RECENT DEVELOPMENTS IN FIDELITY AND SURETY LAW

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I. SURETY LAW

A. *Performance Bonds*

1. Affirmative Claims

In *Platte River Insurance Co. v. Joseph P. Melvin Co.*,[1] a surety issued bonds after relying on an audited financial report that significantly overstated the subcontractor's assets. The subcontractor was terminated for default and the surety filed a tort action against the subcontractor's accounting firm, asserting that the accounting firm had negligently misrepresented the subcontractor's financial condition and that the underlying report was not compliant with generally accepted accounting principles and generally accepted auditing standards.[2] The accounting firm argued that it did not induce the surety to issue the performance bond and that the surety's damages were "theoretical" because separate litigation between the surety and

1. No. CV 20-3380, 2020 WL 6747125 (E.D. Pa. Nov. 16, 2020).
2. *Id.* at *1–2.

obligee remained ongoing.[3] The court denied the accounting firm's motion to dismiss, explaining that the surety's reliance on the firm's misrepresentations was foreseeable because the accounting firm "was and remains in the business of providing accounting services" for construction contractors and knew its reports would be shared with bonding companies.[4] The court further explained that the surety's ongoing separate litigation did not render damages "theoretical" because it had incurred attorneys' fees in attempting to mitigate its losses.[5]

2. Conditions Precedent

In *Rolin Construction, Inc. v. Liberty Mutual Group, Inc.*,[6] a prime contractor terminated a subcontractor for default, notified the subcontractor's surety, and entered into a separate oral contract with the subcontractor to complete part of the subcontractor's original scope of work. The prime contractor filed an unsuccessful action against the subcontractor, in which the court converted the prime contractor's termination for default into a termination for convenience and awarded the subcontractor damages for material breach.[7] The prime contractor subsequently filed an action against the subcontractor's surety for breach of the bond.[8] The surety moved for summary judgment, asserting that the prime contractor's compliance with the subcontract and termination for default were conditions precedent.[9] The court denied the surety's motion, reasoning that the subcontractor's continued work on the project under the oral contract created an issue of material fact as to whether the subcontractor had waived the default.[10]

3. Venue

In *PCL Civil Constructors, Inc. v. Arch Insurance Co.*,[11] a prime contractor appealed the dismissal of its breach-of-contract claims for forum non conveniens. The prime contractor argued that the prime contract's forum-selection clause did not govern its dispute with the subcontractor's surety because the bond incorporated the subcontract (and not the prime contract) by reference.[12] The prime contractor further argued that the subcontract's own forum-selection clause authorized suit in federal district court.[13]

3. *Id.* at *2–5.
4. *Id.* at *4–5.
5. *Id.* at *5.
6. Civ. No. 19-01135-WS-N, 2020 WL 7346033 (S.D. Ala. Dec. 14, 2020).
7. *Id.* at *3–4 (citing Rolin Constr., Inc. v. Wind Clan Constr. Co., CA 18-0032-MU, 2020 WL 1976645 (S.D. Ala. Apr. 24, 2020)).
8. *Id.* at *1.
9. *Id.* at *5–7.
10. *Id.*
11. 979 F.3d 1070 (5th Cir. 2020).
12. *Id.* at 1074.
13. *Id.* at 1075.

The Fifth Circuit affirmed dismissal, reasoning that the prime contract's forum-selection clause modified the subcontract's forum-selection clause because the subcontract "fully incorporated" the prime contract.[14]

In *T&G Corp. v. United Casualty & Surety Insurance Co.*,[15] a prime contractor moved to amend its complaint to add a non-diverse defendant (the subcontractor) and remand after the subcontractor's surety asserted counterclaims. In response, the surety argued that the prime contractor's claims were not "real" and that the motion was intended to defeat jurisdiction.[16] The court granted the prime contractor's motion, emphasizing that its decision was a "close call" under the applicable federal statute.[17] The court noted that the subcontractor's unanticipated avoidance of bankruptcy and post-removal demand for payment constituted a "new" and "valid" reason to add the subcontractor.[18] The court further noted that "overlapping and unresolved issues between the three parties" should be resolved in "one case."[19]

4. Surety Liability

In *Apex Development Co., LLC v. State of Rhode Island Department of Transportation*,[20] a prime contractor repeatedly trespassed on a third party's property during construction of a public project. The third party filed a tort action against the state, which then filed an indemnity action against the prime contractor and its sureties.[21] The sureties moved for summary judgment, asserting that the bond guaranteed only "performance of the work" and did not extend liability to "cover tortious acts of others."[22] In response, the state asserted that the bond incorporated the prime contract, which required the prime contractor to defend and indemnify the state from "any claims."[23] The court granted the sureties' motion, reasoning that the bond's plain language was "focus[ed] on non-performance" and did not require the sureties to indemnify the state for third-party claims "such as trespass."[24]

In *Barlovento, LLC v. AUI, Inc.*,[25] a prime contractor terminated a subcontractor for default after the subcontractor failed to adhere to subcontract

14. *Id.*
15. Civ. No. 20-61589-CIA-ALTMAN/Hunt, 2021 WL 494246 (S.D. Fla. Feb. 10, 2021).
16. *Id.* at *2.
17. *Id.* at *3, *7 (citing 28 U.S.C. § 1447(e)).
18. *Id.* at *3–4.
19. *Id.* at *5–6.
20. C.A. No. PC-2010-5654, 2021 WL 1097932 (R.I. Sup. Ct. Mar. 17, 2021).
21. *Id.* at *2.
22. *Id.*
23. *Id.*
24. *Id.* at *4–5.
25. Civ. No. 18-1112 GJF/JHR, 2020 WL 6706867 (D.N.M. Nov. 13, 2020) [hereinafter *Barlovento I*].

changes on a federal project. The prime contractor and the subcontractor's surety disputed whether the changes discharged the surety from its bond obligations.[26] The surety moved for summary judgment, arguing that the subcontract changes were material and made without its consent.[27] In response and in a separate motion *in limine* to exclude the surety's proposed "consent" jury instruction, the prime contractor argued that the surety "consented in advance" to the changes because the bond incorporated the subcontract, which permitted the prime contractor to change the subcontract without "releasing or discharging" the surety.[28] The court denied the surety's motion for summary judgment and granted the prime contractor's motion *in limine*, explaining that the surety "waived its right to receive advance notice and provide consent to" changes because the bond "expressly provided that *any* changes could be made to the [s]ubcontract work[.]"[29]

In *Iron Branch Associates, LP v. Hartford Fire Insurance Co.*,[30] after the principal was terminated for default, the surety tendered its principal's performance to a completion contractor. The owner released the surety from its obligations under the bond, but reserved the right to recover certain damages against the surety under the performance bond.[31] The surety reserved all rights and defenses under the applicable agreements, as well as its principal's rights and defenses.[32] The owner later demanded additional damages, which were in excess of what the principal agreed to in the construction contract.[33] After the surety denied the owner's claim, the owner sued the surety.[34] The court granted in part and denied in part the parties' cross-motions for summary judgment, determining that the owner could not recover consequential damages from the surety that were expressly waived in the construction contract, but could recover damages not precluded by the construction contract.[35]

5. Limitations

In *In re Fiber-Span, Inc.*,[36] the designer of a wireless network contracted with an equipment supplier, pursuant to which the supplier secured a

26. *Id.* at *2; Barlovento, LLC v. AUI, Inc., Civ. No. 18-1112 GJF/JHR, 2020 WL 6785072, at *2 (D.N.M. Nov. 18, 2020) [hereinafter *Barlovento II*].
27. *Barlovento II*, 2020 WL 6785072, at *2 (citing Nat'l Sur. Corp. v. United States, 118 F.3d 1542 (Fed. Cir. 1997)).
28. *Id.* at *2–3; *Barlovento I*, 2020 WL 6706867, at *2, *5.
29. *Barlovento I*, 2020 WL 6706867, at *5–6; *Barlovento II*, 2020 WL 6785072, at *3–4.
30. No. CV 21-463, 2021 WL 4129116 (D. Del. Sept. 9, 2021).
31. *Id.* at *4.
32. *Id.* at *5.
33. *Id.* at *5–6.
34. *Id.* at *5.
35. *Id.* at *6, *14–19.
36. No. CV 20-2244, 2021 WL 941878 (D.N.J. Mar. 12, 2021), *appeals docketed* Nos.

