RECENT DEVELOPMENTS IN FIDELITY AND SURETY LAW

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I. INTRODUCTION

This article surveys significant fidelity and surety law decisions and legislation reported from September 1, 2006, through August 31, 2007.

II. FIDELITY LAW

A. *Employee Dishonesty*

The financial benefit element of a loan loss definition was scrutinized in *First Guaranty Bank v. BancInsure, Inc.*[1] The insured bank alleged that it suffered a loss covered by its financial institution bond as a result of a mortgage loan investment scheme allegedly perpetrated by two bank employees and assorted outside developers, brokers, and appraisers. Investors were induced to sign contracts to buy new home lots with no money down on the basis that the homes would be built and appraised at a value in excess of the loan amounts and sold for a profit. Allegedly, by inflating the appraisals of the properties and the assets of the investors, the employees and their coconspirators fraudulently caused the bank to make 179 loans to the investors totaling over $26 million.[2]

The insurer contended that the bank could not recover under the bond's employee dishonesty coverage because the employees did not receive an improper financial benefit. They were not alleged to have received any of the loan proceeds themselves by way of kickback or otherwise. However, the bond did not specify that the benefit had to exceed any minimum value.[3] The Eastern District of Louisiana concluded that a fact issue existed as to whether one of the employees obtained such a benefit when she received a free personal appraisal. However, the court dismissed the bank's forgery and fraudulent mortgage coverage claims, reasoning that the bond excluded loss caused by an employee other than any such loss within the employee dishonesty coverage and the bank was unequivocally alleging that its employees caused the loss.[4]

1. No. 06-3497, 2007 WL 1232212 (E.D. La. Apr. 25, 2007).
2. *Id.* at *1.
3. *Id.* at *2.
4. *Id.* at *3.

The court also dismissed the insured's statutory bad faith claim. To recover on such a claim, an insured must prove (1) the insurer received satisfactory proof of loss, (2) the insurer failed to pay the claim, and (3) the insurer's failure to offer timely a reasonable amount was arbitrary and capricious. The insured did not pass this test. It never filed a sworn proof of loss as the bond required, and, by its own admission, the amount of loss had yet to be determined. Thus, the insurer's failure to pay the claim was not arbitrary and capricious.[5]

A commercial crime policy's definition of *employee* was tested in *Carytown Jewelers, Inc. v. St. Paul Travelers Cos.*[6] The insured jewelry store accused a person of stealing jewelry during a hurricane.[7] The insurer moved for summary judgment, contending that there was no coverage because the person was not an employee.[8] The bond defined *employee* as a natural person in the insured's service who is compensated directly by salary, wages, or commissions and whom the employer has the right to direct and control. The definition excluded commission merchants and consignees.[9]

In deciding the insurer's motion, the Eastern District of Virginia recognized that the individual had his own company that did business with the insured on consignment. He was not an employee of the insured in that capacity, although he minded the store one day.[10] Although he may have done so as a courtesy, this was enough to create a fact issue as to the "in service" element of the employee definition.[11] There also was a fact issue as to whether the insured directed and controlled the person as the insured had dictated some of the person's sales.[12]

The court determined, however, that the insured could not meet the third element of the definition of *employee* as there was no evidence that the insured paid salary, wages, or commissions to the person.[13] The insured's accountant admitted that it never calculated wages, tips, or other compensation for the person; never collected or withheld federal or state income tax, FICA, or unemployment taxes; and did not prepare Form W-2, W-4, or 941.[14] The provision of a free apartment above the insured's premises did not qualify as salary, wages, or commissions, nor did a single check that

5. *Id.* at *3–4.
6. No. 3:06CV312, 2007 WL 174020 (E.D. Va. Jan. 18, 2007).
7. *Id.* at *1.
8. *Id.* at *1, 3–4.
9. *Id.* at *2.
10. *Id.* at *4, 6–7.
11. *Id.* at *6–7.
12. *Id.* at *4.
13. *Id.* at *4–6.
14. *Id.* at *4.

was paid in relation to a consignment and that represented the person's share of profits from a joint venture.[15]

B. *On Premises*

The on-premises theft coverage of the standard form Insuring Agreement (B) was at issue in *Citizens Bank, N.A. v. Kansas Bankers Surety Co.*[16] A customer of the bank allegedly created a trust account for his aunt. Acting under a power of attorney, the customer drew checks on the trust account and deposited them in his personal accounts. A successor trustee sued the bank for lack of care in allowing the customer as a fiduciary to deposit the funds into his personal accounts.[17]

The bank made a claim under its financial institution bond for "Loss of Property resulting directly from . . . theft . . . while the Property is lodged or deposited within the offices or premises of the Insured."[18] After summary judgment was entered against the bank in the underlying action on some of the checks, the bank settled with the trust, paying $1.45 million.[19] The bank sued the insurer, and the trial court entered summary judgment in favor of the bank.[20]

The Kansas Court of Appeals reversed, holding that the bond covers theft of property from a bank but not a bank's loss when the proceeds of a theft are deposited into the bank and the bank becomes liable to a third party from whom the funds are stolen. The customer allegedly stole the trust's money, not the bank's. A direct loss from a theft on the premises did not occur when the bank satisfied a claim that it did not meet a standard of care in dealing with a fiduciary. Moreover, the customer was not physically present when the deposits were made; they were made by his employee. The bank suffered no loss until it paid the judgment long after the theft.[21] A bank's negligence does not preclude coverage in the case of a theft from the bank, but there is no coverage when the bank would not have been liable absent negligence.[22]

C. *In Transit*

A ripple effect of the well-known *Tri-State Armored Services, Inc.*[23] debacle was the subject of *Palm Desert National Bank v. Federal Insurance Co.*[24] The

15. *Id.* at *5–6.
16. No. 95,136, 2007 WL 45946 (Kan. Ct. App. Jan. 5, 2007).
17. *Id.* at *2.
18. *Id.* at *1.
19. *Id.* at *2.
20. *Id.* at *3.
21. *Id.*
22. *Id.* at *4.
23. Great Am. Ins. Cos. v. Subranni (*In re* Tri-State Armored Servs., Inc.), 332 B.R. 690 (Bankr. D.N.J. 2005), *aff'd*, 366 B.R. 326 (D.N.J. 2007).
24. 473 F. Supp. 2d 1044 (C.D. Cal. 2007).

insured bank owned a network of automated teller machines (ATMs) at other banks and used Tri-State to deliver cash to and from them.[25] Tri-State would pick up cash for the ATMs from a correspondent bank and bring it to the Tri-State office in an armored vehicle. The cash was then removed from its bundles and placed in cassettes for the ATMs. The cassettes were then transported to the ATMs. The unused cash was returned to Tri-State offices for counting and redeposited into the insured bank's account at the correspondent bank.[26] Tri-State had many bank customers and often intermingled their funds.[27]

After Tri-State filed a bankruptcy petition, some of its employees were accused of having stolen money from the insured bank and others.[28] The insured bank filed an "In Transit" claim under Clause (C) of its financial institution bond.[29] In denying the alleged "In Transit" nature of the loss, the New Jersey bankruptcy court focused on the fact that the loss did not occur while the money was in an armored car or otherwise on the move, nor was the property ready for delivery or in the process of delivery.[30] Rather, the loss occurred while Tri-State was unbundling, sorting, and counting the money in its offices, which was enough of a break to take the money out of transit and, thus, out of coverage.[31] The court distinguished situations where property in transit is temporarily at rest at a fixed location, but no "further work" is done on the property.[32] Here, the stops at the Tri-State offices involved significant further work, and thus the money was not lost in transit.[33]

D. *Forgery*

In *Flagstar Bank, FSB v. Federal Insurance Co.*,[34] a mortgage banker allegedly manufactured forged mortgage documents and promissory notes and submitted them to the insured bank to secure advances on a line of credit; the purported underlying transactions never occurred.[35] The bank submitted a claim under Insuring Clause 4 of its financial institution bond, the substantive equivalent of the standard form's Insuring Agreement (D), for a loss sustained as a result of forgeries on the promissory notes and other

25. *Id.* at 1045–46.
26. *Id.*
27. *Id.* at 1046.
28. *Id.*
29. *Id.*
30. *Id.* at 1047–49.
31. *Id.*
32. *Id.* at 1049–51.
33. *Id.* at 1051.
34. No. 05-70950, 2006 WL 3343765 (E.D. Mich. Nov. 17, 2006).
35. *Id.* at *1.

loan documentation.[36] The insurer denied the claim on the grounds that the alleged forgeries were not the cause of the loss.[37]

The Eastern District of Michigan granted summary judgment in favor of the insurer on the ground that the loss did not result directly from the forgeries. The real cause of the loss was that the factual assertions in the promissory notes were false, not that the signatures were forged.[38] The court reasoned that the loss would still have occurred had the signatures been genuine because the collateral on which the credit was extended did not exist.[39]

Union Planters Bank, N.A. v. Continental Casualty Co.[40] dealt with two issues of importance: forgery in mortgage lending and notice to the excess insurers. The bank made a warehouse line of credit loan to a mortgage lender for closing residential loans.[41] In extending the line of credit, the bank unknowingly took forged mortgages as collateral.[42] After the borrower defaulted, the bank turned to its insurers to recover the loss. Notice was given to the primary insurer shortly after the fraud was discovered, but not to the excess insurers.[43]

The Sixth Circuit considered whether the bank could rely on general allegations of forgeries in the mortgage documents or whether specific instances of forgery would be required for each portion of the claim under Insuring Clause (E).[44] The bank argued that this was a revolving line of credit and no specific advance was at issue.

