RECENT DEVELOPMENTS IN FIDELITY AND SURETY LAW

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I. SURETY LAW

A. *Performance Bonds*

1. Conditions Precedent

In *Western Surety Co. v. U.S. Engineering Construction, LLC*,[1] a subcontractor terminated a second-tier subcontractor and completed the second-tier subcontractor's scope of work before notifying the performance bond surety. In the surety's action for declaratory judgment, the trial court held that the surety's remedies under the bond "necessarily implie[d]" that "timely notice" was a condition precedent to claims against the bond.[2] The subcontractor appealed, arguing that the bond did not specify when notice of termination was required.[3] The District of Columbia Circuit affirmed, explaining that the subcontractor "deprived" the surety of "its contractually agreed-upon opportunity to participate in remedying" the second-tier subcontractor's default by unilaterally completing its scope of work before notifying the surety.[4]

In *Ernest Bock & Sons, Inc. v. City of Philadelphia*,[5] two co-sureties argued that they were discharged from any obligations under their performance bond because the obligee failed to comply with the conditions precedent of notice and declaration of default.[6] In response, the obligee asserted that informal notices and warnings furnished to the principal, together with

1. 955 F.3d 100 (D.C. Cir. 2020).
2. *Id.* (citing Hunt Constr. Grp. v. Nat'l Wrecking Corp., 587 F.3d 1119 (D.C. Cir. 2009)).
3. *Id.* at 104.
4. *Id.* at 104–06.
5. Nos. 349 C.D. 2018, 350 C.D. 2018, 2020 WL 4645106 (Pa. Commw. Ct. Aug. 12, 2020), *appeal denied*, 249 A.3d 255 (Pa. 2021).
6. *Id.* at *13–14.

a formal declaration of default to the sureties, were sufficient under the bonded contract and performance bond.[7] The court held that the obligee's informal notices and warnings were "insufficient to satisfy the written notice requirements" of the performance bond.[8] The court further reasoned that the obligee could not "invoke its rights" under the performance bond by declaring the principal in default "without written notice and an opportunity to cure."[9]

In *Seawatch at Marathon Condominium Association, Inc. v. Guarantee Co. of North America*,[10] an owner and surety were unable to agree to the terms of a takeover agreement and the owner filed a declaratory action to determine its rights and responsibilities under the bond. The trial court found that the surety was entitled to hire the terminated contractor and that the owner's refusal to enter into the takeover agreement did not constitute a material breach.[11] The Florida District Court of Appeal affirmed, reasoning that the performance bond's completion language was "clear and unambiguous" and did not restrict whom the surety could use to complete the project.[12] The court further reasoned that the owner's refusal to enter into the takeover agreement did not relieve the surety from the bonded obligations because the "parties genuinely disagreed in their interpretation of the bond" and the owner "promptly sought judicial intervention through its declaratory action."[13]

In *United States ex rel. GLF Construction Corp. v. FEDCON Joint Venture*,[14] a prime contractor terminated a subcontractor for default, notified the subcontractor's performance bond surety, and completed the subcontractor's scope of work before the surety completed its investigation. The surety moved for summary judgment, arguing that the prime contractor deprived the surety of its performance rights under the bond.[15] The court denied the surety's motion, holding that the prime contractor's evidence created a genuine issue of material fact as to whether the prime contractor's conduct deprived the surety "of its ability to protect itself pursuant to the performance options in the bond."[16] The court emphasized that there was evidence suggesting that the surety "declined to timely pursue its performance options under the bond," citing deposition testimony in which

7. *Id.* at *13.
8. *Id.* at *14, 19.
9. *Id.* at *14.
10. 286 So. 3d 823 (Fla. Dist. Ct. App. 2019).
11. *Id.* at 826, 828–29.
12. *Id.* at 827.
13. *Id.* at 829.
14. No. 817CV01932T36AAS, 2019 WL 5295329 (M.D. Fla. Oct. 18, 2019).
15. *Id.* at *20–21.
16. *Id.* at *28–29.

the surety's representative disclosed that the surety did not "follow up" with the prime contractor during its investigation and that the surety was unlikely to tender performance under the circumstances.[17]

2. Arbitration

In *Great American Insurance Co. v. Johnson Controls, Inc.*,[18] an obligee moved to dismiss a surety's claim seeking declaratory judgment limiting its liability under the performance bond. The obligee and surety disputed whether the surety was bound by the arbitration provision included within the bonded contract.[19] In granting the obligee's motion to dismiss, the court held that the bond incorporated the bonded contract by reference, and that the arbitration provision's incorporation of the American Arbitration Association Construction Rules constituted "clear and unmistakable evidence that the parties intended to reserve arbitrability questions for an arbitrator."[20]

3. Venue

In *Granite Re, Inc. v. Northern Lines Contracting, Inc.*,[21] an obligee moved to dismiss a surety's declaratory judgment action on grounds of forum non conveniens because the bonded contract's forum-selection clause mandated all claims to be brought in state court. In response, the surety argued that, as a non-signatory, it was not bound by the bonded contract's forum-selection clause and that venue was otherwise proper under the bond's own permissive forum-selection clause authorizing suit "in any court" where the work was located.[22] The court granted the obligee's motion, holding that, since the bond incorporated the bonded contract by reference, the bonded contract's mandatory forum-selection clause controlled.[23]

4. Attorneys' Fees

In *City of Olympia v. Travelers Casualty & Surety Co. of America*,[24] an obligee obtained a judgment for liquidated damages, attorneys' fees, and costs against a performance bond surety's principal. The surety argued that it was not obligated to pay the judgment for attorneys' fees and costs because such judgment was awarded under a cost-shifting statute and not the underlying construction contract.[25] In response, the obligee argued that

17. *Id.*
18. Case No. 1:20-cv-96, 2020 WL 4569126 (S.D. Ohio Aug. 7, 2020).
19. *Id.* at *3–4.
20. *Id.* at *1, 6–8, 10.
21. 478 F. Supp. 3d 772 (D. Minn. 2020).
22. *Id.* at 774.
23. *Id.* at 778–80.
24. No. 3:19-cv-5562-RBL, 2020 WL 42252 (W.D. Wash. Jan. 3, 2020).
25. *Id.* at *2 (citing Wash. Rev. Code § 39.04.240).

the cost-shifting statute was incorporated into the contract.[26] The court granted the obligee's motion, explaining that it must construe the bond's ambiguous term "obligation" in the obligee's favor to implicitly incorporate the cost-shifting statute because such statute was designed for disputes arising out of public works contracts.[27] The court continued, alternatively, explaining that the bond expressly covered the judgment for attorneys' fees and costs as "indirect loss resulting from [the principal's] failure to perform."[28]