performance bond. A dispute arose regarding nonconforming goods provided by and payment allegedly owed to the supplier, which in turn refused to maintain or repair the installed goods.[37] The designer sued the supplier for breach of contract and the surety for breach of performance bond.[38] The supplier subsequently filed a chapter 7 bankruptcy petition.[39] After trial, the bankruptcy court entered judgment for the designer on the breach of contract claim and for the surety on the breach of performance bond claim.[40] On appeal, the district court affirmed the bankruptcy court's findings regarding the supplier's breach of contract and the designer's initial rejection of the nonconforming goods.[41] The district court reversed the finding that the designer's failure to reject the nonconforming goods upon knowledge that the supplier was no longer seeking to cure constituted acceptance of the goods.[42] The district court held that the designer's post-rejection use of the nonconforming goods was reasonable under the circumstances.[43] The district court further affirmed the conclusion that acceptance triggers final payment.[44] Because the designer did not accept the nonconforming goods, the district court reversed and held that the designer's suit against the surety was not time-barred and the surety was liable under the performance bond in light of its principal's liability.[45]

6. Principal's Defenses

In *Lake Hills Investments, LLC v. Rushforth Construction Co., Inc.*,[46] the owner sued the contractor for breach of contract alleging, among other things, that the contractor had performed defective work in multiple areas, and the contractor responded by stopping all work and filing its own breach claim against the owner alleging underpayment.[47] The jury returned a mixed verdict, finding the contractor had rendered defective work and the owner had breached the contract, with a net judgment in favor of the contractor.[48] The court of appeals reversed on the basis that the jury instruction for the affirmative defense of defective design plans or specifications misstated the governing law because it did not specify that the construction defect must

21-1712 (3d Cir. Apr. 21, 2021), 21-1713 (3d Cir. Apr. 21, 2021), 21-1806 (3d Cir. Apr. 26, 2021).

37. *Id.* at *6.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at *7–8.
42. *Id.* at *8.
43. *Id.* at *9–10.
44. *Id.* at *12.
45. *Id.*
46. 494 P.3d 410 (Wash. 2021).
47. *Id.* at 412.
48. *Id.*

result "solely" from the defective or insufficient plans or specifications.[49] The state supreme court reversed, holding that an affirmative design defect defense is a complete defense if the damage is solely due to the design.[50] If, however, the defects were caused by a combination of deficient performance and deficient design, then it is not a complete defense.[51] The supreme court further found the jury instruction used at trial to be misleading because it described the defense as a complete defense and did not explicitly inform the jury that it could calculate and attribute proportional liability, determining what percentage of the defect was caused by defective specifications.[52]

7. Penal Sum

In *BDG Gotham Residential, LLC v. Western Waterproofing Co., Inc.*,[53] following a construction accident allegedly caused by the principal's negligent operation of a crane resulting in extensive cost overruns and delays, the contractor declared the principal to be in default and demanded the surety complete its principal's obligations under the subcontract. The surety declined, and the contractor sued the surety for breach of its performance bond.[54] The surety moved to dismiss the contractor's claim against it insofar as it sought damages in excess of the penal sum, contending that its liability is limited by the penal sum amount.[55] The court agreed, observing that state law expressly limits a surety's liability to the amount specified in the surety contract.[56] The court also clarified that, while a surety who elects to assume its principal's performance obligations stands in the shoes of the principal and may be liable under the underlying construction contract beyond the bond's penal sum, the liability of a surety who declines to assume the principal's performance obligations and instead pays the cost of completion or defaults under the bond is limited to the bond's penal sum.[57]

8. Bad Faith

In *City of Hawesville v. Great American Insurance Co.*,[58] after the principal filed for bankruptcy, the obligee sued the principal's surety for breach of contract, violations of the state unfair-settlement-practices statute, and bad

49. *Id.* at 412–13.
50. *Id.* at 417.
51. *Id.*
52. *Id.* at 417–18. Although it found the jury instruction misleading, the supreme court also held that the owner was not prejudiced by the instruction. The supreme court ultimately reversed and remanded to the court of appeals on other grounds.
53. No. 19-CV-6386 (AJN), 2020 WL 6825679 (S.D.N.Y. Nov. 20, 2020).
54. *Id.* at *1.
55. *Id.*
56. *Id.* at *5 (citing N.Y. Gen. Oblig. Law § 7-301).
57. *Id.* at *6.
58. No. 4:20-CV-00135-JHM-HBB, 2020 WL 6491658 (W.D. Ky. Nov. 4, 2020).

faith failure to effectuate equitable settlement of the claims.[59] The surety moved to bifurcate the trial and discovery on the breach of contract and bad faith claims, contending that no bad faith claim could be made unless it was first determined that that the principal breached its contract, the damages flowing therefrom, and that the obligee complied with contract and bond provisions.[60] Because the obligee "must succeed on the contract claim as a predicate to any bad faith regarding the bond," the court granted the surety's motion to bifurcate trial and discovery for the claims.[61]

B. *Payment Bonds*

1. Jurisdiction, Venue & Arbitration

In *Owners Insurance Co. v. Fidelity & Deposit Co. of Maryland*,[62] following a multiparty arbitration in which the surety did not participate, interim and final awards were entered against the principal in favor of a subcontractor and supplier.[63] The surety tendered payment of the amounts awarded, plus post-judgment interest, but denied liability as to fees, costs, and expenses awarded.[64] In the ensuing litigation, the claimants argued that fees, costs, and expenses were "justly due" because principal was liable for such under the terms of its subcontract and purchase orders.[65] The court found that the surety's obligations are delimited by the terms of the bond and bonded contract,[66] and held that attorneys' fees, costs, and expenses were not recoverable under the express terms of the private, common-law bond at issue.[67]

In *Southeastern Concrete Constructors, LLC v. Western Surety Co.*,[68] the subcontractor sued only the surety under the payment bond. The lower court granted the surety's motion to dismiss and transfer venue based on the subcontract's forum-selection clause.[69] The appellate court reversed and remanded, finding that a subcontract's venue-selection clause will control

59. *Id.* at *1 (citing Ky. Rev. Stat. Ann. § 340.12-230).
60. *Id.* at *1–2.
61. *Id.* at *3.
62. No. 4:21-CV-00184 JAR, 2021 WL 3525174 (E.D. Mo. Aug. 10, 2021), *appeal docketed* No. 21-2943 (8th Cir. Aug. 27, 2021).
63. *Id.* at *2–3.
64. *Id.* at *3.
65. *Id.* at *5.
66. *Id.* (observing that "attorneys' fees are not recoverable against a payment bond surety unless expressly authorized by the statute under which the bond is furnished, or by the bonded contract, or imposed because of the surety's own bad faith conduct in litigation involving a claim" (quoting 3 Philip L. Bruner & Patrick J. O'Connor, Jr., Construction Law § 8:174 (2020))).
67. *Id.* at *8–9.
68. 331 So. 3d 763 (Fla. Dist. Ct. App. 2021).
69. *Id.* at 765.

the cause of action only if it is included in the bond itself or is incorporated into the bond, neither of which were present in the payment bond at issue.[70]

In *United States ex rel. John A. Weber Co. v. Milcon Construction, LLC*,[71] a subcontractor sued a prime contractor and its surety seeking to confirm a consent award reached by the subcontractor and the prime contractor at arbitration. During the arbitration, the subcontractor and the prime contractor entered into a settlement agreement, which provided for the entry of the consent award, and a forbearance agreement, which indicated that the prime contractor and the surety were jointly and severally liable for the settlement sum.[72] In the district court action, the subcontractor sought to confirm the consent award against the surety, to which the surety objected on the grounds that it was not a party to the arbitration and therefore could not have the award confirmed against it based on jurisdictional grounds.[73] The court declined to confirm a consent award against the surety who was not named in the consent order nor was a party to the arbitration, as it was not authorized to confirm an arbitration award against a surety who was not a party to the arbitration.[74]