The court held that the insurance for a line of credit would be reviewed as a whole and not loan by loan.[45] The court thus bypassed, for example, the policy's requirement that the bank physically possess the collateral before it extends credit. In effect, the court allowed forgery coverage where the bank released funds before it received the forged documents purporting to secure those funds.

Union Planters is also significant, however, because it relieved the excess insurers of any liability after notice of the loss was not given to them within the guidelines set out by their contracts.[46] The policies required simultaneous notice to the primary and excess insurers.[47] Under Tennessee

36. *Id.* at *2–3.
37. *Id.* at *4.
38. *Id.* at *10.
39. *Id.* at *14.
40. 478 F.3d 759 (6th Cir. 2007).
41. *Id.* at 761–62.
42. *Id.* at 762.
43. *Id.*
44. *Id.* at 763–64.
45. *Id.*
46. *Id.* at 764–66.
47. *Id.*

law, no showing of prejudice was required.[48] A delay of twenty-five days was not simultaneous notice and relieved all of the excess insurers of liability.[49]

E. *Securities*

In *Ohio Savings Bank v. Duncanson*,[50] the president of a closing agent allegedly stole funds advanced by the insured bank to fund several mortgages. The bank sought coverage under Insuring Agreement (E) and the Fraudulent Mortgages Insuring Agreement.[51] The bank claimed Insuring Agreement (E) did not require that the mortgage documents be lost or stolen at the time it extended credit.[52]

The U.S. District Court for the District of Minnesota disagreed and granted summary judgment in favor of the insurer. It held that the documents must be lost or stolen prior to the bank's disbursement of funds to the closing agent; a later loss or theft of documents would not give rise to coverage under Insuring Agreement (E).[53] The court also found no coverage under the Fraudulent Mortgages Insuring Agreement because the loss arose from the agent's theft of the funds and not from any signatures that were obtained through trick, artifice, fraud, or false pretenses.[54] The mortgagors knew that they were executing mortgages, and there was no evidence that their signatures were obtained through any misrepresentations when they signed the documents.[55]

In *First National Bank of Manitowoc v. Cincinnati Insurance Co.*,[56] the insured bank lost $1.7 million on a loan to a used car dealer. The owner of the dealer allegedly created phony carbon copies of car leases bearing forged lessee signatures.[57] The copies described fictitious vehicles or souped-up versions of existing vehicles. The bank took the copies as its security. When the dealer defaulted and the security proved worthless, the bank claimed coverage under Insuring Agreement (E) of its bankers blanket bond.[58] The bond resembled the current standard form of the financial institution bond but contained certain language similar to older bond versions.[59]

48. *Id.* at 766–67.
49. *Id.*
50. No. 05-45, 2006 WL 2583413 (D. Minn. Sept. 6, 2006).
51. *Id.* at *1.
52. *Id.* at *3.
53. *Id.*
54. *Id.* at *4.
55. *Id.*
56. 485 F.3d 971 (7th Cir. 2007).
57. *Id.* at 974.
58. *Id.* at 975–76.
59. *Id.* at 977.

The Seventh Circuit concluded it should construe against the insurer any language not in standard form.[60] The bond covered loss by reason of the insured "having in good faith and in the usual course of business . . . extended any credit . . . upon any security . . . which proves to have been a forgery or to have been altered or raised or counterfeit."[61] The court interpreted this as imposing no duty to follow sound banking practices. The term *good faith* just meant honesty.[62] The term *usual course of business* required no care but meant merely "actions normally taken by a bank."[63] The bank met that standard simply by acting upon a type of document that a bank normally acts upon.[64]

The insurer also argued that Insuring Agreement (E) was not intended to cover loss caused by nonexistent underlying assets or transactions; rather, the loss must be caused directly by the forgeries themselves.[65] Even if the signature had been authentic, the bank would have suffered the loss.[66] After distinguishing a number of cases, the court concluded that it was groundless to assert that the forgery did not cause the loss. The court reasoned that concluding that the forgery did not cause the loss "ignores the practical reality of the situation; but for the forged documents purporting to verify the existence of the collateral, credit would not have been extended in the first place, and there would have been no loss."[67] In addition, construing Insuring Agreement (E) to require a forgery to cause the loss directly would duplicate some of the forgery coverage provided under Insuring Agreement (D).[68]

The insurer further argued that the loss fell within an exclusion of loss caused by employees. The fraud would not have occurred if the bank's employees had conducted a proper investigation into the collateral.[69] The court felt that this argument went too far; it would eliminate coverage in every case because an employee is always involved in a forgery-related loss.[70] "Exclusions are intended to subtract from or limit coverage in specified circumstances. They do not operate as complete cancellations of coverage granted in the insuring agreements."[71]

60. *Id*. at 976–78.
61. *Id*. at 977.
62. *Id*. at 978.
63. *Id*.
64. *Id*.
65. *Id*. at 979.
66. *Id*.
67. *Id*. at 980.
68. *Id*. at 979.
69. *Id*. at 980.
70. *Id*. at 980–81.
71. *Id*. at 981 (internal citation omitted).

F. *Unauthorized Signature or Endorsement*

Citibank Texas, N.A. v. Progressive Casualty Insurance Co.[72] appears to be the first decision construing the unauthorized signature or endorsement coverage of a financial institution bond, a relatively new coverage that can apply in the absence of a forgery or alteration. A company, GoldenLife, brought a conversion suit in Texas state court against a bank for allegedly allowing checks payable to GoldenLife to be deposited into an account held by one Todd Lindley in the name of a sole proprietorship named Lindley Properties.[73] Lindley was president of GoldenLife's general partner, and his name was on GoldenLife's signature card. He allegedly endorsed the checks, but none of his endorsements included GoldenLife's account number. Most instead bore the Lindley Properties account number.[74] The bank gave notice of the suit to its financial institution bond insurer, and the insurer declined to assume the bank's defense.[75] After settling with GoldenLife, the bank sued the insurer for coverage in the U.S. States District Court for the Northern District of Texas under a rider affording coverage for unauthorized signatures or endorsements.[76]

The district court concluded that the endorsements were unauthorized under the bond, which defined an unauthorized signature or endorsement as a genuine signature not appearing on the bank's signature card for the account or accounts in question.[77] Because the state court made such a prior finding in partial summary judgment for GoldenLife against the bank, the bank's insurer was held to be precluded from relitigating that issue despite language in the bond stating that the insurer would not be bound if it declined to defend.[78] The district court also independently concluded that the endorsements were unauthorized.[79] The fact that Lindley was a signatory on GoldenLife's account did not mean there could be no coverage or that his endorsements were authorized. Because Lindley's endorsements included the account number of Lindley Properties, the court concluded that "[u]nder any definition, those endorsements were unauthorized."[80]

The employee exclusion did not bar the claim either, absent proof of collusion or intentional disregard of bank rules by its employees. The exclusion had to be construed narrowly to avoid defeating the purpose of the

72. No. 3:06-CV-0395-H, 2006 WL 3751301 (N.D. Tex. Dec. 21, 2006).
73. *Id.* at *2–3.
74. *Id.* at *2.
75. *Id.* at *3.
76. *Id.* at *3–4.
77. *Id.* at *4–6.
78. *Id.*
79. *Id.* at *5.
80. *Id.*

bond.[81] Nor was the loss excluded for being too indirect; the loss occurred at the time of deposit, not when the bank settled later with GoldenLife.[82]

G. *Direct Loss, Causation, and Standing Issues*

A scheme involving promotional games for the McDonald's hamburger chain, such as "Who Wants to Be a Millionaire" and "Monopoly," generated coverage issues in *Simon Marketing, Inc. v. Gulf Insurance Co.*[83] Simon, a marketing company, produced games for McDonald's.[84] A Simon employee allegedly rigged them so that winning tokens were given to certain individuals in exchange for kickbacks to himself.[85] Litigation followed, including claims against both McDonald's and Simon.

Simon sued its fidelity insurers, adding a claim for loss of business.[86] The California Court of Appeal concluded that there was no coverage. Simon was not seeking coverage for the value of the stolen prizes; that was a loss for McDonald's. At most, Simon had a tort liability.[87] The court reasoned that a fidelity policy only covers loss of tangible property as a direct result of employee dishonesty. Simon's loss of business with McDonald's and others was not such a loss, nor was any cost that Simon incurred in defending and settling the suits against it.[88] The policies insured "against physical loss of or damage to property, and not against detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property."[89] The potential income exclusion also applied.[90]

Simon contended, however, that it was "legally liable" for game tokens that were stolen and thus was entitled to coverage on that basis.[91] The policies covered property "owned by the insured or for which the insured is legally liable, or held by the insured in any capacity whether or not the insured is liable."[92] The court reasoned that although such coverage could arise if an employee stole property that the insured was holding as a bailee or trustee, Simon did not lose any property held in that capacity. Even if it did hold the game pieces, there was no coverage. Simon did not sustain a loss and had not been found liable for theft of the pieces.[93]

81. *Id.* at *6.
82. *Id.* at *6–7.
83. 57 Cal. Rptr. 3d 49 (Cal. Ct. App. 2007).
84. *Id.* at 50.
85. *Id.*
86. *Id.* at 51–52.
87. *Id.* at 52–55.
88. *Id.* at 53.
89. *Id.*
90. *Id.* at 54.
91. *Id.*
92. *Id.* at n.9 (emphases removed).
93. *Id.* at 54–55.