In *Arete Ventures, Inc. v. University of Kentucky*,[29] a surety appealed an award of attorneys' fees and costs to an obligee exceeding the performance bond's penal sum. The appellate court affirmed, reasoning that the state's procurement code did not "include language limiting the surety's liability to only the penal sum."[30] The court further reasoned that the bond itself included "expansive and comprehensive" language that did not "limit the amount of attorney fees in any way."[31]

5. Principal's Defenses

In *Harris County Water Control and Improvement District No. 89 v. Philadelphia Indemnity Insurance Co.*,[32] an owner terminated a prime contractor and brought suit against the contractor and its surety. The contractor failed to appear, and the owner moved for default judgment.[33] In response, the surety argued that the court should not enter default judgment because, as surety, it had "the right to assert" the prime contractor's defenses.[34] The court agreed and denied the motion without prejudice, ruling that entering a default judgment before the surety asserted the prime contractor's defenses "runs the risk of creating two judgments with inconsistent findings."[35]

6. Bad Faith

In *Goudy Construction, Inc. v. Raks Fire Sprinkler, LLC*,[36] a surety moved to strike, or in the alternative, dismiss a prime contractor's claim for bad faith. In response, the prime contractor cited insurance precedent and argued that its bad faith claim was cognizable because the performance bond was

26. *Id.*
27. *Id.* at *3–4.
28. *Id.*
29. 619 S.W.3d 906 (Ky. App. 2020), *review denied* (Apr. 20, 2021).
30. *Id.* at 918.
31. *Id.*
32. Civ. No. H-19-1755, 2019 WL 5191129 (S.D. Tex. Oct. 15, 2019).
33. *Id.* at *1–2.
34. *Id.* at *2.
35. *Id.* at *2–3.
36. Civ. No. 2:19-CV-1303-RDP, 2019 WL 6841067 (N.D. Ala. Dec. 16, 2019).

regulated as "insurance" under state insurance law.[37] The court granted the surety's motion, explaining that state law restricted bad faith claims to "first-party insurance contract[s]" and that inclusion of suretyship bonds under state insurance law was simply "for regulatory and practical purposes."[38]

B. *Payment Bonds*

1. Jurisdiction, Venue, and Arbitration

In *Manganaro MidAtlantic, LLC v. KBE Building Corporation*,[39] a prime contractor and its surety jointly moved to consolidate two cases related to subcontractor work on the same project. The court granted the joint motion and consolidated the cases, ruling that both cases "involve substantial questions of law and fact" because they arose during the same time period and included the same prime contract, prime contractor and surety, causes of action, and defenses and counterclaims.[40] The court further ruled that consolidation would be more efficient because both cases would be resolved in a bench trial.[41]

In *Bedrock Masonry, Inc. v. Innovative Construction & Design Ltd.*,[42] a subcontractor moved to consolidate its case against a prime contractor and surety with another subcontractor's case against the prime contractor and surety on the same project. The prime contractor and surety opposed the consolidation, arguing that the two cases involved separate contracts, unrelated scopes of work, and different alleged contractual breaches.[43] The court granted the subcontractor's motion and reasoned that consolidation would reduce costs and increase efficiencies because of the overlap between the claims, counterclaims, defenses, evidence, and counsel in the two cases.[44]

In *United States ex rel. North Coast Elec. Co. v. Safari Elec., LLC*,[45] a subcontractor filed suit against a supplier on multiple federal construction projects in state court, whereas the supplier filed suit against the subcontractor, the prime contractors, and payment bond sureties on the same projects in federal court.[46] The subcontractor and prime contractors jointly moved to stay the federal court action pending resolution of the earlier filed state court action, arguing that a stay would promote judicial economy, prevent

37. *Id.* at *3 (citing Ala. Code § 27-5-7).
38. *Id.* at *4–5.
39. Nos. 3:19CV00080, 3:20CV00018, 2020 WL 5209535 (W.D. Va. Sept. 1, 2020).
40. *Id.* at *2–3.
41. *Id.* at *3.
42. Nos. 2:19-CV-429-RMP, 2:19-CV-375-SMJ, 2020 WL 4196036 (E.D. Wash. July 21, 2020).
43. *Id.* at *2.
44. *Id.* at *2–3.
45. No. 2:19-cv-00763-RAJ, 2020 WL 5066023 (W.D. Wash. Aug. 27, 2020).
46. *Id.* at *1.

inconsistent results, and avoid needless litigation.[47] The court denied the joint motion, explaining that federal courts cannot "abdicate" their "exclusive jurisdiction over Miller Act claims."[48]

In *United States ex rel. Superior Steel, Inc. v. B.L. Harbert International, LLC*,[49] a prime contractor moved to compel arbitration and stay a subcontractor's payment bond claim under the subcontract's dispute-resolution provision. In response, the subcontractor asserted that the dispute-resolution provision was unconscionable because it gave the prime contractor sole authority to determine how disputes would be resolved, severely limited discovery, and was offered on a take-it-or-leave-it basis.[50] The subcontractor also asserted that its claims were not arbitrable because the dispute-resolution provision excluded "suit[s]" under the Miller Act.[51] The court granted the prime contractor's motion, noting that the subcontractor had failed to provide "any actual evidence" that the dispute-resolution provision's discovery limitation adversely affected the subcontractor or that the subcontractor "lacked the ability to negotiate any contract provision if it so chose."[52] The court also noted that the subcontractor failed to overcome the presumption favoring arbitration because the dispute-resolution provision's reference to "suit" was ambiguous under the circumstances.[53]

In *United States ex rel. John E. Kelly & Sons Electrical Construction, Inc. v. Hartford Fire Insurance Co.*,[54] a prime contractor and surety moved to transfer venue under a subcontract's mandatory forum-selection clause. The subcontractor opposed, arguing that the federal court in Maryland was "better equipped" to decide Maryland state law claims and that the Miller Act's venue provision required the action to be tried in federal court in Maryland.[55] The court granted the motion and held that both federal courts were "well-qualified" to review the case and that the subcontract's mandatory forum-selection clause was sufficient to waive the Miller Act's venue requirement.[56]

In *Ideal Manufacturing, Inc. v. NGC Group, Inc.*,[57] a subcontractor moved to compel a surety to participate in arbitration involving the principal under a subcontract's arbitration provision and a bonded contract's arbitration