In *United States ex rel. Precision Air Conditioning of Brevard, Inc. v. Cincinnati Insurance Co.*,[75] the surety moved to dismiss the subcontractor's Miller Act claim, alleging that the subcontractor's failure to exercise contractual dispute resolution before filing suit was fatal to the subcontractor's complaint. While the court agreed that the dispute resolution requirement was a condition precedent to the subcontractor's claim, the subcontractor's premature filing of the lawsuit did not warrant dismissal of the complaint.[76] The court stayed the action to allow the parties to participate in dispute resolution, reasoning that following contractual dispute resolution procedures did not contravene the Miller Act's purpose.[77]

In *Wall-Tech, LLC v. BES Design/Build LLC*,[78] a subcontractor sued the general contractor and its surety for nonpayment of work performed on a project. The court granted in part and denied in part the general contractor's motion to dismiss or, in the alternative, to stay the case pending arbitration, indicating that it would stay the action pursuant to a federal statute

70. *Id.* at 766–67.
71. 523 F. Supp. 3d 1203 (D. Haw. 2021), *judgment entered*, No. CV 19-00637, 2021 WL 1723657, *3 (D. Haw. Apr. 30, 2021).
72. *Id.* at 1206.
73. *Id.* at 1210.
74. *Id.* at 1211.
75. No. 4:20-CV-190, 2021 WL 1396281 (E.D. Va. Apr. 13, 2021).
76. *Id.* at *5.
77. *Id.* at *5–6.
78. No. 3:20-CV-00048, 2021 WL 720468 (M.D. Tenn. Feb. 23, 2021).

because the subcontractor had requested such.[79] The court, however, found that the subcontractor's claims against the surety were not subject to arbitration as there was no agreement to arbitrate between the subcontractor and the surety, and because the bond at issue did not incorporate the subcontract, which included an arbitration clause, by reference.[80]

2. Notice

In *Johnson-Lancaster & Associates, Inc. v. H.M.C., Inc.*,[81] a sub-subcontractor provided notice of non-payment to the payment-bond surety via email, but did not do so via certified mail as required by the state's Little Miller Act.[82] The court denied the surety's motion for summary judgment, indicating that the certified-mail requirement's purpose is to ensure receipt of the claim, and sending the claim via email provided a digital history of delivery.[83] Because the surety received timely notice of the claim, did not deny that it received the notice, and did not contest the notice's contents, the surety suffered no prejudice receiving the notice via email as opposed to via certified mail.[84]

In *Luong v. Western Surety Co.*,[85] the subcontractor sued the Miller Act surety in small claims court after it provided supervisory work and briefly provided labor on a project. The small claims court ruled in favor of the surety, finding that the subcontractor did not provide the requisite notice within ninety days as required by the state's Little Miller Act.[86] The subcontractor filed an appeal with the superior court, which was denied, and then appealed to the state supreme court.[87] The state supreme court reversed the superior court's denial of the appeal and vacated the judgment and award of attorneys' fees against the subcontractor.[88] The supreme court found that the subcontractor's notice was timely because notice is effectuated on the date of mailing, not the date on which the contractor receives the notice.[89] The supreme court also found that the subcontractor performed labor as defined under the Little Miller Act because its work was necessary to and furthered the project.[90]

79. *Id.* at *2–4 (citing 9 U.S.C. § 3).
80. *Id.* at *3.
81. No. CV ADC-20-0992, 2021 WL 1720865 (D. Md. Apr. 29, 2021).
82. *Id.* at *1 (citing Md. Code Ann., State Fin. & Proc. §§ 17-101–17-111).
83. *Id.* at *4.
84. *Id.*
85. 485 P.3d 46 (Alaska 2021).
86. *Id.* at 49 (citing Alaska Stat. § 36.25.020(b)).
87. *Id.*
88. *Id.* at 48.
89. *Id.* at 53, 56.
90. *Id.* at 50, 52.

In *Blue Ribbon Staffing, LLC v. Flatiron Constructors, Inc.*,[91] the court dismissed the payment bond claims of a third-tier subcontractor for its failure to deliver notice of its claims to the prime contractor and surety by registered or certified mail as required by the state payment-bond statute.[92] The subcontractor did not dispute its failure to give timely notice by mail, but argued that (1) it was entitled to rely on the notice the second-tier subcontractor mailed to the prime contractor and surety; and (2) email notice should be deemed statutorily sufficient.[93] The court rejected both contentions, reasoning first that to allow the third-tier subcontractor to benefit from notice provided by the second-tier subcontractor would render the payment-bond statute's notice deadlines superfluous, and second that email notice did not comply with the plain text of the statute requiring notice to be given exclusively by certified or registered mail.[94] In so holding, the court acknowledged but departed from various state appellate court decisions allowing mere "substantial compliance" with the payment bond statute's notice requirements.[95]

3. Liability

In *Franco Belli Plumbing & Heating & Sons, Inc. v. Citnalta Construction Corp.*,[96] the court granted the subcontractor's breach of contract and payment bond claims against the general contractor and its surety, and awarded attorneys' fees to the subcontractor.[97] The appellate court reversed the attorneys' fee award, but otherwise affirmed the court's judgment.[98] On remand, the parties disputed the date upon which prejudgment interest should begin to accrue, and the subcontractor again sought attorneys' fees against the surety under a state statute, claiming the surety's defense regarding the prejudgment interest issue was frivolous.[99] The trial court ruled in favor of the subcontractor as to the prejudgment interest dispute, but it denied the subcontractor's motion seeking attorneys' fees.[100] The court held that the state fee statute did not apply to the fees incurred in litigating the prejudgment interest issue because such arguments did not constitute "'either the

91. No. 5-20-CV-00686-RBF, 2021 WL 256824 (W.D. Tex. Jan. 26, 2021).
92. *Id.* at *3–5 (citing Tex. Gov't Code Ann. §§ 2253.047(a), (c), 2253.048).
93. *Id.* at *5.
94. *Id.* at *5–8.
95. *See id.* at *6 (discussing and expressly declining to follow United Fire & Cas. Co. v. Boring & Tunneling Co. of Am., 321 S.W.3d 24, 28 (Tex. Ct. App. 2010); Redland Ins. Co. v. Sw. Stainless, *L.P.*, 181 S.W.3d 509, 512 (Tex. Ct. App. 2005); Featherlite Bldg. Prod. Corp. v. Constructors Unltd, Inc., 714 S.W.2d 68, 69 (Tex. Ct. App. 1986)).
96. No. 107725/2011, 2020 WL 7059228 (N.Y. Sup. Ct. Dec. 2, 2020).
97. *Id.* at *1.
98. *Id.*
99. *Id.* at *1, *3–5 (citing N.Y. State Fin. Law § 137[4][c]).
100. *Id.* at *3–5.

original claim [(*i.e.*, the subcontractor's original payment bond claim)] or the defense interposed to such claim'" as required by the statute.[101] Moreover, even if the statutory provisions were applicable, the court would still decline to award fees as the state statute is "about payment bonds" and the surety's prejudgment interest defenses had "nothing to do with the payment bond."[102]

In *Hayward Baker, Inc. v. Westfield Insurance Co.*,[103] a subcontractor sued a general contractor and its surety, and the general contractor countersued alleging damages due to defective work.[104] In a separate but related action, the general contractor entered into a settlement agreement with the subcontractor's insurance carrier, wherein the insurer paid the general contractor an amount in excess of the amount claimed due by the subcontractor.[105] Both the general contractor and the subcontractor later moved to recover attorney fees as the prevailing party pursuant to a state statute that allows the prevailing party to recover attorneys' fees against a surety.[106] The subcontractor successfully moved to set off the insurance payout from the related action against the damages entered against the subcontractor in the initial matter, which resulted in an entry of a final judgment in favor of the subcontractor and against the general contractor and surety in the full amount claimed by the subcontractor plus prejudgment interest.[107] The appellate court held that the subcontractor was the prevailing party.[108] The court indicated that the insurance setoff was "pivotal" to the prevailing party determination and, in the absence of the setoff, it "would be inclined to agree . . . that there was no prevailing party . . . since [the general contractor] and [the subcontractor] were both at fault for the failure of the subcontract."[109]