In *Frontline Processing Corp. v. American Economy Insurance Co.*,[94] the insured sought coverage under a fidelity policy for costs and fees it paid to quantify its loss and for costs, fees, and penalties assessed by the IRS for taxes that the insured failed to pay as a result of the employee's dishonest conduct. The policy, however, only provided coverage for direct loss or damage to money and securities resulting from the dishonest acts of its employees.[95] The federal district court certified the following question to the Montana Supreme Court:

> Does the term "direct loss" when used in the context of employee dishonesty coverage afforded under a businessowner's liability policy, include consequential damages that were proximately caused by the alleged dishonesty, or is the construction of the term "direct loss" limited to those damages that directly result from the alleged employee dishonesty?[96]

Choosing to apply a proximate cause analysis to determine whether a loss is "direct" under a fidelity policy, the Montana Supreme Court held that the term *direct loss* includes consequential damages that are proximately caused by the alleged dishonesty.[97] The court did not address whether the claimed loss in fact was proximately caused by the dishonest acts of the employee.

How to value a loss was considered in *Patrick Schaumburg Automobiles, Inc. v. Hanover Insurance Co.*[98] The insured car dealer made an employee dishonesty claim under its commercial crime policy. Arguing that the "black book" value of the cars in question should guide the valuation of the loss, which allegedly arose from a kickback scheme, the insured claimed a loss of nearly $1.6 million.[99] Responding that this calculation included indirect loss and potential income, the insurer paid less than $80,000.[100] In denying cross-motions for summary judgment, the U.S. District Court for the Northern District of Illinois held that the undefined terms of *direct* and *indirect* loss and the term *inability to realize income* were not ambiguous and should be given their plain and ordinary meanings.[101] A material fact issue remained as to how to value the loss.[102]

In *Graybar Electric Co. v. Federal Insurance Co.*,[103] the insured was sued for refusing to honor a contract that the insured alleged was forged by one

94. 149 P.3d 906 (Mont. 2006).
95. *Id.* at 907.
96. *Id.*
97. *Id.*
98. 452 F. Supp. 2d 857 (N.D. Ill. 2006).
99. *Id.* at 861–62.
100. *Id.*
101. *Id.* at 871.
102. *Id* at 876.
103. No. 4:06 CV 1275, 2007 WL 1365327 (E.D. Mo. May 9, 2007).

of its employees. The insured settled the lawsuit and submitted a claim under its employee dishonesty policy for the amount of the settlement.[104] The policy provided coverage for "direct losses" of money, securities, or other property caused by theft or forgery by an employee.[105] The insurer moved for summary judgment on the ground that losses for which the third party was suing the insured were not a direct loss to the insured within the coverage of its fidelity policy.[106] The U.S. District Court for the Eastern District of Missouri denied the insurer's summary judgment motion. Missouri law uses a proximate cause analysis to determine whether a loss is direct.[107] There were issues of fact as to whether the alleged loss was proximately caused by the dishonest conduct of the employee.[108]

Standing to sue on a bond was at issue in *BNY Midwest Trust Co. v. National Union Fire Insurance Co.*[109] An indentured trustee, BNY, had a security interest in a finance company's fidelity bond. BNY sued on the bond to recover alleged third-party losses. Applying California law, the Ninth Circuit affirmed a dismissal of the suit. An insurance contract is personal, and BNY had no contractual relationship with the insurer.[110] A fidelity bond covers only loss incurred by the insured, not third-party liability.[111] The insured had not assigned any right to sue on the bond to BNY; there had been no transfer of title. BNY's lien at most provided it with a security interest in any proceeds of a bond claim by the insured. Accordingly, the court held that BNY had no standing to make a claim for losses suffered by third parties.[112]

H. *Occurrence, Discovery, Multiple Policy, and Limit Issues*

In *Madison Materials Co. v. St. Paul Fire & Marine Insurance Co.*,[113] the insured's employee allegedly embezzled $1.4 million between 1992 and 2002.[114] The insured had employee dishonesty policies from the same insurer covering the entire period in three-year increments, including the period from 2000 to 2003.[115] The 2000–2003 policy provided coverage for loss sustained through acts committed or events occurring during the policy period. It defined *occurrence* as "an act or series of related acts involving

104. *Id.* at *3.
105. *Id.* at *4–5.
106. *Id.* at *4.
107. *Id.* at *6.
108. *Id.* at *6–7.
109. 213 F. App'x 563 (9th Cir. 2006).
110. *Id.* at 567.
111. *Id.* at 566–67.
112. *Id.* at 567.
113. No. 3:04-CV-14WS, 2006 WL 2792390 (S.D. Miss. Sept. 27, 2006).
114. *Id.* at *1.
115. *Id.* at *2.

one or more Employees."[116] The insurer paid a $350,000 policy limit under the 2000–2003 policy and denied the insured's claim for additional sums under the previous policies on the grounds that the embezzlement was a series of acts that constituted a single occurrence.[117] In granting summary judgment in favor of the insurer, the U.S. District Court for the Southern District of Mississippi rejected the argument that *occurrence* was ambiguous. The policy was clear in stating that multiple acts or a series of related acts were to be treated as one occurrence of loss.[118] The court also rejected the insured's stacking argument. A nonaccumulation of coverage provision precluded any stacking of policy benefits.[119]

The insured in *St. Paul Fire & Marine Insurance Co. v. Whitaker Construction, Inc.*[120] was a construction company that suffered an embezzlement loss over five commercial crime policy periods and found itself in bankruptcy. The older policies were "loss-sustained" forms with one-year discovery periods, and the last one was a discovery policy with a sixty-day discovery period after the policy ended.[121] It was undisputed that discovery occurred more than sixty days after the last policy period, and, thus, there was no coverage under the policies as written.[122] However, the insured argued that the discovery provisions of the policies were void because they conflicted with a Louisiana statute prohibiting an insurer from contractually limiting the time to bring suit on a policy.[123] Depending on the type of insurance, an insurer could not allow an insured less than a year after either (1) the inception of the loss or (2) the accrual of the cause of action.[124] The U.S. District Court for the Western District of Louisiana disagreed, holding that the discovery provisions did not limit the time to sue and that a policy may permissibly limit coverage to loss discovered and reported during the policy term. A policy allowing discovery for a limited period beyond the policy term was therefore enforceable as well.[125] Both the inception of loss and accrual of a cause of action occurred at the time of each dishonest act.[126] The prescriptive period might not begin to run until the insured discovered the loss, but none of the policies forbade the insured

116. *Id.*
117. *Id.* at *1.
118. *Id.* at *6.
119. *Id.* at *7.
120. No. 06-1595, 2007 WL 196903 (W.D. La. Jan. 23, 2007).
121. *Id.* at *2.
122. *Id.* at *3.
123. *Id.* at *3–4 (citing La. Rev. Stat. Ann. § 22:629(B) (2006)).
124. *Id.* at *4.
125. *Id.*
126. *Id.* at *5.

from bringing suit less than a year after any inception of loss or accrual of a cause of action.[127]

The insured in *SGF Global, Inc. v. Hartford Casualty Insurance Co.*[128] had several crime policies with several insurers. The earlier policies were occurrence policies, while the last one was a discovery policy with a bridge endorsement.[129] The U.S. District Court for the Southern District of Texas found as a matter of Texas law that a three-week gap in coverage did not defeat a "replacement" clause of the discovery policy and that the succeeding policy was a replacement of the preceding occurrence policy. There was no effective gap because the cancellation of the prior policy was not effective until the thirty-day period in the policy itself expired following the notice of cancellation.[130] The policies were "similar" enough even though one was occurrence-based and the other discovery-based.[131] Accordingly, for those losses sustained while the prior policy was in effect, the latter carrier's replacement policy was held to be in excess of the limits of the prior policy.[132]

I. *Proof of Loss and Cooperation Issues*

In *Knowledge A-Z, Inc. v. Sentry Insurance*,[133] the insured submitted a claim for a loss from an employee's theft of computer hardware and software. The insured failed, however, to produce documents or have its owner submit to an examination under oath despite repeated requests.[134] The Indiana Court of Appeals affirmed summary judgment for the insurer on the ground that the insured breached the policy's examination under oath requirement.[135] No prejudice needed to be shown because the examination requirement was a separate and express condition above and beyond the cooperation clause. Compliance with a request for an examination under oath was not discretionary and was not subject to a determination of whether the request is reasonable.[136]

In *MDB Communications, Inc. v. Hartford Casualty Insurance Co.*,[137] an employee allegedly embezzled funds from the insured by forging checks.[138] The same insurer issued annual employee dishonesty policies throughout

127. *Id.*
128. No. H-04-4534, 2007 WL 602411 (S.D. Tex. Feb. 27, 2007).
129. *Id.* at *1.
130. *Id.*
131. *Id.* at *4.
132. *Id.* at *5.
133. 857 N.E.2d 411 (Ind. Ct. App. 2006).
134. *Id.* at 415.
135. *Id.* at 422.
136. *Id.*
137. 479 F. Supp. 2d 136 (D.D.C. 2007).
138. *Id.* at 138–39.

the period of the forgeries.[139] The insured recovered part of the loss from the employee and submitted proofs of loss on the last two policies but allocated the recovery to prior policy periods. The insurer rejected the proofs on the grounds that the allocation of recovery to loss was improper.[140] Pursuant to express policy conditions, the insurer repeatedly requested additional information and documents pertaining to the recovery, which the insured never provided.[141] This was a breach of policy conditions requiring the insured to provide such information.[142] The court entered summary judgment for the insurer. A similar motion in a second suit on additional policies was denied because the insurer did not put the policies into evidence in support of the motion.[143]

J. *Limitations*

In *Indiana Regional Council of Carpenters Pension Trust Fund v. Fidelity & Deposit Co.*,[144] an ERISA plan failed to file suit on an ERISA bond within two years after it discovered a fraud. The insurer moved for summary judgment on the ground that the bond required that suit be filed within two years of discovery of the loss.[145] Applying Indiana law, even though the bond was federally mandated, the U.S. District Court for the Northern District of Indiana denied the motion on the ground that the bond was an "official bond" and the applicable statute of limitations could not be shortened.[146]