47. *Id.* at *1, *4.
48. *Id.* at *4–5.
49. No. CV 119-173, 2020 WL 4227307 (S.D. Ga. July 23, 2020).
50. *Id.* at *4–5.
51. *Id.* at *6.
52. *Id.* at *4–5, *11.
53. *Id.* at *7–10.
54. No. 8:19-CV-02924-PX, 2020 WL 704989 (D. Md. Feb. 12, 2020).
55. *Id.* at *1–3 (citing 40 U.S.C. § 3133(b)(3)(B)).
56. *Id.* at *2–3.
57. Civ. No. 1:19-cv-164, 2020 WL 826638 (S.D. Tex. Feb. 4, 2020), *adopted by* 2020 WL 824102 (S.D. Tex. Feb. 19, 2020).

provision. The court denied the subcontractor's motion, explaining that the subcontractor's claims did not fall within the subcontract's arbitration provision because such provision only applied to claims between the prime contractor and subcontractor.[58] The court further explained that the subcontractor could not enforce the arbitration provision contained within the bonded contract or within the bond because the subcontractor was not a party to either contract.[59]

2. Notice

In *United States ex rel. Thomas Industrial Coatings v. Western Surety Co.*,[60] a second-tier subcontractor filed suit against a subcontractor's payment bond seeking nearly four times more in damages than previously disclosed to the subcontractor and its surety. The surety moved for summary judgment dismissing the second-tier subcontractor's claim for failure to provide notice with "substantial accuracy" of the claim amount.[61] The court denied the motion, explaining that it would not read a "substantial accuracy" requirement into the subcontractor's non-statutory payment bond when the parties failed to include the provision.[62] The court continued, noting that reading a "substantial accuracy" requirement into the bond would "contravene" the Miller Act by expanding its notice requirements beyond claims against the prime contractor's payment bond.[63]

3. Limitations

In *A&C Construction & Installation, Co. WLL v. Zurich American Insurance Co.*,[64] a second-tier subcontractor appealed the dismissal of its claim under the Miller Act as untimely. The second-tier subcontractor argued that its claim notice furnished more than ninety days before its last day of work was sufficient.[65] The Seventh Circuit affirmed summary judgment, reasoning that the second-tier subcontractor's early notice was insufficient because the Miller Act unambiguously required such notice "within 90 days" of its last day of work.[66]

In *Charro Boring, Inc. v. Philadelphia Indemnity Insurance Co.*,[67] a subcontractor instituted an arbitration proceeding against a prime contractor and its surety. The arbitrator dismissed the surety without prejudice and

58. *Id.* at *5–6, *10.
59. *Id.* at *6–7.
60. 1:18-CV-00174, 2020 WL 609548 (D. N.D. Feb. 7, 2020).
61. *Id.* at *1, *3–4.
62. *Id.* at *4–6.
63. *Id.* at *4.
64. 963 F.3d 705 (7th Cir. 2020).
65. 936 F.3d at 708.
66. *Id.* at 710 (citing 40 U.S.C. § 3133(b)(2)).
67. No. 4:19-CV-0653-KPJ, 2020 WL 4284928 (E.D. Tex. July 27, 2020).

awarded the subcontractor damages against the prime contractor.[68] The subcontractor filed suit to enforce the award against the bond, and the surety moved for summary judgment, contending that the statute of limitations had expired.[69] In response, the subcontractor argued under alternative theories of estoppel and equitable tolling that the statute of limitations should not be enforced because the surety participated in the arbitration.[70] The court granted the surety's motion and held that the surety's "passive" arbitration participation in which it repeatedly refused to consent to arbitration did not amount to "a promise, an inducement, or a trick" sufficient to avoid the statute of limitations.[71]

In *United States ex rel. Lee Masonry Products v. Forrest B. White, Jr. Masonry, Inc.*,[72] the court conducted a bench trial in which a supplier and surety disputed whether the supplier's claim was timely filed after material was last furnished to the project. The supplier's subcontractor had performed timely contract work in addition to corrective work.[73] The court held that the supplier had failed to proffer "direct evidence" demonstrating that its materials were used in timely contract work.[74] Therefore, the court held that the supplier's lien was untimely because it was based on materials "used for [irrelevant] corrective or repair work."[75]

In *SRS Distribution, Inc. v. Axis Alliance, L.L.C.*,[76] the court considered whether a subcontractor could bring a bond claim when the subcontractor included an erroneous untimely date of last work in its mechanics' lien affidavit. The subcontractor and surety disputed whether "substantial compliance" with state law was sufficient to create a mechanics' lien.[77] The court affirmed the judgment dismissing the subcontractor's lien and held that "a valid lien was never created" under a strict construction of the mechanic's lien law.[78]

In *Digesare Mechanical, Inc. v. U.W. Marx, Inc.*,[79] a surety obtained summary judgment dismissing a bond claim as untimely under bond language more restrictive under the circumstances than a state mechanics' lien law. The appellate court reversed, holding that the state mechanics' lien law

68. *Id.* at *1–2.
69. *Id.* at *2–3.
70. *Id.* at *3–4.
71. *Id.*
72. Civil Action No. 3:13-CV-958-CHL, 2020 WL 1939353 (W.D. Ky. Apr. 22, 2020).
73. *Id.* at *8–9.
74. *Id.* at *9.
75. *Id.* at *9–10 (citing United States *ex rel.* Interstate Mech. Contractors, Inc. v. Int'l Fid. Ins. Co., 200 F.3d 456, 462 (6th Cir. 2000)).
76. 153 N.E.3d 953 (Ohio Ct. App. 2020).
77. *Id.* at 955 (citing Ohio Rev. Code Ann. § 1311.06).
78. *Id.* at 957.
79. 112 N.Y.S.3d 306 (App. Div. 2019).

