on prior rulings and outcomes.

These tools do not—and should not—replace attorney judgment. But they do accelerate workflows, reduce repetitive labor, and free up valuable time for high-level legal analysis. In a profession where clarity, speed, and strategic thinking are paramount, these incremental gains translate into measurable value.

For instance, AI tools are often built to please the user. A passable idea might be called brilliant; a decent paragraph, praised as exceptional. But when prompted intentionally, AI can also serve as a skeptical editor or cynical reviewer—providing hard-nosed critique to junior attorneys before their work reaches a reviewing partner. This iterative process, done in a low-risk environment, offers meaningful training opportunities and builds the kind of resilience and precision that good legal writing requires.

VI. Conclusion

For the reasons already stated, the rapid development of AI technologies and their increasingly widespread adoption across the surety industry represents a fundamental shift in how companies assess risk, serve customers, and compete in the marketplace going forward. Success in this transformation requires balancing multiple considerations: leveraging AI's efficiency gains while maintaining attorney ethical standards, implementing robust AI governance while achieving operational benefits, and navigating evolving regulatory requirements while pursuing competitive advantages. Companies that proactively address these challenges through comprehensive AI policies, robust supervision, and continuous investment in technology and talent will be best positioned for success in the expanding surety market.

In sum, the rise of artificial intelligence represents not just a technological shift but a professional reckoning. The surety industry now stands at a crossroads: those who harness AI's power responsibly—while upholding the integrity, precision, and ethics that define the legal profession—will be the ones who shape its future. For attorneys, underwriters, and executives alike, *the Homework Machine* may not be perfect—but with the right input, its potential is extraordinary.