K. *Rescission*

In *Federal Insurance Co. v. HPSC, Inc.*,[147] the insurer filed a declaratory judgment action to rescind a fidelity policy on the ground that the insured made a material misrepresentation in the policy application. In its policy application, the insured had answered no to a question regarding whether any employee who reconciled monthly bank statements also signed checks.[148] Based on a misreading of a report by the insured's accountant, the insurer concluded that the employee who caused the loss had authority for both. The authority of the employee to sign and reconcile accounts, however, was only as to a single petty cash account unrelated to the loss.[149] The U.S. District Court for the District of Massachusetts submitted the question

139. *Id.* at 138.
140. *Id.*
141. *Id.* at 140.
142. *Id.* at 144–45.
143. *Id.* at 145–46.
144. No. 2:06-CV-32 PS, 2007 WL 683795 (N.D. Ind. Mar. 2, 2007).
145. *Id.*
146. *Id.* at *7.
147. 480 F.3d 26 (1st Cir. 2007).
148. *Id.* at 29–30.
149. *Id.* at 30.

of whether the misrepresentation was material to the jury; and the jury concluded it was not, so rescission was unwarranted.[150] However, on appeal, the First Circuit affirmed the finding that the insurer violated the Massachusetts unfair trade practices act by failing to undertake a reasonable investigation into the facts before denying the claim.[151] The insurer should have sought more information after learning that it misread the accountant's report.[152]

In *Great American Insurance Cos. v. Subranni (In re Tri-State Armored Services, Inc.)*,[153] the insured operated an armored car company that serviced automated teller machines. The insured made a claim under its employee dishonesty policy after suffering a multimillion dollar loss of customer funds as a result of employee dishonesty and other causes.[154] The insurer sought to rescind the policy because of material misrepresentations in the policy application.[155] The insured's customers named as loss payees intervened to oppose rescission as to themselves and to make claims on the policy.[156] The policy expressly limited enforcement to the named insured.[157] The district court affirmed the bankruptcy court's decision to permit rescission and reject the customers' attempts to enforce the policy as if they were insureds.[158]

L. *Bad Faith*

In *Heritage Corp. v. National Union Fire Insurance Co.*,[159] the insured filed suit against its insurer demanding coverage of $3.8 million under several fidelity bonds and errors and omissions policies. The Southern District of Florida determined that only one bond applied, and the jury awarded only $55,310 as the measure of the insured's loss under that bond.[160] The insured filed a new suit against the insurer under Florida's bad faith statute[161] on the ground that coverage litigation had been resolved in its favor.[162] Although the trial court reasoned that an insured's recovery of 1.5 percent of the amount demanded was not favorable enough to support a statutory bad faith claim, the Eleventh Circuit reversed and held that the insured had

150. *Id.* at 31.
151. *Id.* at 34.
152. *Id.* at 36.
153. 366 B.R. 326 (D.N.J. 2007).
154. *Id.* at 332–34.
155. *Id.* at 336.
156. Id. at 335–36.
157. *Id.* at 345–46.
158. *Id.* at 348.
159. 463 F. Supp. 2d 1364 (S.D. Fla. 2006), *rev'd*, No. 06-16333, 2007 WL 4142788 (11th Cir. Nov. 23, 2007) (per curiam).
160. *Id.* at 1365–66.
161. Fla. Stat. § 624.155 (2006).
162. *Heritage Corp.*, 463 F. Supp. 2d at 1366.

stated a bad faith claim under Florida Statute § 624.155 merely by alleging that the insurer had been found liable for damages.[163]

In *Retail Ventures, Inc. v. National Union Fire Insurance Co.*,[164] the insured replaced the credit cards of its customers after credit information was stolen and fraudulently used by a hacker that had broken into its computer system. The insured made a computer crime policy claim, which was denied.[165] After the insured filed suit, the insurer moved to dismiss or strike allegations in the complaint that the insurer had breached its duty of good faith.[166] The U.S. District Court for the Southern District of Ohio struck allegations that the insurer had failed to comply with claims-handling regulations on the ground that there was no private cause of action for violation of the regulations, but it allowed the bad faith claim to stand based on other allegations.[167]

In *Americu Credit Union v. Cumis Insurance Society, Inc.*,[168] the insured credit union sued its fidelity insurer after the insurer paid only part of a claim for a loan loss arising from improper conduct by the loan officer. Applying New York law, the U.S. District Court for the Northern District of New York granted the insurer's motion to dismiss the insured's attorney fees and bad faith claims.[169] An insured may not recover its attorney fees incurred in suing an insurer on a policy.[170] Further, the mere failure to pay an insurance claim does not constitute bad faith; there must be a separate and independent tort, which the insured did not allege.[171]

M. *Subrogation*

The doctrine of superior equities still has force in California, according to *Travelers Casualty & Surety Co. v. Wells Fargo Bank, N.A.*[172] Citing *Meyers v. Bank of America National Trust & Savings Ass'n*,[173] the U.S. District Court for the Northern District of California held that an insurer who paid a claim for employee dishonesty involving forged checks drawn on the insured's bank account could not bring a subrogation or assignment claim against the bank absent allegations that the bank was negligent or participated in

163. *Id.* at 1367–68.
164. No. 2:06-CV-00443, 2007 WL 943011 (S.D. Ohio Mar. 27, 2007).
165. *Id.* at *1.
166. *Id.* at *2.
167. *Id.* at *3.
168. No. 6:06-CV-01348, 2007 WL 1074883 (N.D.N.Y. Apr. 5, 2007).
169. *Id.* at *1.
170. *Id.* at *2 (citing Globecon Group, LLC v. Hartford Fire Ins. Co., 434 F.3d 165, 177 (2d Cir. 2006)).
171. *Id.*
172. No. 06-3531, 2006 WL 2850051 (N.D. Cal. Oct. 5, 2006).
173. 77 P.2d 1084 (Cal. 1938).

the fraud.[174] Moreover, California Commercial Code § 4406(f) precludes a check forgery or alteration claim by a bank customer against a drawee bank more than a year after the bank's statement is made available to the customer.[175] The entire claim appeared to be barred not only by this provision but also by California Code of Civil Procedure § 340(c), which gives a customer only one year to sue a bank for paying forged or altered checks. These statutes could not be avoided unless perhaps by "some equitable principle" that the insurer had yet to articulate, though it would be given an opportunity to do so factually.[176]

III. SURETY LAW

A. *Performance Bonds*

1. Waiver of Limitations

In *Travelers Casualty & Surety Co. v. White Plains Public Schools*,[177] the surety exercised its rights under the bond to complete performance after the owner declared the contractor in default. Despite this action, the surety was held not to have waived its later argument that substantial performance had been achieved, precluding delay damages.[178] The U.S. District Court for the Southern District of New York noted that the surety may have risked additional liabilities had it denied liability without a certification of substantial completion.[179]

In *Reedsport School District No. 105 v. Gulf Insurance Co.*,[180] a school district obligee sued the surety, and the surety made an offer to settle the dispute that required an "immediate" response. Nineteen months after the offer, the school district sent a letter back to the surety stating that the offer was "unconditionally accepted." The surety argued that the school district's claims were barred by the bond's contractual two-year limitation provision.[181] The school district argued that the terms of the bond required the "minimum period of limitation available to sureties . . . in the jurisdiction" to apply, and, thus, the six-year Oregon statute of limitations applied.[182] The Oregon trial court found in favor of the school district on the statute of limitations issue and found that a settlement had been accepted.[183]

174. *Travelers Cas.*, WL 2850051, slip op. at *2–3.
175. *Id.* at *3.
176. *Id.*
177. No. 03-Civ-8144, 2007 WL 935612 (S.D.N.Y. Jan. 26, 2007).
178. *Id.* at *13.
179. *Id.* at *12.
180. 152 P.3d 988 (Or. Ct. App. 2007).
181. *Id.* at 990.
182. *Id.* at 989.
183. *Id.*

The Oregon Court of Appeals reversed, holding that the acceptance was neither "immediate" nor within a reasonable time.[184] With regard to the limitations period, the court held that there is nothing in Oregon law that prevents a public owner from agreeing to a shorter statute of limitations period.[185]

2. Liability of Completing Surety

In *D.A.S. Contracting Corp. v. Nova Casualty Co.*,[186] the surety was found liable to the obligee for the cost of completing a bonded construction project, and the issue remaining was whether the surety was liable for attorney fees. The construction contract provided for the award of attorney fees to the prevailing party in any action for enforcement of the contract "or to recover on a surety bond given by a party under this Agreement."[187] The performance bond incorporated the underlying construction contract by reference. The obligee argued, and the court agreed, that as long as the obligee was a prevailing party, the surety was liable for its attorney fees. However, the court held that the obligee was not a "prevailing party for the purposes of awarding legal fees" because it recovered less than half of the amount that it originally sought.[188]

3. Conditions Precedent

In *C&I Steel, LLC v. Peabody Construction Co.*,[189] a bonded subcontractor brought suit against the general contractor for moneys allegedly due. The general contractor filed a counterclaim against the principal and its surety based on an alleged delay of completion and the resulting assessment of liquidated damages. The surety moved for summary judgment on the ground that the obligee failed to comply with the bond's notice provisions, which required that the obligee first declare the principal in default, followed by written notice of the principal's default and a written demand that the surety perform. The obligee had written the principal a series of letters complaining about its performance but did not terminate the principal, instead demanding that the principal correct its defective work. The court granted the surety's motion, finding that the obligee's failure to declare the principal in default "plainly and unequivocally" or to request the surety's performance on the bond constituted a lack of compliance with the bond's notice provisions.[190]

184. *Id.*
185. *Id.* at 992.
186. 836 N.Y.S.2d 484 (N.Y. Sup. Ct. 2007).
187. *Id.*
188. *Id.*
189. No. PLCV20030664, 2007 WL 1540228 (Mass. Super. Ct. Feb. 28, 2007).
190. *Id.* at *14.