"governs bonds furnished pursuant to that statute, and, although parties may agree to expand the statute's protections, they may not limit them."[80] The court continued by interpreting the bond to "provide for the accrual date set forth in the statute."[81]

4. Proper Claimants

In *McDonald v. Fidelity & Deposit Co. of Maryland*,[82] the court considered whether an employee trust fund could recover unpaid employer trust contributions from a public payment bond. On appeal, the employee trust fund asserted that all unpaid trust contributions were recoverable and the surety argued that only amounts due directly to employees were recoverable.[83] The court adopted a "middle ground," in which it recognized that the mechanics' lien law "encompasses any and all traceable amounts that are ultimately 'due' an individual employee."[84] The court continued, noting that wages and retirement contributions would qualify, whereas general contributions to keep an employee trust fund solvent, liquidated damages, and audit fees would likely not qualify.[85]

In *Aaron Enterprises v. Federal Insurance Co.*,[86] a subcontractor received progress payments shortly before a prime contractor filed for bankruptcy. The subcontractor filed an action for declaratory judgment seeking a declaration that the surety was obligated to pay the subcontractor if the bankruptcy trustee recovered the progress payments.[87] The surety moved to dismiss, asserting that the subcontractor's "contingent claim" did not create a "current case or controversy."[88] The court granted the surety's motion, explaining that the subcontractor's claim was "not ripe" and alternatively sought "an advisory opinion regarding an affirmative defense in potentially separate litigation."[89] The court emphasized that the subcontractor's claim "depends on a future, contingent scenario that is far from immediate in nature and, in fact, may never materialize as such[.]"[90]

80. *Id.* at 312 (citing N.Y. Fin. Serv. Law § 137(b)(4)).
81. *Id.* at 312–13.
82. 462 P.3d 343 (Utah 2020).
83. *Id.* at 347.
84. *Id.* at 345–49.
85. *Id.* at 348–49.
86. 415 F. Supp. 3d 595 (E.D. Pa. 2019).
87. *Id.* at 598.
88. *Id.* at 599.
89. *Id.* at 600–02.
90. *Id.* at 600–01.

5. Principal's Defenses

In *Crosno Construction, Inc. v. Travelers Casualty & Surety Co. of America*,[91] a subcontractor filed an action against a prime contractor's payment bond surety while the prime contractor sought payment from the owner in a separate lawsuit. The trial court granted the subcontractor summary judgment, holding that the subcontract's pay-when-paid provision was unenforceable because it impaired the subcontractor's rights under the state anti-waiver statute.[92] On appeal, the surety and an amicus curiae argued, among other things, that the pay-when-paid provision was enforceable because it did not waive the subcontractor's "unconditional right to payment within a reasonable time" and any statute-of-limitation concerns could be resolved by filing and immediately staying the payment bond action pending resolution of the lawsuit between the owner and prime contractor.[93] The California Court of Appeal affirmed, reasoning that allowing the surety to "postpone its payment bond obligation until some unspecified and undefined point in time when [the prime contractor's] litigation with the [owner] concluded . . . would unquestioningly and unreasonably affect or impair [the subcontractor's] right to recover under the payment bond without either an express waiver or full payment required" by state law.[94]

In *Professional Electrical Contractors of Connecticut, Inc. v. Stamford Hospital*,[95] the court considered, as a matter of first impression, whether a lienable fund is exhausted when, after notice that a subcontractor has filed a mechanics' lien, an owner continues to pay a prime contractor until the full contract price has been paid. The court held that "when the general contractor is not in default, unless there were payments made in bad faith, the lienable fund is the amount still owed by the property owner to the general contractor at the time the property owner received notice of the lien" under state law.[96] The court noted that an alternative holding would "lead to absurd results" because it would "permit an owner and a general contractor to render a subcontractor's lien essentially meaningless."[97]

In *Maguire-O'Hara Construction, Inc. v. Cool Roofing Systems, Inc.*,[98] the court considered whether a prime contractor's bankruptcy petition automatically stays a subcontractor's claims against the prime contractor's payment bond surety. The court held that the automatic stay applied,

91. 261 Cal Rptr. 3d 317 (Ct. App. 2020).
92. *Id.* at 319, 321–22, 327 (citing Cal. Civ. Code § 8122).
93. *Id.* at 328–329.
94. *Id.* at 327–328, 334 (citing Cal. Civ. Code §§ 8124, 8126).
95. 230 A.3d 773 (Conn. App. Ct. 2020).
96. *Id.* at 786, 795 (citing Conn. Gen. Stat. § 49-34).
97. *Id.* at 792, 794–95.
98. Case No. CIV-19-705-R, 2020 WL 674442 (W.D. Okla. Feb. 11, 2020).

noting that case law permitted "a stay to be expanded to cover solvent co-defendants."[99] The court emphasized that the surety's liability was "dependent upon" the prime contractor's liability and the surety had an "absolute contractual indemnity right" against the prime contractor.[100]

In *E Solutions For Buildings, LLC v. Knestrick Construction, Inc.*,[101] an equipment supplier on a public project brought claims against the subcontractor, the prime contractor, and the prime contractor's payment bond surety.[102] The trial court awarded the supplier damages against the subcontractor, but dismissed the supplier's claim against the prime contractor and surety, explaining that the supplier's claim was not ripe until the subcontractor "fails to pay the judgment."[103] The supplier appealed and the appellate court reversed, explaining that it was "unaware of any such limiting requirement" and that such requirement would preclude claimants from complying with strict statute-of-limitation requirements.[104]

C. *Other Bonds*

1. Appeal Bond

In *Tornatore v. Cohen*,[105] litigation arose from an injury during chiropractic treatment. The patient obtained judgment and the chiropractor posted an appeal bond to stay execution.[106] After the appellate court affirmed the judgment, the surety refused to pay interest beyond the bond's penal sum and the patient obtained an order from the trial court awarding prejudgment and post-judgment interest against the surety.[107] The surety appealed and the appellate court affirmed, explaining that the bond did not limit the amount to be paid "to any fixed sum" and "unambiguously" obligated the surety "to fully pay the amount directed by the judgment" including "prejudgment and post-judgment interest."[108]

In *A.T.O. Golden Construction Corp. v. Allied World Insurance Co.*,[109] a prime contractor and surety jointly moved to post an appeal bond after the sub-

99. *Id.* at *1–2 (citing Okla. Federated Gold & Numismatics, Inc. v. Blodgett, 24 F.3d 136, 141 (10th Cir. 1994)).
100. *Id.* at *1.
101. No. M2018-02028-COA-R3-CV, 2019 WL 5607473 (Tenn. Ct. App. Oct. 30, 2019), *appeal denied*, Mar. 26, 2020.
102. *Id.* at *2.
103. *Id.* at *2, *16.
104. *Id.* at *4, *16–17.
105. 128 N.Y.S.3d 107 (App. Div. 2020).
106. *Id.* at 108–09.
107. *Id.*
108. *Id.* at 108–10.
109. Case No. 17-24223-Civ-Williams/Torres, 2019 U.S. Dist. LEXIS 213571 (S.D. Fla. Dec. 10, 2019), *adopted by* 2020 U.S. Dist. LEXIS 10099 (S.D. Fla. Jan. 17, 2020).

contractor obtained a judgment. In response, the subcontractor argued that the prime contractor and surety should post separate bonds because they were jointly and severally liable.[110] The court granted the surety's motion and rejected the subcontractor's argument, explaining that requiring multiple appellate bonds would disturb "the status quo" and "transform a single debt shared between two parties to two debts applicable to each party."[111]