In *United States ex rel. Aarow/IET LLC v. Hartford Fire Insurance Co.*,[110] the subcontractor filed an amended complaint against a general contractor and its payment-bond surety alleging that the subcontractor suffered additional costs due to the general contractor's wrongdoings.[111] The general contractor and surety moved to dismiss the amended complaint, arguing that (1) the subcontract contained a no-damages-for-delay provision, and, as such, the damages sought were contractually barred delay damages; and

101. *Id.* at *4–5 (emphasis omitted) (quoting N.Y. State Fin. Law § 137[4][c]).
102. *Id.*
103. 313 So. 3d 772 (Fla. Dist. Ct. App. 2020).
104. *Id.* at 773.
105. *Id.*
106. *Id.* at 773–75 (citing Fla. Stat. § 713.29).
107. *Id.*
108. *Id.* at 773, 775 (citing Fla. Stat. § 713.29).
109. *Id.* at 774–75.
110. 838 F. App'x 736 (4th Cir. 2020).
111. *Id.* at 740–41.

(2) the subcontractor failed to timely serve a notice of claim under the subcontract.[112] While the lower court ruled in favor of the general contractor and surety, the Fourth Circuit overruled the decision.[113] As to the no-damages-for-delay argument, the Fourth Circuit held that it was not clear from the amended complaint whether the subcontractor was seeking "delay" damages or a different type of damages (such as damages due to "disruptions"), and, as such, explained that "this is not a situation in which it is readily apparent that dismissal is appropriate."[114] As to the notice argument, the Fourth Circuit ruled that the trial court erred as the amended complaint contained sufficient allegations to demonstrate the subcontractor's compliance with the subcontract's notice requirements (*i.e.*, allegations stating that the subcontractor provided "numerous" notices to the general contractor about work disruptions and that the subcontractor satisfied all conditions precedent under the subcontract).[115]

In *United States ex rel. Schneider Electric Building Americas, Inc. v. CBRE Heery, Inc.*,[116] the court denied a surety's request to stay a Miller Act action pending the resolution of the general contractor's claim against a project owner for an equitable adjustment due to project delays.[117] Citing the purpose of the Miller Act and related case law, the court found that a year or two had elapsed since the subcontractors completed their work and, while the general contractor continued to pursue its claim against the owner, the subcontractors could not be made a party to that process.[118] Under these circumstances, the court found that it would be unfair and prejudicial to further delay the subcontractors from pursuing their Miller Act claims.[119]

4. Limitations

In *Dickson v. Forney Enterprises, Inc.*,[120] summary judgment was entered in favor of a payment-bond surety on claims asserted by a professional engineer. The court held that the engineer's suit was time-barred under the Miller Act's one-year statute of limitations, as clerical tasks performed by the engineer after completion were insufficient to extend the statute of limitations.[121]

112. *Id.* at 738–39, 741–42.
113. *Id.* at 743–44.
114. *Id.*
115. *Id.* at 744.
116. No. 5:20-CV-257-BR, 2021 WL 3184539 (E.D.N.C. June 9, 2021).
117. *Id.* at *3–4 (citing 40 U.S.C. §§ 3131–3134).
118. *Id.* at *4.
119. *Id.*
120. No. 1:20-cv-129, 2021 WL 1536574 (E.D. Va. Apr. 19, 2021).
121. *Id.* at *3 (citing 40 U.S.C. § 3133(b)(4)).

In *United States ex rel. Lee Masonry Products, Inc. v. White*,[122] a payment-bond claimant sued the surety for nonpayment under the Miller Act. The surety argued that the claimant's suit was barred by the one-year statute of limitations because there was no evidence that the claimant had supplied materials related to non-remedial work within the one-year period preceding filing the lawsuit.[123] The district court agreed and entered a judgment in favor of the surety on the Miller Act claim.[124] The Sixth Circuit affirmed the judgment, finding that the claimant's suit was time-barred because it did not file its suit within one year from the last date that it delivered materials to the job site that were included in the original contract as opposed to materials delivered for remedial or corrective work.[125]

5. Proper Claimants

In *Groveland Municipal Light Department v. Philadelphia Indemnity Insurance Co.*,[126] the obligee received and paid demands from subcontractors that had not been paid by the principal.[127] The surety denied the obligee's subsequent claims for reimbursement under the payment bond, arguing that the obligee was not a proper claimant.[128] The court granted the surety's motion for summary judgment, finding that the obligee was an improper claimant because the only claimants contemplated by the state's payment-bond statute are subcontractors and materialmen, of which the obligee was neither.[129] The court likewise rejected the obligee's attempt to assert a payment bond claim under an equitable subrogation theory because the obligee failed to provide evidence that it did not act as a volunteer in making payments to subcontractors in excess of the contract amount.[130]

In *United States ex rel. Ballard Marine Construction, LLC v. Nova Group, Inc.*,[131] a subcontractor encountered differing site conditions and asserted a claim for increased costs. When the prime contractor declined to pay until the resolution of its own pass-through claim, which included the subcontractor's claim, the subcontractor then sought payment from the

122. No. 20-5582, 2021 WL 5918011 (6th Cir. Sept. 29, 2021).
123. *Id.* at *2.
124. *Id.*
125. *Id.* at *4.
126. 496 F. Supp. 3d 582 (D. Mass. 2020).
127. *Id.* at 585 (obligee's payment reportedly made on the basis of Mass. Gen. Laws ch. 30, § 39F, "which allows subcontractors that have not been paid by a general contractor to demand payment from the awarding authority directly" (internal citation omitted)).
128. *Id.* at 586 (discussing the surety's contentions that the language of the payment bond, bonded contract, and Mass. Gen. Laws ch. 149, § 29 render only subcontractors and material suppliers proper payment bond claimants).
129. *Id.* at 587 (citing Mass. Gen. Laws ch. 149, § 29).
130. *Id.* at 588–89.
131. No. C20-5954BHS-DWC, 2021 WL 3174799 (W.D. Wash. July 27, 2021).

contractor's sureties.[132] The sureties declined payment on the grounds that there was no unpaid amount due to the subcontractor.[133] Prior to the resolution of the contractor's pass-through claim, the subcontractor sued the sureties and asserted claims under the payment bonds, as well as claims for treble damages under two state statutes.[134] The sureties sought dismissal of the subcontractor's claims for treble damages on the basis of lack of statutory standing.[135] The court—while acknowledging that the surety relationship is not "directly analogous" to third-party and first-party insurance arrangements[136]—determined that the subcontractor had standing under the state statutes as a first-party claimant to the sureties' payment bonds and denied the sureties' motion to dismiss.[137]

6. Principal's Defenses

In *Maguire-O'Hara Construction, Inc. v. Cool Roofing Systems, Inc.*,[138] the court denied the subcontractor's motion *in limine* seeking to preclude the surety from asserting the defenses of its defaulted principal. The court reasoned that although the clerk had *entered a default* against the principal, the subcontractor's motion for default *judgment* would remain pending until the claims against the surety were resolved.[139] Thus, because no judgment had in fact been entered against the principal, the surety was not barred from asserting its principal's defenses.[140]

7. Bad Faith

In *Insight Investments, LLC v. North American Specialty Insurance Co.*,[141] after the first-tier subcontractor defaulted on its payment obligations, the supplier submitted a claim against the subcontractor's payment bond.[142] The surety denied the claim on the basis that the supplier was not a "claimant" as defined by the bond.[143] The supplier sued the surety, and the surety filed a motion for partial dismissal seeking to dismiss the supplier's bad faith