In *New Viasys Holdings, LLC v. Hanover Insurance Co.*,[191] the court granted summary judgment for the surety, holding that the claimant failed to comply with a condition precedent in the bond requiring that the surety be provided with immediate notice of any default.[192] The court interpreted the term *immediate* in the bond to mean within a reasonable period of time and ruled that the claimant failed to comply with the condition precedent.[193] Although not holding that prejudice was required, the court noted that the surety had shown prejudice because it was prevented from mitigating its damages.[194]

In *Donald M. Durkin Contracting, Inc., v. City of Newark*,[195] plaintiff entered into a contract with a city to construct a reservoir. The city subsequently terminated the contract, arguing it had provided the required seven-day termination notice. The court concluded that the letter did not contain the term *terminate* and therefore did not constitute proper notice to the contractor and the surety of the city's alleged intent to terminate the contract.[196]

4. Sovereign Immunity

In *State v. Fidelity & Deposit Co. of Maryland*,[197] the State of Texas sued the surety under the performance bond, and the surety counterclaimed based on the government's breach of the takeover agreement with the surety. The government asserted the doctrine of sovereign immunity and the surety's failure to exhaust its administrative remedies as defenses. The court rejected the government's claim for sovereign immunity, finding that Texas law allowed an adverse party to assert, as an offset, claims related or defensive to those asserted by the government.[198] However, to the extent that the surety's damages exceed those sought by the government, it would retain immunity from suit.[199] The court also rejected the government's contention that the surety failed to exercise its administrative remedies, finding that the statutory administrative scheme did not specifically cover the subject of the contract.[200]

191. No. 2:06cv488, 2007 WL 783179 (E.D. Va. Mar. 12, 2007).
192. *Id.* at *4.
193. *Id.* at *3.
194. *Id.* at *5.
195. No. 04-163 GMS, 2006 WL 2724882 (D. Del. Sept. 22, 2006).
196. *Id.* at *28.
197. 223 S.W.3d 309 (Tex. 2007).
198. *Id.* at 311.
199. *Id.*
200. *Id.* at 312.

5. Incorporation Clauses

In *Liberty Mutual Insurance Co. v Mandaree Public School District #36*,[201] the court ruled that despite an incorporation clause in the bond, an arbitration clause in an underlying contract did not require the surety to arbitrate because the clause clearly stated that it only applied to the principal and obligee.[202] The court further allowed the surety to withdraw an express consent to arbitrate after the surety discovered that the obligee had hired a completion contractor without the surety's consent and had an arbitrator replaced with a three-person panel.[203]

In *Robert J. Denley Co. v. Neal Smith Construction Co.*,[204] the obligee challenged the surety's right to enforce an arbitration provision in the general contract because the surety never signed the contract. The court ruled that the surety does not have to be a signatory to the contract to enforce its provisions as long as the contract is "specifically incorporated by reference in the surety bond."[205]

In *El Dorado Irrigation District v. Traylor Bros.*,[206] the obligee filed suit against the contractor and principal for breach of contract. The jury rendered its verdict and found in favor of the principal and surety and allowed recovery of substantial attorney fees. Although the contract did not include an attorney fees clause, the performance bond provided for attorney fees to a prevailing party and was incorporated into the contract by reference.[207] The court concluded that the bond and contract should be read together and awarded fees to the principal and surety, who were both represented by the same counsel.[208]

In *HAR Construction, Inc., v. San Diego Unified School District*,[209] the bonded contract included a clause providing that the contractor and owner would each bear its own attorney fees. The performance bond stated that if the obligee prevailed in an action on the bond, it would be entitled to fees.[210] Having prevailed on its breach of contract claim, the principal sought fees from the obligee. The court held that the more specific provision in the contract was binding rather than the bond provision, and the claim for fees was denied.[211]

201. 459 F. Supp. 2d 866 (D.N.D. 2006).
202. *Id.* at 871–72.
203. *Id.* at 872–73.
204. No. W2006-00629-COA-R3-CV, 2007 WL 1153121 (Tenn. Ct. App. Apr. 19, 2007).
205. *Id.* at *10.
206. No. S-03-949 LKK/GGH, 2007 WL 512428 (E.D. Cal. Feb. 12, 2007).
207. *Id.* at *10–11.
208. *Id.* at *13.
209. No. D045985, 2006 WL 2766892 (Cal. Ct. App. Sept. 27, 2006).
210. *Id.* at *6.
211. *Id.*

6. Overpayment

In *American Manufacturers Mutual Insurance Co. v. Payton Lane Nursing Home, Inc.*,[212] the primary issue before the court was whether a completing surety could maintain a cause of action against the obligee and architect for overpayment to the principal. After taking over the project, the surety discovered that the architect had approved and the obligee had paid for certain defective work performed by the principal and for work that had not been performed. The architect moved to dismiss, arguing that it was not in privity or "functional privity" with the surety because it did not have a contract with the surety and was not aware that the surety would rely upon its reports and logbooks. The court agreed and dismissed the surety's claim for negligent misrepresentation, holding that the architect was not retained for the particular purpose of providing a log of nonconforming work to the surety.[213] The court, however, refused to dismiss the claim brought by the surety as subrogee of the obligee, finding that the underlying contract's no-assignment clause did not affect the surety's rights as subrogee.[214]

B. *Payment Bonds*

1. Payment Bond Coverage

In *Danco, Inc. v. Arch Insurance Co.*,[215] a supplier and the principal entered into a financing arrangement with a lender, pursuant to which the supplier was paid the amounts it was owed on a bonded contract, leaving the principal obligated to the lender under the terms of their financing arrangement. When the principal defaulted, the lender demanded that the supplier repay the loan. The supplier agreed and only then asserted a claim against the principal's payment bond surety. The appellate court entered judgment for the surety, holding that the surety's obligations were discharged when the supplier received payment under the financing agreement.[216]

In *Casey Industrial, Inc. v. Seaboard Surety Co.*,[217] the U.S. District Court for the Eastern District of Virginia held that a surety waived its right to assert any defenses not specifically raised in its initial response to the claimant's demand. The bond required that the surety send an answer to the claimant setting forth "the amounts that are undisputed and the basis for challenging any amounts that are disputed" within forty-five days. The claimant filed a motion for summary judgment in which it argued

212. No. CV-05-5155 (SJF), 2007 WL 674691 (E.D.N.Y. Feb. 28, 2007).
213. *Id.* at *6.
214. *Id.*
215. 2007 WL 1342190 (N.J. Super. Ct. App. Div. May 9, 2007).
216. *Id.* at *2.
217. No. 1:60cv249(JCC), 2006 WL 3299932 (E.D. Va. Oct. 25, 2006).

that the surety had waived any defenses not included in its initial response letter. The court held that although the surety was not precluded from raising legal defenses, or from conducting discovery and raising any new facts that support the reasons set forth in its initial denial letter, the surety was precluded from developing new bases for dispute outside the forty-five day contractual period.[218]

2. Valid Claimants

In *Halifax Paving, Inc. v. United States Fire Insurance Co.*,[219] a subcontractor who was also in a joint venture with the principal on another project agreed that a check on the joint venture job would be applied to pay the subcontractor's outstanding invoices on the bonded project. The court determined that this agreement was a valid contract for which the principal caused payment to be made to the subcontractor for three specific final invoices.[220] The subcontractor subsequently argued that it was fraudulently induced by the contractor to enter into the agreement. When the subcontractor allegedly discovered that the joint venture debts had not been paid, it attempted to reverse the credits and billing reconciliation to use the money to pay the joint venture obligations. The surety filed a motion for summary judgment, arguing that the principal had caused the invoices on the bonded job to be paid, and, therefore, there were no further bond obligations. The court agreed that the principal paid the subcontractor on the bonded project in full and granted the surety's motion for summary judgment.[221]

3. Notice Requirements

In *United States ex rel. Arica Consulting & Contracting, Inc. v. Great American Insurance Co.*,[222] applying the Miller Act (40 U.S.C. §§ 3131–3134), the court dismissed the lawsuit asserting a claim on a payment bond because plaintiff, a sub-subcontractor, failed to provide notice of a claim on the bond to the bonded contractor within ninety days after the sub-subcontractor last provided labor or supplied materials, as required by 40 U.S.C. § 3133(b)(2). The sub-subcontractor claimed that it was a direct subcontractor to the principal because the relationship with the upstream subcontractor and principal was so close that they were, de facto, one corporation.[223] The court, applying Maryland state law, determined that the subcontractor and principal were not one entity because they observed

218. *Id.* at *3.
219. 481 F. Supp. 2d 1331 (M.D. Fla. 2007).
220. *Id.* at 1335–36.
221. *Id.* at 1338.
222. No. CCB-05-2430, 2006 WL 3247131 (D. Md. Nov. 2, 2006).
223. *Id.* at *3.

corporate formalities and paid dividends, and one did not siphon funds from the other.[224] In addition, the court specifically noted that the sub-subcontractor knew that it was contracting with the subcontractor, triggering the ninety-day notice requirement. Under the Miller Act, notice may be express or implied.[225] The implied notice standard can be satisfied "when the notice can be said to alert the prime contractor that it is being looked to for payment or that a claim against its bond will be pursued."[226] However, "[a] prime contractor's awareness of the existence of a payment dispute between one of its subcontractors and sub-subcontractors, however, does not satisfy the Miller Act [notice] requirement."[227]

4. Limitations Period

In *United States ex rel. PRN Associates v. K & S Enterprises, Inc.*,[228] the court determined that a subcontractor did not file its lawsuit within one year after the day on which the last day of labor was performed, as required under 40 U.S.C. § 3133(b)(4). The subcontractor claimed that it provided additional labor after the one-year time limit.[229] The court noted that under the Miller Act, warranty or repair work on previously completed work does not extend the time deadlines for filing suit.[230] Accordingly, the court rejected the subcontractor's argument that making personnel available under a contract to perform repair work or correct defects should count as "labor" sufficient to extend the Miller Act's deadline.[231] The court also determined that the Miller Act's one-year statute of limitations was a condition precedent to a valid lawsuit that places the burden on plaintiff to plead and prove compliance as a condition precedent to maintaining a lawsuit.[232]

In *Titan Stone, Tile & Masonry, Inc. v. Hunt Construction Group, Inc.*,[233] the claimant failed to file suit within one year of the last date materials or labor were provided on the project, as required by New Jersey's Bond Act.[234] Even though the purpose of the act had been satisfied and the surety had not been prejudiced, the court strictly interpreted the statute and precluded the subcontractor from recovery under the payment bond.