2. Mechanics' Lien Release Bond

In *Wonder Works Construction Corp. v. Bridgeton Amirian 13th Street, LLC*,[112] a prime contractor filed its mechanics' lien after the improved property was conveyed by an unrecorded deed to a purchaser. The purchaser recorded the deed and moved to vacate and discharge the mechanics' lien release bond, arguing that state law prohibited enforcement of the lien after the purchaser recorded the deed transfer.[113] The court agreed and granted the motion, emphasizing that "it is the date of conveyance, not recording, that controls the disposition of a mechanic's lien" under state law.[114]

In re Hollister Construction Services, LLC[115] involved a debtor prime contractor and post-petition claims by a subcontractor and supplier against an owner's mechanics' lien release bond. The owner moved for an order declaring that post-petition claims against the mechanics' lien release bond violated the automatic stay.[116] The court granted the owner's motion in part, reasoning that claims against the mechanics' lien release bond violated the automatic stay because any payment by the surety would entitle the surety to "an equitable lien" on the estate's accounts receivable.[117]

D. *Rights of Surety*

1. Indemnity

In *Great American Insurance Co. v. 53rd Place, LLC*,[118] a surety moved for default judgment against indemnitors for actual and anticipated losses under condominium warranty bonds. The surety submitted affidavits of claims counsel, together with copies of the indemnity agreement and tendered payment checks.[119] The court granted the surety's motion in

110. *Id.* at *7–8.
111. *Id.* at *9, 11.
112. No. 654926/2019, 2020 WL 4003595 (N.Y. Sup. Ct. July 14, 2020).
113. *Id.* at *3 (citing N.Y. Lien Law § 13).
114. *Id.*
115. 617 B.R. 45 (Bankr. D. N.J. 2020).
116. *Id.* at 47, 49, 56.
117. *Id.* at 56–58.
118. No. 3:19-cv-902, 2020 WL 4340538 (E.D. Va. July 28, 2020).
119. *Id.* at *3.

part, explaining that the surety was not entitled to receive judgment for anticipated losses because it had "not yet suffered the additional loss."[120]

In *Bondex Insurance Co. v. Trio Siteworks, LLC*,[121] a surety moved for leave to amend its complaint against indemnitors and add claims for fraud arising from the indemnitors' repeated failure to disclose a collateral demand and related judgment against them. The indemnitors opposed the motion, arguing that the amendment would be futile because, among other reasons, the fraud claims were time-barred.[122] The court granted the surety's motion in part, reasoning that the indemnitors waived their statute-of-limitations defense under the indemnity agreement.[123] The court further reasoned that the surety's fraud allegations were adequately pleaded because the surety likely "would not have entered into [the] contract" or would have "demanded higher premiums or more collateral" if it knew of the collateral demand and judgment against the indemnitors.[124]

2. Collateral Deposit

In *Philadelphia Indemnity Insurance Co. v. Ohana Control System*,[125] the surety obtained a jury verdict against the indemnitors under the indemnity agreement and moved post-trial for specific performance requiring the indemnitors to post collateral.[126] The court granted the surety's motion and the indemnitors moved for a new trial under FRCP 59(a), arguing that fairness required an evidentiary hearing.[127] The court rejected the indemnitors motion, holding that the indemnitors' proffered evidence was cumulative and would not have affected the court's earlier decision because the existing claims against the performance bond were not frivolous.[128]

In *Frankenmuth Mutual Insurance Co. v. Cadet Construction Co.*,[129] a surety moved for a preliminary injunction compelling the indemnitors to post cash collateral in the penal sum of the performance bond. The court granted in part the surety's motion, explaining that the surety would likely suffer irreparable harm absent relief because the indemnitors had been terminated for default and the surety had incurred expenses in investigating and paying bond claims.[130] The court, however, refused to compel the indemnitors to post cash collateral in the penal sum, concluding that a lesser

120. *Id.* at *3, *5.
121. No. 19-614, 2020 WL 2539191 (E.D. Pa. May 19, 2020).
122. *Id.* at *2.
123. *Id.* at *4.
124. *Id.*
125. Civ. No. 17-00435-SOM-RT, 2020 WL 3490021 (D. Haw. June 26, 2020).
126. *Id.* at *1.
127. *Id.* at *1, *3
128. *Id.* at *4–6.
129. 1:19-CV-1125, 2020 WL 2322726 (M.D.N.C. May 11, 2020).
130. *Id.* at *4, *6.

amount comprised of the surety's "reserve," and existing bond payments "seem[ed] adequate" to protect the "surety from irreparable harm."[131]

In *Granite Re, Inc. v. National Credit Union Administrative Board*,[132] a surety filed suit under state law when its credit union's conservator refused to honor an irrevocable letter of credit (ILOC). The conservator moved to dismiss, arguing that it was authorized to repudiate the ILOC under federal law because the ILOC was not a contract and federal law otherwise preempted state law.[133] The trial court agreed and dismissed the surety's complaint.[134] On appeal, the Eighth Circuit reversed, reasoning that federal law expansively defined contract to include "the letter of credit" at issue and that the surety incurred recoverable damages under bonds issued in reliance on the ILOC.[135] The court further reasoned that it did not need to resolve if federal law preempted state law because federal and state law was "reconcilable" because the surety's damages were the "same under either statute."[136]

In *American Contractors Indemnity Co. v. Reflectech, Inc.*,[137] a surety moved for summary judgment against indemnitors under an indemnity agreement for expenses incurred in resolving payment and performance bond claims. In response, the indemnitors proffered expert testimony and argued that the indemnity agreement was unconscionable.[138] The court granted the surety's motion, explaining that the existence of unconscionability in a contract is a legal question decided by the court and not expert testimony.[139]

In *Liberty Mutual Insurance Co. v. Frank Coluccio Construction Co.*,[140] a surety moved for a temporary restraining order to prevent a terminated principal from selling further assets without prior consent. The court denied the surety's motion, holding that the surety failed to demonstrate that the indemnitors were "squirreling away money, as opposed to selling assets in the ordinary course of business[.]"[141] The court also held that the surety failed to demonstrate an injury because liability under the performance bond remained "speculative."[142]

131. *Id.* at *5.
132. 956 F.3d 1041 (8th Cir. 2020) (citing N.D. Cent. Code § 41-05-11).
133. *Id.* at 1043–45 (citing 12 U.S.C. § 1787(c)).
134. *Id.* at 1044.
135. *Id.* at 1045–48.
136. *Id.* at 1048.
137. No. 1:18CV297-HSO-RHW, 2020 WL 1190474 (S.D. Miss. Mar. 12, 2020).
138. *Id.* at *5.
139. *Id.*
140. Civ. No. C19-1652 MJP, 2019 WL 5802071 (W.D. Wash. Nov. 7, 2019).
141. *Id.* at *2–3.
142. *Id.* at *3.