132. *Id.* at *1.
133. *Id.*
134. *Id.* at *2 (citing Washington Insurance Fair Conduct Act (IFCA), Wash. Rev. Code §§ 48.30.010–48.30.900; Washington Consumer Protection Act (CPA), Wash. Rev. Code §§ 19.86.010–19.86.920).
135. *Id.* at *3 (arguing that the IFCA does not afford standing to a third-party claimant against a payment bond, and that IFCA claims are limited to insureds under a "bipartite" relationship).
136. *Id.* at *5.
137. *Id.* at *6.
138. No. 5:19-cv-705-R, 2020 WL 6532852 (W.D. Okla. Nov. 5, 2020).
139. *Id.* at *3.
140. *Id.*
141. No. CIV-20-788-G, 2021 WL 412277 (W.D. Okla. Feb. 5, 2021).
142. *Id.* at *1.
143. *Id.*

claim.[144] Notably, the surety conceded for the purpose of its motion that the supplier was a proper claimant, but nonetheless denied the supplier was a third-party beneficiary of the bond because it did not purchase the bond, was not a named obligee, and was not an express party to the bond.[145] The court rejected the surety's argument, finding the supplier qualified as a third-party beneficiary of the bond.[146] The court observed that the bond was expressly "'for the use and benefit of claimants.'"[147] Such language was consistent with the very purpose of a payment bond, which ensures payment of any unpaid bills of the principal and is therefore "widely recognized" as applying to the benefit of unpaid subcontractors.[148] Relying on the language of the bond, coupled with the surety's concession that the supplier was a "claimant," the court concluded bond was entered into for the supplier's benefit, and the supplier was therefore a third-party beneficiary which could proceed against the surety on a theory of bad faith.[149]

In *Old House Specialists, LLC v. Guarantee Insurance of North America USA*,[150] a subcontractor sued the surety for bad faith after the surety failed to pay the subcontractor's payment bond claim.[151] The surety moved to strike, or alternatively, to dismiss the bad faith claim, arguing that, under state law, the tort of bad faith is recognized in the limited context of insurance contracts, and because the payment bond is not an insurance contract, it cannot provide the basis for a bad faith claim.[152] The court ultimately agreed and granted dismissal of the bad faith claim. The court first observed that the state supreme court has generally refused to extend bad faith claims beyond the typical insurer/insured relationship, and that a payment bond is a surety bond which "does not resemble a typical insurance contract."[153] The court next found that the policy considerations for bad faith claims do not exist in the context of a payment bond.[154] Specifically, the court determined the tripartite relationship in a payment bond is not inherently unbalanced, particularly when a breach stems from obligations to a commercial, third-party beneficiary that did not negotiate the bond.[155]

144. *Id.* The supplier later filed an amended complaint dropping its Miller Act claim and reasserting its breach of contract and bad faith claims. *Id.*
145. *Id.* at *3.
146. *Id.*
147. *Id.* (quoting bond).
148. *Id.*
149. *Id.*
150. 541 F. Supp. 3d 1325 (M.D. Ala. 2021).
151. *Id.* at 1328.
152. *Id.* (citing Ala. Code § 27-1-2(1)).
153. *Id.* at 1329.
154. *Id.* at 1330–31.
155. *Id.* at 1331.

Taken together, the court concluded that the state supreme court would not extend the tort of bad faith to a payment bond.[156]

C. *Other Bonds*

1. Broker Bond

In *Vantage Logistics, LLC v. Dewar Nurseries, Inc.*,[157] a nursery sued its transportation broker's surety for physical damage to the nursery's goods while in transport. The surety had issued a broker bond pursuant to a federal statute that obligates a surety to pay any claim against a broker arising from the broker's failure to pay freight charges under its contracts.[158] The surety filed a motion for judgment on the pleadings, which the court granted.[159] The court found that surety's liability under the bond is limited to claims for the broker's failure to pay freight charges pursuant to the controlling federal statute incorporated into the bond.[160]

2. Construction Bond

In *Karton v. Ari Design & Construction, Inc.*,[161] the surety issued a construction bond to an unlicensed principal. The homeowner sued the surety and its principal seeking recovery under the bond.[162] Because the principal was not properly licensed or insured, the homeowner recovered a "windfall" from the principal, including attorney fees, pursuant to state statute.[163] The trial court also found that the surety was not liable for any attorney fee award assessed against its principal.[164] The appellate court found that because the principal was liable for attorney fees pursuant to a state statute, and because the surety's liability is commensurate with that of its principal, the surety should be held liable for the homeowner's attorney fees.[165] The appellate court also found that the surety could be liable for fees and costs exceeding the penal sum of the bond because the surety decided to participate in the lawsuit, thereby making itself liable for the costs of litigation in excess of the face value of its bond.[166]

156. *Id.*
157. No. 2:19-cv-5400, 2020 WL 6484054 (S.D. Ohio Nov. 3, 2020).
158. *Id.* at *1.
159. *Id.* at *3.
160. *Id.*
161. 276 Cal. Rptr. 3d 46 (Cal. Ct. App. 2021), *as modified on denial of reh'g* (Mar. 29, 2021), *review denied* (June 23, 2021).
162. *Id.* at 49.
163. *Id.* at 50.
164. *Id.* at 52.
165. *Id.* at 59.
166. *Id.* at 59–60.

3. Financial Guarantee Bond

In *Luis Diesel Services, Inc. v. Mapfre Praico Insurance Co.*,[167] a surety issued a financial guarantee bond to a principal for its future purchases from a company. The principal remitted funds to the surety as collateral in exchange for the bond.[168] The principal purchased products from the company, and two weeks later, outstanding invoices remained.[169] One month later, the surety paid the outstanding invoices directly to the company.[170] A few days later, the surety reimbursed itself from the principal's collateral for the invoices it paid to the company and remitted the balance to the principal.[171] Days before the surety paid the company, the principal filed a chapter 11 bankruptcy case.[172] The trustee filed a complaint against the surety and the company seeking to avoid and recover the funds paid by the surety to the company as a preferential and/or fraudulent transfer.[173] After several years of motions, the bankruptcy court dismissed the complaint, finding that there were no preferential and/or fraudulent transfers to recover.[174] The appellate court affirmed, finding that the surety used its own funds, not the principal's, to pay the company, and accordingly, the trustee could not avoid the payment to the company as a preferential and/or fraudulent transfer.[175]

4. Motor Vehicle Dealer Bond

In *Gaff v. Washington International Insurance Co.*,[176] the plaintiff sued a motor-vehicle dealer and its motor-vehicle-dealer-bond surety for fraud, conversion, and other claims after the plaintiff paid for a car and failed to receive it for several years. The court entered a joint and several judgment against the dealer, its owner, and the surety in the amount of $434,416, despite the bond's penal sum of $50,000.00.[177] The appellate court found that the surety was liable for the penal sum of the bond as its share of damages plus its share of costs pursuant to state law, but not for punitive damages based on the principal's fraud, prejudgment interest, or attorney

167. BAP No. PR 19-050, 2021 WL 118626 (B.A.P. 1st Cir. Jan. 11, 2021).
168. *Id.* at *1.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at *2.
173. *Id.*
174. *Id.* at *4.
175. *Id.* at *10.
176. No. G059076, 2021 WL 2411078 (Cal. Ct. App. June 14, 2021).
177. *Id.* at *1.

fees.[178] The appellate court then remanded the matter to the trial court to reduce the amount of the judgment against the surety.[179]

5. Probate Bond

In *Ohio Casualty Insurance Co. v. Adams*,[180] the surety issued a probate bond to a personal representative in exchange for an executed indemnity agreement from the personal representative. An heir claimed that the personal representative committed acts of malfeasance, and the personal representative resigned.[181] The heir and the successor personal representative sued the personal representative and the surety for the personal representative's breach of duties.[182] The personal representative did not defend the claims, so the surety paid for its own defense and settled the case.[183] The personal representative failed to indemnify the surety, so the surety sued the personal representative for breach of the indemnity agreement.[184] The surety filed a motion for summary judgment, which the court denied, finding that there was a genuine issue of fact as to whether the surety reasonably investigated the claim and all available defenses, and whether the surety settled the claim in good faith because the surety did not depose the personal representative, seek written discovery from him or the other parties, subpoena records from the heir's attorney, or investigate the personal representative's status as a beneficiary of the estate before settling the probate bond claim.[185]