224. *Id.*
225. *Id.* at *4.
226. *Id.*
227. *Id.*
228. No. 1:04CV0470-DFH-JMS, 2007 WL 925267 (S.D. Ind. Mar. 27, 2007).
229. *Id.* at *3.
230. *Id.*
231. *Id.* at *4.
232. *Id.*
233. No. 05-3362 (GEB), 2007 WL 869556 (D.N.J. Mar. 20, 2007).
234. *Id.* at *13 (citing N.J. Stat. Ann. § 2A:44-145).

The court also refused to grant the subcontractor relief under the performance bond because the owner was the primary beneficiary.[235]

In *Precision Stone, Inc. v. Arch Insurance Co.*,[236] the court determined that the surety failed to make a prima facie showing that work, evidenced by the claimant to establish that it had complied with the statute of limitations, was remedial.[237]

5. Defenses of the Principal

In *Dobson Brothers Construction, Co. v. D.M. Dozers, Inc.*,[238] a prime contractor entered into a bonded subcontract to perform certain work in Oklahoma for the Oklahoma Department of Transportation. The bonded subcontract included a forum selection clause that all disputes be resolved in Nebraska, the home of the prime contractor.[239] The subcontractor's performance bond incorporated this subcontract, including the forum selection clause, by reference. The obligee sued the principal and its surety in Nebraska, and defendant moved to dismiss the action for improper venue or to transfer the matter to Oklahoma. The court denied the motions and enforced the forum selection clause in the contract.[240] Although the convenience of the witnesses and the comparative costs to the parties weighed in favor of the transfer to Oklahoma, the court concluded that the applicability of Nebraska substantive law, judicial economy, and the choice of forum clause weighed against the transfer of venue.[241]

In *Pineda v. Kel-Tech Construction, Inc.*,[242] the principal and sureties argued that the payment bond claimants' status as illegal aliens barred their recovery.[243] The court ruled that the Immigration Reform and Control Act[244] does not allow an employer to forgo paying an employee, even one who had given false documentation to obtain that employment.[245] Therefore, the court denied the sureties' motion for summary judgment.

C. *Other Bonds*

In *Alleghany Mutual Casualty Co. v. Delachica*,[246] a surety entered into a contract with defendants to act as producers of immigration "appearance

235. *Id.* at *12.
236. 472 F. Supp. 2d 577 (S.D.N.Y. 2007).
237. *Id.* at 582.
238. No. 4:06CV3235, 2007 WL 258309 (D. Neb. Jan. 25, 2007).
239. *Id.* at *3.
240. *Id.* at *7.
241. *Id.* at *18–19.
242. 832 N.Y.S.2d 386 (N.Y. Sup. Ct. 2007).
243. *Id.* at 390–91.
244. 8 U.S.C. § 1324a.
245. 832 N.Y.S.2d at 393–94.
246. No. 06-1913 (JAG), 2006 WL 3476677 (D.N.J. Nov. 30, 2006).

bonds" in Texas. Pursuant to their agreement, defendants agreed to indemnify the surety for any liability incurred in connection with those bonds. After several aliens failed to appear for their court appearances, the surety, pursuant to its obligations under the bonds, entered into an agreement with the Immigration and Naturalization Service (INS) (the obligee on the bonds) wherein it agreed to pay the INS in three installments, payable in 1999, 2000, and 2001. That agreement was dated November 3, 1998. The surety made the required payments and then brought suit against defendants on December 28, 2005, to recover its payments to the INS. Defendants moved for summary judgment on the ground that the surety's claim was untimely because it was not commenced within six years after the date it entered into the settlement agreement with the INS. The district court denied defendants' motion, holding that under New Jersey law, the surety's claim did not accrue until the amount of its loss became fixed, and the surety's loss did not become fixed until its final payment was made to the INS. Hence, the lawsuit was timely.[247]

D. *Rights of Surety*

1. Indemnity

In *Hartford Casualty Insurance Co. v. Cal-Tran Associates*,[248] the principal was terminated from a project for cause, and the surety arranged for the completion of the project and paid numerous claims on the payment bond. The surety sought indemnification pursuant to a general indemnity agreement. The indemnitors filed a motion to dismiss or for a stay of the litigation, arguing that there had been no judicial determination that the declaration of default was proper because that issue was being litigated in a separate action. The court held that under New York law a surety is entitled to indemnity for all losses paid in good faith and that a judicial declaration that a principal actually defaulted on the contract was irrelevant.[249]

In *International Fidelity Insurance Co. v. Fox*,[250] a bankruptcy court determined that the indemnitor breached its obligations under the trust fund provision of the indemnity agreement by using contract funds for uses other than paying material men, laborers, suppliers, or owners who could make claims against the surety, resulting in a nondischargeable debt in favor of the surety under 11 U.S.C. § 523(a)(4).[251] The court reached this conclusion despite evidence that the money was spent on overhead costs necessary to keep the principal's business operating so that it could complete

247. *Id.* at *3.
248. No. 05-5575 (GEB), 2006 WL 3733031 (D.N.J. Dec. 18, 2006).
249. *Id.* at *13.
250. 357 B.R. 770 (Bankr. E.D. Ark. 2007).
251. *Id.* at 781.

the bonded projects (thus mitigating potential damages to the surety).[252] The indemnitor also sought to allocate indirect costs, such as owner-owned equipment, to the bonded projects. The court noted that the plain language of the indemnity agreement stated that the res of the trust was for the benefit of material men, laborers, suppliers, or owners; and, hence, the mere taking of money from the trust by a fiduciary for other purposes was a defalcation. (A finding of embezzlement, fraud, or misappropriation was not required to find a defalcation.)[253]

In *Liberty Mutual Insurance Co. v. Consolidated Electric & Technology Associates Corp.*,[254] the court ruled that the statute of frauds prevented enforcement of an oral promise to sign an indemnity agreement. The surety alleged that it had obtained a verbal agreement for a contractor to sign an indemnity agreement in order for another contractor to obtain a fringe benefit payment bond.[255] The bond was issued without the indemnity agreement being signed, and no effort was made either to obtain the signature thereafter or to cancel the bond.[256] The court found that under such facts the surety could not prove promissory estoppel, which the court acknowledged might prevent defendant from asserting the statute of frauds defense.[257]

In *Lyndon Property Insurance Co. v. Overby Grain Farms, Inc.*, the court ruled that a clause in an indemnity agreement stating that the surety could request that indemnitors resolve claims before the surety is forced to resolve claims did not create an affirmative duty on the surety to notify the indemnitors prior to settling claims against the bond.[258]

In *N.V. Heathorn, Inc. v. United States Fidelity & Guaranty Co.*,[259] the court found that an oral contract was created when the surety and its principal agreed that the surety would elect to designate the principal as its completion contractor.[260] However, the court concluded that the surety did not breach the oral contract by putting conditions on the obligee's acceptance of the principal as its completion contractor, such as preserving the penal limit of the bond, which the obligee refused to accept.[261]

The court granted summary judgment in favor of the surety and against the principal and its indemnitors in *New York Marine & General Insurance*

252. *Id.*
253. *Id.* at 780.
254. No. 06-CV-10217-DT, 2007 WL 118938 (E.D. Mich. Jan. 10, 2007).
255. *Id.* at *2.
256. *Id.* at *3–4.
257. *Id.*
258. No. 5:06-CV-80, 2007 WL 1728263, slip op. at *3 (W.D. Ky. June 14, 2007).
259. Nos. A112107, A112345, 2007 WL 141174 (Cal. Ct. App. Jan. 22, 2007).
260. *Id.* at *6.
261. *Id.* at *7–8.

Co. v. Beck Electric Co.[262] The court rejected the indemnitor's argument that defalcation by the fund control company, which the surety had required the principal to use as a condition for the issuance of bonds, absolved the indemnitors of their obligations under the indemnity agreement. The court found that the fund control company was not an agent of the surety because the surety had no right of control over that company.[263]

In *Credit General Insurance Co. v. TNT Dredging, Inc.*,[264] the surety settled a payment bond claim brought by one of the principal's subcontractors but did not file suit against the indemnitors until more than five years later. The indemnitors argued that the surety's cause of action accrued when the claimant asserted its claim; and because the claim was asserted more than six years (the statute of limitations for breach of contract actions in Michigan) before suit was filed, the surety's action was untimely. The court held that the surety's cause of action did not accrue until it settled with the claimant and, thus, granted the surety's motion for summary judgment.

