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Newsletter

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42ND SURETY CLAIMS INSTITUTE ANNUAL MEETING AND SEMINAR NEMACOLIN WOODLANDS RESORT, FARMINGTON, PENNSYLVANIA

Nemacolin Woodlands Resort – Front Entrance

By: Jason R. Potter , Wright, Constable & Skeen, LLP, Baltimore, MD

The Surety Claims Institute's ("SCI") 42nd Annual Meeting to be held June 21-23, 2017 at Nemacolin Woodlands Resort is almost upon us. Amy Bentz, of The Bentz Law Firm in Pittsburgh, Pennsylvania, has assembled an outstanding group of speakers addressing relevant and timely topics for surety claims professionals, outside attorneys and consultants.

Thursday morning's presentations will begin with the annual review of surety case decisions presented by Ben Lentz and Patricia Wager of Torre Lentz Gamel Gary & Rittmaster and Rachel Walsh of Liberty Mutual Surety. This is always an interesting topic. Over the past several years, Ben and Patricia have converted a *(continued on page 3)*

In this issue:

Comments from the Editor 2

Surety, We're Not In Kansas Anymore: Navigating the Parallel Universe of Energy Bonds... 7

Surety Casenotes 15

Fidelity Casenotes............................22

Legislative Update...........................25

Program Agenda..............................27

Program Schedule............................28

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Comments From The Editor

I was recently asked to speak at the National Association of Surety Bond Producers on the subject of electronic surety bonds. Of course, that subject is relatively new and it is one with which I, and virtually every other private practitioner whom I know, have had little experience. Of course, as a commercial litigator, having little experience with the subject matter of a dispute is just part of the process, so I was forced to delve into the subject of commercial suretyship. Fear of embarrassment before a large crowd is always a motivator, so I spent Easter weekend learning about electronic suretyship, evidentiary issues relating to authentication of digital agreements, ancillary risks of cyber liability, availability of cyber liability insurance coverage, applicability of state financial services regulations to insurers relating to protection of confidential personal information which might be subject to hacking attacks, potential directors and officers liability insurance issues that might be implicated by the combination of electronic suretyship, cyber liability exposure, regulations applicable to insurers with respect to protection of confidential data, etc.

Several of my children visited for Easter, and finding me once again holed up in my office at home reading stacks of mind-numbing materials was a reminder to them and me as to why none of my four children ever had the least interest in becoming a lawyer. Of course, the practice of law has many benefits that I fully appreciate, even if my kids do not realize the connection between payment of their graduate school tuition and how I have spent weekends over the years. Nor do they see the friendships created while practicing surety law for over 40 years and participating in national bar and surety industry events. As each year goes by, I savor those friendships more than ever and find myself getting together with several of those friends for occasional weekend jaunts having nothing to do with business (mostly golf of course). While I have no plans to retire anytime soon, when that day comes, I am sure that I will continue to enjoy those friendships long after the work ends (providing that, hopefully, we remain healthy enough to continue to get together).

In short, while it has been and remains hard work, the rewards span both my personal life and my private life, and these days I look forward to seeing my retired friends (whom, I admit, I sometimes envy), making new friends, and maintaining friendships with those active in the surety industry. The surety “fraternity” has been an important part of my life which I continue to enjoy and which I encourage others in our fraternity/sorority to continue to expand and savor. The Surety Claims Institute’s Annual Meeting is a good place to start!

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(continued from page 1)

potentially dry subject into a very interesting and engaging presentation with some humor included.

This presentation will be followed by Ed Dudley, of Great American Insurance Group and Greg Veal of Bovis, Kyle Burch & Medlin, LLC, who will address the ever present and vexing problem facing surety claims professionals on the issue of whether the penal sum actually limits surety’s liability to that amount. More and more frequently, obligees are attempting to make claims in excess of the surety’s penal sum by utilizing imaginative arguments or crafting bond forms automatically increasing the bond penal sum. Ed and Gary will discuss how best to assure that the surety’s liability remains limited to the bond’s penal sum.

Dan Pentecost of Westfield Group and Jonathan Bondy of Chiesa, Shahinian &

Giantomasi will discuss new and interesting concepts regarding how to deal with contentious obligees who believe a bond is an insurance policy that the surety should simply pay upon demand. Dan and Jon will suggest methods to deal with obligees who believe a surety has no rights other than to simply write a check to complaining obligees.

They will be followed by Doug Wills of Chubb and David Olson of Frost Brown Todd, who will discuss recent modifications to the Federal Rules of Civil Procedure and the changes to federal discovery rules which could result in an increase to the surety's liability exposure.

Thursday's final presentation will feature Sharon Edwards of Swiss Re America Holding Corp., Patrick Kingsley of Stradley, Ronon, Stevens & Young, and Todd Braggins of Ernstrom & Dreste, who will address whether a payment bond or performance bond claimant can assign its bond rights and the risks to the surety which could result from that assignment.

On Friday morning, the program will commence with the annual review of fidelity case law presented by Carla Crapster of Strasberger & Price. For those of you who have attended the past several meetings, Carla has become the mainstay for this topic and she has again developed an interesting and enjoyable way to address it.

Following that program, Will Pearce of Arch Insurance Company, Sarah Wilson of The Hartford, Betsy Gordon of Shields Mott, and Brandon Bains of Langley LLP will review the current state of the law regarding unfair claim settlement practices and what can be done to avoid such claims. They will also address how best to deal with the unfortunate event facing a surety when such a claim is presented; and what the surety can do in dealing with regulators seeking the surety's response to complaints from bond beneficiaries regarding claims settlement practices.

That presentation will be followed by a panel discussion lead by Steve Nelson of SureTec, Kimberly Czap of Philadelphia Indemnity, Tracy Haley of Zurich, James Gibson of Liberty Mutual, Bruce Shreves of Simon Peregrine, Smith & Redfearn and Matt Horowitz of Wolf Horowitz & Etlinger, who will discuss mediation or settlement techniques when dealing with complex topics involving multiple parties. As litigation costs continue to increase, sureties remain very interested in ADR as a means to reduce or limit their exposure to such costs.

Blake Wilcox of Liberty Mutual Surety and T. Scott Leo of the Law Offices of T. Scott Leo will follow with a discussion of the myriad problems a surety may face in the principal's bankruptcy proceedings. Although bankruptcy can be an unpleasant experience for sureties, Blake and Scott will identify strategies to reduce that pain and use bankruptcy to the surety's advantage.

Finally, Christina Craddock of Liberty Mutual and John B. Dunlap of Dunlap Fiore will present the ethical topic, which will focus on the pitfalls that may arise when a lawyer inadvertently violates the rules of professional conduct. SCI expects to receive one full hour of CLE/CE credit for Christina's and John's presentation.

While education remains the SCI's paramount objective, SCI believes it is also important to hold its annual meetings at family friendly locations which offer amenities and activities to entice spouses and children to join in the surety industry's only industry function tailored to attract the whole family. The Nemacolin Woodlands Resort in Farmington, Pennsylvania, the site of this year's annual meeting, is truly an outstanding location. Nemacolin has consistently received AAA's Five Diamond Award as an outstanding resort location. The Lautrec, one of Nemacolin's restaurants, was recently named as one of only 29 restaurants in the world to receive both the AAA Five Diamond Award and a Forbes Five Star Rating. The hotel boasts its own airplane landing strip. Based on the Site Committee's visit to Nemacolin it appeared that some people fly into Nemacolin just to enjoy Lautrec's fine dining. For those who stay Friday or Saturday night, you may want to consider dining at the Lautrec.

After you arrive at the hotel, you will not need your car again unless you leave the resort, as Nemacolin has an on-demand shuttle system to take guests to any location on the resort's property.

Nemacolin also offers recreational opportunities for people of all ages and all SCI attendees receive a 10% discount on all resort activities, excluding food, beverage and other miscellaneous purchases. Nemacolin offers an off-road driving school, zip lining, rock climbing, and even has its own zoo. For more adventurous individuals, Nemacolin offers dog sledding lessons with Nemacolin's resident huskies.

One of the pool complexes is adjacent to both the chateau and the lodge, which are the two main lodging locations. Nemacolin also boasts an incredible collection of art, which is valued at over $55 million and is on display throughout the resort. Connected to the lodge is a reproduction of a 1950 era soda shop, which features interesting Hollywood memorabilia. One of the items on display is a dress worn by Marilyn Monroe in one of her movies.

Nemacolin hosts the Mystic Rock Golf Course, which is one of the top rated golf courses in Pennsylvania. For many years, it was the home of the PGA's 84 Lumber Classic and this year will host the duffers of the Surety Claims Institute!

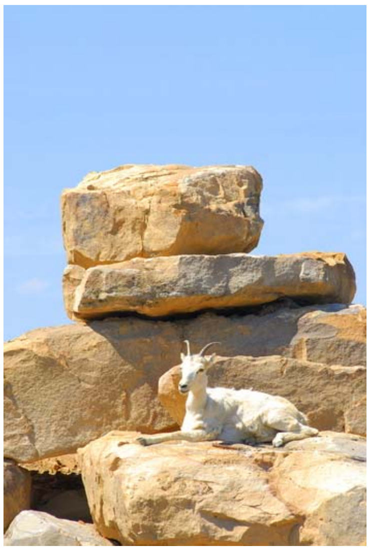
On Thursday afternoon, for those individuals who do not want avail themselves of either the resorts' amenities or golf, the SCI has arranged a trip to Frank Lloyd Wrights' residential masterpiece, Fallingwater. For those not familiar with this architectural marvel, I suggest an internet tour to whet your appetites.