3. Subrogation

In *Travelers Casualty & Surety Company of America v. Vazquez Colón*,[143] the owner filed a counterclaim seeking to interplead project retainage and remaining contract balance. The surety moved to dismiss, arguing that there were no adverse claims against the retainage and contract balance because it had paid the principal's subcontractors and was therefore subrogated to the rights of such subcontractors.[144] In response, the owner asserted that adverse claims existed because the principal, as a government debtor, was barred from recovering further payment under territorial statute.[145] In granting the surety's motion, the court reasoned that the principal's outstanding debt was "irrelevant" because the surety's subrogation rights were "superior to those of general creditors."[146]

In *Pineda REO, LLC v. Weir Bros., Inc.*,[147] a subcontractor defaulted on a bonded project and the surety paid subcontractors and suppliers, and otherwise fulfilled its bonded obligations. The subcontractor's secured lender moved to garnish project retainage and remaining contract balance, and the prime contractor filed a counterclaim seeking to interplead such funds.[148] The court evaluated cross-motions for summary judgment disputing whether the surety's equitable interest in the disputed funds took priority over the government's tax lien and the secured lender's interest.[149] The court held that the surety's interest was inferior, explaining that the indemnity agreement failed to create a valid express trust under state law because it did not designate a trustee or beneficiary and otherwise referred to the surety as a "secured party" with a "security interest."[150]

In *Capitol Indemnity Corp. v. United States*,[151] the government terminated a prime contractor for default and entered into a takeover agreement with the prime contractor's performance bond surety. The surety filed suit against the government to recover certain progress payments released to the prime contractor before termination.[152] The government moved to dismiss, arguing that pre-termination communications did not trigger the surety's equitable subrogation rights.[153] The court granted in part and denied in part the government's motion, holding that the surety did not state a claim for the

143. No. 18-1795 (GAG), 2020 WL 3259428 (D. P.R. June 15, 2020).
144. *Id.* at *1–2.
145. *Id.* at *2 (citing P.R. Laws Ann. tit. 3, § 282).
146. *Id.* at *3.
147. Civ. No. 3:18-CV-1660-N, 2020 WL 1236548 (N.D. Tex. Mar. 12, 2020).
148. *Id.* at *1–2.
149. *Id.* at *2–9.
150. *Id.* at *7–8, *11.
151. 147 Fed. Cl. 371 (2020).
152. *Id.* at 374–76.
153. *Id.* at 374, 378–80.

earlier of two progress payments because the surety did not "acknowledge its potential liability" or make any "objections to the progress payments" at that time.[154] In contrast, the court held that the surety stated a claim to recover the latter progress payment because the surety's pre-payment communications with the government were "tantamount" to the surety "acknowledging" default and assuming responsibility.[155]

In *Guarantee Co. of North America v. Ikhana, LLC*,[156] a prime contractor requested additional compensation and time based on repeated work stoppages and contract modifications. The government denied the prime contractor's requests and terminated the prime contractor for default.[157] The prime contractor appealed the government's denial and termination for default to the Armed Services Board of Contract Appeal (the "Board").[158] The surety subsequently entered into a settlement agreement with the government and moved to intervene and withdraw the prime contractor's appeal based on the prime contractor's purported assignment of contractual rights under the indemnity agreement following termination for default.[159] The Board denied the surety's motion for lack of standing and the surety appealed.[160] The Federal Circuit affirmed, explaining that the surety could not "commandeer" the appeal because its standing based on the settlement agreement arose after the prime contractor's claims arose.[161]

II. FIDELITY LAW

A. *Financial Institution Bonds*

In *Berkley Regional Insurance Co. v. Greater Eastern Credit Union*,[162] the insurer issued a financial institution bond based on the written representation from the insured's CEO that the insured had no pending losses or information that could give rise to a claim. After the insurer issued the bond, the insured learned that the CEO stole over one million dollars from the company.[163] The insurer rescinded the bond and sought declaratory relief that the bond was null and void based upon the CEO's false representation in the application.[164] The court found that the insurer properly

154. *Id.* at 374, 380–82.
155. *Id.* at 380–81.
156. 941 F.3d 1140 (Fed. Cir. 2019).
157. *Id.* at 1142.
158. *Id.*
159. *Id.* at 1141–42.
160. *Id.* at 1141–43.
161. *Id.* at 1143–44.
162. 438 F. Supp. 3d 857, 859 (E.D. Tenn. 2020).
163. *Id.*
164. *Id.*

rescinded the bond because the CEO, as agent of the insured, lied on the application, which increased the risk to the insurer.[165]

In *Citizens State Bank v. Leslie*,[166] the insured purchased an interest in twelve fraudulent mortgage loans. A dispute arose as to whether the insured had met the conditions of the financial institution bond to cover the losses resulting from the fraudulent loans.[167] The bond required possession of the original loan documents by an authorized representative, that the bank relied "on the faith" of the loan documents, and that the bank acted in good faith in purchasing the mortgage loans.[168] The court found that the bank met the possession condition because the closing agent, a representative authorized to possess the loan documents, had possession of the loan documents.[169] Additionally, the court found issues of material fact as to whether the bank relied on the loan documents and whether the bank acted in good faith when it purchased its interest in the mortgage loans.[170]

Furthermore, in *Citizens State Bank v. Leslie*[171] the insurer moved to strike the expert's opinion.[172] In the appeal, the insurer objected to the part of the order denying the motion with regard to the expert's opinion that one of the individuals was an authorized representative of the bank.[173] The insurer argued that the lower court erroneously found that the insurer's objection to the opinions regarding whether an individual was an authorized representative of the bank went to the weight of the testimony and not the admissibility.[174] In denying the appeal, the court held that Texas law allows admission of testimony that provides "an explanation concerning the relevant course of dealing and industry context" of a particular contract.[175] While the court held that extrinsic evidence was allowed to inform the court of the meaning of contract language, it was not allowed to "alter or contradict the terms" of the contract.[176]

In *Crown Bank JJR Holding Co. v. Great American Insurance Co.*,[177] the parties disputed whether a bank's loss arising from an email impersonation of an account holder was covered under a financial institution bond and a computer crime policy. The bank received wire transfer requests via email,