In *Fidelity & Deposit Co. v. Tri-Lam Co.*,[265] the court held that the indemnity agreement granted the surety the contractual right to settle claims on the bonds without a judicial determination of liability.[266] Where a surety is given the express unqualified right to settle claims, it is immaterial whether the surety and its principal are legally liable on the bond.[267] The court held that common law principles such as reasonableness of the settlement and a requirement of potential liability did not apply where the indemnity contract expressly gave the surety the right to settle claims without adjudication.[268]

In *Fireman's Fund Insurance Co. v. Thomas Creek Lumber & Log Co.*,[269] the indemnitors claimed that there was an oral settlement of their obligations to the surety.[270] The court held that the indemnitor's vague allegations of an oral settlement were not sufficient to establish a material issue of fact. The indemnity agreement required that any modification be in writing and signed by an authorized representative of the surety.[271] There was no such writing in existence, and the indemnitors failed to present evidence that the surety waived or modified its rights under the indemnity agreement. Therefore, summary judgment was granted in favor of the surety.[272]

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262. No. 3:05 CV 373-H, 2007 WL 160689 (W.D.N.C. Jan. 16, 2007).
263. *Id.* at *7.
264. No. 1:06 CV 107, 2007 WL 142171 (W.D. Mich. Jan. 16, 2007).
265. No. SA-06-CA-207-XR, 2007 WL 1452632 (W.D. Tex. May 15, 2007).
266. *Id.*
267. *Id.* at *9.
268. *Id.* at *14.
269. No. 06-6277-AA, 2007 WL 1342803 (D. Or. Apr. 4, 2007).
270. *Id.* at *3.
271. *Id.* at *8.
272. *Id.* at *14.

In *Great American Insurance Co. v. McElwee Bros.*,[273] the court addressed the scope of a surety's rights to complete a project as it sees fit. The parties stipulated that the indemnitors were liable to the surety for all losses, costs, expenses, and attorney fees pursuant to the terms of the indemnity agreement. The indemnitors filed what the court considered to be conclusory, self-serving affidavits stating that the surety did not complete the project in a reasonable fashion.[274] The court determined that the surety "had the unfettered right to complete a project as it saw fit."[275]

2. Equitable Subrogation

In *Lyndon Property Insurance Co. v. Duke Levy & Associates*,[276] the Fifth Circuit reversed a summary judgment ruling in favor of a project engineer and found that the engineer's exculpatory clause in its contract with the obligee was not sufficiently clear to act as a limitation of liability under Mississippi law.[277] The court concluded that the owner could not bargain away the engineer's potential duty to a surety.[278] As such, the court found that the surety could pursue its claim as equitable subrogee to the obligee against the project engineer for breach of his duty to inspect the work and either reject the work or withhold payment for the work performed by the principal.[279]

In *Braude & Marguiles, P.C. v. Fireman's Fund Insurance Co.*,[280] a law firm represented the principal in two separate lawsuits involving suits by the obligees on the respective bonds. When the principal filed for bankruptcy protection without paying its fees, the law firm brought suit to recover its unpaid fees from the surety. The law firm did not argue that its fees were due under the bond, but rather asserted claims for breach of contract (both express and implied), quantum meruit, and account stated. The court dismissed all of the law firm's claims, primarily basing its decision on the fact that the law firm fully expected to be paid by the principal, with whom it had an express contract, and not the surety.[281]

In *Monteleone & McCrory v. Merrill Lynch Business Financial Services, Inc.* (*In re Colt Engineering, Inc.*),[282] a dispute arose between the principal's surety and the bankruptcy trustee's attorney as to who was entitled to receive payment out of the bankrupt principal's property. The surety, the

273. No. 03-2793 Sec. K(2), 2007 WL 861152 (E.D. La. Mar. 19, 2007).
274. *Id* at *6.
275. *Id*. at *14.
276. 475 F.3d. 268 (Miss. 2007).
277. *Id*. at 272–73.
278. *Id*. at 272.
279. *Id*. at 273.
280. 468 F. Supp. 2d 190 (D.D.C. 2007).
281. *Id*. at *9.
282. Nos. 03-17316, 04-56041, 04-56042, 04-56049, 2006 WL 2255842 (9th Cir. 2006).

court explained, was subrogated to the rights of the owners, the claimants, and the principal.[283] As such, "any interest in settlement proceeds or retained funds" belonged to the surety to the extent necessary to reimburse it for any payments it made, "and [the interest] never became property of [the principal's] bankruptcy estate to which [an] attorney's lien could attach."[284]

3. Recovery Against Third Parties

Spirco Environmental, Inc. v. American International Specialty Lines Insurance Co.[285] involved a dispute between an owner and a contractor regarding an asbestos removal contract. The contractor sought recovery of the remaining amount due on the contract, while the owner alleged that the contractor failed to properly perform and that the work caused property damage. After the contractor received judgment on its claim, the surety was granted indemnity from the contractor for the substantial expense it incurred in defense of the underlying action. The contractor, in turn, sought indemnification from its liability insurer for the amounts due the surety. Applying Missouri law, the court granted the contractor recovery against its liability carrier for the amount due the surety.[286] In its decision, the court noted that the owner's claims fell within the policy's definition of *arising from . . . property damage* and that the contractor's indemnity obligation to its surety was not merely an economic loss but resulted directly from claims for property damage.[287] As such, these losses were recoverable under the liability policy. And, most importantly, the court found that the claim against the surety was also a part of the claim against the principal.[288]

In *Carolina Casualty Insurance Co. v. R.L. Brown & Associates*,[289] a completing surety brought claims against the bonded project's construction manager after discovering that it had approved payments to the principal for work that proved to be defective. The surety brought claims in its own name and as assignee and subrogee of the obligee. The construction manager moved for summary judgment as to all of the surety's claims. The court granted defendant's motion as to the professional negligence and negligent misrepresentation claims brought by the surety in its own name, holding that under Georgia law plaintiff cannot recover in tort where it was not in

283. *Id.* at *2.
284. *Id.* at *1.
285. No. 4:05 CV 1437 DDN, 2007 WL 1460409 (E.D. Mo. May 16, 2007).
286. *Id.* at *4.
287. *Id.* at *5.
288. *Id.*
289. No. 1:04 CV 3537-GET, 2006 WL 2842733 (N.D. Ga. Sept. 29, 2006).

privity with defendant and its damages are purely economic.[290] The court also granted defendant's motion as to the surety's professional negligence and negligent misrepresentation claims asserted by way of subrogation, reasoning that under Georgia law, a mere breach of contract is insufficient to create a tort cause of action, and, in the absence of any authority imposing a duty on defendant outside of its contract with the obligee, the surety could not maintain these claims.[291] The court, however, denied the construction manager's motion as to the surety's breach of contract claims brought as assignee and subrogee of the obligee, finding issues of fact as to whether defendant breached its contract with the obligee.[292]

E. *Bad Faith*

In *Weathertrol Maintenance Corp. v. Nova Casualty Co.*,[293] the court denied an award of attorney fees to plaintiff because even if a decision regarding payment is unreasonable, failing to pay a contractual obligation prior to litigation does not rise to the level of bad faith when there was no abuse of the litigation process itself.[294] According to the court, attorney fees may be awarded to a successful party when "his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[295] Because fees awarded under the bad faith exception to the "American Rule" are designed to punish the abuse of the judicial process itself rather than the underlying claims, the bad faith exception does not extend to purely prelitigation bad faith conduct and must have occurred or been part of the litigation process itself.[296]

F. *Bankruptcy*

In *St. Paul Fire & Marine Insurance Co. v. Century Asphalt Materials, LLC*,[297] the principal filed a bankruptcy petition, after which a dispute arose regarding two prepetition checks received by a subcontractor from the general contractor that cleared postpetition. The claims between the trustee and the subcontractor were settled, and the subcontractor made a claim against the surety for the amount of the settlement.[298] The surety argued that the subcontractor failed to give proper notice of its claim as required by Texas statute, precluding the claim.[299] The court held that there is no legal authority for the position that an avoidance under the Bankruptcy

290. *Id.* at *5.
291. *Id.* at *10.
292. *Id.*
293. No. 05-21345, 2007 WL 566293 (S.D. Fla. Feb. 20, 2007).
294. *Id.* at *4.
295. *Id.* at *3.
296. *Id.* at *4–5.
297. No. H-07-0580, 2007 WL 1468549 (S.D. Tex. May 18, 2007).
298. *Id.* at *1.
299. *Id.* at *2.

Code excused a statutory notice requirement.[300] In addition, the court reversed the application of the doctrine of equitable estoppel to the statutory notice requirement, holding that equitable estoppel principles only apply to affirmative defense limitations and not to "jurisdictional statutory prerequisite[s]."[301]

IV. LEGISLATION AND REGULATION

A. *Federal*

As of July 25, 2007, proposed rules published on September 26, 2006, were effective in relation to the Small Business Administration (SBA) Surety Bond Guarantee Program (SBG) as follows:

1. The new rules effectuate a statutory reduction in the frequency of the audits required of Preferred Surety Bond (PSB) sureties to at least once every three years rather than every year.
2. The SBA SBG, which guarantees to pay 90 percent of a Prior Approval Program surety's loss on Prior Approval bonds, is extended to apply to bonds written for a small business owned and controlled by a veteran.
3. Sureties must pay a guarantee fee to SBA on each guaranteed bond within sixty calendar days after SBA's approval of the prior approval payment or performance bond on SBA Form 990, Guarantee Agreement.
4. PSB sureties may charge premiums in accordance with applicable state ceilings, as already permitted under the Prior Approval Program.
5. They remove the expiration of the PSB program reference.
6. They allow affiliates of a PSB surety to participate in the Prior Approval Program.[302]

B. *States*

1. Alabama

The Crenshaw County probate judge is now required to perform all duties in relation to the assessment and collection of taxes for motor vehicles and, in doing so, must execute an additional bond in a sum determined by the Examiners of Public Accounts.[303]

2. Colorado

A surety technical program has been established to assist historically underutilized businesses in qualifying for performance bonds required for these businesses to bid public projects.[304]

300. *Id.*
301. *Id.* at *3.
302. 72 Fed. Reg. 34,597; Surety Bond Guarantee, 13 C.F.R. § 115 (2007).
303. Alabama Act 2007-273, Laws of 2007, H.B. 834 (2007).
304. Colo. Rev. Stat. § 24-49.5-105 (2007).