All in all, Nemacolin offers every amenity and the type of wonderful accommodations which SCI and their attendees have become accustomed to enjoying. The SCI Board looks forward to renewing its friendships with returning attendees and to making friends with first-time attendees. We look forward to seeing you at Nemacolin..







Surety, We’re Not In Kansas Anymore: Navigating the Parallel Universe of Energy Bonds

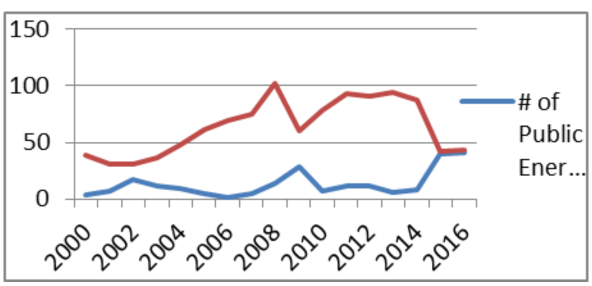
By: Gina D. Shearer, Strasburger & Price, LLP, Frisco, Texas

Default. Notice. Termination. Demand. Evaluation. Performance. Release. These are familiar mile markers to the performance bond surety following the yellow brick road leading from the principal’s performance default. When following this familiar path, the surety is accustomed to relying on the protections afforded by the language of the bond or applicable statute, which often impose conditions precedent to the surety’s performance obligation, permit the surety to make an election of performance alternatives, and limit the amount of the surety’s liability to the penal sum of its bond. Recently, the surety industry has found the black and white world of commercial performance bonds awash in new and unusual strains of color following industry-wide defaults in the energy sector. Once thought of as yielding high premiums with little potential for exposure, the surety industry has learned that it’s not in Kansas anymore when dealing with energy industry bond obligations.

I. Storm's a-brewin': The effects of depressed commodity prices following high-profile industry catastrophes

It comes as no surprise that the precipitous decline of oil prices beginning in 2014 has significantly impacted the energy industry. Characterized as the worst downturn in decades, energy companies flocked to the bankruptcy courts in record numbers as commodity prices remained depressed. Over 60 percent of bankruptcy filings in 2014-2016 were in the energy industry, an industry that historically makes up only 2 to 15 percent of bankruptcy filings.[1] The increased insolvency risk of energy companies has had far reaching effects, including on sureties. The increasing financial instability, along with several high-profile offshore disasters have led to an increased demand by public and private entities for financial assurance from exploration and production companies. This assurance often is provided through surety bonds. When oil prices were high, the plugging and abandonment or other reclamation obligations typically secured by surety bonds were seen by the surety as good sources of premiums with remote long-term risk. However, the growing industry-wide instability caused by dramatic changes in the economic viability of oil and gas endeavors have negatively impacted sureties as they have unexpectedly seen their bonded obligations come home to roost.

As depicted below, there is a direct correlation between falling oil prices and increased energy industry bankruptcy filings:[2]



[1] *Energy Sector Bankruptcies:A review of bankruptcy activities in the energy sector: 2015-2016*, BANKRUPTCYDATA, http://bankruptcydata.com/p/master-the-distressed-energy-sector (last visited April 24, 2017).
[2] *See id.; see also Historical Crude Oil Prices (Table)*, INFLATIONDATA.COM, https://inflationdata.com/Inflation/Inflation_Rate/Historical_Oil_Prices_Table.asp (last visited April 24. 2017).

II. A scarecrow, a tinman, and a lion: The governmental players the surety can expect to encounter along the way

Whether its oil, natural gas, coal, or other minerals, operators and owners are statutorily obligated to return the land to its original condition after extraction activities cease. In the oil and gas realm, these activities are referred to as "decommissioning." Among the many obligations operators and lessees face when decommissioning are: (1) plugging and abandoning unproductive wells; (2) removing facilities and other structures from the site; (3) restoring the site to its original condition; and (4) complying with applicable statutes and regulations aimed at protecting the environment and the public health and safety. In the surface mining industry, "reclamation" activities require restoring the original contour of the land, minimizing disturbances to the hydrologic system by avoiding runoff of harmful substances and sediment, and establishing permanent vegetative cover in the area.

Decommissioning and reclamation obligations are statutory in origin and are enforced by the applicable federal or state regulatory agency with authority over those activities in a particular jurisdiction. On the federal level, the Department of the Interior ("DOI") regulates natural resources located on federal land and in federal waters. The Bureau of Ocean Energy Management ("BOEM") and its sister agency the Bureau of Safety and Environmental Enforcement ("BSEE") have authority for leasing and managing offshore resources. The Bureau of Land Management ("BLM") has authority over onshore resources. State agencies vary, but some of the major players in resource-rich regions include: the Texas Railroad Commission, the Louisiana Department of Natural Resources, the Montana Department of Natural Resources and Conservation, the Missouri Department of Natural Resources, and the Virginia Department of Mines, Minerals and Energy. In addition to rules and regulations promulgated by these agencies, energy industry players must also comply with regulations enacted by other agencies, such as the Environmental Protection Agency.

III. Ruby slippers: Surety bonds as a preferred source of financial assurance

The ultimate goal of state and federal agencies that regulate the energy industry is to prevent taxpayers from bearing the cost of site restoration activities. Historically, larger companies considered "too big to fail" were exempt from various financial assurance requirements. Given the current industry climate and the number of bankruptcy filings, most agencies have modified or eliminated available exemptions, and now require companies to post surety bonds, deposit cash collateral, or otherwise insure their ability to perform decommissioning or reclamation obligations.

Surety bonds are a preferred form of financial assurance and agencies, such as BOEM, have openly expressed their desire to expand the use of surety bonds. In July 2016, BOEM caused a wave of apprehension amongst lessees when it issued Notice to Lessees 2016-N01 ("NTL") announcing that it was eliminating prior financial assurance exemptions and requiring lessees to insure 100 percent of future decommissioning obligations for outer continental shelf oil and gas facilities. The NTL was accompanied by unexpected and significant increases of decommissioning cost assessments by BOEM's sister agency, BSEE. BSEE's decommissioning cost assessments are used by BOEM to determine the amount of financial assurance required by lessees and the increase sparked industry-wide concern. Following the industry's reaction, implementation of the NTL has been suspended until at least June 2017, but when the NTL is implemented the effect will be a significant increase in the number and amount of surety bonds.

IV. A horse of a different color: Understanding the risks of energy industry bonds

Reclamation and decommissioning bonds (together, "Energy Bonds") are performance bonds. However, they operate very differently from the contract and commercial performance bonds sureties typically write. Energy Bonds are forfeiture bonds, and the full penal amount of the bonds is subject to immediate collection by the obligee upon demand. Unlike traditional performance bonds, Energy Bonds generally have no conditions precedent, such as notice requirements, that must be performed by the obligee in order to trigger the surety's obligations.

And your little dog too: The obligee's forfeiture demand and the surety's options

Upon receipt of a forfeiture demand on most Energy Bonds, the surety has three options: (i) pay; (ii) perform; or (iii) appeal. While sureties are accustomed to a pay or perform scenario, the risks associated with performance of decommissioning or reclamation activities, including the lack of penal limit credit, the potential for increased environmental exposure, the challenges of dealing directly with multiple government agencies, the complex regulatory framework, and the surety's lack of familiarity with energy facilities, necessitate extreme scrutiny by the surety prior to electing performance.

Payment is self-explanatory, although the surety will want to ensure it obtains a release from the obligee, as discussed in detail below. Most applicable regulations provide that, if the surety forfeits the penal sum of its bond and the cost of performance is ultimately less than the penal limit, any excess funds must be returned to the surety. In practice, there are rarely, if ever, any funds left over when the government is facilitating performance. Decommissioning or reclamation activities facilitated by a government agency are generally less efficient and more costly than the same work performed by the private sector.

Performance is a risky option for the surety. Not only are decommissioning and reclamation activities highly specialized, high-risk activities necessitating expertise typically not possessed by the surety or its consultants, the surety is not guaranteed penal limit credit for amounts it spends in furtherance of these activities unless it is able to specifically negotiate it. In evaluating its performance option, the surety should engage specialty consultants familiar with the reclamation or decommissioning process for the type of natural resources at issue and local to the area to evaluate the cost, scope, and risks of performance. Often, the surety will be able to obtain turnkey bids for decommissioning or reclamation activities. As with any turnkey bid, it is important for the surety's consultants to evaluate the exclusions from the bid and estimate the additional costs associated with the excluded items or contingencies. Given the nature of the work to be performed and the attendant environmental risks, as well as factors beyond the surety's control such as weather or natural disasters, it is inevitable that the cost of performance will exceed the amount budgeted by the surety. The surety's costs are also subject to increase due to unavoidable delays associated with obtaining necessary permits, inspections, and approvals from the governing agencies.

If the surety is comfortable the work can be performed for less than the penal limit, the surety may decide to negotiate with the obligee to perform the decommissioning or reclamation work. If the surety is concerned the cost of the work is near or will exceed the penal limit of its bond, performance may not be the best option for the surety. Agencies typically will not give the surety penal limit credit for funds spent in furtherance of decommissioning or reclamation activities. Without a specific agreement in place guaranteeing dollar-for-dollar penal limit credit, the surety bears the risk of any costs incurred in excess of its penal limit. Government agencies will also generally not enter into agreements with sureties for less than the entire scope of reclamation or decommissioning work, even where the bond funds are known to be insufficient to cover the entire cost. For example, there may be discreet, identifiable activities that can be accomplished in furtherance of reclamation or decommissioning, such as shutting in a well or cleaning acid filled pits, where allocation of the bond funds would result in abatement of a hazard or make a substantial contribution towards completion of the larger scope of work. If the surety undertakes these discrete activities on its own as a mitigation effort or as a good steward, the agency will likely adopt a "you touched it, you bought it" policy and look to the surety to bear the entire cost to complete the decommissioning or reclamation work.