In *Simmons v. Harleysville Insurance Co.*,[186] a decedent's estate's personal representative sued the surety of the decedent's former conservator, alleging that the former conservator breached his fiduciary duties to the decedent and that the estate was entitled to recover from the surety. The personal representative did not name the former conservator as a party to the lawsuit.[187] The surety filed a motion for summary judgment, arguing that the personal representative cannot recover from the surety because she had not secured a judgment against the former conservator or named him as a party.[188] The court granted the surety's motion, finding that the personal

178. *Id.* at *2.
179. *Id.* at *7.
180. No. 2:19-cv-00023, 2020 WL 7055561 (M.D. Tenn. Dec. 2, 2020).
181. *Id.* at *1.
182. *Id.* at *2.
183. *Id.*
184. *Id.*
185. *Id.* at *2–3.
186. No. 4:18-cv-00055, 2021 WL 1947868 (S.D. Ga. May 14, 2021), *appeal docketed* No. 21-12041 (11th Cir. June 11, 2021).
187. *Id.* at *2.
188. *Id.* at *1–2.

representative could not obtain a judgment against the surety because she did not include the former conservator as a party and had not shown she had previously obtained a judgment against the former conservator as required by state law.[189]

6. Release of Lien Bond

In *Kalos, LLC v. White House Village, LLC*,[190] plaintiff recorded a mechanic's and materialmen's lien after it was not paid for work performed on a project. The court dismissed the plaintiff's enforcement of lien, unjust enrichment, and lien priority counts against the various parties, leaving only the plaintiff's claim for liability under the bond against the surety and its principal.[191] The surety and its principal filed a motion to dismiss the liability under the bond count, which the court granted, agreeing that payment under the bond is conditioned upon the principal and surety paying a judgment obtained by plaintiff, which was now impossible because the court had already dismissed the enforcement of lien count.[192]

D. *Rights of Surety*

1. Indemnity

In *Anthony T. Rinaldi, LLC v. Anchorage Construction Corp.*,[193] the general contractor moved to dismiss the principal's counterclaim for breach of contract based on the principal's failure to retain counsel as required by state procedural rules.[194] Because the principal did not have an attorney as required, the surety responded that the principal had subrogated and assigned its claims to the surety through the indemnity agreement.[195] The court denied the general contractor's motion, finding that while a corporation cannot appear without an attorney, the principal assigned its claims to the surety, and the dismissal of claims pursuant to the state procedural rule can be avoided by assigning the claims to a different party.[196]

In *Arch Insurance Co. v. Centerplan Construction Co., LLC*,[197] the Second Circuit affirmed the district court's decision to grant the surety's motion for summary judgment on its contractual indemnification claim against the indemnitors. The Second Circuit agreed that because the terms of the bonds were not incorporated into the indemnity agreements and actual lia-

189. *Id.* at *7.
190. No. 3:20-cv-00812, 2021 WL 1022752 (M.D. Tenn. Mar. 17, 2021), *aff'd*, No. 21-5352, 2022 WL 59617 (6th Cir. Jan. 6, 2022).
191. *Id.* at *1.
192. *Id.* at *3–4.
193. No. 450691/2016, 2021 WL 143476 (N.Y. Sup. Ct. Jan. 14, 2021).
194. *Id.* at *1 (citing N.Y. C.P.L.R. 321(a)).
195. *Id.*
196. *Id.* at *4.
197. 855 F. App'x 11 (2d Cir. 2021).

bility was irrelevant to the obligation to indemnify under the agreements, the surety did not act in bad faith.[198] The Second Circuit further agreed that the indemnitors' liability was not determined by the bonds because (1) the bonds were not incorporated by reference into the indemnity agreement because the indemnity agreements and bonds were not part of a single transaction; (2) the bonds and the indemnity agreements did not involve identical parties and were not signed with temporal proximity; and (3) the relevant project or bond was not specifically referenced in the indemnity agreements.[199] The Second Circuit also affirmed that the multiple obligee rider did not create a contractual duty from surety to principal, and the principal had no cause of action for breach of the bond against its own surety because of the surety's payment to the obligee.[200]

In *Arch Insurance Co. v. Watermark Environmental, Inc.*,[201] in response to an indemnity action filed by the surety, two indemnitor spouses argued that they were not liable under the indemnity agreement pursuant to a federal statute that prohibits discrimination in any credit transaction based on marital status.[202] The court granted the surety's motion for summary judgment for contractual indemnification, finding that the statute was inapplicable, as enforcement of the indemnity agreement and issuance of surety bonds did not operate as debt or credit instruments under the statute because there was no right granted to any party to defer payment and the financial arrangement did not constitute a credit transaction.[203]

In *Fidelity & Deposit Co. of Maryland v. Goran*,[204] the surety sued its indemnitors to enforce an indemnity agreement. Two co-owners formed the principal corporation.[205] One co-owner, without the requisite authority, bid on out-of-state projects and obtained bonds from the surety for the principal for those projects.[206] After the co-owner who obtained the unauthorized bonds was fired, the remaining owner executed an indemnity agreement with the surety, which ratified all bonds already issued by the surety naming the principal as principal, and partially completed the out-of-state projects, which resulted in a performance bond claim and caused the surety to incur bond losses.[207] The court granted summary judgment for the surety, upholding the indemnity agreement and requiring the indemni-

198. *Id.* at 17–18.
199. *Id.* at 16–17.
200. *Id.* at 19.
201. No. 2:20cv388, 2021 WL 1561708 (E.D. Va. Apr. 20, 2021).
202. *Id.* at *2 (citing 15 U.S.C. §§ 1691-1691f).
203. *Id.* at *4.
204. No. 2:17-cv-00604-TC-PMW, 2020 WL 7401628 (D. Utah Dec. 17, 2020), *appeal docketed* No. 21-4131 (10th Cir. Nov. 1, 2021).
205. *Id.* at *1.
206. *Id.* at *2.
207. *Id.* at *2–3.

tors to indemnify the surety.[208] Subsequently, the surety sought to amend its judgment against the indemnitors to include pre- and post-judgment interest.[209] The court granted the surety's motion, holding that the Federal Rules of Civil Procedure permit judgments to be amended until all claims against all parties are resolved and specifically finding that post-judgment interest on any money judgment is mandatory.[210]

In *Nationwide Mutual Insurance Co. v. Bianchi, LLC*,[211] the court denied the surety's motion for summary judgment for contractual indemnification for bond losses. The Court held that by identifying only the terms of the indemnity agreement and the bond loss amount, the surety failed to provide sufficient explanation and supporting law as to why it was entitled to indemnification from the indemnitors under the indemnity agreement.[212]

In *Philadelphia Indemnity Insurance Co. v. Midwest Steel Fab, LLC*,[213] certain indemnitor companies ceased operations but allegedly continued to operate as new companies funded by the proceeds of bonded contracts. The subsequent companies moved to dismiss the surety's claim for indemnification for its bond losses, alleging that they had no privity of contract with the surety because they did not sign the indemnity agreement and were not successors as defined by state statute.[214] The court denied the subsequent companies' motion, finding that the statutory definition of successor did not apply outside the statutory section and was not adopted in the indemnity agreement.[215] The court further found that the surety adequately alleged facts to support a facially plausible claim that the subsequent companies were successors or affiliates under the indemnity agreement.[216] The subsequent companies could be successors because the transfer of contract proceeds from the indemnitor companies to the subsequent companies indicated an assumption of interests by the subsequent companies.[217] Such an assumption of interest may have vested the subsequent companies with the rights and duties of the indemnitor companies and was sufficient to support successorship and privity of contract.[218] Similarly, because the subsequent companies operated as limited liability companies and were owned and operated by individual indemnitors, thereby