3. Connecticut

The contract dollar threshold before a bond can be required by a contracting officer on public projects has increased from $50,000 to $100,000.[305] In the 2005 session, the surety bond threshold at which a bond must be required was increased from $50,000 to $100,000 but could have been required at lower than $100,000.

4. Florida

Incremental annual contract bonds that cumulatively total the full contract price are now permitted on multiyear contracts. The contract dollar threshold amount at which surety bonds are required by the Department of Transportation (DOT) was increased from $150,000 to $250,000, as specified. DOT may waive surety bond requirements on projects costing $250 million, as specified, and may instead require that the surety bond and acceptable alternate security equal the full contract amount, or provide for incremental surety bonds with the acceptable alternate security covering the balance of the contract amount.

The Orlando-Orange County Expressway Authority can waive the bond requirement for projects costing $500,000 or less when the project is awarded pursuant to an economic development program for the encouragement of local businesses, with a clause that the county will pay subcontractors and suppliers that would have been protected had a bond been provided. Public-private projects may exclude the bond requirement unless specified in the procurement documents, but "the department shall ensure that generally accepted business practices for exemptions provided by this subsection are part of the procurement process or are included in the public-private partnership agreement."[306]

On non-DOT public projects, the required bond equals the contract price; however, for projects of more than $250 million, if a bond in the full amount is not available, the public owner could set the amount at the largest amount reasonably available, but no less than $250 million. The bond does not cover the cost of design or other nonconstruction-related services (design or construction management) unless this cost is included in the bond cost.[307]

5. Georgia

The contract dollar threshold up to which letters of credit are acceptable in lieu of bid and performance bonds has been increased from $300,000 to

305. Conn. Gen. Stat. Ann. § 49-41a (West 2007).
306. Fla. Stat. §§ 337.18, 334.30, 348.754 (2007).
307. Fla. Stat. § 255.05(c) (2007).

$750,000.[308] The contract dollar threshold amount at which payment and performance bonds are required from contractors on department projects was increased from $50,000 to $100,000.[309]

6. Hawaii

Under the prompt payment provision, release of retainage bonds are more fully outlined with the bond amount specified as "no more than two times the amount being retained."[310] Requiring use of a specific surety or producer by a contractor as a prerequisite to the award, grant, or issue of a construction or renovation project has been prohibited.[311]

7. Indiana

For public works projects, including Design/Build projects, entered into after June 30, 2007, the contract dollar threshold before payment and performance surety bonds are required has been raised from the prior $100,000/$150,000 amount to $200,000, with bonds permitted on projects below $200,000. In addition, retainage can now be held either for the first half of a project in the amounts between 6 percent and 10 percent, or 3 percent to 5 percent for the entire project. Stadium and convention projects may waive bonds as specified.[312]

8. Kansas

The Kansas Fairness in Public Construction Contract Act established payment requirements for public organizations, contractors, and subcontractors that enter into contracts for the construction of public projects. The act does not apply to construction projects that must comply with § 109 of the Kansas Department of Transportation special provisions to the standard specifications, 1990 edition (90P-205-R6), or any subsequent edition. Retainage is permitted up to 10 percent.[313]

9. Kentucky

In any civil action brought under any legal theory, the amount of a supersedeas bond necessary to stay execution of a judgment granting relief during the course of all appeals or discretionary reviews of the judgment by all appellate courts must be set in accordance with applicable law. However, the

308. Ga. Code Ann. §§ 36-91-51, -71 (West 2007).
309. Ga. Code Ann. § 32-2-70 (West 2007).
310. Haw. Rev. Stat. § 103-10.5 (2006).
311. Haw. Rev. Stat. § 431:10F- (citation to be determined) (2007); H.B. 1833 (2007).
312. Ind. Code §§ 4-13.6-7-5 to -7, 5-16-5.5-2, 5-16-5.5-3.5, 5-30-8-4, 8-15-2-5, 8-23-7-19, 8-23-9-8, 36-1-12-4.5, 36-1-12-13.1 (2007).
313. New Kansas Fairness in Public Construction Contract Act (citation to be determined); Kan. Stat. Ann. §§ 75-6402, 44-717 (both repealed and reenacted per the 2007 law).

total amount of the supersedeas bonds that are required collectively of all appellants during the appeal of a civil action may not exceed $100 million in the aggregate, regardless of the amount of the judgment that is appealed, unless the party appealing is found to be dissipating the assets purposefully. In that case, the court can order a bond for the full judgment. Prior law capped only the punitive or exemplary portion at $100 million.[314]

10. Maine

Renters are permitted to purchase surety bonds in lieu of placing a security deposit on a rental property, although the landlord is neither required to accept a surety bond from a tenant nor mandate a surety bond from a tenant in lieu of the security deposit.[315]

11. Missouri

Financial responsibility for motor vehicle service contracts must be shown by providing a surety bond, securities, cash, a letter of credit, or another (unspecified) prescribed form of security.[316]

12. Nebraska

An applicant for an installment sales contract is required to provide a $50,000 surety bond in favor of the State of Nebraska and any Nebraska resident who may have claims or causes of action against the applicant.[317]

13. Nevada

Under the Uniform Custodial Trust Act, a beneficiary, the beneficiary's conservator, an adult member of the beneficiary's family, a guardian of the person of the beneficiary, a person interested in the custodial trust property, or a person interested in the welfare of the beneficiary may now petition the court to remove the custodial trustee for cause and designate a successor custodial trustee and to require the custodial trustee to furnish a bond or other security for the faithful performance of fiduciary duties or for other appropriate relief. A bond is not required unless specified in the trust document by agreement with the beneficiary or by court order.[318]

14. New Mexico

Under the Prompt Pay Act, retainage can no longer be held.[319]

314. Ky. Rev. Stat. Ann. § 411.187 (West 2007).
315. Me. Rev. Stat. Ann. tit. 14, §§ 6031, 6039 (2007).
316. Mo. Rev. Stat. §§ 385.202, 385.302 (2007).
317. Neb. Rev. Stat. § 45-346 (2007).
318. Nev. Rev. Stat. § 13. (citation to be determined) (2007); S.B. 46 (2007).
319. N.M. Stat. Ann. § 57-28-5 (West 2007).

15. North Dakota

A professional employer is now required to hold either capital or a bond with a minimum $100,000 value as reflected in the financial statement submitted to and held by the secretary of state to secure payment of any tax, wage, benefit, or other entitlement due to, or with respect to, a covered employee if the professional employer does not make the payment when due. A bond provided under this section may not be included for the purpose of calculation of the minimum net worth required by this section. An employee is not covered under the surety or fidelity bond unless specifically named, as required. If the professional employer cannot provide an audited and verified financial statement before required, either an extension must be requested as required or a bond provided to secure the abovementioned payment.[320]

16. Tennessee

No more than 5 percent retainage can be held on both public and private projects. Prior law required only that "reasonable" retainage per the contract be held. Interest (not required in prior law) now must be paid on the retainage that prior law required to be held in escrow. In addition, the escrow account must be separate. Retainage must be paid within the earlier of ninety days from work completion or substantial completion, and the contractor must pay its subcontractors within ten days from when it receives retainage payment.[321]

17. Texas

A judge can now require a new bond without notice, with reasons and amount specified, from guardians and other personal representatives.[322]

18. Virginia

The definition of *agent* now includes a person licensed as a "bail bondsman who has been given [a] power of attorney to act on [] behalf of a licensed property bail bondsman." A property bail bondsman may "not enter into any bond if the aggregate of the penalty of such bond and all other bonds, on which he has not been released from liability, is in excess of four times the true market value of the equity in his real estate, cash or certificates of deposit issued by a federally insured institution."[323]

320. N.D. Admin. Code § 43 (2007).
321. Tenn. Code Ann. §§ 4-15-102, 66-11-144, 66-34- (citation to be determined) (2007); H.B. 1003 (2007).
322. Tex. Prob. Code Ann. §§ 205, 206, 713, 714 (2007).
323. Va. Code Ann. §§ 9.1-185, 9.1-185.8 (West 2007).

19. Washington

A producer who is not appointed as an agent of an insurer is required to have a bond in the amount of $2,500 or 5 percent of the brokered premiums in the last calendar year, whichever is greater, up to a maximum of $100,000.[324]

20. West Virginia

Supersedeas bonds are capped at $50 million, with multiple judgments from consolidated cases treated as one judgment, unless the judge is shown that the appellant is dissipating assets.[325]

21. Wyoming

Supersedeas bonds are capped at $2 million in any action in which all appellants are either individuals or have fifty or fewer employees, or $25 million dollars in any other action. However, if an appellant is found to be dissipating assets, the appellant may be required to post a bond in an amount up to the amount of the judgment. An appellee of a judgment to pay taxes or liens is directed to post a bond in an amount not less than the full amount of the judgment plus interest and the cost of appeal, unless otherwise ordered.[326]

324. Wash. Rev. Code § 48.17, with main concern under §§ 48.17.250(1), -(6) (West 2007).
325. W. Va. Code R. § 58-5-14 (2007).
326. Wyo. Stat. Ann. § 1-17-201 (2007).