To the extent the surety believes the obligee's forfeiture demand is improper, the surety can appeal the agency action, often forestalling its obligation to surrender the penal sum. Appeals of any demand by BOEM or BLM are sent to the Interior Board of Land Appeals ("IBLA"). State agencies each have their own appellate system in place, although certain states, such as Kentucky, require a pre-payment of the bond amount in order to pursue an appeal. Ultimately, the likelihood of the surety's success on appeal is low. Agencies are given broad discretion to interpret and carry out their regulations. Although the surety may believe an agency acted improperly or failed to act in accordance with its regulations, absent a blatant violation or disregard by the agency of its regulations, it is likely the agency's actions and interpretation of its own regulations will be afforded deference.

There's no place like home, there's no place like home: Duration of the surety's exposure on Energy Bonds

Under most contract and commercial performance bonds, the surety's performance obligations are of a limited duration or have an easily identifiable end date, such as the completion of work on a construction project. In contrast, the surety's exposure under Energy Bonds is less finite and may extend for years or even decades until the decommissioning or reclamation obligations accrue, which usually occurs at the end of life of a well or mine. In assessing risk when issuing bonds, the surety may assume that its actual exposure is quite low given the extended life of many wells and mines or the likelihood that such assets will be sold to a third-party or decommissioned at the end of their lifecycle. In reality, especially in light of the recent volatility in the industry as a result of depressed commodities pricing and an increase in bankruptcy filings, the surety may face exposure much sooner than anticipated. Many operators are shutting in wells and mines earlier than projected because current commodities prices do not make production economical. Once a facility is shut-in, applicable regulations start the clock ticking and require the commencement of decommissioning or reclamation activities within a certain period of time. Likewise, forfeiture demands are being made by agencies to sureties and predecessors-in-interest as companies enter bankruptcy or otherwise declare their financial instability.

When the current leaseholder fails to perform its reclamation or decommissioning obligations, regulatory agencies will look to sureties, predecessors-in-interest, and co-lessees to satisfy the obligation. A prior leaseholder is jointly and severally liable for all obligations that accrue under a lease prior to the date of assignment of the lease or, in the case of the surety, release or replacement of its bond. For example, decommissioning obligations accrue when a well is drilled and subsequent transfer of the lease expands the number of parties that are responsible for decommissioning obligations. However, the subsequent transfer does not release the transferee. Stated simply, the surety's principal would not be relieved of any liability to BOEM for leases assigned to a third-party to the extent any decommissioning obligations accrued (i.e. wells were drilled) while the principal held the leases. It is common, however, for parties in the chain of title to contract for indemnification or to apportion liability. The surety should also look to co-lessees or predecessors in interest as a potential salvage opportunity to the extent the surety has contribution claims after satisfying its bond obligation.

Absent payment of its penal sum, the surety has limited options for release of its bond. Annual bond renewals present an opportunity for the surety to decline renewal of the bond. While the surety may use the renewal process to negotiate for collateral with the principal, non-renewal of the bond constitutes a default and will result in a forfeiture demand from the obligee. The other option available to the surety is to request the principal to replace the surety's bond. Ideally, the replacement bond will explicitly acknowledge the replacement surety's responsibility for all obligations of all previous sureties. Otherwise, prior sureties may still be liable for decommissioning or reclamation obligations that accrued while their bonds were in place.

In negotiating for release of the surety's bond (whether in a replacement scenario, following the surety's performance of its bonded obligations, or in connection with the principal's assignment of a lease to a third party), the surety should involve the applicable agency named as obligee and obtain a written acknowledgement of the following: (i) the effective date of the replacement bond, (ii) the termination date of period of liability of the surety's bond, and (iii) a release by the obligee, including a release of any residual liability.

The Emerald City: The importance of collateral to the Energy Bond surety

Many Energy Bonds are under-collateralized or not collateralized at all because the surety anticipated the principal would be able to perform its decommissioning or reclamation obligations in the ordinary course. Reacting to the recent wave of defaults and bankruptcies, some sureties now demand one-hundred percent collateral for new bonds. As a result, many operators and lessees are instead opting to deposit collateral directly with the applicable agency rather than fully collateralizing the surety and paying ongoing premiums. As a compromise between these two extremes, the prudent surety may want to encourage its principal to prepare for the inevitable by making adequate provisions to cover future decommissioning costs. The creative surety can often mitigate its exposure and facilitate the principal's performance of its obligations simultaneously, such as by entering into an agreement with the principal to set up an escrow account that the principal funds on a monthly or quarterly basis. To the extent the principal performs reclamation or decommissioning activities on bonded facilities, the surety agrees to release funds from the escrow account to pay for the work. In the event the principal becomes insolvent, the escrowed funds are available to the surety to apply towards performing the decommissioning or reclamation work.

The prudent surety should also learn about the extent and nature of the principal's decommissioning obligations in advance of issuing or renewing bonds. Relevant inquiries include understanding the landscape of existing wells and infrastructure, plans for future exploration activities, the economics of production (including at what price production ceases to be economically viable), and the real-world decommissioning costs and schedule associated with each facility.

V. Off to see the wizard: Bankruptcy and its impact on the surety

The bankruptcy risk of companies engaged in energy exploration and production activities has increased significantly in recent years and remains high due to a variety of factors, including (i) low commodity prices for a sustained period of time; (ii) reduced borrowing bases triggering mandatory pay down of loans; (iii) the termination of hedges employed by many energy companies resulting in decreased liquidity; and (iv) years of increasing regulatory compliance costs. When evaluating exposure on Energy Bond accounts, sureties can expect to end up in a bankruptcy court more often than not.

It is no secret that few outside the surety industry, including judges, fully understand surety bonds and the surety's rights and obligations. Particularly in the bankruptcy context, many parties-in-interest consider bonds to be insurance and are eager to leave the surety holding the bag as the debtor seeks to slough off undesirable assets. Although many bankruptcies have seen the debtor eliminate significant debt and successfully emerge, many others have caused consternation for the sureties as the debtor seeks to abandon bonded assets or develop elaborate plans to address their obligations that ultimately leave the surety or predecessors-in-interest holding the bag.

The debtor will often file a motion for continuation of its surety bonding as part of its first day filings. The surety bonding order generally authorizes the debtor to maintain its bonding program in the ordinary course, including payment of premiums. Even if the debtor fails to pay the renewal premium, the surety must renew the bonds unless it first obtains relief from the automatic stay. Further, as previously noted, non-renewal of the bonds is not necessarily in the surety's best interest, as it will likely result in an immediate forfeiture demand from the obligee.

The debtor's treatment of its assets varies greatly in bankruptcy. Courts are generally concerned with reconciling the sometimes conflicting goals of providing the debtor a fresh start while protecting the public interest. Where a debtor seeks to abandon environmental liabilities, the Supreme Court has held that the bankruptcy court must formulate conditions to adequately protect the public's health and safety from imminent threats of harm.[3] However, the mandate of protecting public health and safety does not mean that the debtor must ultimately be the party to shoulder those obligations. Bankruptcy courts often permit the debtor to shift the burden of environmental compliance to someone else.

In *Midlantic*, the Chapter 7 trustee proposed to abandon two sites contaminated with carcinogenic toxic waste and subject to clean-up orders from state agencies.[4] Over objections raised by the interested agencies and municipalities on the basis that abandonment posed a threat to public health and safety, the bankruptcy court approved the abandonment under 11 U.S.C. § 554(a), which authorizes a trustee to "abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate."[5] The Supreme Court affirmed the appellate court's reversal of the bankruptcy court's construction of § 554(a), determining that a bankruptcy trustee did not have the "right to abandon property in contravention of state or local laws designed to protect public health or safety."[6] Rather, the "Bankruptcy Court does not have the power to authorize abandonment without formulating conditions that will adequately protect the public's health and safety."[7] The Supreme Court did not specifically explore what conditions constitute threats to public health and safety and how permanently those threats must be addressed. In practice, however, bankruptcy courts generally authorize abandonment where (i) imminent threats are mitigated; (ii) there is a set aside of funds to permanently address the obligations or someone else is obligated to do so; or (iii) the governing agency consents to the proposal for abandonment. Since *Midlantic,* energy industry debtors have explored a variety of mechanisms to facilitate reorganization while also addressing public health and safety concerns.

Beware the flying monkeys: Piecemeal sale of the debtor's assets

Typically, the energy debtor's portfolio of assets includes both profitable and unprofitable facilities. If the debtor elects to market its assets for sale, potential purchasers (often the lender who wants to credit bid) naturally gravitate away from unprofitable assets, and parties-in-interest may learn that the debtor intends for its post-sale assets to consist only of environmental liabilities. Courts faced with this situation typically require a set aside from sale proceeds to address environmental liabilities.

In re ATP Oil & Gas Corp. certain parties-in-interest objected to the debtor's proposed sale of oil & gas assets to its DIP lender on the basis that the lender "cherry picked" the assets it deemed to be most valuable, leaving behind undesirable properties carrying substantial environmental and decommissioning

[3] *See Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Protection*, 474 U.S. 494 (1986).
[4] *Id*. at 497-98.
[5] *Id.* at 501.
[6] *Id.* at 502.
[7] *Id.* at 507.

liabilities with the "shell" debtor that constituted administrative expenses and would render the estate administratively insolvent.[8] Ultimately, the court approved the sale after the DIP lender-purchaser set aside $44.25 million in trust to be administered by BOEM and applied towards decommissioning obligations on the leave-behind properties for which ATP was solely liable.[9] However, the escrowed funds represented less than 25 percent of the expected cost of decommissioning for the leave-behind assets, and government authorities made demand on the debtor's predecessors-in-interest to perform their joint-and-several decommissioning obligations.[10]

Do not look behind the curtain: Addressing environmental liabilities in Chapter 11 plans

In lieu of, or in conjunction with, the type of sale discussed in the preceding section, debtors may also use a reorganizing or liquidating plan to address decommissioning or reclamation obligations. The surety should carefully consider the plan proposal and examine the scope of releases proposed by the debtor to determine whether the debtor's proposal is truly feasible.