208. *Id.* at *10.
209. No. 2:17-cv-000604-TC-JCB, 2021 WL 4332775, *1 (D. Utah Sept. 23, 2021), *appeal docketed* No. 21-4131 (10th Cir. Nov. 1, 2021).
210. *Id.*
211. No. 2:19-cv-001279-RAJ, 2021 WL 2823225 (W.D. Wash. July 7, 2021).
212. *Id.* at *1–2.
213. No. 6:19-CV-01026-EFM-KGG, 2021 WL 2711152 (D. Kan. July 1, 2021).
214. *Id.* at *2–3 (citing Kan. Stat. Ann. § 17-6808a(e)).
215. *Id.* at *3.
216. *Id.* at *3–4.
217. *Id.* at *3.
218. *Id.*

showing a common means of control, they could be considered affiliates under the indemnity agreement.[219]

In *Pickard & Butter Construction, Inc. v. County of Santa Cruz*,[220] the appellate court affirmed the trial court's order enforcing a settlement agreement between the county and the surety as assignee of the principal's rights. The principal argued that the court lacked authority to enforce the settlement because issues implicating the indemnity agreement's enforceability were being litigated in a separate action between the principal and surety.[221] The appellate court disagreed and held that the trial court did not adjudicate issues pending in the separate action or abuse its discretion because there was no manifest injustice in enforcing the settlement agreement.[222] The appellate court determined that the trial court, relying on the indemnity agreement and evidence of the principal's default, found only that the settlement agreement was enforceable based on substantial evidence showing valid assignment of the principal's claims to the surety as a matter of law, and that the trial court expressly limited the scope of its order stating that it should not be construed as a final determination of the merits of any factual or legal issues which may be litigated in the separate action.[223]

In *Robert A. Hall Revocable Trust v. U.S. Specialty Insurance Co.*,[224] an owner of the principal corporation executed an indemnity agreement that made two trusts under which he was trustee liable for the obligations of the principal. The owner's son later claimed that the owner did not have the authority to execute the indemnity agreement on behalf of the trusts.[225] The appellate court affirmed, ruling that the owner did have the authority to execute the indemnity agreements on behalf of the trust, finding that the trust documents granted such authority to the owner as trustee.[226]

2. Collateral Deposit

In *BRC Uluslararasi Taahut ve Ticaret A.S. v. Lexon Insurance Co.*,[227] while an arbitration between the principal and its subcontractor was pending, the subcontractor also sued the principal and surety in federal court under the Miller Act. After the arbitration panel found in favor of the subcontractor and the federal court confirmed the arbitration award against the principal and the surety, the federal court granted the surety's motion for prelimi-

219. *Id.* at *4.
220. No. H046816, 2020 WL 7554084, *1–2 (Cal. Ct. App. Dec. 21, 2020), *review denied* (Mar. 17, 2021).
221. *Id.* at *1.
222. *Id.* at *4.
223. *Id.*
224. 2021 Ark. App. 268, *4 (2021).
225. *Id.* at *5.
226. *Id.* at *8.
227. No. 8:19-cv-00771-PX, 2020 WL 6801933 (D. Md. Nov. 19, 2020).

nary injunction to enforce the indemnity agreement's collateral security provision against the principal and indemnitors.[228] The court found that the surety's likelihood of success on the merits was high due to the indemnity agreement's clear and unambiguous collateral security provision,[229] that the surety would be irreparably harmed without the preliminary injunction because money damages could not compensate the surety for the loss of its bargained-for right to collateral security,[230] and that the balance of equities and public policy considerations favored the surety.[231]

3. Contract Funds

In *Kenco Construction, Inc. v. Porter Brothers Construction, Inc.*,[232] a subcontractor (Subcontractor I) filed suit against the prime contractor and its surety (Surety I) seeking to recover sums owed by the prime contractor under its subcontract with Subcontractor I.[233] The prime contractor, in turn, counterclaimed against Subcontractor I and its surety (Surety II).[234] Another of the prime's subcontractors (Subcontractor II) also sued the prime contractor and Surety I.[235] The trial court consolidated the subcontractors' lawsuits, and after a trial, awarded judgments as follows: for Surety II against the prime contractor, and for Subcontractor I and Subcontractor II against the prime contractor, Surety I, and the withheld retainage.[236] Surety I and the prime contractor appealed.[237] Following entry of the judgments, Surety I perfected its security interest in the retainage under its indemnity agreement with the prime contractor.[238] Surety I subsequently took an assignment of the prime contractor's interest in the retainage as part of its settlement.[239] Surety I also satisfied the judgments against the prime contractor in favor of Subcontractor I and Subcontractor II.[240] Surety II then filed a writ of garnishment against the owner seeking retainage.[241] Faced with competing claims, the owner deposited the retainage with the court.[242] Surety II also paid claims of Subcontractor I's subcontractors and suppliers

228. *Id.* at *9–10, *12.
229. *Id.* at *14.
230. *Id.*
231. *Id.* at *15.
232. 14 Wash. App. 2d 1065, 2020 WL 6270272 (Wash. Ct. App. 2020).
233. *Id.* at *1.
234. *Id.*
235. *Id.*
236. *Id.* at *2–3.
237. *Id.* at *1, *3.
238. *Id.* at *2.
239. *Id.*
240. *Id.* at *3–4.
241. *Id.* at *2.
242. *Id.* at *2–3.

and, in exchange for Subcontractor I's payment to Surety II, Surety II assigned its judgment against the prime contractor to Subcontractor I.[243] In determining who had priority to the retainage, the court held that, as between Surety I, Surety II, and Subcontractor I, Surety I had priority.[244] When Surety II assigned its judgment against the prime contractor to Subcontractor I, Surety II lost its right to enforce the judgment and was therefore no longer entitled to assert a claim for the retainage based on its prior writ.[245] The court held the trial court erred in disbursing the retainage funds to Surety II.[246] The court further held that, by obtaining a judgment for costs and fees but failing to assert Surety II's expenditures, Subcontractor I no longer held a first priority lien on the retainage.[247] Instead, it was a general creditor as assignee of Surety II's judgment against the prime contractor, and its claim against the retainage was subordinate to Surety I's.[248] Although Surety I was not a statutory "person" qualified to hold a lien against the retainage, Subcontractor II qualified as a statutory claimant and held a first priority lien.[249] Because Subcontractor II assigned its statutory claim against the retainage to Surety I, Surety I stepped into Subcontractor II's shoes and held a first priority lien against the retainage.[250]

II. FIDELITY LAW

A. *Financial Institution Bonds*

In *Federal Insurance Co. v. Axos Clearing, LLC*,[251] the insured, a settlement and clearing firm, brought a claim against its insurer's Financial Institution Bond for reimbursement of amounts paid to settle claims after its representative defrauded investors. The district court found that the insured's claim was outside the bond's insuring clauses covering losses resulting directly from an employee's dishonest act and granted summary judgment in favor of the insurer.[252] The Eighth Circuit affirmed, holding that, under New Jersey law, the insured's settlement payments to third parties based on its employee's dishonest acts directed at those third parties were not a "direct loss" under the bond and the insured had failed to raise a material factual dispute that its employee's dishonest acts fell within the bond's coverage.[253]

243. *Id.* at *3.
244. *Id.* at *7.
245. *Id.* at *6.
246. *Id.*
247. *Id.* at *9.
248. *Id.*
249. *Id.* at *6.
250. *Id.* at *7.
251. 982 F.3d 536 (8th Cir. 2020).
252. *Id.* at 538.
253. *Id.* at 541–42.