165. *Id.* at 866.
166. Civil No. 6-18-CV-00237-ADA, 2020 WL 1644017 (W.D. Tex. Apr. 2, 2020).
167. *Id.*
168. *Id.*
169. *Id.* at *4–5.
170. *Id.* at *17.
171. Civ. No. 6-18-CV-00237-ADA, 2020 WL 1065723, at *1 (W.D. Tex. Mar. 5, 2020).
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at *3.
176. *Id.*
177. Civil Action No. 16-8778, 2020 WL 634147 (D. N.J. Feb. 11, 2020).

resulting in millions of dollars being sent to unknown accounts.[178] Among other things, the parties disputed the cause of the loss with the insurer maintaining that the insured's failure to follow its procedures was the cause, and the insured contending that the loss was caused by the receipt of fraudulent wire transfer forms.[179] In denying the insured's motion for summary judgment as to its entitlement to coverage, the court did not reach the issue of causation under the bond as the insured failed to show that the plain language of the bond would cover the loss.[180] The court denied both parties' motions for summary judgment as to coverage under the Computer Systems Fraud Insuring Agreement ("CSFIA").[181] The court noted that the insured argued that the language of the CSFIA was ambiguous, but did not offer its own construction that would afford coverage, and that neither party addressed the relevant standard for interpreting the CSFIA.[182]

In *MPB Collection LLC v. Everest National Insurance Co.*,[183] the parties brought competing motions for summary judgment in a dispute over coverage under a financial institution bond. The underlying dispute involved a large loan by the insured to a company. The insured later discovered that the company had not been truthful in its loan application by forging the personal guaranties with creditors.[184] The court found that the plain language of the insuring agreement was satisfied and the "loss resulting directly from" language refers to loss directly caused by the extension of credit.[185] The insurer argued that the loss did not "result directly" from the guaranties, but rather, from the many other misrepresentations made to it by the company so that it could obtain the loan. In rejecting this argument, the court held that "the issue raised by the language of the bond is whether the loss was directly caused by the loan, not whether the loan may have lacked value for reasons in addition to the forged [guaranties]."

B. *Crime Coverage*

In *Quality Plus Services, Inc. v. National Union Fire Insurance Co. of Pittsburgh, Pa.*,[186] the insured made a claim on its crime coverage policy for monetary transfers based on illegitimate email requests made to an employee. On the denial of cross-motions for summary judgment, the court held that there were genuine issues of material fact as to the location from which

178. *Id.* at *2.
179. *Id.* at *3.
180. *Id.* at *4.
181. *Id.* at *7.
182. *Id.*
183. No. CV-17-04022-PHX-GMS, 2019 WL 5789469, at *1 (D. Ariz. Nov. 6, 2019), *appeal docketed*, No. 20-15275 (9th Cir. Feb. 21, 2020).
184. *Id.*
185. *Id.*
186. Civil Action No. 3:18cv454, 2020 WL 239598 (E.D. Va. Jan. 15, 2020).

the emails originated and thus the applicability of the funds transfer fraud provision. Issues of material fact also existed as to the number of people who sent the emails and thus whether the emails constituted one occurrence under the policy or multiple occurrences.

In *Sherwin-Williams Co. v. Beazley Insurance Co., Inc.*,[187] the court denied the insurer's motion for summary judgment, finding that there were issues of material fact as to whether alleged overcharges constituted employee theft under the crime insurance policy. The alleged theft involved the insured employee's approval of inflated invoices by a vendor.[188] The insured determined that the employee had colluded with an unknown employee of the vendor to deprive the insured of millions of dollars.[189] The employee had also established a shell company for the purpose of receiving kickbacks.[190] The court rejected the insurer's argument that even if employee theft was involved, the insured's claim fell under a policy exclusion for losses caused by a third party, noting that a juror could find the exclusion inapplicable.[191]

In *M&C Holdings v. Great American Insurance Co.*,[192] the insured's employee siphoned commissions paid by the insured to both legitimate and fictional third-party travel agencies. The crime protection insurance policy provided that the insurer will pay for loss "resulting directly from acts committed … by [the insured] during the Policy Period."[193] Insurer filed a motion to dismiss insured's complaint stating the parties subject to harm for the employee's scheme were the uncompensated third-party travel agencies and thus, the insured did not suffer a direct loss. Insurer further argued that insured failed to file suit within the two-year limitations period contained in the policy. The court denied the motion finding that the insured properly alleged a direct loss arising from the actual disbursement of the insured's funds, and that there was an issue as to whether the insurer waived compliance with the limitations provision.

In *Communications Unlimited Contracting Services, Inc. v. Liberty Mutual Insurance Co.*,[194] the insured made a claim for cable television equipment stolen by an employee. Insurer denied the claim based on the two-year limitations period in its commercial crime policy and plaintiff filed suit.[195] Granting the insurer's motion for summary judgment, the court found that discovery of the loss triggering the two-year limitation period occurred

187. Civil No. 18-02964 (DWF/DTS), 2020 WL 4226866 (D. Minn. July 23, 2020).
188. *Id.* at *1.
189. *Id.*
190. *Id.*
191. *Id.* at *5.
192. Case No. 1:20-cv-121, 2020 WL 4365635 (S.D. Ohio July 29, 2020).
193. *Id.*
194. Case No. 2:18-CV-00613-CLM, 2020 WL 5016820 (N.D. Ala., Aug. 25, 2020).
195. *Id.*

when the insured was back-charged by the cable television company for which it was completing installations that equipment was missing and not at the time it resolved its dispute with the contracting cable company two years later.[196]

In *Ohio Casualty Insurance Co. v. MyPayrollHR, LLC*,[197] the insurer alleged that the insured fraudulently obtained a renewed commercial crime policy and sought rescission. The insurer alleged that the insured was engaged in financial fraud crimes at the time it applied for insurance coverage and that failing to disclose such criminal activity amounted to fraud in obtaining the policy.[198] The court granted the insurer's motion for default judgment.[199] The court noted that the insurer's motion for default judgment contained additional information about the scheme, as well as documents demonstrating that the insured concealed material information from the insurer in applying for and renewing the policy.[200] Citing New York law, the court held that "an insurer may rescind a policy if it was issued in reliance on material misrepresentations" and that rescission can also occur "if the insured fraudulently concealed from or misrepresented a material fact to the insurer at the time the policy was issued."[201]

In *Principle Solutions Group, LLC v. Ironshore Indemnity Inc.*,[202] a scammer, posing as the managing director of the insured, emailed the controller of the insured and directed a wire of funds. The scammer then posed as an attorney, who emailed the controller and gave wiring instructions.[203] The controller completed the wire transfer, resulting in a loss to the insured.[204] A dispute arose between the insured and insurer as to whether the loss was covered under the commercial crime insurance policy. The court granted, in part, the insured's motion for summary judgment.[205] On appeal, the Eleventh Circuit affirmed, finding that the emails together constituted a "fraudulent instruction" and, applying Georgia's proximate causation interpretation of "resulting directly from," the scheme "directly" caused the loss despite intervening acts that may preclude recovery under a "direct means direct" interpretation.[206]

196. *Id.* at *8-9.
197. No. 1:19-CV-1267 (TJM/CFH), 2020 WL 1451302 (N.D.N.Y. Mar. 25, 2020).
198. *Id.* at *1.
199. *Id.* at *2.
200. *Id.* at *1.
201. *Id.*
202. 944 F.3d 886, 889 (11th Cir. 2019).
203. *Id.* at 889.
204. *Id.*
205. *Id.* at 893.
206. *Id.* at 891–92.