The debtors in *In re RAAM Global Energy Company* succeeded in confirming a liquidating plan that effectuated a credit bid sale of certain of the debtors' producing assets to the lender and abandoned the debtors' other Gulf of Mexico offshore assets.[11] The abandonment did not relieve the debtors of their decommissioning obligations with respect to the properties, but no specific allocation of funds to perform decommissioning obligation was made by the debtors since the court found that the existence of surety bonds and predecessors-in-interest was sufficient to ensure that public health and safety would not be jeopardized. In connection with discharging its bonded obligations, the plan provided the surety with rights to a portion of the sale proceeds, as well as the balance of a prepetition escrow account the principal had established with the surety to fund decommissioning obligations.

Another important consideration for the surety in assessing the feasibility of a plan is its complexity. The more involved and the longer the timeframe over which the debtor proposes to address its decommissioning or reclamation obligations, the more likely it is that the obligations will not successfully be addressed. Likewise, to the extent the surety is a party to post-confirmation decommissioning or reclamation activities, the surety should make sure that adequate protections are built into the plan. The adage "an ounce of prevention is worth a pound of cure" is aptly demonstrated in such circumstances by the Black Elk decommissioning plan.

Black Elk Energy Offshore Operations LLC was initially placed into an involuntary Chapter 7 bankruptcy by certain trade creditors.[12] After converting to a voluntary Chapter 11 proceeding, Black Elk confirmed a liquidating plan that involved the largest ever attempted Chapter 11 oil and gas decommissioning effort. A joint effort between Black Elk, its predecessors-in-interest, and its sureties, the decommissioning plan utilized third-party turnkey contracts to decommission dozens of Black Elk's offshore facilities. Favorably structured for the sureties and other parties-in-interest, the decommissioning agreements deferred the surety's release of collateral (as partial payment to the contractor) until after the release of the surety's bonds by the obligee. Ultimately, the cash flow constraints imposed by the extended payment structure contributed to the bankruptcy of Black Elk's largest plugging and abandonment contractor, leaving the majority of Black Elk's facilities in a state of limbo and not fully decommissioned. It remains to be seen how the parties-in-interest will address this new hurdle, but it will no doubt result in an increased scrutiny of long-term decommissioning plans by bankruptcy courts.

A reorganizing debtor may seek to maintain certain, if not all, of its assets and either keep the surety's bonds in place or solicit new bonds in connection with the debtor's emergence from bankruptcy. For example, Peabody Energy Corporation, the world's largest

[8] 540 B.R. 294 (Bankr. S.D. Tex. 2015); *see generally Texas v. Lowe (In re HLS Energy Co.)*, 151 F.3d 434, 438 (5th Cir. 1998) (oil and gas decommissioning obligations that accrue post-petition are administrative expenses).

[9] *In re ATP Oil & Gas Corp.*, 540 B.R. at 295.

[10] Jeremy Heallen, *Anadarko Seeks to Stall ATP's Oil Field Abandonment*, LAW360.COM (Jun. 26, 2013), https://www.law360.com/articles/453249/anadarko-seeks-to-stall-atp-s-oil-field-abandonment.

[11] No. 15-35615 (Bankr. S.D. Tex. Oct. 28, 2015).

[12] *In re Black Elk Energy Offshore Operations, LLC*, No. 15-34287, 2016 Bankr. LEXIS 3935 (Bankr. S.D. Tex. Nov. 9, 2016).

private-sector coal producer, filed Chapter 11 in April 2016.[13] Eleven months later, Peabody confirmed its plan and emerged from bankruptcy. Prior to bankruptcy, Peabody self-bonded a significant portion of its reclamation obligations. Its initial Chapter 11 plan contemplated that Peabody would continue to self-bond its obligations, causing parties-in-interest to voice significant concerns. Ultimately, while the company believed it still qualified for self-bonding, Peabody arranged for $1.26 billion of commercial surety bonds and $14.5 million through a state bond pool to be in place upon emergence, which amounts represent the undiscounted amount of reclamation obligations without taking into account the remaining economic life of the mines. Situations like *Peabody* are an opportunity for the surety to obtain collateral or, at a minimum, work with the debtor to implement a plan for the debtor to address its environmental liabilities as they arise.

VI. I had the strangest dream: Lessons learned from energy sector bonding

Surety bonds are a preferred form of financial assurance in the energy sector. Recent tightening of regulatory requirements across the energy sector will only increase the demand for Energy Bonds. Although high premiums and deferral of exposure may be incentives to the surety, it is important that surety professionals understand how Energy Bonds differ from traditional performance bonds. By obtaining collateral, protecting the penal limit, and understanding the nature of its underlying obligations, the surety can mitigate its risk and successfully navigate the world of Energy Bonds.

[13] *In re Peabody Energy Corp.*, No. 16-42529 (Bankr. E.D. Mo. Apr. 13, 2016).

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Surety Casenotes

By: Brian Kantar, Chiesa Shahinian & Giantomasi, PC, West Orange, NJ

Court Finds that Obligee's Refusal to Approve of Defaulted Principal to Complete Work Does Not Constitute Breach of Bond

Bovis Lend Lease (LMB), Inc. v. Lower Manhattan Dev. Corp., 40 N.Y.S.3d 371 (N.Y. App. Div. 1st Dep't 2016).

The prime contractor, Bovis Lend Lease (LMB), Inc. ("Bovis"), terminated the surety's principal, John Galt Corporation ("Galt"), for default. The surety sought to complete the project utilizing the services of Galt, but Bovis refused to consent. The lower court granted the surety's motion for summary judgment excusing its alleged nonperformance due to Bovis' breach of the bonds by prohibiting the surety from retaining Galt to complete its work after it was terminated.

The appeals court reversed, finding that the bonds expressly required the surety's replacement of Galt to be "in accordance with" Galt's subcontracts, which incorporated the prime contract. Although the surety contested the propriety of the default, and thus the reasonableness of Bovis' refusal to consent to permitting the surety to complete the project utilizing Galt, the court found that the surety was precluded from contesting whether the subcontractor breached the subcontract because the same issue was addressed in a criminal case where Galt was found guilty of reckless endangerment.

Federal Court Holds that Montana Law Prohibits Payment Bond Surety from Limiting Time to Commence Suit to One Year

W. Mun. Constr., Inc. v. Zirkelbach Constr., Inc., 2016 WL 6583614 (D. Mont. Nov. 4, 2016).

Zirkelbach Construction, Inc., ("Zirkelbach") was the general contractor for the construction of a multi-million dollar FedEx Ground Terminal Hub (the "FedEx Project") Zirkelbach retained Western Municipal Construction ("Western"), as a subcontractor, to provide utility installation, among other things, at the FedEx project. Western performed work on the FedEx Project through August 20, 2014 and submitted invoices totaling $357,624.70. After Zirkelbach failed to pay Western, Western sent a letter to the surety stating it intended to file a claim on the payment bond. Western timely filed a construction lien against the FedEx Project. The surety responded to Western's claim, stating that $217,107.76 of the $357,644.70 was undisputed and offered to provide the undisputed amount if Western executed a "Partial Release and Assignment of Portion of Claim." The surety made the partial payment to Western and Western amended its construction lien to reflect the partial payment. By February 2016, the disputed amount of $140,516.94 had not been resolved and Western filed suit against Zirkelbach, the surety, and others, to recover the disputed amount.

The surety filed a motion to dismiss, arguing that Western filed its claim after the expiration of the payment bond's one-year limitation on actions. The surety further argued that Western failed to state a claim for which relief can be granted because the "Partial Release" released the surety from all the claims asserted in the lawsuit. The court denied the surety's motion, holding that under Montana law "[a] condition in a contract that limits the time within which any party may enforce the party's rights is void." Since, Montana law provides that actions based on any contract, obligation, or liability founded upon an instrument in writing must be brought within eight years, the court found that the payment bond's one-year limitation is void. The court also held that the partial release did not cover the claims in Western's complaint against the surety.

Surety Cannot be Compelled to Arbitrate Even Though Performance Bond Incorporates the Subcontract, which Contains an Arbitration Clause, by Reference

Schneider Elec. Bldgs. Critical Sys., Inc. v. W. Sur. Co., 149 A.3d 778 (Md. Ct. Spec. App. 2016), *cert. granted*, 2017 WL 1282156 (Md. Mar. 3, 2017).

Schneider Electric Buildings Critical Systems, Inc. ("Schneider") and National Control Services, Inc. ("NCS") entered into a Master Subcontract Agreement ("MSA"), pursuant to which Schneider would engage NCS' services. The MSA provided that it would apply to all future subcontracts between Schneider and NCS and contained an agreement to arbitrate. Schneider and NCS subsequently entered into a subcontract, in accordance with the MSA, providing that NCS was to perform certain work at the construction site of the Aberdeen Proving Ground. The subcontract required NCS to furnish a performance bond, which incorporated by reference the subcontract between Schneider Electric and NCS, which, in turn had incorporated by reference the MSA with its mandatory arbitration clause.