B. *Crime Coverage*

In *CyrusOne, LLC v. Great American Insurance Co.*,[254] the insured submitted a claim under a crime and fidelity policy stating that its employee had engaged in an elaborate self-dealing scheme in which the employee received "kickbacks" from vendors and directly or indirectly passed the costs of the kickbacks to the insured. The insurer denied the claim and the insured subsequently sued.[255] The insured alleged that its loss stemmed from the employee, acting as the insured's purchasing agent, accepting kickbacks from vendors in exchange for awarding them construction work, and having a financial interest in several of the vendors.[256] The employee dishonesty provision of the policy provided coverage for loss of money "'resulting directly from dishonest acts committed by an employee, whether identified or not, acting alone or in collusion with other persons, with the manifest intent'" to cause the insured to sustain a loss and also to obtain a financial benefit.[257] The trial court found that the employee had defrauded the insured; however, the court declined to increase the award to include alleged loss from kickbacks and claim expenses.[258] On appeal, the appellate court upheld the lower court's findings.[259]

C. *Computer Fraud Coverage*

In *G&G Oil Co. of Indiana v. Continental Western Insurance Co.*,[260] the insured brought a claim against its insurer's multi-peril commercial insurance policy based on a payment made by the insured to hackers to recover its computer systems from a ransomware attack. The trial court granted summary judgment in favor of the insurer, holding that the loss was outside the policy's coverage for Computer Fraud because it was the result of theft rather than fraud and was not a loss resulting directly from the use of a computer but a voluntary payment.[261] The insured appealed to the Supreme Court of Indiana, which reversed the summary judgment and remanded for further proceedings.[262] The court found the factual record insufficient to support an award of summary judgment, as it was unclear how the insured's computer systems were infected with the ransomware, and it may have fallen within the definition of "fraud" under Indiana law.[263] Furthermore, it concluded that the insured's payment of cryptocurrency to the hackers

254. 174 N.E.3d 41 (Ohio Ct. App. 2021).
255. *Id.* at 44.
256. *Id.*
257. *Id.* at 44–45 (quoting policy).
258. *Id.* at 49.
259. *Id.* at 51.
260. 165 N.E.3d 82 (Ind. 2021).
261. *Id.* at 86.
262. *Id.* at 90.
263. *Id.* at 88–89.

to recover the use of its computer systems was not an intervening cause of its loss because it was made under duress and therefore the loss resulted directly from the use of a computer.[264]

In *Mississippi Silicon Holdings, LLC v. Axis Insurance Co.*,[265] the insured's employees transferred over $1 million dollars to a fraudulent account after receiving emails identifying new banking information for what they believed to be for payments to one of their vendors.[266] The policy stated the Computer Transfer Fraud provision applied to loss "'resulting directly from Computer Transfer Fraud that causes the transfer, payment, or delivery of Covered Property from Premises or Transfer Account to a person, place, or account beyond the Insured Entity's control, without the Insured Entity's knowledge or consent.'"[267] The insurer paid the insured under the policy's Social Engineering Fraud provision but denied coverage under the Computer Transfer Fraud provision.[268] The district court held that the Computer Transfer Fraud provision was not satisfied because it requires that the transfer occur without the insured's knowledge or consent, but the money transfers at issue were initiated with the insured's approval.[269] The appellate court affirmed the lower court's decision.[270]

In *RealPage Inc. v. National Union Fire Insurance Co. of Pittsburgh, PA*,[271] the insured provides retail payment-processing services for property owners and managers, allowing tenants of various rental properties to pay their rent online via credit card or direct bank transfer.[272] Once paid, the money is held by a third-party payment processor who then directs its bank to transfer the rental money to the insured's customers.[273] Bad actors gained access to the payment platform using phishing emails and obtained credentials of the insured's employees, changed the bank account information for the payments from the third-party processor, and ultimately diverted millions of dollars to the bad actors' accounts.[274] The insured brought suit against its two insurers alleging coverage under the commercial crime policy for loss of clients' funds diverted through the phishing scheme.[275] The court granted summary judgment for the insurers, finding that the Ownership of Property provision in the policy required that the insured

264. *Id.* at 90.
265. 843 F. App'x 581 (5th Cir. 2021).
266. *Id.* at 582.
267. *Id.* at 584 (quoting policy).
268. *Id.* at 583.
269. *Id.*
270. *Id.* at 585–87.
271. 521 F. Supp. 3d 645 (N.D. Tex. 2021), *aff'd*, 21 F.4th 294 (5th Cir. 2021).
272. *Id.* at 647–49.
273. *Id.*
274. *Id.* at 649.
275. *Id.* at 649–51.

"hold," and therefore possess, the client funds at the time of the theft.[276] Because a third-party payment processor, and not the insured, possessed the client funds at the time of the theft, the insured did not "hold" or possess them and could not incur a "direct loss" covered by the policy.[277]

In *Ryeco, LLC v. Selective Insurance Co.*,[278] a hacker posing as the insured's vice president sent out a number of unauthorized emails to the insured's bank requesting the bank execute wire transfers based on false Wire Transfer Authorization Forms reflecting the insured's officers' signatures.[279] The insured's bank executed the transfers, resulting in a loss of over $1.4 million dollars.[280] The insured argued for coverage from the insurer under the Forgery or Alteration provision of its commercial crime policy and the insurer denied coverage, leading the insured to sue for breach of contract and bad faith.[281] The insured did not purchase Funds Transfer Fraud or Computer Fraud coverage from the insurer.[282] The court granted the insurer's motion for summary judgment, finding that the Wire Transfer Authorization Forms are not negotiable instruments covered by the Forgery or Alteration provision.[283]

In *Star Title Partners of Palm Harbor, LLC v. Illinois Union Insurance Co.*,[284] the insured, a title settlement company, brought a claim under its insurer's Cyber Protection insurance policy after sending the proceeds of a real estate transaction to the wrong account due to fraudulent wire transfer instructions provided by an unknown party impersonating a mortgage lender.[285] The district court awarded summary judgment in favor of the insurer, concluding that the policy did not provide coverage for the loss because the misrepresentation did not originate from an "employee, customer, client or vendor," and the insured did not verify the authenticity of the wire instructions in accordance with its internal procedures.[286]

D. *Errors and Omissions Policy*

In *Diamond Residential Mortgage Corp. v. Liberty Surplus Insurance Corp.*,[287] the insured, a mortgage loan provider, sued its insurer for breach of contract on its Errors and Omissions Policy and a Mortgage Bankers Fidelity Bond.

276. *Id.* at 652–55.
277. *Id.* at 655–61.
278. CV 20-3182, 2021 WL 1923028 (E.D. Pa. May 13, 2021).
279. *Id.* at *3.
280. *Id.*
281. *Id.* at *4.
282. *Id.* at *2.
283. *Id.* at *7–8.
284. Case No. 8:20-cv-02155-JSM-AAS, 2021 WL 4509211 (M.D. Fla. Sept. 1, 2021), *appeal docketed* No. 21-13343 (11th Cir. Sept. 29, 2021).
285. *Id.* at *1–2.
286. *Id.* at *5.
287. No. 19-CV-06439, 2020 WL 7027652 (N.D. Ill. Nov. 30, 2020).

After a senior employee at the insured defrauded customers for his own financial benefit and submitted fraudulent loan applications, the Illinois Department of Financial and Professional Regulation launched an investigation in which it concluded that the employee had fraudulently originated loans and that the insured had negligently supervised employees, which culminated in the insured making a settlement payment to the state.[288] The insured made a claim under the policy and the bond, and the insurer denied coverage on the basis that the terms of the policies did not extend coverage to the loss. In its motion to dismiss, the insurer argued that the bond did not provide coverage as the insured did not provide adequate notice or proof of loss and the loss did not result "directly from" an employee's fraudulent acts.[289] The court agreed with the insurer. Because the insured's losses stemmed from losses to third parties and a subsequent government investigation, the insured's losses did not result "directly from" employee misconduct and were not covered under the bond.[290]

288. *Id.* at *1.

289. *Id.* at *5 (the bond provided coverage for "'[l]oss resulting directly from dishonest or fraudulent acts committed by an Employee acting alone or in collusion with others'").

290. *Id.* ("If an employee's dishonesty causes losses to a third party, which then leads to litigation concluding in a judgment or settlement, the insured has not incurred a 'direct loss' under a fidelity bond; the insured's loss is 'indirect' and the third party's loss is 'direct'" (quoting RBC Mortg. Co. v. Nat'l Union Fire Ins., 812 N.E.2d 728, 737 (Ill. App. Ct. 2004))).