In *RealPage Inc. v. National Union Fire Insurance Co. of Pittsburgh, Pa.*,[207] the insured sued its commercial crime policy insurer under the Texas Prompt Payment of Claims Act ("PPCA"), among other causes of action, after the insurer denied coverage for most of its losses. The insurer moved to dismiss the insured's PPCA claims alleging that it could not bring claims under the PPCA because the policy was a fidelity bond and the PPCA does not apply to fidelity bonds.[208] Specifically, the insurer argued that commercial crime policies are synonymous with fidelity bonds.[209] The court disagreed.[210] Adopting the Black's Law Dictionary definition of "fidelity bond," the court found that only a portion of the Policy functioned as a fidelity bond and allowed the insured's PPCA claims to go forward.[211]

C. *Computer Fraud Coverage*

In *Cincinnati Insurance Co. v. Norfolk Truck Center, Inc.*,[212] the insurer filed a lawsuit seeking declaratory relief and claiming that it did not owe coverage to the insured under a computer fraud insuring agreement after an imposter caused the insured to wire money to the wrong location. The issue was whether the loss resulted "directly" from the use of a computer, which fell under the Computer Fraud insuring agreement of the policy.[213] The court found that "directly" means "something that is done in a 'straightforward' or 'proximate' manner and 'without deviation' or 'without intervening agency' from its cause." Applying this definition, it found that the Policy covered the loss because computers were used every step of the way, including receipt of the instruction and the insured's wiring of funds.[214]

In *G&G Oil Co. of Indiana v. Continental Western Insurance Co.*,[215] the insured sought recovery made to a computer hacker in ransomware attack under the computer fraud provision of insurer's commercial crime policy. On appeal from a trial court order granting the insurer's, and denying the insured's, motions for summary judgment, the court held that the claim was not covered under the computer fraud provision where the hacker's computer was not used to make an unauthorized direct transfer of property.[216]

In *Mississippi Silicon Holdings LLC v. Axis Insurance Co.*,[217] a bad actor posed as a representative with one of the insured's material suppliers and

207. Civil Action No. 3:19-CV-1350-B, 2020 WL 1550798 (N.D. Tex. Apr. 2, 2020).
208. *Id.* at *5, *7.
209. *Id.* at *8.
210. *Id.* at *11.
211. *Id.* at *15–16.
212. 430 F. Supp. 3d 116, 118-19 (E.D. Va. 2019).
213. *Id.* at 125.
214. *Id.* at 130.
215. 145 N.E.3d 842 (Ind. Ct. App. 2020).
216. *Id.* at 845–47.
217. 440 F. Supp. 3d 575, 577–78 (N.D. Miss. Feb. 21, 2020).

requested wire transfers to a bank account different from that listed in the billing company's invoices. The insured's employees initiated the wire transfers, which resulted in a loss.[218] The insured sued its insurer after the insurer approved coverage under the social engineering fraud coverage but denied coverage under the computer transfer fraud and fund transfer fraud insuring agreements.[219] The court found that the computer transfer fraud provision was inapplicable because it required that the fraudulent act "directly" cause the loss, and refused to follow a "proximate cause" standard, which the facts did not support.[220] The court also found that the funds transfer fraud provision was inapplicable because it required that the transfer be "issued without the [insured's] knowledge or consent."[221]

D. *Employee Theft*

In *Whitney Equipment Co., Inc. v. Travelers Casualty & Surety Co. of America*,[222] an employee manipulated the company's books, resulting in employee bonus payments and a company-wide vacation, causing losses to the insured. The insured had an employee theft policy that covered the "direct loss of . . . Money . . . directly caused by Theft . . . committed by an Employee."[223] The court found that a "theft" occurred because the employee intentionally took money from the company.[224] Additionally, the court found that the theft directly caused the loss because the bonuses and company-wide vacations were based solely on the employee's actions.[225] However, the court found that the insured could not recover for the vacation expenses because an exclusion applied that excluded from coverage payments made by the company to third parties.[226]

In *Concorde Investment Services, LLC v. Everest Reinsurance Co.*,[227] an employee embezzled from insured's investment firm's client. Insured filed suit against insurer, and insurer moved to dismiss for insured's failure to file suit within the two-year limitation period contained in the policy. Denying the motion to dismiss, the court found that plaintiff's claim for breach of the implied duty of good faith was not covered by the limitations provision and that issues of the insurer's waiver and estoppel precluded the dismissal of the remaining counts.[228]

218. *Id.*
219. *Id.* at 579.
220. *Id.* at 582–83.
221. *Id.* at 585.
222. 431 F. Supp. 3d 1223, 1225 (W.D. Wash. 2020).
223. *Id.*
224. *Id.* at 1227.
225. *Id.* at 1229.
226. *Id.* at 1230.
227. Case No. 19-13203, 2020 WL 2933329 (E.D. Mich. June 3, 2020).
228. *Id.* at *8-9.

E. *Business Insurance Policy*

In *3BC Properties, LLC v. State Farm Fire & Casualty Co.*,[229] the court considered whether the insured could recover under the business insurance policy where the employee falsified time records for herself and her relatives, resulting in overpayments. After the court granted the insurer's motion for summary judgment, the insured appealed.[230] The court affirmed and held that unearned salaries and commissions are nonetheless salaries and commissions—they do not lose their essential character as employer-to-employee financial transactions merely because they were obtained through deceit.[231] Thus, the policy provision indemnifying the employer for losses arising out of an employee's dishonesty did not cover salaries not earned in the normal course of employment.[232]

229. 156 N.E.3d 626 (Ill. App. 2d Dist. 2020).
230. *Id.* at 628.
231. *Id.* at 630–31.
232. *Id.*