Thereafter, NCS declined to perform the construction required by the subcontract, as a result of a payment dispute. Schneider filed, as provided by the MSA, a demand for arbitration. Although that demand, initially, named only NCS as a respondent, it was subsequently amended to include the surety, on the grounds that the performance bond incorporated by reference the subcontract, which, in turn, had incorporated by reference the MSA, with its mandatory arbitration clause, and thereby purportedly bound the surety to that clause. In response, the surety filed a petition to stay the arbitration and for a declaratory judgment that it was not a party to the agreement to arbitrate and therefore could not be compelled to participate in the pending arbitration proceeding. The surety additionally asserted that Schneider breached the performance bond and the breach relieved the surety of any liability thereunder. The lower court granted partial summary judgment in favor of the surety, concluding that, under either federal or state law, the surety was not subject to the arbitration provision of the incorporated MSA and therefore could not be compelled to participate in the pending arbitration. Schneider appealed.

The appeals court affirmed the lower court's decision, holding, as an initial matter, that the dispute is governed by state law, and not the Federal Arbitration Act, because the issue is one of contract formation and enforceability of an arbitration agreement against a non-signatory.

The appeals court also held that the mere incorporation of one contract into another contract involving different parties does not automatically transform the incorporated document into an agreement between the parties to the second contract, unless there is an indication of a contrary intention. The court further noted that the performance bond indicates an intention to litigate disputes. The bond provided that "[a]ny proceeding, legal or equitable, under this Bond may be instituted in any court… and shall be instituted within two years." In rejecting the argument that an incorporation-by-reference clause bound the surety to arbitrate, the court found that such a reading of the bond would, in effect, read out of it a provision, which provided that "[a]ny suit under the bond must be instituted before the expiration of two years from the date on which final payment under the subcontract falls due."

Obligee's Failure to Comply with Conditions Precedent Prove Fatal to Performance Bond Claim

Arch Ins. Co. v. John Moriarty & Assocs. of Fla., Inc., --- F.Supp.3d ----, 2016 WL 7324144 (S.D. Fla. Dec. 12, 2016).

John Moriarty & Associates of Florida, Inc. ("JMA") entered into a subcontract with R.C. Aluminum Industries, Inc. ("RC"). JMA sent RC's surety a letter advising that JMA was considering declaring RC to be in default. However, without formally declaring a default or terminating the subcontract, JMA unilaterally completed the subcontract without providing the surety the opportunity to exercise its completion rights as required by the bond. JMA also failed to agree to pay the contract balance to the surety; JMA ultimately offered to do so after the surety filed suit. JMA subsequently demanded payment of $995,239.83 under the performance bond.

The surety commenced an action seeking declaratory judgment that it had no obligation under the performance bond. The court found that JMA never allowed the surety to mitigate its damages by arranging for the completion of the subcontract itself. By depriving the surety of its completion options, JMA materially breached the bond.

Under Georgia Law, Statute of Limitations for Action on Little Miller Act Payment Bonds Runs from Time Work is Complete, Not "Final Acceptance" of the Work

Strickland v. Arch Ins. Co., 2017 WL 104320 (S.D. Ga. Jan. 10, 2017).

Devin B. Strickland ("Strickland") supplied sand to Douglas Asphalt for use on a Georgia Department of Transportation ("GDOT") road project. Douglas Asphalt went into default and the surety took over the project. Strickland was never paid. He sued the surety seeking recovery on August 22, 2014.

According to GDOT, the underlying road work was "substantially complete," "ready for final inspection," and "complete and satisfactory" on August 25, 2010. The builder requested final inspection on September 1, 2010 and requested that GDOT take over project maintenance on January 25, 2012, since all the work had been completed. On February 1, 2012, GDOT's area engineer informed his district engineer that the project had been satisfactorily completed. On March 12, 2012, GDOT accepted project maintenance responsibility retroactive to September 14, 2011. It considered all construction work complete, and all that remained to be done was "the final close out" paperwork. Up until GDOT's "final written acceptance," the builder had the duty to protect the project and repair any damage to it. Final written acceptance issued on September 22, 2014.

Under Georgia law, the statute of limitations on a Little Miller Act payment bond claim bars suits for recovery on public works payment bonds brought after "one year from the completion of the contract and the acceptance of the ... construction by the proper public authorities." Completion and acceptance are both required. Completion refers to the builder's performance, and acceptance "to action by the public authority." Strickland argued that acceptance did not occur until final acceptance was issued on September 22, 2014, thereby rendering Strickland's suit to be timely. The Court disagreed, holding that "final acceptance does not determine the completion date for purposes of [Georgia's Little Miller Act]. Georgia precedent indicates that a project is complete when the actual work is done." The Court granted the surety's motion for summary judgment.

General Contractor and Surety Not Precluded from Recovering Attorney's Fees under the Miller Act

United States ex rel. RMP Capital Corp. v. Turner Constr. Co., --- F. App'x ----, 2017 WL 244066 (11th Cir. Jan. 20, 2017).

Turner Construction Company ("Turner") was the general contractor for a Department of Veterans Affairs project, on which Bolena Construction, Inc. ("Bolena") was a subcontractor and Southwick, Inc. ("Southwick") was a sub-subcontractor. Bolena and RMP Capital Corp., as assignee of Southwick, brought suit in federal district court, seeking to collect against a Miller Act payment bond. On the first day of trial Bolena and RMP jointly filed a motion to dismiss their Miller Act claims. Turner and its sureties moved for attorney's fees and costs. The district court granted some of the costs but denied attorney's fees. With regard to attorney's fees, the district judge first observed that the Miller Act does not explicitly provide for attorney's fees. The court then determined that there is precedent for awarding attorney's fees in Miller Act cases where a contract provides for fees to be awarded to the prevailing party and when that party is a subcontractor. But there is no precedent governing the award of attorney's fees to a general contractor or a surety when the subcontractor voluntarily dismisses a Miller Act claim. The district court thus denied the motion for attorney's fees based on this lack of precedent, reasoning that awarding attorney's fees to a general contractor or surety would be in tension with the Miller Act's express purpose of protecting subcontractors and suppliers on federal projects.

Although the Miller Act does not mention attorney's fees, the appeals court observed, as a threshold matter, that attorney's fees are a recoverable item under a Miller Act bond when provided for in a contract. The court ruled that the district court was wrong in holding that general contractors and sureties are barred from receiving attorney's fees in any case originally brought under the Miller Act. The district court's error stemmed from its misreading of Miller Act cases. The cases do not state a general principle that only subcontractors and sub-subcontractors who contract for attorney's fees can receive them in cases brought under the Miller Act. Rather, they stand for the more limited principle that subcontractors and sub-subcontractors may recover contracted-for attorney's fees from the Miller Act payment bond. In light of this limited principle, the lack of precedent allowing for the recovery of attorney's fees in Miller Act cases by general contractors and sureties makes sense. Miller Act payment bonds are procured by general contractors from sureties for the protection of subcontractors and sub-subcontractors. General contractors or sureties would not seek to recover against their own bond.

The court held that like all other parties to contracts, general contractors on federal projects and their sureties can recover attorney's fees where a contract allocates attorney's fees to them. The case was remanded to district court to interpret the contract so as to determine whether it entitles Turner and its sureties to an award of attorney's fees, and if so how much.

<u>Federal District Court Denies Application to Disqualify Surety's Counsel Because Counsel was Allegedly a Material Witness</u>

Am. Safety Cas. Ins. Co. v. Happy Acres Enters. Co., Inc., 2017 WL 279616 (W.D. Wash. Jan. 20, 2017).

The bond principal, Happy Acres Enterprises Company, Inc. ("Happy Acres"), filed a motion seeking to disqualify the surety's counsel because he was allegedly a material witness in the case. The surety was a party to an arbitration between Happy Acres and the obligee, Doe Bay Water User's Association, Inc. ("Doe Bay"). Doe Bay alleged, among other things, that Happy Acres was in default under its contract and submitted a claim against the performance bond. An Award of Arbitrator was entered in favor of Happy Acres on its claims against Doe Bay. The Award also found in favor of Happy Acres on Doe Bay's counterclaims. Further, the Award found in the surety's favor as to Doe Bay's claims against the surety.

The surety commenced litigation seeking to enforce its indemnity rights. Happy Acres contended that the surety did not participate in any meetings, communications or discovery between Happy Acres and Doe Bay in anticipation of the arbitration proceedings; the surety's counsel attended the arbitration but did not participate, did not present any witnesses, did not participate in any of the arbitration preparation work, either before, during or after the arbitration, nor assist with preparation of witnesses; and the surety also had its claims consultant and identified expert witness attend all five days of the arbitration, but he was never called as a witness. As a result, Happy Acres has asserted the affirmative defenses of failure to mitigate, no reasonable necessity, and lack of good faith, among others.

Happy Acres moved to disqualify the surety's counsel on the basis that Happy Acres intended to call into question the decisions made by the surety and the resultant fees in the underlying case, and therefore the surety's counsel "will undoubtedly be a material witness in this case." Happy Acres thus argued that, counsel could not represent the surety in this action pursuant to Rule 3.7 of the Rules of Professional Conduct—the lawyer (advocate)-witness rule—and should be disqualified as the surety's counsel. The court denied Happy Acres' motion, finding that Happy Acres failed to provide sufficient evidence supporting disqualification in this matter. Happy Acres did not provide any support for its contention that the information Happy Acres' believes it will obtain from counsel is unobtainable elsewhere. The court also held that counsel's proposed testimony, if any, would go directly to the nature and value of legal services rendered, and therefore an exception to RPC 3.7 applies. Specifically, where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, counsel is permitted to testify without the need for a second trial with new counsel to resolve the issue.

The surety argued that Happy Acres' motion to disqualify was disingenuous and retaliatory, particularly given that Happy Acres never identified the surety's counsel as potential witnesses until after discovery closed. The court agreed. Rule 26 of the Federal Rules of Civil Procedure provides, among other things, that "a party must, without awaiting a discovery request, provide to the other parties ... the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information...." and that a party must supplement its initial disclosures "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing...." Happy Acres did not dispute that it identified counsel as people with potentially discoverable information for the first time nearly a month after discovery closed and days after it filed its Motion to Disqualify, and failed to provide any explanation for its actions. On that basis, the court prohibited Happy Acres from calling counsel as a witness.

Obligee's Failure to Provide Sufficient Notice Discharges Surety Under AIA A312 (2010) Bond

Int'l Fid. Ins. Co. v. Americaribe-Moriarty JV, --- F. App'x ----, 2017 WL 766912 (11th Cir. Feb. 28, 2017).

The surety issued a performance bond for a subcontract between Americaribe-Moriarty JV ("Americaribe"), a general contractor, and Certified Pool Mechanics 1, Inc. ("CPM"). After Americaribe terminated CPM for defaulting on the subcontract, it notified the surety, but also hired a new subcontractor, Dillon Pools, Inc. ("Dillon). The subcontract included a termination provision that required Americaribe to provide three-days notice before it could act to complete the job on its own. Section 1 of the bond (AIA A312 (2010)) expressly incorporated the subcontract. The bond also included termination provisions. Section 3 set out three steps by which Americaribe could trigger the surety's obligations under the bond, including a notice requirement in § 3.2. Section 5 provided the surety with four options for completing CPM's work after it was terminated, allowing the surety to elect the option that best mitigated its damages. If the surety failed to elect an option "with reasonable promptness," Americaribe had to provide the surety with seven-days notice before it could enforce other remedies.

On August 17, 2015, Americaribe issued a notice of default to CPM and the surety, in accordance with Section 3 of the bond, requesting a conference call with the surety "to substitute CPM's scope ... with an alternative subcontractor." On August 20, the surety responded to Americaribe requesting more information and directing Americaribe "not to take any steps with respect to the completion of the project without the written consent of the Surety." On September 2, the parties held a conference call. On September 21, Americaribe sent CPM and the surety a letter terminating CPM, notifying the surety, and agreeing to pay the balance of the contract price, consistent with

§ 3 of the bond and § 12.2 of the subcontract. However, on September 16, Americaribe obtained a proposal from Dillon for completing the work that remained on the subcontract. And, on September 17, Dillon sent Americaribe a schedule with a presumed start date of September 21. Then, on September 22, Americaribe sent vendors of CPM a letter, again copying the surety, and informing them of CPM's termination and that "[Americaribe] intends to award the subcontract to complete the remaining work ... to Dillon." As of September 23, Dillon had begun "supplementation work and on site investigations to determine corrective work required for the project."

On October 1, Americaribe sent the surety the "additional written notice" required by § 6 of the bond, which started the seven-day clock toward the surety defaulting on its obligations under the bond. On October 8, the surety responded to Americaribe that its actions in engaging Dillon may have discharged the surety's obligations under the bond. On October 9, Americaribe responded that the surety was in default of the bond for not acting under § 5 with reasonable promptness. On November 5, the surety issued a formal denial of Americaribe's claim because Americaribe materially breached the bond by commencing efforts to supplement CPM's work before providing the surety with an opportunity to remedy any alleged default.

On November 4, Dillon signed a subcontract with Americaribe. The contract was dated October 1, 2015, and listed a start date of September 28, 2015. On November 5, Americaribe paid Dillon over $1 million for invoices with a period ending date of September 30. This payment included $450,000 for a supplier which had supplied materials to CPM, but had not been paid before CPM was terminated.

The surety filed an action for declaratory judgment against Americaribe, alleging it failed to satisfy the conditions precedent to make a claim against the bond and instead breached that bond. Americaribe counterclaimed, alleging that the surety breached the bond. The district court granted the surety's motion for summary judgment. Americaribe appealed. The Court of Appeals affirmed.

Both the bond and subcontract required Americaribe to provide notice to the surety when terminating CPM. Although Americaribe provided notice on September 21, the subcontract required the contractor give three-days notice before undertaking to complete the work. In addition, the bond gave the surety time to choose among four options for undertaking the work itself, after Americaribe sent the termination notice. Neither the bond nor the contract allowed Americaribe to immediately hire Dillon to complete the work. Americaribe's immediate hiring of Dillon to complete the project and the costs Dillon incurred completing CPM's work thwarted the surety's ability to choose among the options it had for remedying CPM's default under § 5 of the bond. Therefore, the court held that the surety was not liable on the bond.

Court Holds that Under New York Law: 1) Indemnitors Bear the Burden of Proving a Surety Acted in Bad Faith; 2) Timely Notice of Principal's Default is Condition Precedent to Recovery Under Bond Form Substantially Similar to AIA A311 Performance Bond

MES, Inc. et al. v. Safeco Ins. Co. of Am., et al., 2017 WL 1194730 (E.D.N.Y. Mar. 30, 2017).

This omnibus decision resolved several motions for summary judgment for two parallel actions. In the first part of the decision, the court granted one surety's motion for summary judgment on its claim for full indemnity. The indemnitors opposed the motion on the grounds that the surety allegedly acted in bad faith. The court stated that, under New York law, "pursuant to an indemnity agreement such as that signed by the defendants, the surety is entitled to indemnification upon proof of payment, unless payment was made in bad faith or was unreasonable in amount, and this rule applies regardless of whether the principal was actually in default or liable under its contract with the obligee."

The indemnitors argued that the surety has the burden of proving it acted in good faith, and that it had an "honest belief" that it was liable under the subject bonds. The court held that, because the indemnity agreement provided, among other things, that the surety has "exclusive authority to determine in good faith whether any claim or suit upon any Bond shall, on the basis of belief of liability, expediency or otherwise, be paid, compromised, defended or appealed", the language of the indemnity agreement itself rebutted the indemnitors' arguments that good faith be defined as having an "honest belief in liability" or that the surety bears the burden initially to show good faith in the event of a dispute. The court added that the indemnity agreement not only allowed the surety to settle claims made against the bond without an "honest" belief in liability, it granted the surety this right where the surety had no belief in liability and simply acted out of "expediency or otherwise". The court additionally held that "it is clear then that 'good faith,'… cannot be equated with, or limited to, having a belief in liability, no less an "honest" one, and that the broad discretion accorded the surety under the [indemnity agreement], in effect, creates a presumption of good faith with respect to any decision it makes pursuant to the [a]greements' terms, such that, in challenging those decisions, defendants must first make an affirmative showing that [the surety] acted in bad faith, i.e., engaged in "fraud or collusion". The court rejected all of the indemnitors' arguments that purportedly evidenced the surety's bad faith, finding the indemnitors failed to raise triable issues of fact.

In the second part of the decision, another surety was granted summary judgment dismissing claims asserted under two subcontract performance bonds issued on behalf of S.A. Comunale Co., Inc. ("Comunale"), the fire protection subcontractor to M.E.S., Inc. ("MES"), the general contractor, on two federal construction projects. MES alleged that the surety breached its contractual obligations and acted in bad faith in handling MES' claims against the bonds by failing to perform after MES declared Comunale to be in default. The Comunale performance bonds at issue were similar in form to the AIA A311 bond form. The conditions precedent under the bond include, among other things, that Comunale be in default, MES declare Comunale in default under its Subcontract and that the surety be permitted to exercise one of several options to "perform and complete the Subcontract."

On its motion for summary judgment, the surety argued it had been discharged of its obligations under the Comunale performance bonds as MES failed to satisfy the conditions precedents since MES did not declare Comunale in default when it was possible for the surety to exercise its express contractual right to perform and complete the projects. The surety demonstrated through documentary evidence that MES did not send notice to the surety of any claim until several months after MES itself had been terminated by the government and that its notices of claim did not contain any indication that Comunale was in default under its subcontracts. MES subsequently engaged in protracted negotiations with the government in an effort to settle the matter. After MES' efforts failed, and nearly a year after the government terminated MES, MES wrote to the surety, declared Comunale to be in default of the subcontracts and demanded that the surety pay to MES the full penal sum of each bond. The court granted the surety's motion for summary judgment, finding that MES was unable to point to any evidence from which a jury could reasonably conclude that MES satisfied the conditions precedent for triggering the surety's obligations under the performance bonds, i.e., that Comunale was in default and was declared to be in default at a time when the surety had an opportunity to complete the projects. In granting the surety's motion, the court rejected as insufficient the "self-serving" affidavit submitted by one of the indemnitors, which was which was the only evidence proffered to establish that the surety was notified of Comunale's default prior to MES' own terminations.

<u>Failure to Comply with AIA A312 Performance Bond's Requirement that the Obligee Agree to Pay the Contract Balance Precludes Recovery by Obligee, Regardless of any Indication by the Surety as to Whether it Intends to Perform or to Deny the Claim</u>

RKI Constr., LLC v. WDF, Inc., 2017 WL 1232441 (E.D.N.Y. April 3, 2017).

The action involved a contract dispute between a subcontractor and sub-subcontractor. The sub-subcontractor sued the subcontractor for breach of contract and the subcontractor filed a counterclaim against the sub-subcontractor and a third-party claim against the sub-subcontractor's performance bond surety. The surety moved for summary judgment dismissing the third-party claim on multiple grounds, including the failure of the subcontractor to comply with the condition precedent contained in paragraph 3.3 of the bond, to agree "to pay the Balance of the Contract Price." The court noted that both state and federal courts interpreting New York law have found that Paragraph 3 of the AIA A312 Performance Bond sets forth strict conditions precedent to the surety's duties under the bond, and courts have required strict adherence in cases involving similar bond provisions.

The subcontractor argued that it did not have the opportunity to agree to tender the contract price before the surety denied the claim. The court rejected this argument because the subcontractor did not offer any plausible excuse for its failure to satisfy the express conditions precedent before the surety denied the claim. The court stated that "Paragraph 3 of the performance bond sets forth strict conditions precedent to its [the surety's] duties under the performance bond." The court granted the surety's motion for summary judgment and dismissed the subcontractor's third-party claim under the bond.

Fidelity Casenotes

By: Lynda Riesgo Jensen, Travelers Bond & Specialty Ins., Braintree, MA

Improper Financial Benefit Requirement Not Satisfied

Renasant Bank v. St. Paul Mercury Ins. Co., --- F.Supp.3d ----, 2017 WL 698382 (N.D. Miss. Feb. 21, 2017).

The loan officer/vice president of a state-chartered bank purportedly colluded with borrowers to manipulate large commercial real estate loan transactions to gain a financial benefit for herself and to cause a loss to the bank. The insured bank submitted a claim under its fidelity bond seeking coverage for employee dishonesty. The insurer denied the claim on the grounds that the insured bank failed to establish that the employee gained an improper financial benefit, a necessary element of an employee dishonesty claim involving loan-related losses. The insured bank filed suit in federal court alleging breach of contract against the insurer. The parties cross-moved for summary judgment.

Applying Mississippi law, the district court granted the insured's motion in part and the insurer's motion in its entirety. The court opined on the insured bank's motion first. The insured bank argued that the bond was a statutory bond and that the court should read out provisions that are inconsistent with the statute. The court observed that, as a state-chartered bank and member of the FDIC, Mississippi regulatory laws and not federal banking laws required it to secure a bond. The court held that the fidelity bond is a statutory bond, because in obtaining it, the insured bank satisfied Mississippi law requiring the bank to secure coverage and fulfilled the statute's purpose of strengthening and protecting itself. The court continued, however, that the bond's additional proof requirements for loan-related losses are consistent with the purposes of the Mississippi statute. The concept of dishonesty incorporates an element of intent and proof requirements such as improper financial benefit or collusion are "logical requirements in keeping with the statutory language." The court further held that the commissions the employee received as part of the lending scheme did not satisfy the improper financial benefit element because they were received in the normal course of employment and are expressly excluded under the bond. It also held that the insured bank failed to identify any other such improper benefit to defeat summary judgment.

No Use of a Computer To Cause a Direct Loss

InComm Holdings, Inc. v. Great Am. Ins. Co., 2017 WL 1021749 (N.D. Ga. Mar. 16, 2017).

The insured operates a debit card processing business. Consumers who purchased prepaid debit cards could load funds onto the cards using the insured's processing system. The cardholders purchased "chits" from a retailer, and the retailer transferred the funds from the chit purchase to the insured's bank account. The cardholder could use that chit only once and redeem it through the insured's Interactive Voice Response system by telephone. The system allowed the cardholder to respond to voice commands or enter touch tone codes through the telephone. The insured would make the funds available for use on the cardholder's debit card and would wire funds to the bank of the debit card issuer to reimburse it for purchases. The processing system had a vulnerability that enabled the cardholder to redeem a chit more than once. The insured discovered more than $10 million in unauthorized redemptions and submitted a claim for consideration under the Computer Fraud coverage of its crime policy. The insurer denied the claim on the grounds that the loss did not involve use of a computer, no direct loss occurred and the losses represent separate occurrences all within the applicable retention. The insured filed suit in federal court, and the parties cross-moved for summary judgment.

Applying Georgia law, the district court granted the insurer's motion, holding that the cardholders did not use a computer when they redeemed the chits; rather, they used telephones. First, the court held that a telephone does not qualify as a computer. Second, the court explained that a person uses a computer by taking, holding or employing it to accomplish something. "That a computer was somehow involved in a loss does not establish that the wrongdoer 'used' a computer to cause the loss. To hold so would unreasonably expand the scope of the Computer Fraud Provision, which limits coverage to 'computer fraud.'" The court explained that even if computers had been used to cause the insured's loss, the loss did not result directly from the computer use. The fraudulent redemptions did not cause the loss; rather, the loss did not occur until the bank paid funds to merchants to settle cardholder expenditures of fraudulently redeemed chits. The court held that the weight of authority consistently interprets "directly" to mean "immediately."

Adverse Interest Exception Applied In Rescission Action

Nat'l Credit Union Admin. Bd. v. CUMIS Ins. Soc'y, Inc., --- F.Supp.3d ----, 2017 WL 1047256 (D. Minn. March 17, 2017).

The insured credit union discovered that its manager embezzled more than three million dollars and submitted the loss for coverage consideration under its financial institution bond. The insurer sought to rescind the bond based on misrepresentations that the manager made in a renewal application regarding the ongoing theft, and refunded premiums. The premium check was negotiated, albeit with a subsequent question raised as to the understanding as to the check's purposes. The receiver appointed as a result of the theft filed an action in federal court seeking a declaration that the insurer owed coverage under the bond. The insurer moved for summary judgment on the grounds that a Minnesota statute allows for rescission because the misrepresentations increased the risk of loss and the insured credit union, through the receiver, agreed to rescind the bond by negotiating the premium check.

Applying Minnesota law, the district court denied the insurer's motion. No party disputed that the manager misrepresented facts about the theft on the bond renewal application. The court found that the insurer established that the misrepresentation increased the risk of loss. Specifically, the insurer issued a bond on the risk of employee theft and the fact that the employee was actually stealing at the time of issuance changed that risk to a guarantee. However, the court elected not to impute the misrepresentation to the insured credit union, relying on the adverse interest exception. The court held that the only reason the manager did not disclose the existence of the theft was for her own benefit and to the detriment of the insured credit union. As a result, the exception did not merit imputing the misrepresentation. The court applied the exception narrowly, however. Because the manager's misrepresentation related to the fraud only, and not to tangential matters such as internal controls, the court elected not to impute it to the insured credit union. The court held that the insured had not demonstrated that negotiating the check constituted an acceptance of the offer to rescind, but allowed discovery to proceed as to the impact of that action and as to whether grounds to rescind exist.

Consultant Did Not Qualify As Employee Under Crime Policy

Telamon Corp. v. Charter Oak Fire Ins. Co., 850 F.3d 866 (7th Cir. 2017).

The insured telecommunications firm engaged a consultant through a series of Consulting Services Agreements to serve as its Vice President of Major Accounts. The consultant used that position to steal more than five million dollars from the insured. The insured submitted the loss for coverage consideration under its crime policy and its property policy. The crime insurer denied coverage because the consultant did not qualify as an employee under the policy's definition. The property insurer denied coverage because, in practice, the consultant functioned as an employee. The insured filed suit against both insurers in state court, and the insurers removed the case to federal court. The insured thereafter attempted to add an additional insurer, and when the district court prevented it from doing so, it filed a separate action against that additional insurer in a case that was later dismissed. On the original action, the insurers filed summary judgment, and the court granted their motions. The insured appealed.

Applying Indiana law, the Seventh Circuit affirmed the district court's ruling. The district court found that the consultant did not qualify as an employee under the crime policy. The Seventh Circuit agreed, explaining that the entity that entered into the Consulting Services Agreement with the insured served as the consultant's vehicle for providing the consultant's services and did not function as a labor leasing firm as contemplated by the crime policy's definition of employee. After determining that the property policy likewise did not cover the loss, the Seventh Circuit declined the insured's request to certify the question to the Supreme Court of Indiana as to whether Indiana law recognized the tort of bad faith in handling insurance claims. The Seventh Circuit finally addressed the impermissible attempt to add an additional insurer by splitting the claim into two lawsuits. The Seventh Circuit agreed with the reasoning of the district court and noted that the claims in the new action were nearly identical to the first action and the policies at issue were "materially indistinguishable." It concluded that the insured "was not at liberty to split its cause of action and subject insurers to repetitious lawsuits."

<u>No Unauthorized Entry or Introduction of Instructions Through Social Engineering Scheme</u>

Taylor & Lieberman v. Fed. Ins. Co., --- F. App'x ----, 2017 WL 929211 (9th Cir. Mar. 9, 2017).

The insured accounting firm held power of attorney and was authorized to make transfers from its client's bank account. The insured received emails from a fraudster that had taken over a client's email account and used its authority to transfer funds. The insured thereafter learned that a fraudster, not the client, actually sent the email instructions. The insured submitted the loss for coverage consideration under its crime policy, but the insurer denied the claim. The insured brought suit in federal court, which granted summary judgment for the insurer.

Applying California law, the Ninth Circuit affirmed the district court's ruling, holding that no computer fraud occurred. Sending an email, absent something more, does not constitute an unauthorized entry into the recipient's computer system. Moreover, the email instructions did not serve as the type of instructions the policy was designed to cover. They were not malicious computer codes that a fraudster could introduce into the system and that could propagate themselves throughout that system; rather, they were instructions to the insured to undertake action. The Ninth Circuit held that no funds transfer fraud occurred, because the insured knew of, and requested, the wire transfers and because the insured is not a financial institution. The Ninth Circuit held that no forgery or alteration coverage was available because the coverage pertains only to financial instruments and an email does not qualify as such under the policy's definition.

LEGISLATIVE UPDATE

By: Angela Gleason, Associate Counsel, American Insurance Association, Washington, DC

The 2017 legislative sessions are well underway and a handful of states have already adjourned for the year. Below you will find a sampling of surety legislation adopted during some of the legislative sessions that have adjourned. We continue to see a number of commercial surety bills as well as efforts to adjust state bond thresholds. For instance, Idaho established its first bond threshold at $50,000. The Virginia legislature passed legislation to permit local authorities to waive bid bond prequalification in certain circumstances. Further, there has been activity related to alcohol excise tax bonds(MS), the process for claims handling of grain warehouseman license bonds (SD), and home service contractor registration bonds (VA). For complete details on the aforementioned legislation and a sampling of other surety issues included in this article, please see the statutory section or bill number identified in the text and footnotes below.

Idaho

<u>Public Project Bond Threshold</u>

Idaho has been one of the only states without a bond threshold for public works and public building projects. The legislature changed that this year with an amendment to Idaho Code Ann. §54-1926 to establish a $50,000 bond threshold.[1]

Mississippi

<u>Alcohol Excise Tax Bond</u>

Existing Mississippi law requires those in the business of a brewpub and those in the business as manufacturers, wholesalers, and distributors of light wines or beer to post a surety bond. This legislation[2] amends the law to also require a manufacturer operating a small craft brewery that is also distributing light wine or beer for sale to post an additional bond in an amount not to exceed the estimated excise tax for any 60-day period.

South Dakota

<u>Grain Warehouseman Bond Claims</u>

Upon notice of revocation, termination, or cancellation of a warehouseman's license, any claims against that warehouseman must be made in writing to the Public Utilities Commission within 6 months. Written notice of the claim is no longer required to be sent to the warehouseman and surety bond provider. Language that relieves the surety from its obligations if a claim is not timely made is removed from the statute as well. Further, the sentence prohibiting reducing the aggregate liability of the surety to other claimants below the face amount of the bond is also eliminated.[3]

Virginia

<u>Bid Bonds – Conditions for Dispensing with Prequalification</u>

Under Virginia law, where bid bonds have been waived for non-transportation related construction contracts in excess of $100,000 but less than $500,000, the prospective contractors must be prequalified for each individual project. The law was amended during this legislative session to allow waiver of the prequalification

[1] S.B. 1074 (Effective: 07/01/2017).

[2] Miss. Code Ann. § 27-71-311 (H.B. 1322; effective: 07/01/2017).

[3] S.D. Codified Laws § 49-43-5.9.

requirement for bidders with a current Class A contractor license on contracts in excess of $100,000 but less than $300,000 upon an advance written determination by the local governing body that such waiver is in the locality's best interest. A locality cannot enter into more than 10 such contracts per year.[4]

<u>Home Service Contractor License</u>

New Va. Code Ann. § 59.1-434.3[5] outlines bonding (or letter of credit) requirements for home service contractors. The home service contractor is required to file a surety bond or letter of credit in the amount of $10,000. An additional bond amount is also required and that amount shall be adjusted from time to time based on the schedule contained in the statute. For example, home service contractors with a total amount of unexpired contracts ranging from $50,001 to $300,000 shall provide an additional $40,000 bond or letter of credit; an additional $65,000 bond or letter of credit for a total amount of unexpired home service contracts ranging from $300,001 to $750,000; and an additional $90,000 surety bond or letter of credit for total unexpired home service contracts of $750,001 or more. The bond shall be in a form acceptable to the Commissioner of Insurance (Commissioner) and shall not be cancelled or terminated except with the consent of the Commissioner. The aggregate liability is capped at the amount of the bond or letter of credit. In lieu of a bond or letter of credit, the home service contract provider may demonstrate financial responsibility by filing a liability insurance policy that covers 100% of the provider's liabilities, including the administration of claims and the cost for such administration.

West Virginia

<u>Reclamation Bond Release</u>

The schedule for releasing a surface coal mining reclamation bond as identified in W. Va. Code § 22-3-23 is amended.[6] For example, there is no longer a distinction for handling the release when there has been a variance granted and when no variance has been granted. Also, the condition of release after 2 years following the last augmented seeding, fertilizing, etc. with a minimum $10,000 retention has been eliminated in favor of a condition of release after revegetation has been established on the regraded mined lands in accordance with the approved reclamation plan and there is a structure for determining the amount to be released under this condition.

[4] Va. Code Ann. § 2.2-4336 (H.B. 2017).
[5] H.B. 1542.
[6] S.B. 687.

Surety Claims Institute
42nd Annual Meeting & Seminars

Wednesday, June 21 – Friday, June 23, 2017
Nemacolin Woodland Resorts, Farmington, Pennsylvania

AGENDA

Tuesday, June 20		
3:00 – 5:00 p.m.	Registration Desk Open	

Wednesday, June 21		
8:30 – 9:00 a.m.	Board of Directors Breakfast	
9:00 a.m. – Noon	Board of Directors Meeting	
2:00 – 5:00 p.m.	Registration Desk Open	
6:00 -10:00 p.m.	Get Acquainted Reception and Buffet Dinner*	

Thursday, June 22		
7:30 a.m.	Continental Breakfast for Registrants	
8:00 a.m. – 11:30 a.m.	Seminar Program	
11:30 a.m. – 1:00 p.m.	Buffet Lunch *	
1:00 – 5:00 p.m.	Golf Tournament*	
1:00 – 5:00 p.m.	FLW Fallingwater Tour*	
6:30 – 9:30 p.m.	Children's Party*	
7:00 – 10:00 p.m.	Reception and Banquet Dinner *	

Friday, June 23		
7:30 a.m.	Continental Breakfast for Registrants	Ballroom Foyer A
8:00 a.m. – Noon	Seminar Program	Ballroom AB
Noon	Adjourn	

*Reservations Required

Times/speakers/and educational topics subject to change

42ND ANNUAL MEETING – SURETY CLAIMS INSTITUTE
SEMINAR PROGRAM SCHEDULE
THURSDAY PROGRAM

JUNE 22, 2017

START/ END TIME	PROGRAM/SPEAKERS	
8:00 a.m. – 8:15 a.m.	**Opening Remarks:** *David Kitchin, Great American Insurance* **Program Remarks:** *Amy Bentz, Bentz Law Firm* **Speaker Introductions:** *Gary Valeriano, Anderson, McPharlin & Connors, LLP*	
8:15-8:50	**Annual Review of Surety Case Decisions**	***Rachel Walsh,*** *Liberty Mutual Surety* ***Ben Lentz,*** *Torre Lentz Gamel Gary & Rittmaster,* ***Patricia Wager,*** *Torre Lentz Gamell Gary & Rittmaster*
8:50-9:25	**Thus Far May You Come, But No Further: The Penal Sum and How Sureties Can Preserve It**	***Ed Dudley,*** *Great American Insurance Company,* ***Gregory Veal,*** *Bovis, Kyle, Burch & Medlin, LLC*
9:25-10:00	**Advanced Obligee Negotiation/Discussion Techniques**	***Daniel Pentecost,*** *Westfield Group,* ***Jonathan Bondy,*** *Chiesa Shahinian & Giantomasi PC*
10:00-10:35	**Modifications to the Federal Rules of Civil Procedure and the "Shifting burdens" on Discovery Costs for Sureties**	***Douglas James Wills,*** *Chubb & Son, Inc.,* ***David C. Olson,*** *Frost Brown Todd LLC*
10:35-10:50	**BREAK**	
10:50-11:30	**Assignments-Avoiding Problems in Taking Assignments (Assuming Liabilities, Rights that Cannot be Assigned, Assignment of Rights Against Surety Bonds, Inadvertently Releasing Assignment Rights, Assignments of Lien Right, Balancing of the Equities and the Subrogated Surety)**	***Sharon Edwards,*** *Swiss Re America Holding Corp.,* ***Patrick Kingsley,*** *Stradley, Ronon, Stevens & Young LLP,* ***Todd R. Braggins,*** *Ernstrom & Dreste, LLP*

42ND ANNUAL MEETING – SURETY CLAIMS INSTITUTE
SEMINAR PROGRAM SCHEDULE
FRIDAY PROGRAM

JUNE 23, 2017

START/ END TIME	PROGRAM/SPEAKERS	
8:00 a.m. – 8:15 a.m.	**Opening Remarks:** *David Kitchin, Great American Insurance* **Program Remarks:** *Amy Bentz, Bentz Law Firm* **Speaker Introductions:** *Gary Valeriano, Anderson, McPharlin & Connors, LLP*	
8:15-8:50	**Annual Review of Fidelity Case Law**	***Carla Crapster,*** *Strasburger & Price LLP*
8:50-9:25	**Dealing with the Regulators and the Unfair Claim Settlement Practice Acts, state and federal**	***William Pearce,*** *Arch Insurance Company,* ***Sarah E. Wilson,*** *The Hartford,* ***Elizabeth L. Gordon,*** *Shields Mott, LLP,* ***Brandon Bains,*** *Langley, LLP*
9:25-10:05	**Complex Mediations and Settlement Techniques for Sureties**	***Steve Nelson,*** *SureTec Insurance Company,* ***Kimberly Czap,*** *Philadelphia Indemnity,* ***Tracy Haley,*** *Zurich American Insurance Company,* ***James Gibson,*** *Liberty Mutual Surety,* ***H. Bruce Shreves,*** *Simon, Peragine, Smith & Redfearn, LLP* ***Matthew Horowitz,*** *Wolf, Horowitz & Etlinger, LLC,*
10:05-10:20	**BREAK**	
10:20-10:55	**The Surety's opportunities in the Contractor's Bankruptcy: A Guidebook to ease the next vacation in Hell**	***Blake Wilcox,*** *Liberty Mutual Surety,* ***T. Scott Leo,*** *Law Offices of T. Scott Leo, PC*
10:55-11:55	**Ethics: Ethical Violations that Take the Attorney by Surprise—How Attorneys Inadvertently or Innocently Violate the Rules**	***Christina Craddock,*** *Liberty Mutual Surety,* ***John B. Dunlap, III*** *Dunlap Fiore, LLC*

SUGGESTIONS & COMMENTS??

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42nd Annual Meeting and Seminar

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June 21-23, 2017